No. 23-1410

United States Court of Appeals for the Eighth Circuit

RICKY HUGHES,

Plaintiff-Appellant,

v.

WISCONSIN CENTRAL, LTD.
PORTACO, INC. AND
RACINE RAILROAD PRODUCTS, INC.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Northern District of Minnesota
No. 0:19-cv-02733

BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from a February 2, 2023 order of the district court: 1) granting summary judgment in favor of the Defendants based on the doctrine of judicial estoppel and 2) dismissing the case for lack of standing.

In a previous ruling on October 29, 2021, the district court declined to apply the doctrine of judicial estoppel because there was nothing in the record to suggest that Plaintiff had acted with intent to defraud creditors or manipulate the judicial system and further denied Defendants' motions to dismiss for lack of standing, without prejudice, because it was unclear whether the reopening of the bankruptcy estate would allow for a benefit to the creditors. Thus, the district court stayed proceedings pending clarification from the bankruptcy court.

Following a ruling from the bankruptcy court on April 13, 2022, Defendants refiled their motions. This time the district court reversed its position on both judicial estoppel and standing and granted Defendants' motions. On appeal, Plaintiff submits that the district court abused its discretion in granting summary judgment based on judicial estoppel where there was no factual or legal basis for the court to change its ruling. Further, the court erred in dismissing the case for lack of standing after the bankruptcy court held that the lawsuit vested in the debtor upon discharge under 11 U.S. C. § 1327(b).

Plaintiff respectfully requests 30 minutes per side for oral argument.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota had jurisdiction under 28 U.S.C. § 1331. A final judgment disposing of all parties' claims was entered on February 2, 2023, and a notice of appeal was timely filed on March 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in dismissing the case for lack of standing.

   In re Thompson, 344 B.R. 461, 464 (Bankr. W.D. Va. 2004);
   In re Kelly, 358 B.R. 443, 446 (Bankr. M.D. Fla. 2006);
   In re Frausto, 259 B.R. 201, 217 (Bankr. N.D. Ala. 2000);
   McClain v. Amer. Econ. Ins. Co., 424 F3d 728, 732-33 (8th Cir. 2005).

2. Whether the district court abused its discretion in granting summary judgment for the Defendants based on the doctrine of judicial estoppel when: a) the district court previously made a finding that there was nothing in the record to suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system, b) there was no evidence of any harm suffered by the creditors, and c) the district court erroneously failed to construe the evidence and reasonable inferences therefrom in the light most favorable to the Plaintiff.

   Enter. Bank v. Magna Bank of Mo., 92 F.3d 743,747 (8th Cir. 1996);
   Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996);
   Stallings v. Hussmann Corp., 447 F.3d 1041, 1049 (8th Cir. 2006);
   Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 364 (3rd Cir. 1996).

STATEMENT OF THE CASE

A. Pre-suit Background

Plaintiff Ricky Hughes resides in Carlton, Minnesota. (R. Doc. 71-1, at 13.) Mr. Hughes has a high school education and no legal training. (App. 162166, R. Doc. 98, at 29.) He served active duty in the military for 3 years and 10 years in the Minnesota National Guard. (R. Doc. 71-1, at 18.) He was hired as a trackman by Canadian National Railway/Wisconsin Central in 1998. (R. Doc. 71-1, at 32-33.) His wife, Linda Hughes, is a high school teacher. (R. Doc. 71-1, at 16.)

Ricky Hughes and his wife filed a Chapter 13 bankruptcy petition on May 2, 2012. Prior to the filing of the petition, they signed a Notice of Responsibilities of Chapter 13 Debtors and their Attorneys form which provided in pertinent part as follows:

> IV. Before the case is filed, the chapter 13 debtor shall:
>
> * * * *
>
> C. Prior to and throughout the case, timely provide the attorney with full and accurate financial and other information and documentation the attorney requests, INCLUDING BUT NOT LIMITED TO:
>
> * * * *
>
> 14. Information and documents relating to any lawsuits in which the debtor is involved before or during the case or claims the debtor has or may have against third parties;
>
> * * * *
>
> V. After the case is filed, the chapter 13 debtor shall:

A. Timely and promptly comply with all applicable bankruptcy rules and procedures and with the terms of the chapter 13 plan;

* * * *

(App. 164, R. Doc. 75-6, at 3.)

Before the bankruptcy case was filed, Ricky Hughes and his wife had no pending lawsuits or claims for monetary damages to report to their attorney. (App. 185, R. 162 Doc. 98, at 29-30.). The bankruptcy plan was confirmed on December 18, 2012. (App. 856, R. Doc. 190-1, at 1.) After the case was filed, Mr. Hughes was not asked by their attorney to provide information about lawsuits or claims for monetary damages. However, he had none to report had he been asked. (App. 185, R. Doc. 98, at 29-30.)

On October 24, 2016, approximately 4 ½ years after the petition for bankruptcy was filed, Ricky Hughes was injured at work. Thereafter, he sought payment of his medical bills from his employer. (App. 185, R. Doc. 98 at 29-30, App. 221, R. Doc. 180-6) Mr. Hughes and his wife made their last payment under the plan in May 2017. (App. 763, R. Doc. 190-1, at 2.)

On August 8, 2017, Mr. Hughes sustained a second injury at work. Once again, he sought payment of his medical bills from his employer. (App 185, R. Doc. 98, at 29-30, App, 223, R. Doc. 180-7) Although he asked Canadian National Railway/Wisconsin Central to pay his medical bills for both injuries, he was unaware of any causes of action that he might have. (App 162, R. Doc. 98, at 29-30.)

Ricky Hughes and his wife were discharged in bankruptcy on February 9, 2018. (App. 166, 167, R. Doc. 190-1, at 2.) At that time, he had no pending lawsuits or claims for monetary damages to report to his attorney had he been asked. (App. 185, R. Doc. 98, at 29-30.)

It was not until October 12, 2019, approximately 1 ¾ years after being discharged in bankruptcy and nearly 2 ½ years after the last payment under the plan, that Mr. Hughes consulted with and hired an attorney regarding a potential cause of action against Canadian National Railway. (App. 185, R. Doc. 98, at 29-30, 36-37.)

B. The Pending Litigation

Plaintiff commenced a FELA action against Canadian National Railway Company and Wisconsin Central, Ltd. ("WCL") on October 17, 2019. (App. 1, R. Doc. 1) The complaint sought relief for work-related injuries occurring in two separate incidents on October 24, 2016 and August 8, 2017. Pursuant to a stipulation, Canadian National was subsequently dismissed. (App. 29, R. Doc. 12) Plaintiff filed an amended complaint on April 2, 2020, adding Portaco, Inc. ("Portaco") as a defendant in a pendant product liability action arising out of the August 8, 2017 incident. (App. 12, R. Doc. 21) On August 6, 2020, Plaintiff filed a second amended complaint adding Racine Railroad Products, Inc. ("Racine") as product liability defendant arising out of the August 8, 2017 incident. (App. 53, R. Doc. 33)

On or about August 11, 2021, after litigating the case for approximately a year, Defendants filed separate motions for summary judgment based on the doctrine of judicial estoppel. (App. 100, R. Docs. 69, 70 (WCL), App. 98, R. Docs. 73, 74 (Portaco), App. App. 100 Docs. 77,78 (Racine)) The motions generally asserted Plaintiff was judicially estopped from pursuing his claims because he had failed to disclose them during the pendency of the bankruptcy proceedings. Portaco and Racine also asserted that Plaintiff lacked standing to file suit in his own name.

Thereafter, Plaintiff's bankruptcy counsel filed a petition to reopen the Chapter 13 bankruptcy. On or about August 27, 2021, the bankruptcy case was reopened and an amended schedule of assets was filed disclosing the pending lawsuit as an asset. (App. 166, R. Doc. 98, at 23-28.)

Plaintiff responded to the motions for summary judgment asserting that his failure to disclose the claims was inadvertent and that he neither derived an unfair advantage nor imposed an unfair detriment on the creditors because he had reopened the bankruptcy and amended the schedule of assets. (App. 162, R. Doc. 98, at 17, 21-28) The response was supported by Ricky Hughes' sworn affidavit (App. 162, R. Doc. 98, at 29.)

In its reply brief, WCL asserted that Ricky Hughes' affidavit was contradicted by an Application for Sickness Benefits he submitted within 2 weeks of each of the injuries wherein he answered "yes" to the question: "Have you filed

or do you expect to file a lawsuit or claim against any person or company for personal injury?" Additionally, in response to the inquiry: "Furnish the name and complete address of the person or company," he responded: "Canadian National Railroad." (App. 212, R. Doc. 124 at 2, Ex. 10.1, 10.2)

On October 29, 2021, the district court entered an order denying Defendants' motions for summary judgment without prejudice. At that time, the court stayed proceedings pending clarification from the Bankruptcy Court as to whether reopening the case would allow for a benefit to the estate. (App. 290, R. Doc. 135 at 8.)

The district court declined to apply the doctrine of judicial estoppel for reason that: 1) Plaintiff had presented evidence that the bankruptcy case had been reopened; 2) the record does not suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system; and 3) even though the bankruptcy case had been concluded, it is not clear to the court that the interests of the creditors are not still implicated in the reopened proceeding. (App. 304, R. Doc. 135 at 7.)

On December 8, 2021, Ricky Hughes and his wife entered into a Settlement Agreement with the Chapter 13 trustee. (App. 324, R. Doc. 161-20 at 6-9.) Pursuant to the terms of the agreement, Debtors agreed to "pay to the Trustee (1) all net proceeds received by the Debtors as damages from the above-mentioned FELA case currently pending, or (2) an amount from such proceeds sufficient to

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pay all $57,371.85 of allowed, unpaid unsecured claims and applicable statutory Trustee's fees in full, whichever is less." (App. 324, R. Doc. 161-20 at 6-9.) There is no evidence in the record that the settlement agreement has been rescinded. Hence, the agreement remains in effect today.

On December 13, 2021, Plaintiff filed in the bankruptcy court a motion to approve a settlement with the Trustee. (App. 324, R. Doc. 161-20) Portaco objected to the motion. (App. 333, R. Doc. 161-21 at 3.) A hearing was held on February 16, 2022. (App. 787, R. Doc. 161-4 at 6.)

On April 13, 2022, the bankruptcy court issued a written order. (App. 333, Doc. 161-21, Ex. O) The court held that Portaco had no standing to object to the settlement, but nevertheless denied the motion to approve the settlement for reason that the five-year term of the Debtors' plan expired in May 2017 and no distribution may be made in a Chapter 13 case after the expiration of the five-year period no matter how beneficial it might be to the creditors. The court noted that this is true even if the Lawsuit had been properly disclosed. (App. 333, R. Doc. 161-21, Ex. O, at 11.) However, the court further stated:

> This Court is not ruling on whether the Debtors can agree outside of the bankruptcy process to pay the unsecured creditors. The Debtors can clearly pay any proceeds from the Lawsuit to the creditors pursuant to 11 U.S.C. § 524(f) which allows voluntary payments on discharged debts. The Debtors can use anyone, including the Chapter 13 Trustee (in an unofficial capacity), as a disbursing agent to pay the remaining unsecured creditors outside of the bankruptcy process. The Debtors have repeatedly represented they will voluntarily pay the creditors from any recovery in the Lawsuit. It is clear that if there is a recovery and the Debtors follow through, the unsecured creditors will receive a benefit from the Debtors' payment. But, it cannot be done through the Chapter 13 bankruptcy process.

> Ironically, there has been no harm to creditors as a result of the Debtors' failure to disclose the Lawsuit. This is because the potential recovery to the Debtors from the Lawsuit could not have been paid within five years since even now, years later, no money has been awarded or paid to the Debtors. In fact, the injury which Mr. Hughes alleges Portaco caused did not occur until August 8, 2017, after the five-year period expired. In other words, even if disclosed in a timely matter, the creditors would have received nothing under the confirmed Chapter 13 plan from the Lawsuit, as there was nothing to distribute during the five-year period.

(App. 787, R. Doc. 161-21, Ex. O, at 11.)

Having noted that the Debtors received a discharge in bankruptcy on February 9, 2018, the bankruptcy court made a specific finding that the lawsuit vested in the Debtors upon discharge. (App. 787 , R. Doc. 161-21, Ex. O at 2, 10.)

On September 23, 2022, Defendants filed separate motions for summary judgment and supporting memoranda of law essentially renewing their previous arguments that Plaintiff lacked standing to file suit in his own name and that he was judicially estopped from pursuing his claims. (App. 782, 787, R. Docs. 161-1, 161-4, (Portaco), (App.809 , R. 161-1, 161-4, (Portaco), (App. 809, 811 , R. Docs. 163, 164, (WCL), (App. 829, R. Docs. 165, 166, (Racine) Except for references to the bankruptcy court's order of April 13, 2022, there was no new evidence presented in the motions. Plaintiff responded on October 13, 2022. (App. 843, R. Doc. 190, at 1-8.), (App. 851, R. Doc. 190-1, at 1-12.) A hearing was held on November 4, 2022. (App. 906, R. Doc. 194, at 1.)

On February 2, 2023, the district court issued a memorandum opinion and order granting Defendants' motions for summary judgment and dismissing the case with prejudice. (App. 1007, R. Doc. 195, at 1.) Predicated on the bankruptcy

court's determination that it was too late to modify the bankruptcy plan, the district court concluded that "it is now clear that Plaintiff is unable to pursue the claims on behalf of the estate." Thus, the court reasoned that Plaintiff is pursuing the claims for himself, not on behalf of the estate, and therefore lacks standing. (App. 1012, R. Doc. 195, at 6-7.)

Additionally, the district court completely reversed its stance on judicial estoppel. (App. 1013, R. Doc. 195, at 7-9.) Whereas the court previously declined to apply the doctrine of judicial estoppel in part because "the record does not suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system," it now held that a finding of malice or intent is not required and that Plaintiff's motive to conceal may be inferred, citing *Eastman v. Union Pac. R.R. Co.,* 493 F.3d 1151, 1159 (10th Cir. 2007). The court further concluded that Plaintiff would derive an unfair advantage if not estopped and that the creditors had been harmed as a result of his inconsistent positions. Further, the court disagreed with Plaintiff's assertion that he acted in good faith. (App. 1028, R. Doc. 195 at 7-9.)

On March 1, 2023, Plaintiff filed a notice of appeal. (App. 1028, R. Doc. 200, at 1.)

SUMMARY OF ARGUMENT

The district court committed reversible error on two separate grounds. First, it erroneously dismissed Plaintiff's cause of action, in its entirety, for lack of standing. Second, it abused its discretion in reversing its previous decision not to apply the doctrine of judicial estoppel under the unique factual circumstances of the case.

I. On October 29, 2021, the district court declined to grant Defendants' motions to dismiss for lack of standing pending clarification from the bankruptcy court as to the implications of the debtor re-opening the bankruptcy estate. However, after the bankruptcy court held that it lacked jurisdiction to approve a settlement agreement wherein Plaintiff agreed to pay his creditors from the proceeds of any recovery in the pending lawsuit more than five years after the first payment under the plan, the district court dismissed the complaint for lack of standing, stating that the lawsuit was the property of the bankruptcy estate, not Mr. Hughes. In dismissing the case for lack of standing on February 2, 2023, the district court completely ignored that part of the bankruptcy court's order which held that the lawsuit vested in the debtor upon discharge under 11 U.S.C. §1327(b). Having specifically requested clarification from the bankruptcy court on matters involving bankruptcy law, the district court erred in failing to heed the bankruptcy court's ruling.

II. On October 29, 2021, the district court initially declined to apply the doctrine of judicial estoppel under the unique factual circumstances of the case. The court made an express finding that there was nothing on record to suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system. The court denied Defendants' motions for summary judgment without prejudice. Thereafter, Defendants refiled their motions. On February 2, 2023, the district court granted the motions.

In reversing course and granting summary judgment in favor of the Defendants based on judicial estoppel, the court essentially took inconsistent positions based on the same evidence. In its first memorandum opinion and order, the district court specifically stated that there was nothing in the record to suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system. However, in its second memorandum opinion and order, the court considered the very same evidence, but this time improperly chose to construe that evidence in the light most favorable to the Defendants. In one breath, the district court made an express finding that there was no evidence of any intent on the part of the Plaintiff to defraud his creditors or the court. However, in the very next breath, without any new evidence to consider, the court drew an improper inference that Plaintiff had a motive to conceal his claims. The so-called distinction between *intent to defraud* and *motive to conceal* is clearly a distinction without a difference. To make such a distinction, the district court clearly abused

its discretion in failing to view the evidence and reasonable inferences to be drawn from the evidence in the light most favorable to Mr. Hughes. The court further abused its discretion in construing the language of the Application for Sickness Benefits in the light most unfavorable to Mr. Hughes, i.e., as evidence that he had knowledge of his claims. Further, the district court improperly drew an inference from the evidence that Plaintiff's creditors had been harmed despite the ruling by the bankruptcy court that the creditors suffered no harm and would never have been entitled to collect even a penny from the proceeds of any recovery in the lawsuit.

Therefore, the February 2, 2023 order of the district court should be reversed.

STANDARD OF REVIEW

The Eighth Circuit generally reviews issues of standing *de novo*. *Indigo LR LLC v. Advanced Ins. Brokerage of America, Inc.*, 777 F.3d 630 (8th Cir. 2013), *PW Enters. v. ND Racing Comm'n*, 540 F. 3d 892 (8th Cir. 2008). However, the court has reviewed the issue of standing for abuse of discretion when there are questions of injury-in-fact. *McClain v. American Economy Ins. Co.*, 424 F.3d 728, 734 (8th Cir. 2005). In this appeal there is a question as to whether the District Court failed to properly interpret and apply 11 U.S.C. § 1327(b) to the facts of this case. As this involves a question of law, Plaintiff submits that the proper standard of review is *de novo*.

Orders granting summary judgment are generally reviewed *de novo*. *Midwest Oilseed, Inc. v. Limagrain Genetics Corp.*, 383 F.3d 705 (8th Cir. 2004), *Am. Red Cross v. Cmty. Blood Ctr.*, 257 F.3d 859 (8th Cir. 2001). However, the Eighth Circuit generally reviews an application of the judicial estoppel doctrine for an abuse of discretion. *Opportunity Finance, LLC v. Kelley*, 822 F.3d 451, 456 (8th Cir. 2016), *Van Horn v. Martin,* 812 F.3d 1180, 1181–82 (8th Cir.2016). The court "will not overturn a district court's discretionary application of the judicial estoppel doctrine unless it plainly appears that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the proper factors." *Stallings v. Hussmann Corp.,*447 F.3d 1041, 1046–47 (8th Cir.2006).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE CASE FOR LACK OF STANDING

In its October 29, 2021 memorandum opinion and order, the district court deferred ruling on the issue of standing "pending a determination in the Bankruptcy Court that will clarify whether the reopening of the bankruptcy case would allow for a benefit to the estate." (App. 310 R. Doc.135, at 7.) The court took note of the unique facts and procedural posture of the case and clearly did not want to rush to judgment without considering the bankruptcy court's perspective.

Plaintiff is not disputing that the district court gave thoughtful consideration to the issue of standing in this case. However, in its February 2, 2023 ruling, the

court erroneously focused its attention only on the part of the bankruptcy court's order that denied the Debtors' motion to approve the settlement with the Trustee. The court completely ignored the part of the order that was most salient to the issue of standing, to-wit: The Lawsuit vested in the Debtors upon discharge.

In the bankruptcy proceedings, both the Debtor and the Trustee sought court approval of an agreement allowing the Trustee to disburse the proceeds of any recovery in the Lawsuit to the creditors. The Trustee specifically argued that the lawsuit did not vest in the Debtors upon confirmation of the plan pursuant to 11 U.S.C. § 1327 (b) and that it remained the property of the estate because it was not disclosed in the Debtors' bankruptcy. The bankruptcy court rejected this argument and held that the lawsuit vested in the Debtor upon discharge, citing *In re Thompson*, 344 B.R. 461, 464 (Bankr. W.D. Va. 2004).

In re Thompson involved an issue similar to the instant case wherein the Debtor failed to disclose a pending "qui tam" action during the pendency of a Chapter 13 bankruptcy and subsequently sought to reopen her case so that the claim could be administered for the benefit of her creditors. Relying on Section 1327(b) of the Bankruptcy Code, the court held that the estate could not be reopened and that confirmation of the Chapter 13 Plan vested in the Debtor the property of the bankruptcy estate, including the "qui tam" claim. The court noted that "(w)hile section 554 is generally applicable to proceedings under Chapters 7, 11, 12, and 13 of the Bankruptcy Code, . . . it is subject to the specific provision

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of 11 U.S.C. § 1327(b)" *In re Thompson* at 464. Also see, *In re Kelly*, 358 B.R. 443, 446 (Bankr. M.D. Fla. 2006)

> Bankruptcy Code Section 1327 provides:
>
> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
>
> (b) *Except 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.*
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11. U.S. C. § 1327 (Emphasis added.)

The *Kelly* court held that Chapter 13 is designed to allow the repayment of debts from a debtor's future income, not by liquidating a debtor's property as is done in a Chapter 7 case. Thus, Chapter 13 allows the debtor to retain all property of the estate and vests that property in the debtor upon confirmation of a plan, citing 11 U.S.C. § 1327(b). *In re Kelly* at 447. Also see, *In re Frausto*, 259 B.R. 201, 217 (Bankr. N.D. Ala. 2000) ("No provision of the Bankruptcy Code provides for the negation of the effect of section 1327 as to property owned by a debtor but not disclosed.").

Standing must exist at the time the lawsuit is filed. *McClain v. Amer. Econ. Ins. Co.,* 424 F3d 728, 732-33 (8th Cir. 2005). Thus, the question for the district court to consider was whether Plaintiff had standing to file suit in his own name when he initially filed the FELA action against WCL on October 17, 2019, and when he subsequently amended his complaint to add separate product liability

claims against Portaco and Racine on April 2, 2020 and August 6, 2020, respectively.

Here, the bankruptcy court unequivocally held that the confirmation of the plan pursuant to 11 U.S.C. § 1327(b) on December 18, 2012 vested the Lawsuit in the Debtors upon discharge. There was no appeal taken from the bankruptcy court's order. As the Debtors were discharged on February 19, 2018, Ricky Hughes had standing to sue in his own name as of that date.

Plaintiff respectfully submits that the district court erred in failing to follow 11 U.S.C. § 1327(b) and the ruling of the bankruptcy court. Plaintiff clearly had standing to file suit in his own name against WCL, Portaco, and Racine. It was error for the district court to dismiss Plaintiff's claims for lack of standing and an abuse of its discretion.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON JUDICIAL ESTOPPEL.

In addition to ruling that Plaintiff lacked standing to file suit in his own name, the district court reversed course from its previous decision not to apply the doctrine of judicial estoppel. Instead, the court held that Plaintiff was judicially estopped from asserting his claims. Plaintiff submits that the court erred.

A. The Language Of The Application For Sickness Benefits Is Ambiguous.

In support of their first and second motions for summary judgment, Defendants argued that Mr. Hughes had knowledge of his claims and that he intended to file a lawsuit because he filled-out an Application for Sickness Benefits

following both of his work-related injuries wherein he answered the following questions:

15. Have you filed or do you expect to file a lawsuit or claim against any person or company for personal injury?
☑ Yes - Complete Items A-D, below ☐ No - Go to Item 16
A. Furnish the name and complete address of the person or company.
Name Canadian National Railroad Co.

(Doc. 161-4, Ex. F)

15. Have you filed or do you expect to file a lawsuit or claim against any person or company for personal injury?
☑ Yes - Complete Items A-D, below ☐ No - Go to Item 16
A. Furnish the name and complete address of the person or company.
Name Canadian National / Attn: Stephen Molles

(Doc. 161-4, Ex. G)

These responses to the questions on the Application for Sickness Benefits form are ambiguous at best. The first question is compound in nature and has multiple conjunctions such that it is not clear which part of the question Mr. Hughes is answering. Was he answering the "have you" or "do you expect to" part of the question? Was he answering the "lawsuit" or "claim" part of the question? Looking at the question and answer in the light most favorable to Mr. Hughes, he was simply submitting a claim for sickness benefits to his employer, Canadian National Railroad Co., and was in no way intending to convey that he understood that he had a cause of action under the Federal Employers Liability Act ("FELA").

Defendants' reliance on the Application for Sickness Benefits form is misplaced and does not establish that Ricky Hughes had knowledge of claims against "third parties" as referenced in the Notice of Responsibilities of Chapter 13 Debtors and their Attorneys form. Plaintiff submits that the district court

appreciated this ambiguity when it initially made a finding that there was nothing in the record suggesting that Plaintiff acted with any intent to defraud his creditors or mislead the court.

B. The District Court Had No Basis For Inferring A Motive to Conceal.

As referenced above, the district court previously declined to apply the doctrine of judicial estoppel because: 1) Plaintiff had presented evidence that the bankruptcy case had been reopened; 2) the record does not suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system; and 3) even though the bankruptcy case had been concluded, it is not clear to the court that the interests of the creditors are not still implicated in the reopened proceeding.

Between the time that the district court issued its first memorandum opinion and order on October 29, 2021, declining to apply the doctrine of judicial estoppel, and the issuance of its second memorandum opinion and order on February 2, 2023, granting summary judgment based on judicial estoppel, there was no new evidence for the court to consider, except for bankruptcy court's order of April 13, 2022. To be sure, there was no new evidence presented to the district court suggesting that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system.

Despite the fact that the only new information for the District Court to consider was the order of the bankruptcy court, the court went from finding that

there was nothing in the record to suggest that Ricky Hughes acted with any intent to defraud his creditors or manipulate the judicial system to drawing an inference from the same record that Ricky Hughes had a motive to conceal his claims.

In support of drawing an inference that Ricky Hughes had a motive to conceal, the district court cited the Tenth Circuit decision in *Eastman v. Union Pac. R. Co.,* 493 F.3d 1151, 1159. However, that case is completely distinguishable from the facts of the present case. In *Eastman*, the debtor had failed to disclose a pending lawsuit prior to filing the petition and then lied to the bankruptcy trustee at a creditors meeting when he specifically denied having a personal injury cause of action. In the instant case, Mr. Hughes did not have a pending lawsuit at the time he filed for bankruptcy, nor did he have a pending lawsuit or claim for monetary damages at any time during the pendency of the bankruptcy. Rather, the first time he sought legal consultation regarding a potential claim against WCL was approximately 1 ½ years after he was discharged in bankruptcy. Most importantly, there is no evidence that he lied to the bankruptcy trustee, or anyone else, at any time. To be sure, Mr. Hughes' circumstances were entirely different from those of the debtor in the *Eastman* case and the district court should not have relied on that case in support of its ruling.

Having previously made a finding that there is nothing in the record even suggesting that Ricky Hughes acted with intent to defraud his creditors or the court, the question becomes where in the record did the court find evidence from

which to infer a motive to conceal? The answer lies in footnote 3 of its memorandum opinion and order, wherein the court referenced "Plaintiff's knowledge of his claims and intent to file a lawsuit." To draw such an inference, the court necessarily construed the ambiguous language of the Application for Sickness Benefits in the light most favorable to the Defendants. This was prejudicial error.

As discussed below, the district court had an obligation to view all reasonable inferences from the evidence in the light most favorable to Mr. Hughes. Here, the court did just the opposite. It construed the evidence in the light most unfavorable to him.

Additionally, as discussed below, even after the bankruptcy court explained in considerable detail why there had been no harm to the creditors, the district court nonetheless concluded that the creditors had been harmed. Again, the court failed to construe the evidence in the light most favorable to Ricky Hughes.

C. The District Court Had An Obligation To View The Evidence In The Light Most Favorable To Ricky Hughes.

It is a black-letter principle of law that on summary judgment the court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the non-moving party. In fact, the district court cited *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743,747 (8th Cir. 1996) in support of this legal principle in both of its memoranda opinions and orders.

Plaintiff submits that this principle of law is not simply a platitude to be cited in every motion for summary judgment. Rather, it requires that the court carefully consider the evidence presented to determine whether a question of fact exists for trial. If there is conflicting evidence or if more than one reasonable inference can be drawn from the evidence, the law requires that the court construe the evidence in favor of the non-moving party.

In the present case, when considering each of the factors pertinent to the doctrine of judicial estoppel, the district court had an obligation to construe all of the evidence and reasonable inferences drawn from that evidence in the light most favorable to Ricky Hughes.

For example, if there is a question of *intent to defraud creditors or to manipulate the judicial system*, the district court had an obligation to: 1) determine whether any such evidence exists in the record; and 2) construe any conflicting evidence or reasonable inferences from the evidence in favor of Mr. Hughes.

Likewise, if there is a question of fact as to whether there was any *harm to creditors*, the court was obligated to consider all of the evidence presented and construe any conflicts in the evidence or inferences in favor of Mr. Hughes.

Finally, if there is a question of fact as to whether Ricky Hughes had *a motive to conceal* any lawsuits or claims from his creditors or the courts, the district court was required to follow the same approach.

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Plaintiff submits that the district court followed this legal principle in its first memorandum opinion and order of October 29, 2021. However, the court subsequently drifted off course and failed to view the evidence in the light most favorable to Ricky Hughes when it 1) inferred a motive to conceal and 2) made a finding that the creditors had been harmed in its second memorandum opinion and order on February 2, 2023.

D. The Bankruptcy Court Clearly Established That The Creditors Suffered No Harm Yet the District Court Still Inferred Harm.

Although the bankruptcy court ruled that it lacked authority to approve a settlement that would allow for payments to creditors beyond the five-year term of the Debtor's Chapter 13 plan, the court was quick to point out that nothing prevented the Debtors from agreeing outside of the bankruptcy process to pay the unsecured creditors, stating:

> The Debtors can clearly pay any proceeds from the Lawsuit to the creditors pursuant to 11 U.S.C. § 524(f) which allows voluntary payments on discharged debts. The Debtors can use anyone, including the Chapter 13 Trustee (in an unofficial capacity), as a disbursing agent to pay the remaining unsecured creditors outside of the bankruptcy process. The Debtors have repeatedly represented they will voluntarily pay the creditors from any recovery in the Lawsuit. It is clear that if there is a recovery and the Debtors follow through, the unsecured creditors will receive a benefit from the Debtors' payment. But, it cannot be done through the Chapter 13 bankruptcy process.

This is precisely what the Debtors have done. On December 8, 2021, they entered into a written settlement agreement with the Trustee whereby they agreed to pay the creditors in full from the proceeds of any recovery. Although the

bankruptcy court could not officially approve the agreement, it nevertheless remains in effect today. Should a recovery be made, the creditors stand to benefit.

Further, the Bankruptcy court stated:

> Ironically, there has been no harm to creditors as a result of the Debtors' failure to disclose the Lawsuit. This is because the potential recovery to the Debtors from the Lawsuit could not have been paid within five years since even now, years later, no money has been awarded or paid to the Debtors. In fact, the injury which Mr. Hughes alleges Portaco caused did not occur until August 8, 2017, after the five-year period expired. In other words, even if disclosed in a timely matter, the creditors would have received nothing under the confirmed Chapter 13 plan from the Lawsuit, as there was nothing to distribute during the five-year period.

In other words, even if Mr. Hughes had called his bankruptcy attorney immediately after his first work-related injury on October 24, 2016 and reported a potential FELA claim (which he did not know about at that time) and the attorney then modified the schedule of assets to reflect the claim, the creditors would never have received a penny because there was no payment within the five-year period of the plan.

With respect to the August 8, 2017 work-related injury (which gave rise to the second FELA claim and two product liability claims), the incident itself occurred *after* the expiration of five-year period of the plan. Therefore, it would have been impossible for the creditors to receive any payment whatsoever from those claims.

The district court had knowledge of all of the foregoing information prior to making its ruling on February 2, 2023. Nevertheless, it disregarded the very case authority cited in its own memorandum opinion by ignoring evidence that was

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favorable to Mr. Hughes and instead construing the evidence in the light most unfavorable to him in finding that the creditors had been harmed. This was an abuse of the court's discretion.

Plaintiff submits that when the district court issued its memorandum opinion and order on February 2, 2023, it erred in failing to consider the effect of the settlement agreement in the context of the bankruptcy court's ruling, and in failing to view the evidence in the light most favorable to the non-moving party. *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743,747 (8th Cir. 1996) Had the court viewed the evidence in the light most favorable to Plaintiff, it would have appreciated that there was at least a question of fact as to whether the creditors were harmed or that the Plaintiff derived a benefit from his failure to disclose the potential claim. It is uncontroverted that Plaintiff entered into a settlement agreement with the Trustee whereby he has agreed to pay the creditors from the proceeds of any recovery in the lawsuit. As Plaintiff has agreed to pay his creditors $57,371.85 that they never would have been entitled to receive in the first place, how can that be construed by the court as a benefit to the Plaintiff?

E. Judicial Estoppel Is An Equitable Doctrine That Should Be Applied Cautiously.

Judicial estoppel is an equitable principle that prevents "a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th Cir. 2001) An additional purpose that judicial estoppel

promotes is "'the orderly administration of justice and regard for the dignity of judicial proceedings,' and . . . 'protect against a litigant playing fast and loose with the courts.'" *Id*. (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

The application of judicial estoppel must be applied cautiously since it bars a party from a remedy that would otherwise be available. *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996); *Valdez v. JDR LLC*, 2006 WL 2038456 (D. Ariz. 2006).

Additionally, the application of the defense must be tempered by the fact that the FELA was enacted by Congress with the broad remedial and humanitarian purpose to provide railroad employees, such as Plaintiff, with an exclusive remedy for job-related injuries. *Urie v. Thompson*, 337 U.S. 163, 180-81 (1949).

Consistent with both the general equitable principles and the broad remedial purposes of the FELA, judicial estoppel:

> [I]s not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to wield by adversaries unless such tactics are necessary to "secure substantial equity."

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 364 (3rd Cir. 1996); *Valdez*, 2006 WL 2038456, * 3.

Thus, judicial estoppel is a doctrine that bars a litigant from misleading a court and gaining an unfair advantage. However, before the doctrine may be used to summarily terminate a claim, the intent of the party purported to have misled must be closely scrutinized. Relying on *Ryan Operations G.P.*, the Ninth Circuit stated "[j]udicial estoppel applies when a party's position is 'tantamount to a

knowing misrepresentation to or even fraud on the court." *Johnson v. State*, 141 F.3d 1361, 1369 (9th Cir. 1998) (quoting *Ryan Operations G.P.*, 81 F.3d at 362-63).

The Eighth Circuit has also adopted the position taken in *Ryan Operations G.P.* when it stated "[n]otably, judicial estoppel does not apply when a debtor's 'prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006) (quoting *Ryan Operations G.P.*, 81 F.3d at 362.)

Accordingly, it is not enough for a party asserting the defense to show that the opposing party's position was an inadvertence or a mistake. *Johnson v. State*, 141 F.3d 1361, 1369 ((9th Cir. 1998)(citing *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989)). Instead, the party wielding the sword of judicial estoppel must show that the "incompatible positions are based . . . on chicanery." *Id.*

In the pending case, there is absolutely no evidence that Ricky Hughes intentionally failed to disclose the potential claims against the Defendants. Nor is there evidence that he ever appreciated that he had a cause of action until he hired a FELA attorney approximately 1 ½ years after the discharge of the bankruptcy. Even then, his attorney did not ascertain that there was a product liability cause of action until months later. Clearly, there is no evidence of chicanery or any intent to deceive his creditors. Moreover, Plaintiff and his bankruptcy counsel have taken

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steps to remedy the mistake by entering into an agreement with Trustee to pay the creditors from the proceeds of any recovery in the Lawsuit.

Based on the factual circumstances of this case, as well as the district court's own initial finding that there was nothing in the record to suggest that Mr. Hughes acted with intent to defraud his creditors or to mislead the court, there was absolutely no basis for the court to "disagree" with Plaintiff's assertion that he acted in good faith. It was an abuse of the court's discretion to reach that conclusion in its February 2, 2023 ruling.

F. The District Court Misapplied The Judicial Estoppel Factors.

The factors that must be considered to determine whether judicial estoppel may be invoked are: (1) whether the party's second position is "clearly inconsistent" with his or her initial position; (2) whether the party succeeded in persuading a first court to accept his or her initial position, which makes the acceptance of the inconsistent position by a second court appear that either of the courts were misled; and (3) whether the party who took the inconsistent positions "derive[d] an unfair advantage or impose[d] an unfair detriment on the opposing party if not estopped." *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d at 782-83 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

With respect to the first factor, the incompatible positions must be based "on chicanery," and cannot be merely based "on inadvertence or mistake." *Johnson v. State*, 141 F.3d at 1369.

Ricky Hughes is a layperson with a high school education and no legal training. As discussed above, his failure to disclose a potential claim in his bankruptcy case was not based on bad faith or chicanery. It is undisputed that he had no pending lawsuits or claims for monetary damages either before or after he filed the bankruptcy petition through the date of discharge on February 9, 2018. Nor is there any evidence that he had ever been asked by his bankruptcy attorney to disclose any injuries he has suffered during the pendency of the bankruptcy. The Notice of Responsibilities form that he was provided in May of 2012 was vague and ambiguous about what constituted a "claim" or who are "third parties." Certainly, a layperson could not be reasonably expected to know the bankruptcy laws and procedures or to appreciate the nuances of legalese. The evidence is uncontroverted that he did not know that he had a cause of action against his employer under FELA until he consulted with a lawyer in October of 2019, long after he had been discharged in bankruptcy.

In *Ryan Operations G.P.,* the Third Circuit expressed the sound policy of the courts when considering whether to apply the doctrine of judicial estoppel:

> We are persuaded, however, that policy considerations militate against adopting a rule that the requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding. Such a rule would unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies. While we by no means denigrate the importance of full disclosure or condone nondisclosure in bankruptcy proceedings, we are unwilling to treat careless or inadvertent nondisclosures as equivalent to deliberate manipulation when administering the "strong medicine" of judicial estoppel.

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81 F.3d at 364 (quoting *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993)).

As made clear by the evidence, Defendants failed to satisfy the first factor requiring a showing of inconsistent positions taken in the bankruptcy claim and his pending FELA /product liability claims beyond mere "inadvertence or mistake." Nevertheless, the district court ruled that the first factor had been satisfied.

In its February 2, 2023 memorandum opinion and order, the district court stated that "Plaintiff failed to inform the bankruptcy court or Trustee of the pending personal injury claims." However, the court again erroneously construed the evidence in the light most unfavorable to Mr. Hughes. The evidence is uncontroverted that there were no pending personal injury claims. Mr. Hughes had merely filled-out applications for sickness benefits. Thus, it was an abuse of the court's discretion to make a finding that the first factor had been satisfied based on non-existent evidence.

As to the second factor, the district court stated that by discharging Plaintiff's debts, the bankruptcy court "adopted the position that Plaintiff's personal injury claims did not exist." However, the court ignored the part of the second factor which requires a showing that it was done in a way aimed at "persuading" the courts or giving the appearance that the courts were misled, thereby undermining the judicial system. Moreover, district court had already made a finding that there was nothing in the record suggesting any intent to

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mislead or manipulate the judicial system. Therefore, Plaintiff submits that there was no basis for the Court's finding that the second factor had been satisfied.

Regarding the third factor, the question for the district court to consider was whether Ricky Hughes purported inconsistent positions caused him to derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Hamilton*, 270 F.3d at 782-83 (quoting *New Hampshire v. Maine*, 532 U.S. at 750). As discussed above, there was no evidence that any of the creditors were harmed, nor is there any evidence that Mr. Hughes has derived an unfair advantage. If the creditors were never entitled to the proceeds of any recovery in the first place, then Mr. Hughes received no unfair advantage. This is even more true in light of the fact that he has entered into an agreement with the Trustee to pay the creditors should he make any recovery in this matter.

It is noteworthy that the district court, in support of its February 2, 2023 ruling, relied upon the Eighth Circuit decisions in *Van Horn v. Martin*, 812 F.3d 1180 (8th Cir. 2016) and *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016). However, the court's reliance on those decisions is misplaced because they are factually distinguishable from the present case. Both of those cases involved plaintiffs who had failed to disclose discrimination lawsuits that were filed during the pendency of their bankruptcies. No such facts exist in this case.

Plaintiff is cognizant that the Eighth Circuit has shown no reluctance in affirming lower court orders dismissing a case based on the doctrine of judicial

estoppel when there is evidence in the record to support the decision and the lower court did not abuse its discretion. As the district court noted in its initial ruling on October 29, 2021, this case presents with "unique facts and procedural posture." Plaintiff respectfully submits that the district court lost its way in evaluating the issues in this case and took the wrong path in deciding to grant summary judgment based on the doctrine of judicial estoppel. The court failed to construe the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the non-moving party, ignored findings of the bankruptcy court that were material to the issues at bar, and disregarded its own finding that there was no evidence of any intent on the part of the Plaintiff to defraud his creditors or to mislead or manipulate the courts. For these reasons, and the other reasons stated above, the district court abused its discretion in granting summary judgment based on judicial estoppel.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court reverse and vacate the district court's order of February 2, 2023, in its entirety, and that the case be reinstated and remanded for a trial on the merits, and for such other relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ Michael B. Gunzburg
Michael B. Gunzburg

No. 23-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RICKY HUGHES, Plaintiff-Appellant, v. WISCONSIN CENTRAL, LTD., PORTACO, INC. and RACINE RAILROAD PRODUCTS, INC., Defendant-Appellee.	)))))))))	Appeal from the District Court of Minnesota No. 19-cv-02733-DWF-LIB Honorable Donovan W. Frank Judge Presiding

CERTIFICATE OF COMPLIANCE

The undersigned, on behalf of the Plaintiff, RICKY HUGHES, certified as follows:

1. The plaintiff's brief was prepared using Microsoft Word. It complies with the word limits and type-size limits of LR 7.1.

2. The word count for the brief totals 9,232.

3. The undersigned certifies that the word processing software creating the word count included all text, hearings, footnotes and quotations.

Dated: June 12, 2023

Respectfully submitted,

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No. 23-1410

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

RICKY HUGHES,	)	Appeal from the District Court
	)	of Minnesota
Plaintiff-Appellant,	)	
v.	)	No. 19-cv-02733-DWF-LIB
	)	
WISCONSIN CENTRAL, LTD.,	)	
PORTACO, INC. and RACINE	)	Honorable Donovan W. Frank
RAILROAD PRODUCTS, INC.,	)	Judge Presiding
Defendant-Appellee.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that she served a copy of the foregoing Plaintiff-Appellant's Brief upon the attorneys listed below via electronic mail on June 12, 2023.

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