

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-M-00809-SCT

COPIAH COUNTY

APPELLANT

VS.

NANCY OLIVER

APPELLEE

On Appeal from the Circuit Court of Copiah County, Mississippi
Civil Action No. 2007-0629

BRIEF OF APPELLEE

(Oral Argument Not Requested)

CURT CROWLEY (MB# [REDACTED])
THE CROWLEY LAW FIRM, PLLC
POST OFFICE BOX 4673
JACKSON, MISSISSIPPI 39296-0673
PHONE: 601.944.1984
FAX: 601.510.9513
curt@thecrowleylawfirm.com

*Attorney for the Appellant,
Nancy Oliver*

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-M-00809-SCT

COPIAH COUNTY

APPELLANT

VS.

NANCY OLIVER

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Nancy Oliver, Appellee
2. Curt Crowley, The Crowley Law Firm, PLLC, Attorney for the Appellee
3. Copiah County, Appellant
4. Rebecca B. Cowan, Joseph W. Gill, Currie Johnson Griffin Gaines & Myers, P.A., Attorneys for the Appellant

SO CERTIFIED this the 16th day of February, 2010.

Nancy Oliver,
Appellee



CURT CROWLEY (MB# [REDACTED])
Attorney for the Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
I. TABLE OF AUTHORITIES	iii
II. STATEMENT REGARDING ORAL ARGUMENT	1
III. STATEMENT OF THE ISSUES	2
IV. STATEMENT OF THE CASE	3
V. SUMMARY OF THE ARGUMENT	5
VI. ARGUMENT	6
A. STANDARD OF REVIEW	6
B. THE PLAINTIFF'S CLAIMS ARE NOT BARRED BY JUDICIAL ESTOPPEL, AS THE POST- PETITION, POST-CONFIRMATION PERSONAL INJURY CLAIM WAS NOT AN ASSET OF THE BANKRUPTCY ESTATE, AND NO AMENDMENT OF SCHEDULES WAS REQUIRED	6
C. ALTERNATIVELY, EVEN IF THE CLAIM WERE PROPERTY OF THE BANKRUPTCY ESTATE, THE APPLICATION OF THE EQUITABLE DOCTRINE OF JUDICIAL ESTOPPEL IS IMPROPER AND GROSSLY INEQUITABLE	10
VII. CONCLUSION	14
VIII. CERTIFICATE OF SERVICE	16

I. TABLE OF AUTHORITIES

Cases

<u>Griffin v. Dollar General Corp.,</u> 2006 WL 1982749 (N.D.Miss. 2006)	11
<u>In Re Carter,</u> 258 B.R. 526 (S.D.Ga. 2001)	8
<u>In Re Coastal Plains, Inc.,</u> 179 F.3d 197 (5 th Cir. 1999)	10
<u>In Re Foreman,</u> 378 B.R. 717 (S.D.Ga. 2007)	5,7
<u>Kirk v. Pope,</u> 973 So.2d 981 (Miss. 2007)	6
<u>Matter of Heath,</u> 115 F.3d 521 (3 rd Cir. 1997)	7
<u>Telfair v. First Union Mortgage Corporation,</u> 216 F.3d 1333 (11 th Cir. 2000)	7

II. STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff does not request oral argument in this case. The Plaintiff respectfully submits to the Court that the issues herein can be adequately considered by the Court based upon the briefs and submissions of the parties.

III. STATEMENT OF THE ISSUE

The trial court did not err in denying the Defendant's motion for summary judgment due to judicial estoppel as (a) the personal injury claim at issue is not an asset of the Chapter 13 estate; and (b) the Defendant failed to demonstrate a genuine issue of material fact as to the Plaintiff's intent to conceal the personal injury claim from the Bankruptcy Court.

IV. STATEMENT OF THE CASE

On October 15, 2005, the Plaintiff filed a Voluntary Petition pursuant to Chapter 7 of the United States Bankruptcy Code. This case was commenced in the United States Bankruptcy Court for the Southern District of Mississippi. The bankruptcy action is styled In Re: Nancy Jean Roberts; No. 05-07095-ee.

Upon the motion of the Plaintiff, the Chapter 7 case was converted to a Chapter 13 on December 15, 2005. The Plaintiff filed her Chapter 13 plan with the Court on December 20, 2005. The Court entered an Order confirming the plan on February 14, 2006.

On March 27, 2006, the Plaintiff tripped and fell at the Copiah County Courthouse. The Plaintiff suffered significant injuries as a result of the incident. The cause of the incident was the failure of Copiah County to correct a known, unreasonably dangerous condition on its business premises.

On July 26, 2007, the Plaintiff filed a Complaint against Copiah County in the Circuit Court of Copiah County, Mississippi, wherein she alleged that the Defendant was negligent, and that she suffered injuries as a result of said negligence.

On September 7, 2009, the Defendant served its First Interrogatories and Request for Production of Documents upon the Plaintiff. In response to the interrogatories, the Plaintiff disclosed the fact that she had commenced the Chapter 13 bankruptcy proceeding.

On June 10, 2008, the Defendant took the Plaintiff's deposition in this matter. The Plaintiff again disclosed the existence of the bankruptcy during her deposition testimony.

The Defendant subsequently filed a Motion for Summary Judgment, wherein it alleged that the Plaintiff was estopped from pursuing her claim against Covich County because she never amended her bankruptcy schedules to reflect the existence of this post-petition, post-confirmation claim. By Order entered April 30, 2009, the trial court denied the Defendant's Motion for Summary Judgment.

The Defendant subsequently filed a Petition for Interlocutory Appeal, which was granted by this Court.

V. SUMMARY OF THE ARGUMENT

The Plaintiff's post-petition, post-confirmation personal injury claim is not an asset of the bankruptcy estate which requires disclosure and amendment of her bankruptcy schedules.

In a Chapter 13 bankruptcy case, tort claims which accrue after the Chapter 13 Plan is confirmed are not property of the bankruptcy estate unless the claims are "necessary to maintain the Plan." See In Re Foreman, 378 B.R. 717, 720 (S.D.Ga. 2007). If the funds from said claims are not necessary to maintain the Plan, the claims are not property of the bankruptcy estate, and the Plaintiff is not required to amend the bankruptcy schedules to disclose the claims. Id.

The Defendant failed to demonstrate the absence of a genuine issue of material fact as to whether the Plaintiff's personal injury claim was necessary to maintain the Plan. As such, the trial court did not err in denying the Defendant's Motion for Summary Judgment.

In the alternative, the application of judicial estoppel, an equitable remedy, would be grossly inequitable in this case, considering the lack of intent to deceive, and potential adverse effect upon the Plaintiff. Accordingly, the trial court did not abuse its discretion when it declined to apply the doctrine of judicial estoppel to the Plaintiff's claims.

VI. ARGUMENT

A. STANDARD OF REVIEW

The trial court's decision whether to apply the doctrine of judicial estoppel is subject to review pursuant to an abuse of discretion standard. Kirk v. Pope, 973 So.2d 981, 986 (Miss. 2007).

B. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DUE TO JUDICIAL ESTOPPEL AS (A) THE PERSONAL INJURY CLAIM AT ISSUE IS NOT AN ASSET OF THE CHAPTER 13 ESTATE; AND (B) THE DEFENDANT FAILED TO DEMONSTRATE AN ABSENCE OF GENUINE ISSUE OF MATERIAL FACT AS TO THE PLAINTIFF'S INTENT TO CONCEAL THE PERSONAL INJURY CLAIM FROM THE BANKRUPTCY COURT.

1. The Plaintiff's Claims Are Not Barred By Judicial Estoppel, As The Post-Petition, Post-Confirmation Personal Injury Claim Was Not An Asset Of The Bankruptcy Estate, And No Amendment Of Schedules Was Required

In a Chapter 13 bankruptcy case, tort claims which accrue for the benefit of the debtor after the petition is filed, and after the Chapter 13 Plan is confirmed, are not assets of the estate which must be disclosed through an amendment to the debtor's schedules, unless the claim is necessary to maintain the Plan.

It appears that neither this Court, nor the United States Court of Appeals for the Fifth Circuit, have addressed this issue in a post-confirmation Chapter 13 case. However, the Eleventh and Third Circuits, as well as U.S. Bankruptcy Courts in Georgia, have considered this issue on multiple occasions.

In a Chapter 13 case, disclosure of assets which are acquired

after the Plan is confirmed is required only if the claim is "property of the estate under the Bankruptcy Code." In Re Foreman, 378 B.R. 717, 720 (S.D.Ga. 2007). Tort claims which arise after a Chapter 13 Plan is confirmed **"are not property of the bankruptcy estate unless they are necessary to maintain the plan."** Id. at 721 (emphasis added).¹ If not necessary to maintain the Plan, the Debtor is not required to amend the schedules to reflect the existence of post-confirmation tort claims. Id. at 720.

In Foreman, the U.S. Bankruptcy Court for the Southern District of Georgia discussed the precise issue presented in this appeal. In Foreman, the Debtor and her husband jointly commenced a Chapter 13 case. Id. at 719. The Debtors' Chapter 13 Plan was subsequently confirmed by the Court. Id. The Plan was apparently to be funded by the wages of the Debtors. Id.

Approximately five (5) months after the Plan was confirmed, the Debtor's husband was fatally injured in an explosion. Id. The Debtor then asserted tort claims against various persons she claimed were responsible for the explosion. Id. After asserting these claims, the Debtor filed a Motion to Amend Schedules, in order to disclose the existence of the post-petition, post-

¹See also Telfair v. First Union Mortgage Corporation, 216 F.3d 1333 (11th Cir. 2000) (In Chapter 13 cases, assets acquired post-confirmation are property of the estate only if the assets are necessary to fund the Chapter 13 Plan). The Seventh Circuit has taken the same position as to assets which are acquired post-confirmation. See Matter of Heath, 115 F.3d 521 (3rd Cir. 1997).

confirmation claims arising as a result of the explosion. Id.

The Bankruptcy Court held that because the Debtor's tort claims accrued post-confirmation, and were not shown to be necessary to maintain the Plan, the claims were not property of the bankruptcy estate. Id. at 727. As such, the Debtor had no duty to disclose the claims. Id. For these reasons, the Court denied the Debtor's Motion to Amend Schedules as "unnecessary." Id.²

In the case at bar, it is undisputed that the Plaintiff's claims against the Defendant arose after her Chapter 13 Plan had been confirmed by the Bankruptcy Court. Because the claim arose post-confirmation, the claim was property of the bankruptcy estate only if the claim was necessary to fund or maintain the Chapter 13 Plan.

The Defendant wholly failed to prove that the Plaintiff's claim was an asset of the bankruptcy estate, which would necessitate the application of judicial estoppel. In fact, the Defendant made absolutely no effort whatsoever to prove that the claim was necessary to fund the Plan, so as to cause the claim to be an asset of the bankruptcy estate, for which disclosure is required. There was a complete failure of proof on these issues. Accordingly, the Defendant failed to demonstrate that no genuine

²See also In Re Carter, 258 B.R. 526 (S.D.Ga. 2001) (amendment of schedules to reflect tort claim which arose post-confirmation is not required, as the claim was not necessary to maintain or fund the plan). "The debtors had no reason much less obligation to disclose [the claims]." Carter, 258 B.R. at 258.

issue of material fact existed as to whether the claim was an asset of the estate, and likewise failed to demonstrate that it was entitled to judgment as a matter of law. For these reasons, the trial court did not err in denying the Defendant's Motion for Summary Judgment.

Even if the Defendant had made an effort to prove the claim was necessary to fund the Plan and was, consequently, an asset of the estate, such an effort would have failed. The Plaintiff's claim was clearly not necessary to fund the Plan. The Plan was funded entirely by the Plaintiff's wages. The Plaintiff paid all sums due pursuant to the Plan. The Plan was fully funded without resorting to proceeds from the personal injury claims, and the Chapter 13 Trustee filed a Notice of Completion of Plan Payments.

The fact that the Plaintiff made all necessary payments and completed her Plan using only her wages, without resort to the subject personal injury claim, is conclusive proof that the personal injury claim was not necessary to maintain and/or fund the Plan. This fact is not disputed by Copiah County, and is, in fact, indisputable.

For these reasons, the claim was not an asset of the bankruptcy estate, and the Plaintiff had no duty to amend her schedules to disclose the existence of the claim. The Defendant has wholly failed to demonstrate the absence of a genuine issue of material fact as to these issues, and has further failed to prove

that it is entitled to judgment as a matter of law.

2. Alternatively, Even If The Claim Were Property Of The Bankruptcy Estate, The Application Of The Equitable Doctrine Of Judicial Estoppel Is Improper And Grossly Inequitable.

a. The lack of authority within this jurisdiction makes application of judicial estoppel inequitable and inappropriate.

The Plaintiff maintains her position that the claim was not property of the bankruptcy estate, and consequently no amendment of her schedules was required. However, even if the claim were deemed to be property of the bankruptcy estate, the application of the equitable doctrine of judicial estoppel would be inappropriate and inequitable.

The doctrine of judicial estoppel is designed to prevent a party from taking inconsistent positions in litigation, "[t]he purpose of which is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self-interest." In Re Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999). The clear purpose of judicial estoppel is to prevent a party from "gaming" the courts to obtain an ill-gotten tactical advantage. Id.

As stated previously, neither the Mississippi Supreme Court, nor the U.S. Court of Appeals for the Fifth Circuit has ever determined whether, in a Chapter 13 case, a tort claim which accrues post-confirmation is property of the bankruptcy estate which must be disclosed. There is, quite frankly, no clear law

within this jurisdiction that would require the Plaintiff to amend her bankruptcy schedules to reflect this post-confirmation claim. Moreover, the overwhelming majority of authority from outside this jurisdiction leads to the conclusion that the claim is not property of the bankruptcy estate.

The Third Circuit, Eleventh Circuit, and U.S. Bankruptcy Courts within Georgia have consistently held that post-confirmation claims identical to the Plaintiff's claims are not property of the estate. The fact that the Plaintiff did not file a motion to amend her schedules is entirely consistent, and in compliance with, the overwhelming majority of applicable authority. In the absence of authority within the Fifth Circuit, the Plaintiff's compliance with the law, as held by the Third and Eleventh Circuits, clearly indicates a lack of fraudulent intent on the part of the Plaintiff.

The Plaintiff has cited authority from the Third and Eleventh Circuits which supports her position in this case. In opposition to the Third and Eleventh Circuits, the Defendant literally scrapes the bottom of the barrel and bases its entire argument on a single, obscure, non-published opinion from a U.S. Magistrate Judge, from which no appeal was taken to the Fifth Circuit.³ The overwhelming

³Of the cases cited by the Defendant, only Griffin v. Dollar General Corp., 2006 WL 1982749, concerns claims which arose post-confirmation in Chapter 13 cases. The remaining cases cited by the Defendant involve claims which accrued in either (1) Chapter 7 cases; or (2) pre-confirmation or pre-petition Chapter 13 cases. Different rules apply in those proceedings than in post-confirmation Chapter 13 cases. Accordingly, none of those cases

majority of authority supports the proposition that the Plaintiff acted properly in this case. The Defendant has failed to explain exactly how the Plaintiff's compliance with the law as dictated by the Third and Eleventh Circuits could in any way be deemed as "gaming" the system to gain an advantage.

The fact is that the Plaintiff's actions were consistent with multiple federal appellate courts. This fact alone indicates that the Plaintiff's actions were not wrongful or fraudulent, and should not give rise to the application of judicial estoppel. Even if this Court were to reject the position of the Third and Eleventh Circuits, and adopt the position of the unpublished magistrate judge opinion, the Plaintiff's failure to comply with that authority does not support a finding of fraudulent intent on the part of the Plaintiff.

For these reasons, the application of judicial estoppel to bar the Plaintiff's claims is inequitable.

b. The Plaintiff's Actions In The Litigation Of This Case Show No Fraudulent Or Wrongful Conduct.

At every point in the litigation of this case, the Plaintiff has demonstrated full disclosure and honesty relating to her bankruptcy. Throughout the litigation of this case, the Plaintiff made no effort to conceal the existence of her bankruptcy case. To the contrary, she honestly, freely and openly disclosed the fact of

are applicable to the case at bar.

her bankruptcy.

As stated previously, the Plaintiff disclosed the fact that she had commenced the Chapter 13 bankruptcy proceeding in response to the Defendant's interrogatories. Furthermore, the Plaintiff again disclosed the existence of the bankruptcy when she was deposed by the Defendant. The Plaintiff's repeated disclosure and discussion of her bankruptcy proceeding belies any allegation that the Plaintiff intentionally concealed this claim or the fact that she had filed a bankruptcy proceeding. The application of judicial estoppel is simply inappropriate in this case.

VII. CONCLUSION

Copiah County should not be allowed to "play[] fast and loose with the courts" by engaging in a cynical game of "GOTCHA" to escape responsibility for its wrongful and irresponsible conduct.

Copiah County has completely failed to prove that the claim in this case is property of the bankruptcy estate. Copiah County made no effort to prove that the claim was necessary to fulfill or maintain the Chapter 13 Plan. Copiah County failed to establish the absence of a genuine issue of material fact, as to this issue, and likewise failed to demonstrate that it was entitled to judgment as a matter of law.

Finally, the evidence in this case demonstrates that the Plaintiff made no attempt to "play fast and loose with the courts," as her conduct was fully supported by authority from the Third and Eleventh Circuits. In the absence of authority from this jurisdiction, the Plaintiff was justified in relying upon these authorities. Further, the evidence indicates that the Plaintiff made no effort to conceal the claim or the fact of the bankruptcy proceeding. These facts make the application of judicial estoppel inapplicable in this case.

For these reasons, the trial court's denial of the Defendant's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this the 16th day of February, 2010.

Nancy Oliver,
Plaintiff

By:



CURT CROWLEY (MB# [REDACTED])
Attorney for the Plaintiff

OF COUNSEL:

THE CROWLEY LAW FIRM, PLLC
POST OFFICE BOX 4673
JACKSON, MISSISSIPPI 39296-0673
PHONE: 601.948.3822
FAX: 601.510.9513
curt@thecrowleylawfirm.com

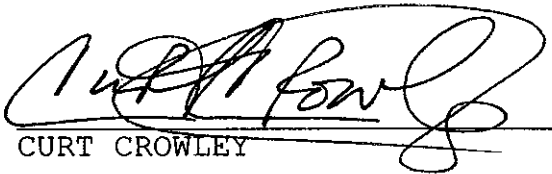
VIII. CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first-class U.S. Mail, postage-prepaid, a true and correct copy of the attached and foregoing document, upon the following persons:

Judge Lamar Pickard
Circuit Court of Copiah County
Post Office Box 310
Hazlehurst, Mississippi 39083-0310

Rebecca B. Cowan, Esquire
Joseph W. Gill, Esquire
Currie Johnson Griffin Gaines & Myers, P.A.
Post Office Box 750
Jackson, Mississippi 39205-0750

This the 16th day of February, 2010.


CURT CROWLEY