

**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.                | ) |                             |

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

**RAWLE & HENDERSON LLP**

Handwritten signature of George T. Lees III in cursive script.

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Dated: July 9, 2014

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## INTRODUCTION

This appeal by Defendant Below-Appellant New Castle Motors, Inc. (hereinafter “New Castle Motors”) challenges the verdict obtained in favor of Plaintiff Below-Appellee Nakira Darden (“hereinafter “Darden”) on three (3) grounds. The principle challenge arises out of Ms. Darden’s flagrant failure to disclose this personal injury claim to The United States Bankruptcy Court, District of Delaware, despite the actual and affirmative obligation for her to make such a disclosure. Counsel relies upon the arguments previously set forth on the other two issues pending before the Court and will focus the arguments in this Reply Brief on the issue of judicial estoppel.

The mandates of the United States Code were ignored by Ms. Darden and her bankruptcy attorney Fred Barakat, who has subsequently been suspended from practice by this very Court, for among other reasons, “the submission of false and/or misleading statements”. (AR20). Ms. Darden not only did not disclose the personal injury action, the verdict of which is being disputed, but also another claim to real property in Philadelphia. As then Judge Slight stated, “the failure of a debtor to satisfy his statutory disclosure duty is inadvertent only when, in general, the debtor lacks knowledge of the undisclosed claims or has no motive for the concealment.” *Hopkins v. AsrtraZeneca, LP*, C.A. No. 06C-01-325 SER, Slight, J. (Del.Super. May 18, 2009)(Transcript) (A294 at 46:2-6).

There can be no contention or assertion that Ms. Darden did not know of her personal injury claim arising out of the slip and fall, especially where Ms. Darden had retained Ken Roseman, Esquire as her attorney by as early as April 18, 2011, and Mr. Roseman was contacting Ms. Darden's medical providers to have her medical bills provided to him. (AR24).

After retaining separate counsel for prosecution of the present claim and having been represented by counsel in the Bankruptcy Court Chapter 13 proceedings since 2007, in June 2011, while a Motion to Dismiss was pending, Ms. Darden converted her Bankruptcy case to a Chapter 7. The Bankruptcy trustee had no knowledge of this claim, which pursuant to 11 U.S.C. §1306(a)(1) was property of the estate, as it had been acquired on February 23, 2011, before the case was converted to a Chapter 7 Bankruptcy.

That property of the estate was never disclosed to the Trustee and never disclosed, despite clear statutory mandate, to the Bankruptcy Court.

On September 22, 2011, a 341 Meeting of the Creditors was held. Ms. Darden did not appear at that meeting and she never testified regarding her bankruptcy case, which is why unlike *Hopkins, supra*, no transcript of her testimony is part of the record below.

As such, all the Trustee and Judge Shannon had in their possession at the time that the Trustee issued his Report of No Distribution on September 23, 2011

(A75) and the Court entered its Order Discharging Debtor on November 1, 2011 (A110-A115) were schedules, that were inaccurate, incomplete, and did not disclose this personal injury claim, which under Chapter 13, was property of the estate. In fact, the Trustee's report very clearly states, "that there is no property available for distribution from the estate." (A75). What is clear as well is that Ms. Darden never listed this claim as an "Asset Exempt", for the Trustee listed that information as "Not Available." (A75). The record from the Bankruptcy Court, which was before the Court below as part and parcel of the Motions practice, demonstrated clearly that the Trustee and the Bankruptcy Court relied upon the incorrect, incomplete, and as the record demonstrates, false statements of Ms. Darden when it held that she had no assets to satisfy her debtors, permitted her case to be converted without objection and granted her a discharge.

The Superior Court has previously found the exact efforts undertaken by Plaintiffs such as Ms. Darden repugnant and done to "the detriment of her creditors." (A294 at 46:23-47:1). In refusing to permit the dishonest Plaintiff from reaping the reward of her dishonesty, Judge Slights stated:

[t]his is precisely the type of case where the vast majority of courts that have considered the issue have concluded that judicial estoppel bars the plaintiff from pursuing the claim. The Court so concludes in this case.

*Hopkins, supra.* (A294 at 47:14-18).

There is a conflict between the holding of Judge Slights in *Hopkins*, wherein

he found that the failure to disclose a claim by a Plaintiff to the Bankruptcy Court acts as a bar to the Plaintiff benefiting from her non-disclosure and the holding in the present action, where similar affirmative non-waivable duties of disclosure were affirmatively violated by a person who was represented by not one, but two (2) members of the bar of this Court.

New Castle Motors respectfully requests that this Court resolve the divergent opinions as between the Judges of the Superior Court and issue a ruling which definitively addresses and sanctions the evasive, improper and dishonest conduct of Plaintiff in attempting to hide assets from her creditors for her sole benefit after she obtained relief from the Bankruptcy Court.

## ARGUMENT

### **I. PLAINTIFF BELOW, APPELLEE IS 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. Ms. Darden may not rely upon the advice of counsel when same is violative of clear Federal mandate.**

Respondent attaches in her Appendix to the Response Brief her Response in Opposition to Defendant's Motion for Summary Judgment on the Issue of Judicial Estoppel. (B1-10). Attached to that Response is the affidavit of Fred Barakat, an attorney who this Court has suspended because he has made false or misleading statements to this Court. (B4-7). That affidavit on its face is problematic for several reasons.

First, it cites to 11 U.S.C. §707(a) , which appears to be at a minimum a typographical error as it is 11 U.S.C. §706(a) that allows the conversion of the case, while 11 U.S.C §707 addresses dismissal. (B-5). What however is more troubling is the assertion that "Ms. Darden was examined by the trustee under oath." This statement is troubling because Ms. Darden failed to appear at her 341 meeting of creditors. (AR 26-27). Ms. Darden never testified, so to state otherwise raises significant concerns about not only that assertion, but the remaining assertions in the affidavit.

Further, the affidavit itself provides that the trustee can object to the



conversion if it was done in bad faith, but then in the same breath, discounts bad faith asserting same was not found to exist by the trustee. That assertion in and of itself deserves scrutiny, since how can the trustee make a determination of bad faith, if the very facts upon which such a finding would be premised are withheld from the trustee despite the clear requirement that those facts be disclosed. We know that in this instance that the jury awarded Ms. Darden a sizable sum that one cannot out of hand assert would be foregone by the trustee who has an affirmative obligation to maximize the recovery of the creditors.

In the present action, New Castle Motors has demonstrated not just one (1) but two (2) instances of Appellee trying to not include assets that she had an affirmative obligation to disclose in her bankruptcy case so she could retain them for herself after her bankruptcy was discharged.<sup>1</sup> This court can and should take as a matter of law determine that to be bad faith.

The issues with the affidavit do not however stop there. The affidavit contains unsupported hearsay of alleged findings of the trustee that no bad faith existed.<sup>2</sup> Nowhere in the record is there any evidence that the trustee even undertook an inquiry into whether the conversion was conducted in bad faith.

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<sup>1</sup> Further, the Court should also note the attempt by Ms. Darden's counsel to obtain a discharge of Court ordered restitution of \$845,270.00, which by its very nature is not dischargeable in Bankruptcy. (A45) 11 U.S.C. §1328(a)(3).

<sup>2</sup> The Court in *Berge v. Mader*, addressed this very issue when it stated that, "[a]ny hearsay presentations as to the underlying reasons as to why or how those sworn statements occurred are

Appellee did not appear twice for her 341 meeting. There is no evidence that Appellee informed the court or the trustee of the two interests she held that were not disclosed. Moreover, there is no evidence that the trustee rendered any ruling on the issue of bad faith, since the evidence for the trustee to make such a determination, while known to Appellee and her counsel, was not disclosed to the Court or the trustee. The fact that Ms. Darden's counsel is the one who advised her to not disclose the claim (Response Brief at 3) does not excuse her flagrant failure to list two (2) claims that she had an affirmative obligation to disclose.

**B. Ms. Darden knew of the existence of the claim prior to her Bankruptcy Case being converted to a Chapter 7 and prior to her discharge.**

The Response Brief openly admits that Ms. Darden knew of the personal injury claim prior to her Chapter 13 case being converted to a Chapter 7 case. (Response Brief at 3). The argument of Appellee focuses on the issue of whether the Court relied on Ms. Darden's lack of disclosure, without specifically addressing or refuting the mandates the clear, concise and unequivocal language of 11 U.S.C §541 which required Ms. Darden to update her schedules to reflect any property "that the estate acquires after the commencement of the case." *In Re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5<sup>th</sup> Cir 1999); *see also Eubanks v. CBSK Fin Group, Inc.*, 385 F.3d 894, 897 (6<sup>th</sup> Cir. 2004). What is clear is that Ms.

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better left to others in any subsequent litigation that may follow." 957 N.E. 2d 968, 973 (Ill. App.

Darden knew of the present claim and her real property claim and did not disclose either to the trustee or Court. She had an affirmative obligation to disclose the claims and did not do so. While she may at this time assert that it was based upon the advice of counsel, she is bound by those statements regardless of whether she relied upon her attorney in good faith. Berge, at 973, citing *Cannon-Stokes v. Potter*, 453 F.3d 446, 449 (7<sup>th</sup> Cir. 2006). The simple explanation as to why Ms. Darden and her counsel did not disclose the claims is what Judge Slights previously observed, that the Appellee wanted to keep the claim for her own benefit to the detriment of her creditors.

In this instance, the very statutory citation cited in the Response Brief evidences the bad faith nature of the failure to disclose. Under 11 U.S.C. §1306, this claim became property of the estate the moment it arose. Ms. Darden, by never disclosing the claim, was then able to successfully convert her claim from a Chapter 13, where the creditors receive the benefit of the claim, to a Chapter 7. This is significant, for if the Court performs the calculation of reducing the claimed unsecured non-priority claims noted in Schedule F (A44) and subtracts out the non-dischargeable restitution order that leaves \$110,357.48 in unsecured claims<sup>3</sup>. As the record demonstrates, the pre-trial demand was \$125,000.00 (A263) and the

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Ct. 2011).

<sup>3</sup> The Court should also note that of this amount, \$66,665.00 was a student loan, which have been held to be not dischargeable, thus reducing the amount of the unsecured claims to \$33,702.48

jury ultimately awarded Ms. Darden \$56,381.14. Even after reducing the award for fees, the verdict would leave over \$37,000.00 for the benefit of the creditors which is approximately a third of the debt Ms. Darden was seeking to discharge, that was potentially eligible for discharge.

Appellee's Response attempts to dissuade the Court from applying the doctrine of judicial estoppel by focusing on whether the Bankruptcy estate would have included the personal injury claim. As noted above however, the fraud was committed on the Bankruptcy Court in the first instance when the personal injury claim and the real property claims were not disclosed to the Court. New Castle Motors contends that that commission in and of itself is sufficient to warrant the application of the doctrine of judicial estoppel and bar the claim in its entirety.

**C. Appellee's reliance upon 11 U.S.C. §348(f) does not excuse or sanction the non-disclosure of the known claim.**

As discussed above, Appellee attempts to argue that because the Bankruptcy Court made no finding that the personal injury claim was not disclosed in "bad faith", then the claim is not part of the bankruptcy estate and is retained by Ms. Darden. As was noted and discussed above, this argument is circumspect *ab initio* as it presumes in the first instance that the Bankruptcy Court had notice and knowledge of the claim such that it somehow could make the highly factual inquiry

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which could have been satisfied in its entirety by the verdict in this case. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

necessary to determine whether the claim was not disclosed in bad faith. *In Re Siegfried*, 219 B.R. 581 (Bankr. Colo. 1998). To the contrary, no such inquiry, let alone a finding was made as neither the Bankruptcy Court nor the trustee were aware that the inquiry and investigation need be made as the claims were not disclosed.

First, the Response ignores the mandates of Federal Bankruptcy Rule 1019 (C) which requires the filing of an amended schedule of property. This was not done by Appellee. Moreover, no Motion was filed to convert the Bankruptcy from a Chapter 13 to a Chapter 7, and instead a simple Notice of Conversion was filed. (A74). As such, there was no Motion that required inquiry and determination by the Court.

*In re Siegfried* involved a Motion by the Trustee to determine that the conversion of the Chapter 13 to Chapter 7 was done in bad faith, thereby keeping the property acquired post-petition pre-conversion within the estate as permitted by 11. U.S.C. 348(f)(2). The issue presented to the Court arose out of the debtors failure to not only disclose all his debts, but because the debtors failed to reveal funds in which the debtor had an interest.<sup>4</sup> The Court found that where the debtor converted the Petition with pending objections and failed to disclose assets, that the conversion was done in bad faith and the asset remained property of the estate.

Factually, the present case is similar, as Ms. Darden converted her case while a Motion to Dismiss was pending and she failed to disclose a claim that had substantial value not only in her attorney's eyes (A263), but also in the eyes of a Delaware jury. (A254-255). As such, the Court below erred when it failed to perform any inquiry into the issue of bad faith and when it precluded counsel from questioning the Appellee on this issue at time of trial, to include the failure to disclose the claim and the timing of the conversion.

Additionally, in *In re Easley-Brooks*, the Court discussed whether a conversion from a Chapter 13 to Chapter 7 would have been challenged by trustee and the Court had they been aware of the Plaintiff's personal injury claim. 487 B.R. 400 (Bankr. S.D.N.Y. 2013). In fact, in discussing the rationale for the Plaintiff's non-disclosure, the Court noted "she hoped to keep the full amount of any recovery without having to repay any of her prior debts." *Id.* at 408. In addressing the issue of whether non-disclosure was in bad faith, the Court noted that "[b]ad faith nondisclosure may be inferred from the record." *Id.* at 15, *citing*, *In Re Lowery*, 398 B.R. 512 (Bankr. E.D.N.Y. 2008). The Court then discussed the two prong inquiry of whether the Plaintiff had notice of the claim and a motive to conceal the claim. Because the Plaintiff had notice and knowledge of the claim and would benefit financially from concealing the claim, she had motive to conceal

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<sup>4</sup> The amount of the funds at issue were \$44,563.99, less than the jury's verdict in this case. *Id.*

the claim. As such, her non-disclosure was found to be in bad faith.

The Court further noted that:

lawsuits resulting from causes of action that accrue post-petition but prior to conversion and were not declared in good faith will remain property of the bankruptcy estate...

*In re Easley- Brooks*, at 409, citing, *In re Arana*, 456 B.R. 161(Bankr. E.D.N.Y. 2011). Ultimately, the Court held that because the Plaintiff did not disclose a personal injury claim of which she was aware, she did not have the right and the personal injury claim remained the property of the bankruptcy estate.

The undisputed facts of the present case clearly demonstrate that Ms. Darden knew of not one but two claims she concealed from the Bankruptcy Court so that she could file suits within months of receiving her discharge. She converted her case from a Chapter 13 to a Chapter 7 only after a Motion to Dismiss was filed and after her personal injury claim had arisen. Having successfully avoided her debts, to the detriment of her creditors, Ms. Darden should not now be permitted to receive the benefit of her misconduct and misrepresentations to Judge Shannon and the Chapter 13 and Chapter 7 trustees.

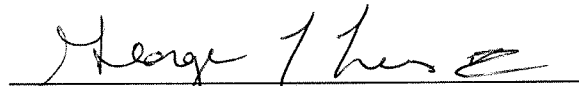
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at 4.

**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.

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