IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-M-00809-SCT

COPIAH COUNTY **APPELLANT/DEFENDANT**

V.

NANCY OLIVER **APPELLEE/PLAINTIFF**

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

REPLY BRIEF OF THE APPELLANT

(ORAL ARGUMENT NOT REQUESTED)

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Appellee/Plaintiff, Nancy Oliver, is judicially estopped from pursuing her cause of action against Appellant/Defendant, Copiah County, because she failed to amend her Chapter 13 bankruptcy schedule of assets to disclose her asserted cause of action against Copiah County.

A. Oliver's cause of action against Copiah County is an asset of her Chapter 13 estate, which she was required to disclose to the bankruptcy court through the amendment of her schedule of assets.

Appellee/Plaintiff, Nancy Oliver ("Oliver") argues in her Brief of Appellee that "[i]n 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." (*See* Brief of Appellee, at p. 6). In support of this assertion, Oliver cites no Mississippi state or federal case law, but, instead, relies almost exclusively on federal case law from Georgia. *See Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000); *In re Foreman*, 378 B.R. 717 (Bankr. S.D. Ga. 2007); *In Re Carter*, 258 B.R. 526 (Bankr. S.D. Ga. 2001).[1] However, each of these cases is either distinguishable or simply no longer the law of the Eleventh Circuit. *See In re Waldron*, 536 F.3d 1239 (11th Cir. 2008).

Oliver incorrectly claims that the court in *Telfair v. First Union Mortgage Corp*, 216 F.3d 1333 (11th Cir. 2000), held that "[i]n Chapter 13 cases, assets acquired post-confirmation are property of the estate only if the assets are necessary to fund the Chapter 13 Plan." (*See* Brief of

[1] Additionally, Oliver also relies on a single case from the Seventh [not Third, as asserted in the Brief of Appellee] Court of Appeals, *Matter of Heath*, 115 F.3d 521 (7th Cir. 1997).

Appellee, at p. 7, n. 1). While construing 11 U.S.C. §§ 1306(a)[2] and 1327(b)[3], the Eleventh Circuit in *Telfair* adopted the "estate transformation approach," which provides that "while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation **returns so much of that property** to the debtor's control **as is not necessary** to the fulfillment of the plan." *See Telfair*, 356 B.R. at 561 (emphasis added). That said, the Court in *Telfair* applied this approach "solely to property that **existed, and had been revealed, at or before the confirmation** of the debtor's Chapter 13 plan." *In re Harvey*, 356 B.R. 557, 563 (Bankr. S.D. Ga. 2006) (emphasis added). The court in *Telfair* did not address whether post-confirmation property acquired by the debtor belonged to the Chapter 13 estate.[4]

Oliver is correct that the bankruptcy courts in *In re Carter*, 258 B.R. 526, and *In re Forman*, 378 B.R. 717, extended *Telfair* in holding that "assets acquired post-confirmation are not property of the bankruptcy estate unless they are necessary to maintain the plan." *In re Forman*, 378 B.R. at 721 (quoting *In re Ross*, 278 B.R. 269 (Bankr. M.D. Ga. 2001)). *See also In re Carter*, 258 B.R. at

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[2] Section 1306(a)(1) states that "all property of the kind specified in [Section 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted" is property of the estate.

[3] Section 1327(b) states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

[4] It should be noted that federal courts in Mississippi do not apply the "estate transformation approach" adopted in *Telfair* even to assets in existence and revealed prior to plan confirmation. *See, e.g., Eddins v. GMAC*, No. 02-17545-DWH / 08-1058-DWH, 2008 WL 4905477, at *2 (Bankr. N.D. Miss. Oct. 20, 2008) ("In this judicial district the Chapter 13 confirmation order provides that property of the estate is not revested at confirmation in the debtors."); *In re Cox*, No. 03-13839-DWH / 08-1060-DWH, 2008 WL 4900552, at *2 (Bankr. N.D. Miss. Sept. 19, 2008) (same); *In re Madison*, 337 B.R. 99, 104 (Bankr. N.D. 2006) (same). In fact, the Order Confirming Oliver's Chapter 13 Plan specifically states "[a]ll property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge, or conversion." (CP. 18).

527. However, since then the Eleventh Circuit Court of Appeals has explicitly rejected such an extension of *Telfair*.

In *In re Waldron*, the Eleventh Circuit specifically held that a post-confirmation cause of action is property of the Chapter 13 bankruptcy estate, which requires disclosure to the bankruptcy court. *See In re Waldron*, 536 F.3d at 1240-41, 1245 ("The bankruptcy court is entitled to learn about a substantial asset that the court had not considered when it confirmed the debtors' plan."). Explaining that the "estate transformation approach" adopted by the court in *Telfair* cannot apply to assets acquired post-confirmation, the Eleventh Circuit in *In re Waldron* noted that "[n]ew assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him them." *Id.* at 1243. The court in *In re Waldron* explained the reasoning for requiring the disclosure of post-confirmation assets to the bankruptcy court as follows:

> The disclosure of postconfirmation assets gives the trustee and creditors a meaningful right to request under section 1329, a modification of the debtor's plan to pay his creditors. A confirmed plan may be modified at the request of the debtor, the trustee, or the holder of an allowed unsecured claim to "(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or to] (2) extend or reduce the time for such payments." 11 U.S.C. § 1329(a). . . . When a debtor discloses assets acquired after confirmation, creditors may move the bankruptcy court to modify the plan to increase payments made by the debtor to satisfy a larger percentage of the creditors' claims. Id. § 1329(a)(1). If postconfirmation assets were not subject to disclosure, modifications for increased payments would be rare because few debtors would voluntarily disclose new assets, and the trustee and creditors would be unlikely to obtain this information from sources other than the debtor.
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> As we recognized in *Burnes*, "[f]ull and honest disclosure in a bankruptcy case is 'crucial to the effective functioning of the federal bankruptcy system,' " 291 F.3d at 1286 (quoting *Ryan Operations G.P. v. Sanitam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996)), and postconfirmation disclosure reinforces the ability-to-pay standard of Chapter 13. "Congress ... intended ... that the debtor repay his creditors to the extent of his capability during the Chapter 13 period." *Arnold v. Weast* (*In re Arnold*), 869 F.2d 240, 242 (4th Cir. 1989) (citing *Deans v. O'Donnell*

> (*In re Deans*, 692 F.2d 968, 972 (4th Cir. 1982)); *see also* 11 U.S.C. § 1325(b); *Barbosa*, 235 F.3d at 37. "Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors." *Arnold*, 869 F.2d at 242. When a debtor discloses assets acquired after confirmation to the court, his creditors may share in any unanticipated gain if the court determines that these assets are available to repay debts. *See* 11 U.S.C. § 1329(a)-(b). If he loses a stream of income, a debtor likewise can move to modify his plan to decrease his payments. *Id.* § 1329(a); *see also Sys. & Servs. Techs., Inc. v. Davis* (*In re Davis*), 314 F.3d 567, 570 (11th Cir. 2002). Under the ability-to-pay standard, creditors share both the gains and losses of the debtor.

Id. at 1245-46. *See also In re Harvey*, 356 B.R. at 563-64.

Far from"scrap[ing] the bottom of the barrel" (as Oliver states in her Brief of Appellee, p. 11) to support the proposition that assets acquired post-confirmation by the Chapter 13 debtor become property of the bankruptcy estate, numerous courts have reached this conclusion. *See, e.g., Barbosa v. Soloman*, 235 F.3d 31, 36-37 (1st Cir. 2000); *United States v. Harchar*, 371 B.R. 254, 268 (N.D. Ohio 2007); *Woodard v. Taco Bueno Rests., Inc.*, No. 4:05-CV-804-Y, 2006 WL 3542693, at *10-11 (N.D. Tex. Dec. 8, 2006); *In re Drew*, 325 B.R. 765, 770 (Bankr. N.D. Ill. 2005); *In re Grogg*, 295 B.R. 297, 302 (Bankr. C.D. Ill. 2003); *In re Nott*, 269 B.R. 250, 257-58 (Bankr. M.D. Fla. 2000); *In re Kolenda*, 212 B.R. 851, 855 (W.D. Mich. 1997); *In re Koonce*, 54 B.R. 643, 645 (Bankr. D.S.C. 1985). In addition to all of the other jurisdictions that have held that assets acquired post-confirmation are part of the bankruptcy estate, the only Mississippi court to have addressed this issue to date reached the same conclusion. *See Griffin v. Dollar General Corp.*, No. 4:05CV11, 2006 WL 1982749, at *1 (N.D. Miss. July 13, 2006).[5] Therefore, Oliver's argument that her alleged cause of action against Copiah County is not property of her Chapter 13 bankruptcy

[5] While the district court in *Griffin* did not expressly state that Griffin's cause of action arose post- confirmation, this is the only reasonable conclusion that can be drawn since her cause of action arose over three years after she filed her Chapter 13 petition.

estate, requiring disclosure to the bankruptcy court through the amendment of her schedule of assets, is without merit.

B. Fraudulent intent to conceal an asset is not a prerequisite for the application of judicial estoppel.

Next, Oliver argues in her Brief of Appellee that even if her post-confirmation cause of action against Copiah County were deemed to be property of the bankruptcy estate, the application of judicial estoppel would be inappropriate and inequitable because Oliver's failure to disclose the cause of action in her bankruptcy proceedings does not evidence "fraudulent intent." (*See* Brief of Appellee, at 12). However, the application of the doctrine of judicial estoppel does not require a showing of "fraudulent intent." *See, e.g., Kirk v. Pope*, 973 So. 2d 981, 991 (Miss. 2007) (quoting *In re Superior Crewboats*, 374 F.3d 330, 335 (5th Cir. 2004)) ("[The] three requirements for judicial estoppel [are as follows]: '(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent.'"). Inadvertence does not require "fraudulent intent." *See In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999) ("[I]n considering judicial estoppel *for bankruptcy cases,* the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.") (emphasis in opinion). *See also Kirk*, 973 So. 2d at 991. According to the court in *Guerra v. Lehman Commercial Paper, Inc.*, No. H-06-1444, 2007 WL 419517, at *7 (S.D. Tex. Feb. 5, 2007) (citing *In re Coastal Plains*, 179 F.3d at 210-213), "judicial estoppel does not necessarily require 'bad faith' or deceptive intent; the inadvertence of the nondisclosure prong is satisfied when a debtor unreasonably disregards her express, affirmative

disclosure duties." Therefore, a showing of "fraudulent intent" is not necessary for demonstrating inadvertence, and, thus, is not necessary for applying the doctrine of judicial estoppel.

Oliver became aware of her potential cause of action against Copiah County on March 27, 2006, the date she allegedly tripped and fell at the Copiah County Courthouse. Her continuing failure to disclose this asset while reaping the benefit of the bankruptcy court's approval of her Chapter 13 plan without the information necessary for potential post-confirmation modification demonstrates that her refusal to disclose her cause of action was anything but inadvertent.

Oliver's argument that her failure to disclose her cause of action against Copiah County in her bankruptcy proceedings is excusable due to the "lack of authority within this jurisdiction" is equally without merit. A debtor's continuing duty to disclose her assets during a Chapter 13 bankruptcy is governed by the federal bankruptcy code, and the sole Mississippi federal case on point (along with the plethora of cases from other jurisdictions cited above) states that the bankruptcy code requires a debtor to disclose post-confirmation causes of action or be judicially estopped from pursuing them. *See Griffin v. Dollar General Corp.*, 2006 WL 1982749, at *1. In order for a debtor to escape the application of judicial estoppel for failure to disclose a cause of action in her bankruptcy proceedings, it is not enough for the debtor to be merely unaware "of her duty to report her claim"; rather, the debtor "must show that she was unaware of the facts giving rise to her claim." *See In re Condere Corp.*, 226 F.3d 642, 2000 WL 1029098, at *3 (5th Cir. July 11, 2000) (unpublished disposition) ("A lack of awareness of the statutory disclosure duty is simply not relevant to the question of judicial estoppel. . . . [The debtor] therefore must show that she was unaware of the facts giving rise to her claim, not of her duty to report her claim.").

C. Oliver's disclosure of her bankruptcy in the present litigation is irrelevant.

Lastly, Oliver argues in her Brief of Appellee that the application of judicial estoppel in the case *sub judice* is inappropriate because she disclosed her bankruptcy in this litigation. According to Oliver:

> 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 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.

(*See* Brief of Appellee, at pp. 12-13) (emphasis added).

Oliver confuses the issue presented to the Court. The issue is not whether Oliver failed to disclose her bankruptcy in this litigation, but whether she disclosed this litigation (asserted cause of action) in her bankruptcy. The fact that she disclosed her bankruptcy in the case *sub judice* is completely irrelevant to the issue of whether she disclosed her alleged cause of action in her bankruptcy proceedings so as to prevent the application of the doctrine of judicial estoppel in the present case. As a result, Oliver's argument is without merit.

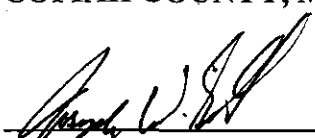
CONCLUSION

Oliver had a duty to disclose her post-confirmation cause of action, which was property of her Chapter 13 estate, to the bankruptcy court. Because Oliver consistently failed to disclose her cause of action, thus effectively telling the bankruptcy court that it did not exist, her pursuit of it in

this litigation is judicially inconsistent. The trial court abused its discretion in refusing to apply the doctrine of judicial estoppel to dismiss Oliver's claims against Copiah County on summary judgment. Therefore, Copiah County respectfully requests that this Court reverse the trial court's Order and render judgment in Copiah County's favor.

RESPECTFULLY SUBMITTED,

COPIAH COUNTY, MISSISSIPPI

BY: 

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a true and correct copy of the above and foregoing instrument by causing a copy of same to be hand delivered and/or mailed, postage prepaid, to the following counsel of record at the address shown:

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Hon. Lamar Pickard,
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THIS, the 10th day of March, 2010.

REBECCA B. COWAN
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