

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

BRIEF OF THE APPELLANT

(ORAL ARGUMENT NOT REQUESTED)

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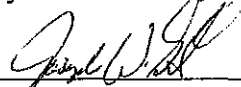
APPELLEE/PLAINTIFF

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, Esquire
3. Rebecca B. Cowan, Esquire
4. Joseph W. Gill, Esquire
5. Currie Johnson Griffin Gaines & Myers, P.A.

SO CERTIFIED, this the 9th day of November, 2009





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TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issue	1
Statement of the Case	2
Statement of the Facts	4
Summary of the Argument	5
Argument	6
Conclusion	10
Certificate of Service	12

TABLE OF AUTHORITIES

Cases

<i>Casey v. Peco Foods, Inc.</i> , 297 B.R. 73 (S.D. Miss. 2003)	6,9
<i>Diamond Z Trailer, Inc. v. JZ L.L.C.</i> , Nos. ID-07-1011-KMoR, 01-03545-TLM, 2007 WL 1954035 (9 th Cir. BAP June 18, 2007)	8
<i>Griffin v. Dollar General Corp.</i> , No. 4:05CV11, 2006 WL 1982749 (N.D. Miss. July 13, 2006)	6,7,8
<i>Guerra v. Lehman Commercial Paper, Inc.</i> , No. H-06-144, 2007 WL 419517 (S.D. Tex. Feb. 5, 2007)	9,10
<i>In re Breauxsaus</i> , 304 B.R. 273 (N.D. Miss. 2003)	6
<i>In re Coastal Plains, Inc.</i> , 179 F. 3d 197 (5 th Cir. 1999)	5,6,8,9,10
<i>In re Harvey</i> , 356 B.R. 557 (S.D. Ga. 2006)	10
<i>In re Superior Crewboats, Inc.</i> , 374 F.3d 330 (5 th Cir. 2004)	5,8,9
<i>Jethroe v. Omnova Solutions, Inc.</i> , 412 F.3d 598 (5 th Cir. 2005)	5,7,8
<i>Kirk v. Pope</i> , 973 So. 2d 981 (Miss. 2007)	5,8,9,10
<i>Marrama v. Citizens Bank of Mass.</i> , 549 U.S. 365 (2007)	6

Statutes

11 U.S.C. § 521(a)(1)(B)(i)	6
11 U.S.C. § 1306 (a)(1)	6
28 U.S.C. § 1746	6

Rules

Fed. Rule Bkrtcy. Proc. 1008	9
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STATEMENT OF THE ISSUE

- I. Whether the Circuit Court of Copiah County, Mississippi, erred in denying the Motion for Summary Judgment filed by Appellant, Copiah County, Mississippi, in which Appellant argued that Appellee, Nancy Oliver, is judicially estopped from pursuing her cause of action against Copiah County, which allegedly arose during the pendency of her Chapter 13 bankruptcy case, because she failed to comply with certain provisions of the United States Bankruptcy Code by amending her schedule of assets to disclose her asserted cause of action.

STATEMENT OF THE CASE

On July 26, 2007, Appellee, Nancy Oliver (“Oliver”), filed her Complaint against Appellant, Copiah County, Mississippi (“Copiah County”), alleging that she was injured on March 27, 2006, as a result of Copiah County’s negligence. (CP. 6-8; RE. 1-3). At the time she filed her Complaint, Oliver’s Chapter 13 bankruptcy case was pending. (CP. 13, 17-20; RE. 4, 8-11). However, Oliver never amended her bankruptcy schedule of assets to reflect any potential cause of action she had against Copiah County. (CP. 14; RE. 5).

On July 11, 2008, Copiah County filed its Motion for Summary Judgment on grounds that Oliver was barred from asserting her cause of action against Copiah County under the doctrine of judicial estoppel because she never amended her bankruptcy schedule of assets in her pending Chapter 13 bankruptcy case to reflect her potential cause of action against Copiah County. (CP. 13-16; RE. 4-7). Copiah County asserted that “[w]here a debtor has failed to disclose a potential cause of action as an asset in her bankruptcy schedules, she is barred from subsequently pursuing that cause of action under the doctrine of judicial estoppel.” (CP. 14; RE. 5). Oliver filed no written response to Copiah County’s Motion for Summary Judgment.

On March 30, 2009, the Circuit Court of Copiah County heard a Copiah County’s Motion for Summary Judgment. (T. 3-17). During the hearing, counsel for Oliver did not deny that Oliver had failed to amend her bankruptcy schedule of assets to reflect her potential cause of action against Copiah County. (T. 8-9). Rather, Oliver’s counsel argued that Oliver is not required to amend her bankruptcy schedule until her lawsuit against Copiah County is concluded either by judgment or settlement. (T. 9). At the conclusion of the hearing, the trial court denied Copiah County’s Motion for Summary Judgment, and on April 15, 2009, the trial court entered an Order to this effect. (T. 17; CP. 29; RE. 12). That order was filed on April 30, 2009. (CP. 29; RE. 12). Copiah County

subsequently filed its Petition for Interlocutory Appeal and for Stay of Trial Court Proceedings, which this Court granted. (CP. 30, 54).

STATEMENT OF THE FACTS

The Complaint Nancy Oliver filed against Copiah County on July 26, 2007, alleges that she was injured as a result of Copiah County's alleged negligence on March 27, 2006, when she tripped and fell on a piece of loose carpeting on the steps of the Copiah County Courthouse. (CP. 6-8; RE. 1-3). Previously, on October 15, 2005 (prior to the commencement of this action and Oliver's date of injury), Oliver filed a voluntary petition for a Chapter 7 bankruptcy in the United States Bankruptcy Court in the Southern District of Mississippi. (CP. 13; RE. 4). Upon a motion filed by Oliver, the case was converted to a Chapter 13 bankruptcy case on December 15, 2005. (CP. 13; RE. 4). On February 15, 2006, the bankruptcy court entered an Order confirming Oliver's Chapter 13 Plan ("the Plan") for a period of "36 months or until paid, not to exceed 60 months." (CP. 13, 17-20; RE. 4, 8-11).

When Oliver filed her Complaint in the present matter, her bankruptcy case had not been closed, dismissed or converted to another type of bankruptcy case. (CP. 13; RE. 4). Oliver never amended her bankruptcy schedule of assets to reflect any potential cause of action against Copiah County.

SUMMARY OF THE ARGUMENT

As a Chapter 13 debtor, Oliver had a continuing duty to disclose her assets, including her cause of action against Copiah County, in her bankruptcy schedules until her bankruptcy case was closed. Because Oliver never amended her bankruptcy schedule of assets to include her cause of action against Copiah County during the pendency of her bankruptcy case, she effectively made a representation to the bankruptcy court that the cause of action did not exist. Oliver's pursuit of her claim against Copiah County in the Circuit Court of Copiah County is inconsistent with this representation to the bankruptcy court. Under the doctrine of judicial estoppel, parties are prevented from taking inconsistent positions in litigation. Judicial estoppel "is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005). Therefore, the trial court abused its discretion in failing to apply the doctrine of judicial estoppel to Oliver's claims against Copiah County, and refusing to grant Copiah County's motion for summary judgment based on judicial estoppel.

STANDARD OF REVIEW

A trial court's decision regarding whether to apply the doctrine of judicial estoppel "is subject to review under an abuse of discretion standard." *Kirk v. Pope*, 973 So. 2d 981, 986 (Miss. 2007) (citing *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004)). "[B]y definition," a trial court "abuses its discretion when it makes an error of law." *Superior Crewboats*, 374 F.3d at 334 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)).

ARGUMENT

Oliver is judicially estopped from pursuing her cause of action against 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 bankruptcy debtor has a duty, under penalty of perjury, to file a schedule of her assets as part of the bankruptcy proceedings. 11 U.S.C. § 521(a)(1)(B)(i); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 378 (2007) (citing 28 U.S.C. § 1746; FED. RULE BKRTCY. PROC. 1008). A potential cause of action held by a bankruptcy debtor is an asset of the bankruptcy estate, and, therefore, must be disclosed in the debtor's schedule of assets. *See In re Breauxsaus*, 304 B.R. 273 (N.D. Miss. 2003).

In a Chapter 13 bankruptcy case, the debtor's duty to disclose assets is a continuing one. *See* 11 U.S.C. §1306(a)(1) (property of the estate in a Chapter 13 bankruptcy includes property acquired "after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first"). As a result, Oliver had a continuing duty to disclose her assets and was "required to amend [her] financial statements if circumstances change." *Casey v. Peco Foods, Inc.*, 297 B.R. 73, 76 (S.D. Miss. 2003). The doctrine of judicial estoppel bars a bankruptcy debtor from subsequently pursuing a cause of action where the debtor has failed to disclose the potential cause of action as an asset in her bankruptcy schedules. *See Griffin v. Dollar General Corp.*, No. 4:05CV11, 2006 WL 1982749, at *1 (N.D. Miss. July 13, 2006). The doctrine of judicial estoppel prevents 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 at 205. The Fifth Circuit has held that "[j]udicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate

tribunal based on that undisclosed asset.” *Jethroe*, 412 F.3d at 600.

Griffin v. Dollar General Corp., 2006 WL 1982749, is directly on point. In *Griffin*, the relevant facts were as follows:

Plaintiff filed her **Chapter 13** bankruptcy petition in the U.S. Bankruptcy Court for the Northern District of Mississippi on **February 20, 2001**. She filed a Charge of Discrimination against Defendant Dollar General Corporation (“Dollar General”) with the EEOC on **August 8, 2004**. She initiated the instant lawsuit against Dollar General on **January 13, 2005**. The final order closing plaintiff’s bankruptcy case was issued on **July 11, 2005**. **During the pendency of the chapter 13 proceedings, plaintiff did not inform the bankruptcy court of her EEOC claim or the instant discrimination suit.**

Id. at *1 (emphasis added). The district court adopted the Report and Recommendation of Magistrate Judge Eugene Bogen, which stated as follows:

Judicial estoppel is particularly appropriate where a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on the undisclosed asset. *Jethro v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir.2005). “A plaintiff is judicially estopped from pursuing an EEOC charge filed while ... [her] ... bankruptcy petition was pending and where ... [she] ... did not fulfill ... [her] ... duty to amend the petition to include that claim.” *Id.* (citation omitted). The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one. *Id.* Thus, a bankruptcy petitioner is under a duty to disclose potential legal claims throughout the pendency of her bankruptcy petition. *See id.*

Id. (emphasis added). As such, the district court in *Griffin* held Griffin was “judicially estopped from pursuing the instant lawsuit.” *Id.*

Griffin’s cause of action against Dollar General Corporation accrued after she filed her Chapter 13 bankruptcy petition. *See id.* While the court did not specifically state that Griffin’s cause of action arose after her bankruptcy plan was confirmed, this is the only reasonable assumption that can be made since her cause of action arose over three years after she filed her Chapter 13 petition. *See id.* Likewise, Oliver’s alleged cause of action against Copiah County arose after her bankruptcy case had been converted to a Chapter 13 case and after her plan was confirmed (albeit, Oliver’s

alleged cause of action against Copiah County arose approximately three months as opposed to Griffin's, which arose three years after her Chapter 13 petition was filed). The court in *Griffin* held that Griffin was judicially estopped from bringing her action against Dollar General because she did not disclose the "pending and unliquidated claims in bankruptcy proceedings." *See id.* Likewise, Oliver should be judicially estopped from bringing her action against Copiah County because she refused to disclose the "pending and unliquidated claim in [her] bankruptcy proceedings." *See id.*

Courts employ the following factors in determining whether the doctrine of judicial estoppel should be applied under circumstances like Oliver's: "(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." *Kirk*, 973 So. 2d at 991 (Miss. 2007) (quoting *In re Superior Crewboats*, 374 F.3d 330, 335 (5th Cir 2004). *See also Jethroe*, 412 F.3d at 600. Under the first two factors of *Kirk*'s judicial estoppel test, *i.e.*, that the position of the party be plainly inconsistent with its prior legal position, and that the party sought to convince a court to accept her prior position, the court in *Diamond Z Trailer, Inc. v. JZ L.L.C.* held that "[t]he debtor need only have gained some advantage through the court's acceptance of the initial position, such as plan confirmation or grant of discharge" by failing to disclose an asset. Nos. ID-07-1011-KMoR, 01-03545-TLM, 2007 WL 1954035, at *6 (9th Cir. BAP June 18, 2007). *See also Kirk*, 973 So. 2d at 991 (holding that first prong was met by plaintiff's failure to list lawsuit in bankruptcy schedules as such "represented that no such suit existed and [was] inconsistent with his subsequent pursuit of the claim," and that the second prong was met because the bankruptcy trustee and court necessarily relied upon the plaintiff's schedules in granting discharge).

With regard to the third factor of the judicial estoppel test, *i.e.*, whether the party acted inadvertently, the Fifth Circuit in *In re Coastal Plains, Inc.*, held that a finding of inadvertence

requires that the debtor must lack knowledge of the claim or have no motive to conceal it. 179 F.3d at 210. *See also Kirk*, 973 So. 2d at 991. “[J]udicial 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.” *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).

A. Oliver’s position in this case is clearly inconsistent with the position she took in her bankruptcy case.

In the present case, once Oliver became aware of her cause of action, she was duty-bound to file an amended schedule of assets in her bankruptcy case. *See, e.g., Casey*, 297 B.R. at 76. Oliver’s failure to amend her schedule of assets once she became aware of her potential cause of action is the specific act that requires the application of judicial estoppel in this case. When Oliver failed to amend her schedule of assets to disclose her potential cause of action against Copiah County, she took the position in her bankruptcy case that no such cause of action existed. *See In re Superior Crewboats*, 374 F.2d at 335 (“[O]mission of [a] personal injury claim from [plaintiffs’] mandatory bankruptcy filings is tantamount to a representation that no such claim existed.”). This position is “clearly inconsistent” with her position in her suit against Copiah County. *See Kirk*, 973 So. 2d 991.

B. The bankruptcy court accepted Oliver’s previous position.

With regard to the second factor of the judicial estoppel test, Oliver has “convinced [the bankruptcy] court to accept the prior position,” as her Chapter 13 Plan rests, in part, on the premise that Oliver did not have any additional assets, such as a potential cause of action against Copiah County, that belonged to the bankruptcy estate. By deliberately concealing her cause of action against Copiah County from her creditors, Oliver denied these creditors the right to seek a

modification of her Chapter 13 Plan. *See In re Harvey*, 356 B.R. 557, 563-64 (S.D. Ga. 2006).

C. Oliver's failure to disclose her potential cause of action was not inadvertent.

The final factor of the judicial estoppel analysis is met in this case because Oliver never amended her schedule of assets to disclose her cause of action against Copleah County. Oliver became aware of the potential cause of action on March 27, 2006, the date she alleges that she tripped and fell at the Copleah County Courthouse. Oliver's 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 – even after filing her Complaint in the present matter – sufficiently demonstrates that her refusal to disclose her cause of action against Copleah County is anything but inadvertent. *See, e.g., Guerra*, 2007 WL 419517, at *7; *Kirk*, 973 So. 2d at 991. Furthermore, despite having received notice from Copleah County, *via* the filing of its Motion for Summary Judgment, Oliver has still failed to disclose the present cause of action in her bankruptcy proceeding and refused to amend her schedule of assets.

CONCLUSION

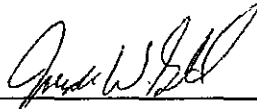
Oliver should not be allowed to “play[] fast and loose with the courts” by pursuing a cause of action in one court and denying its existence in another. *See In Re Coastal Plains, Inc.*, 179 F. 3d at 205. By denying Copleah County's Motion for Summary Judgment, the trial court has allowed Oliver to pursue a cause of action that belongs to her bankruptcy estate while, all along, representing to the bankruptcy court that no such cause of action exists. The trial court allowed Oliver to take two judicially conflicting and incompatible positions in two different courts, thus allowing her figuratively to have her cake and eat it, too. The trial court abused its discretion in refusing to apply the doctrine of judicial estoppel to dismiss Oliver's claims against Copleah County on summary judgment. Therefore, Copleah 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

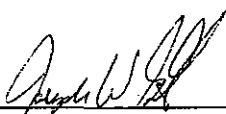
I do hereby certify that I have this day served a true and correct copy of the above and foregoing instrument by causing a copy of same to be hand delivered and/or mailed, postage prepaid, to the following counsel of record at the address shown:

Ms. Kathy Gillis, Clerk
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Hon. Lamar Pickard,
Copolah County Circuit Court Judge
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Hazlehurst, MS 39083

THIS, the 9th day of November, 2009.



REBECCA B. COWAN
JOSEPH W. GILL