



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iii
NATURE OF PROCEEDINGS .....	1
RESPONSE TO SUMMARY OF ARGUMENT .....	2
COUNTER STATEMENT OF FACTS .....	3
ARGUMENT	
I.    THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY FAILING TO PRECLUDE THE PLAINTIFF FROM PROSECUTING HER PERSONAL INJURY CLAIM BASED UPON THE DOCTRINE OF JUDICIAL ESTOPPEL .....	5
A. Question Presented .....	5
B. Scope of Review .....	5
C. Merits of Argument .....	5
II.   THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY PRECLUDING EVIDENCE AND TESTIMONY REGARDING THE PLAINTIFF’S FAILURE TO LIST HER PERSONAL INJURY CLAIM ON HER BANKRUPTCY SCHEDULES .....	10
A. Question Presented .....	10
B. Scope of Review .....	10
C. Merits of Argument .....	10
III.  THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY DENYING THE DEFENDANT’S MOTION FOR NEW TRIAL .....	12

A. Question Presented . . . . .	12
B. Scope of Review . . . . .	12
C. Merits of Argument . . . . .	12
CONCLUSION . . . . .	14

**TABLE OF AUTHORITIES**

Davis,  
156 U.S. at 689 ..... 6

Edwards,  
690 F.2d at 599 ..... 6

Hook,  
1995 F.3d at 306 ..... 6

Justice v. State,  
947 A.2d 1097 (Del. 2007). ..... 13

Klein v. Handley,  
47 A3rd 524 (Del. Super., 2012) ..... 8

Konstantinidis,  
626 F.2d at 939 ..... 6

Maharai,  
128 F.3d at 98 ..... 6

Maler v. Santucci,  
597 A.2d 747 (Del. 1997) ..... 12

McNally v. Eckman,  
466 A.2d 363 (Del. 1983) ..... 11,13

New Hampshire v. Maine,  
532 U.S. 742 (2001) ..... 5, 7

Philadelphia, W., & B.R. co. v. Howard,  
54 U.S. 307, 13 HOW 307, 335-337, 14 L. ed. 157 (1852) ..... 6

Scarano,  
203 F.2d at 513 ..... 6, 7

Shively v. Klein,  
551 A.2d 41 (Del. 1988) .....12

United States v. C.I.T. Constr. Inc.,  
944 F.2d 253, 259 (CA5 1991) .....5

Wright v. State,  
25 A3rd 747 (Del. 2011) ..... 5, 10

11 U.S.C. § 348(f)(1)(a). .....7

18 Wright § 447, p. 782 ..... 7

Delaware Uniform Rules of Evidence, Rules 401, 403 ..... 11

**NATURE OF THE PLEADINGS**

The Plaintiff-Below-appellee adopts the Nature of the Proceedings contained in the Opening Brief of the Defendant-Below-Appellant.

**RESPONSE TO SUMMARY OF ARGUMENT**

- I. DENIED. THE SUPERIOR COURT DID NOT COMMIT ERROR WHEN IT DENIED THE MOTION FOR SUMMARY JUDGMENT, THE MOTION FOR REARGUMENT 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. DENIED. THE SUPERIOR COURT DID NOT COMMIT ERROR 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. DENIED. THE SUPERIOR COURT DID NOT COMMIT ERROR WHEN IT DENIED THE MOTION FOR NEW TRIAL.

## **COUNTER STATEMENT OF FACTS**

On October 3, 2007, the plaintiff filed a Chapter 13 Bankruptcy Petition. (A18-A55) The Plaintiff's bankruptcy counsel was Fred Barakat, Esquire. (A57)

The plaintiff slipped and fell on ice on February 23, 2011. The plaintiff slipped and fell on premises owned and maintained by the defendant. (A203)

On July 25, 2011, the plaintiff filed a Notice of a Conversion of her Chapter 13 Bankruptcy Petition to a Chapter 7 Bankruptcy Petition. (A73) Based upon the advice of her bankruptcy counsel, the plaintiff did not disclose the instant personal injury claim on any of her bankruptcy schedules. (B4–B10)

The trial of the instant personal injury action commenced on November 25, 2013. (A190-A226; A227-A253) During closing argument, counsel for the plaintiff discussed the application of comparative negligence. For illustrative purposes, counsel referred to the sum of \$100,000 during the discussion of the application of comparative negligence.

We now get to question No. 5. Let me explain comparative negligence to you. Comparative negligence means that, if a defendant is negligence – in this case, they were – then the plaintiff can also be negligent. And if the plaintiff and the defendant are both negligent, then you have to determine to what degree was each of those parties at fault. If you were to find that the plaintiff is more than 50 percent at fault, then she is entitled to no recovery. On the other hand, if you find that the plaintiff was less than 50 percent at fault, then her recovery is reduced by the percentage of her negligence. The simplest example – and I'm picking an easy figure. If



you determine that Miss Darden's damages were \$100,000 – .... Trial Transcript (A-243), pp. 61, 62.

Immediately after counsel referred to the figure of \$100,000, the trial court reprimanded counsel and gave a curative instruction to the jury.

THE COURT: don't suggest numbers, even for illustrative purposes.

The lawyers are prohibited from suggesting any number as to what the damages ought to be, and you have to ignore any suggestion in any form as to that.

Proceed. Trial Transcript (A-243), p. 62.

This is the Plaintiff's Answering Brief on Appeal.

## ARGUMENT

### **I. THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY FAILING TO PRECLUDE THE PLAINTIFF FROM PROSECUTING HER PERSONAL INJURY CLAIM BASED UPON THE DOCTRINE OF JUDICIAL ESTOPPEL**

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

Did the Superior Court Commit an Abuse of discretion By Failing to Preclude the Plaintiff from Prosecuting Her Personal Injury Claim Based Upon the Doctrine of Judicial Estoppel?

#### **B. Scope of Review**

The application of the doctrine of Judicial Estoppel is a matter of a court's discretion. New Hampshire v. Maine, 532 U.S. 742 (2001). 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 v. State, 25 A3rd 747 (Del. 2011)

#### **C. Merits of Argument**

The trial court did not commit an abuse of discretion by ruling that the plaintiff was not judicially estopped from prosecuting her personal injury claim due to her failure to list that claim on her bankruptcy schedules.

The court observes Defendant has not made a record from which the court can hold Plaintiff had a duty to declare the incident. Even if she had a duty Defendant similarly has not made a record of the extent, if any, the omission influenced the bankruptcy court. Further, this sort of omission does not go to

the heart of judicial estoppel – fraud before the court. The evidence does not suggest Plaintiff sought to deliberately conceal or unfairly benefit from her claim. Perhaps most importantly, Plaintiff’s approach to her bankruptcy poses no unfair burden on Defendant, nor does the court need protection from Plaintiff’s conduct. To the contrary, giving Defendant a bye confers a windfall on Defendant, it punishes Plaintiff, and it may punish Plaintiff’s creditors, who may have recourse if Plaintiff shorted them. Accordingly, judicial estoppel will not bar Plaintiff’s claim. (Court Order denying motion for new trial, A278-A281).

First, the defendant argues that the failure to list her personal injury claim on her bankruptcy schedule triggers the application of judicial estoppel. However, the defendant’s argument fails as the defendant never argues nor establishes that the plaintiff’s alleged failure to list her claim influenced any decision of the bankruptcy court nor allowed the plaintiff to gain any unfair advantage in her bankruptcy case.

Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled,” Edwards, 690 F.2d at 599. Absent success [751] in a prior proceeding, a party’s later inconsistent position introduces no “risk of inconsistent court determinations,” United States v. C.I.T. Constr. Inc., 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 1995 F.3d at 306; Maharai, 128 F.3d at 98; Konstantinidis, 626 F.2d at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Davis, 156 U.S. at 689; Philadelphia, W., & B.R. Co. v. Howard, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); Scarano, 203 F.2d at

513 (judicial estoppel forbids use of “intentional self-contradiction . . . as a means of obtaining unfair advantage”); see also 18 Wright § 4477, p. 782. New Hampshire v. Maine, 532 U.S. 742 (2001).

In fact, the plaintiff’s alleged failure did not influence nor affect the outcome of her bankruptcy case, because, even if she had listed her personal injury claim in her bankruptcy schedules, that claim would not have become an asset of her bankruptcy estate. The plaintiff’s personal injury claim would not have become an asset of her bankruptcy estate as the personal injury claim arose after the date of filing of the initial Chapter 13 Petition.

Pursuant to 11 U.S.C. § 348(f)(1)(a), when a Chapter 13 Petition is converted to a Chapter 7 Petition, as was the case here, property of the estate in the converted case shall consist only of property that was part of the estate as of the date of the filing of the Chapter 13 Petition.

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title –

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition that remains in the possession of or is under the control of the debtor on the date of the conversion.

Because the plaintiff’s personal injury claim would not have become part of the converted Chapter 7 bankruptcy estate, the plaintiff would have maintained her ownership of that claim and the outcome of her bankruptcy case would not have been affected by the failure to identify her claim on bankruptcy schedules. Since

the plaintiff's failure to list her claim on a bankruptcy schedule did not influence any court decision nor enable the plaintiff to derive any unfair advantage, the trial court properly rejected the application of judicial estoppel in this case.

Second, the trial court properly rejected the application of judicial estoppel as the plaintiff's failure to list her personal injury claim on bankruptcy schedules was not an act of "bad faith".

The determination of whether the judicial estoppel doctrine is implicated by inconsistent positions requires the facts to satisfy a two-part inquiry: (1) the plaintiff's position is inconsistent with position asserted in the bankruptcy proceedings; and (2) the plaintiff asserted either or both positions in bad faith. "Only if both prongs are satisfied is judicial estoppel an appropriate remedy." Klein v. Handley, 47 A3rd 524 (Del. Super., 2012).

The plaintiff did not act in bad faith as her failure to list her personal injury claim on her bankruptcy schedules was not an intentional wrongdoing that was designed to mislead the bankruptcy court.

The third Circuit relied on decisions from the D.C. Circuit and the Seventh Circuit to define bad faith; which is required to trigger the judicial estoppel doctrine. Bad faith is found to exist in situations where a party employs a scheme or commits an intentional wrongdoing to mislead the court. A mistake made in good faith does not give rise to use of the judicial estoppel doctrine. Use of the judicial estoppel doctrine is reserved for situations of intentional wrongdoing as a means of obtaining unfair advantage. Klein v. Handley, *supra*.

The plaintiff's failure was not an act of bad faith as it was merely the result of her bankruptcy counsel's belief that the claim did not have to be listed on schedules as it would not be an asset of the bankruptcy estate even if the claim was listed. (B4-B10) Since the plaintiff did not commit an intentional wrongdoing that was designed to influence the outcome of her bankruptcy case, the trial court properly rejected the application of judicial estoppel in this case.

In conclusion, the trial court did not commit an abuse of discretion by ruling that the plaintiff was not barred from prosecuting her personal injury claim by the doctrine of judicial estoppel. The application of judicial estoppel was properly rejected as the plaintiff did not act in bad faith nor did her actions influence the outcome of her bankruptcy case nor result in the plaintiff gaining any unfair advantage.

## ARGUMENT

### **II. THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY PRECLUDING EVIDENCE AND TESTIMONY REGARDING THE PLAINTIFF'S FAILURE TO LIST HER PERSONAL INJURY CLAIM ON HER BANKRUPTCY SCHEDULES**

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

Did the Superior Court Commit An Abuse Of Discretion by Precluding Evidence and Testimony Regarding the Plaintiff's Failure to List Her Personal Injury Claim on Her Bankruptcy Schedules?

#### **B. Scope of Review**

The Supreme Court reviews a trial court's decision to admit or preclude evidence for abuse of discretion. 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 v. State, 25 A3rd 747 (Del. 2011).

#### **C. Merits of Argument**

The trial court did not commit an abuse of discretion by prohibiting the defendant from questioning the plaintiff about her failure to list her personal injury claim on bankruptcy schedules and by denying the admission into evidence of those bankruptcy schedules. The trial court acted properly as the precluded

questioning and evidence was not relevant and as the defendant did not suffer any prejudice by the exclusion of the testimony and evidence.

First, since the trial court had properly rejected the application of the doctrine of judicial estoppel, the excluded evidence and testimony would not have been relevant to any fact at issue. Therefore, the court properly excluded the evidence to avoid “jury confusion” and to prevent a “waste of time.” See, Delaware Uniform Rules of Evidence, Rules 401, 403.

Second, since the trial court had properly rejected the application of the doctrine of judicial estoppel, the defendant was not prejudiced by the exclusion of the testimony and evidence. Absent a showing of prejudice resulting from the exclusion of the testimony and evidence, the trial court did not commit an abuse of discretion. McNally v. Eckman, 466 A.2d 363 (Del. 1983).



## ARGUMENT

### **III. THE SUPERIOR COURT DID NOT COMMIT AN ABUSE OF DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL**

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

Did the Superior Court Commit An Abuse Of Discretion by Denying the Defendant's Motion for New Trial?

#### **B. Scope of Review**

The Supreme Court reviews a decision on a motion for new trial for abuse of discretion. Maler v. Santucci, 697 A.2d 747 (Del. 1997). To establish an abuse of discretion, appellants must show that the improper comment was so prejudicial as to deny it a fair trial. Shively v. Klein, 551 A.2d 41 (Del. 1988).

#### **C. Merits of Argument**

The trial court did not commit an abuse of discretion by denying the defendant's motion for new trial that was based upon counsel's illustrative use of a specific dollar figure during closing argument. (A243, pp. 61, 62). The motion for new trial was properly denied as the trial court's immediate reprimand and curative instruction prevented any prejudice to the defendant.

“The Court: Don't suggest numbers, even for illustrative purposes.

The lawyers are prohibited from suggesting any number as to what the damages ought to be , and you have to ignore any suggestion in any form as to that.

Proceed.” (A-243, p. 62).

In addition, the motion for new trial was properly denied as counsel's argument was not part of a "studied purpose" to inflame or prejudice the jury. In fact, counsel's illustrative use of a dollar figure was the only part of the closing argument that drew an objection from the defendant.

First, the trial judge properly denied the motion for new trial as the trial court's immediate remedial action cured any potential prejudice to the defendant.

"A trial judge's prompt curative instructions are presumed to cure error and adequately direct the jury to disregard improper statements. A curative instruction is a meaningful or practical alternative to declaring a mistrial, and juries are presumed to follow the instructions." Justice v. State, 947 A.2d 1097 (Del. 2007).

Second, to the extent that counsel's illustrative reference to a dollar figure was improper, the rest of the record "does not reveal a studied purpose on the part of counsel to enflame or prejudice the jury improperly." Absent such a "studied purpose" to prejudice the jury, a new trial would not be the appropriate remedy. McNally v. Eckman, 466 A.2d 363 (Del. 1983).

In conclusion, the trial court did not commit an abuse of discretion by denying the defendant's motion for new trial. The motion for new trial was properly denied as the immediate curative instruction prevented any prejudice to the defendant and as counsel's singular reference to a dollar figure was not part of a "studied purpose" to prejudice the jury.

**CONCLUSION**

For the reasons set forth above, the decisions of the trial court should be affirmed.

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