Case 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.,

Defendants–Appellees.

On Appeal from the U.S. District Court for
the District of Minnesota
Honorable Donovan W. Frank, District Judge

Brief of Defendant–Appellee Racine Railroad Products, Inc.

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SUMMARY OF CASE AND ORAL ARGUMENT POSITION

Plaintiff-appellee Ricky Hughes' filing for bankruptcy protection results in his lack of standing to pursue personal injury claims in this case, and his failure to disclose his injury claims with the bankruptcy court results in the claims being barred by judicial estoppel. His attempt to correct his omission in the bankruptcy court was denied by that court as untimely. The late attempt highlights Hughes' harm to the judicial system. In this appeal, Hughes claims the district court erred because he is an unsophisticated plaintiff and did not knowingly intend harm. However, the district court properly dismissed Hughes' claims, by applying the law that malicious intent is not required here. *See Eastman v. Union Pac. R.R. Co*., 493 F.3d 1151, 1159 (10th Cir. 2007) (where debtor has knowledge of claims and a motive to conceal, courts infer deliberate manipulation). This court should affirm the district court.

Defendant-Appellee Racine Railroad Products, Inc. believes this case can be decided without oral argument. If the court determines oral argument is necessary, twenty minutes for each party should be sufficient.

CORPORATE DISCLOSURE STATEMENT

Per Fed. R. App. P. 26.1, Defendant-Appellee Racine Railroad Products, Inc. discloses that it does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of Racine Railroad Products, Inc.

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STATEMENT OF ISSUES

I. Does plaintiff have standing to pursue personal injury claims when he failed to disclose the claims in his bankruptcy court filings?

Most apposite authority:

In re Brokaw, 452 B.R. 770 (2011).

Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116 (2nd Cir. 2008).

II. Does failure to disclose personal injury claims in bankruptcy court constitute an inconsistent position from filing personal injury claims in district court such that judicial estoppel would bar the claims?

Most apposite authority:

Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016).

Cover v. J.C. Penney Corporation, Inc., 187 F.Supp.3d 1079 (D. Minn. 2016).

III. Can a plaintiff who amends his bankruptcy disclosure after discharge of his debts and closure of the bankruptcy court proceeding undue the harm he caused such that he would now establish standing to bring personal injury claims?

Most apposite authority:

Eastman v. Union Pac. R.R. Co., 493 F.3d 1151 (10th Cir. 2007).

STATEMENT OF THE CASE

This case involves the failure of a personal injury plaintiff to disclose his claims to the bankruptcy court during the pendency of his bankruptcy case. The district

court ruled that the filing for bankruptcy deprived plaintiff of standing to sue in district court. Further, by taking inconsistent positions in two courts, that he has injury claims in district court, and denying the existence of such claims in bankruptcy court, the doctrine of judicial estoppel applies to bar the claims.

I. Factual Background

Plaintiff-Appellant Ricky Hughes claims injury from two accidents, both occurring on the job at Wisconsin Central Ltd. (App. 53; R.Doc. 33, at 3-6). The first incident, on October 24, 2016, happened when Hughes was working with a crew to raise a low section of track using track jacks (App. 56; R.Doc. 33, at 3-4). Hughes claims a jack slipped out, caused him to fall, and caused a co-worker to fall on him (App. 57; R.Doc. 33 at 3-4). The second incident, on August 8, 2017, happened while Hughes was using a hydraulic spike puller tool (App. 58; R. Doc. 33 at 58). He claims the spike puller malfunctioned and injured him. (Id.)

Hughes filed applications with the U.S. Railroad Retirement Board for the work injuries on November 7, 2016 and August 22, 2017, checking "yes" to question 15, "Have you filed or do you expect to file a lawsuit or claim against any person or company for personal injury?". (App. 221-224; R.Doc. 125-2, at 1, 125-3 at 1).

On May 2, 2012, Hughes filed a voluntary Chapter 13 petition in the United States Bankruptcy Court for the District of Minnesota. (R. Doc. 118, ex. A), which included the filing of these documents:

• Schedule B—Personal Property, requiring Hughes to list "contingent and unliquidated claims of every nature, including tax refunds, counter-claims of the debtor, and rights to setoff claims . . . [with] estimated value of each." (*Id.* at 9-10). In response, Hughes checked "None." (*Id.*)

• Schedule C: Property Claimed as Exempt, requiring Hughes to list property claimed as exempt from creditors, value of such property, value of the claimed exemption, and the laws specifying the exemption. (*Id.*at 12.)

• Statement of Financial Affairs, requiring Hughes to list all suits and administrative proceedings to which he was a party within one year immediately preceding the filing of his bankruptcy. (*Id.* at 30.)

In addition, Hughes received and signed the Notice of Responsibilities of Chapter 13 Debtors and their attorneys, which provides the rules debtors must follow. Specifically, the Notice states that the Chapter 13 debtor shall:

> 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 related 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.

(App. 198; R. Doc. 118, ex. Ex. F. at 3-4.)

On February 9, 2018, the bankruptcy court entered an order discharging Hughes' debt. (R. Doc. 118, ex. D). In the Trustee's Final Report and Account, the trustee

notes that $81,045 of Hughes' unsecured debt had been discharged without full payment. (R. Doc. 118, ex. E (Trustee's Final Report Account).) On March 15, 2018, Hughes' bankruptcy was closed. (R. Doc. 118, ex. C.)

The Trustee's Report and Final Account was filed on December 13, 2017 (Id.). Thus, at the time of his accidents in 2016 and 2017, Hughes had a pending bankruptcy action. On April 13, 2012, Hughes signed a statement in bankruptcy court acknowledging he would provide "full and accurate financial and other information" including "information and documents relating to any lawsuits in which the debtor is involved before or during the case or claims the debtor may has or may have against third parties." (R. Doc. 118, ex. Ex. F. at 3-4.) Although Hughes was involved in the two accidents that are the subject of this case and was aware he had claims for injuries, he failed to disclose the claims to the bankruptcy court. Hughes did not amend his asset schedules to disclose this cause of action as an asset during the pendency of the bankruptcy proceeding, as he was legally required to do, nor did he seek to exempt this claim from the bankruptcy estate.

II. Procedural Background

On August 27, 2021, after defendants moved the court for summary judgment of dismissal based on lack of standing and judicial estoppel, Hughes applied to reopen the bankruptcy proceeding and the bankruptcy court reopened its file. (App. 188; R. Doc. 98, ¶ 2, Ex. A.) Hughes amended his Summary of Schedules in the bankruptcy

case on August 30, 2021 to reflect the potential personal injury claims as assets of the bankruptcy estate. (App. 189-93; R.Doc 98, ¶ 2, Ex. B.) Hughes took no steps to correct his omission of fact in the bankruptcy court until defendants in this case moved to dismiss based on Hughes' omission of fact in violation of law.

On April 13, 2022, the bankruptcy court denied Hughes' Motion to Approve Compromise Under Rule 9109 (App. 862; R. Doc. 190-1 at 12). The court ruled "the Settlement cannot be approved as it allows for a potential distribution outside the five-year plan period." (App. 859-60; R. Doc. 190-1 at 9-10).

On February 2, 2023, the U.S. District Court for the District of Minnesota, the Honorable Donovan W. Frank presiding, granted summary judgment of dismissal to Defendants – Appellees. (App. 1016; R. Doc. 195) The court ruled Hughes lacks standing to pursue his personal injury claims, stating:

> Here, Plaintiff's FELA claims became property of the bankruptcy estate because they arose after the bankruptcy case commenced but before it was closed. There is no dispute that Plaintiff did not list these claims on his schedule of assets and liabilities. Plaintiff attempted to reopen the bankruptcy proceeding, but the Bankruptcy Court ruled that it was too late to modify the plan. Therefore, it is now clear that Plaintiff is unable to pursue his claims on behalf of the estate. Because Plaintiff is bringing the claim for himself, and not on behalf of the estate, he lacks standing.

(App. 1022; R. Doc. 195 at 7 (footnote omitted)).

The district court also ruled that Hughes' claims are barred by judicial estoppel, because Hughes took inconsistent positions in two courts, and Hughes would derive an unfair advantage if not estopped:

> Plaintiff knew at the time that the bankruptcy was pending that he had these personal injury claims and that he planned to pursue litigation. Plaintiff, however, did not disclose the claims to the Trustee. The bankruptcy court relied on Plaintiff's disclosures when it discharged his debts. This left Plaintiff with the potential to attain monetary relief for the personal injury claims. Plaintiff argues that the creditors did not suffer any harm from any inconsistent position he took and that he acted in good faith. The Court disagrees. Plaintiff's potential damages arising from this lawsuit would go directly to him and not to his creditors. Therefore, these creditors have been deprived of the opportunity to receive payments from any proceeds he might have recovered.

(App.1023-24; R. Doc.195 at 8-9). The court also addressed the absence of malice:

> The Court acknowledges that there is no clear record of malice on Plaintiff's part, a point noted in the Court's prior order. Even so, a finding of intent or malice is not required. And the record clearly indicates that the bankruptcy file represented Plaintiff's assets as not including the pending FELA claims at the time discharge was granted, despite Plaintiff's knowledge of his claims and intent to file a lawsuit. The trustee was not privy to the existence of this asset when Plaintiff's debt was discharged and Plaintiff's motive to conceal may be inferred. *See Eastman v. Union Pac. R.R. Co.,* 493 F.3d 1151, 1159 (10th Cir. 2007) (noting that when a debtor has both knowledge of the claims and a motive to conceal, courts infer deliberate manipulation).

(App. 1024; R. Doc. 195 at 9, n. 3).

III. The Present Appeal

Plaintiff – Appellant Ricky Hughes appeals from the district court's summary judgment ruling, arguing he is unsophisticated and didn't intend harm. He also claims the court improperly reversed itself on the finding of no malice. However, the weight of authority supports the district court's ruling, that a finding of malice is not required because when a debtor has both knowledge of the claims and a motive to conceal, courts infer deliberate manipulation.

SUMMARY OF ARGUMENT

There are several reasons why this court should affirm the district court: (1) because Hughes lacks standing to bring claims that are properly owned by the bankruptcy trustee; (2) because Hughes should not benefit from his failure to disclose assets to the bankruptcy court; (3) because the weight of authority supports the district court's ruling, that a finding of malice is not required as courts infer deliberate manipulation when a debtor has knowledge of claims and a motive to conceal them; and (4) because applying judicial estoppel will protect courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. Further, Hughes' recognition of his claims as assets comes too late to correct the harm that occurred, too late to allow the bankruptcy court to fairly distribute the assets to creditors and doesn't remedy his failure to comply with bankruptcy law; to allow his delayed "correction" would only reward his unjust maneuvering. Hughes still has no standing to sue, and the district court correctly applied judicial estoppel to preclude these claims.

ARGUMENT

I. HUGHES LACKS STANDING TO PURSUE THESE CLAIMS.

The standard of review of a district court's dismissal for lack of standing is *de novo. Wieland v. United States HHS,* 793 F.3d 949, 953, (8th Cir. 2015).

In the bankruptcy case, all of Hughes' assets, including the present lawsuit,

became property of the bankruptcy trustee. *In re Brokaw,* 452 B.R. 770, 773 (2011); 11 U.S.C. §541(a)(1) (2010). After appointment of a trustee, a debtor no longer has standing to pursue a cause of action. *In re Brokaw,* 452 B.R. 770, 773. Only the trustee, as representative of the estate, has the authority to prosecute and/or settle such causes of action. *Id. at* 773; *citing Harris v. St. Louis University,* 114 B.R. 647, 648 (E.D. MO. 1990). The *Brokaw* Court noted that the debtor relinquished ownership and control of his personal injury lawsuit, and lacked standing to pursue that lawsuit, as the debtor had failed to disclose the personal injury claim in his bankruptcy petition and attachments. Undisclosed assets automatically remain property of the bankruptcy estate after the case is closed. *Chartschlaa v. Nationwide Mut. Ins. Co.,* 538 F. 3d 116 (2nd Cir. 2008).

Hughes has no standing to pursue claims belonging to the bankruptcy estate, unless he was actually proceeding "in behalf of the estate." Fed. R. Bankr. P. 6009. That rule states: "With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal". Fed. R. Bankr. P. 6009. The debtor may only pursue the claims "***in behalf of the estate.***" The test for whether the debtor is acting in behalf of the estate is whether the debtor has properly disclosed the cause of action to the bankruptcy court, the trustee, and creditors. *Richardson v.*

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United Parcel Service, 195 B.R. 737, 739 (E.D. Mo. 1996). In the present case, Hughes did not disclose the cause of action to the bankruptcy court, the trustee, or the creditors, so he was not proceeding in behalf of the estate. Further, as the bankruptcy court denied Hughes' attempted do-over (court ruled "the Settlement cannot be approved as it allows for a potential distribution outside the five-year plan period"), it is too late for Hughes to proceed on behalf of the estate. Hughes lacks standing. Hughes gave up any interest he had in his personal injury claims arising from the accidents when he filed for bankruptcy. Hughes failed to identify or disclose his personal injury claims during his bankruptcy case. Hughes lacks standing to prosecute this claim, and this court should affirm the dismissal.

II. JUDICIAL ESTOPPEL BARS HUGHES' CLAIMS.

This court reviews "application of judicial estoppel for abuse of discretion, including in the summary judgment context. … [W]e 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.'" *Gustafson v. Bi-State Dev. Agency,* 29 F.4th 406, 410, (8th Cir. 2022) (citations omitted).

Judicial estoppel requires application of a three-factor test:

> First, a party's later position must be "clearly inconsistent" with its prior position. Second, a court should consider whether a party has persuaded a court to accept its prior position "so that judicial acceptance of an inconsistent position in a later proceeding would

> create the perception that either the first or the second court was misled." Finally, a court should consider whether the party asserting inconsistent positions "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 1033 (8th Cir. 2016) *citing New Hampshire v. Maine,* 532 U.S. 742, 749, (2001). All 3 factors are met here: Hughes' position in this court, that he has injury claims is inconsistent with his position in the bankruptcy court, that he had no such claims; the bankruptcy court accepted that position; and Hughes collecting damages that should belong to the bankruptcy estate would derive an unfair advantage if not estopped.

The doctrine of judicial estoppel curbs abuses of the judicial process by parties who adopt contrary positions in separate proceedings to the disadvantage of an adverse party. *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 419 (3rd Cir. 1988). Judicial estoppel preserves disclosure statement reliability and reorganization plan finality. *Pako Corp. v. Citytrust,* 109 B.R. 368, 373-74 (D. Bankr. Minn. 1989). Judicial estoppel scrutinizes the connection between the litigant and the judicial system and seeks to protect the integrity of the judicial system. *Oneida,* 848 F.2d at 419.

Hughes' claims accrued during the pendency of his bankruptcy. Those claims became property of his bankruptcy estate under 11 U.S.C. §§ 541 and 1306. Hughes had an affirmative duty to disclose his interest in these claims by filing an amended Schedule B - Property in the Bankruptcy Court. He failed to do this during the

pendency of his bankruptcy case, thus taking the position that he had no injury claims, and now in this court taking the position that he does have injury claims.

Hughes now claims the bankruptcy disclosure requirement was for lawsuits or personal injury claims only, and that his applications for sickness benefits did not acknowledge a lawsuit or injury claim, but merely a request for payment of medical bills. (Appellant's brief at page 3). This argument strains credibility considering the clear and unambiguous language of the applications Hughes signed. In the Application for Sickness Benefits Hughes signed on November 7, 2016, he answered these unambiguous questions as follows:

Section C **Accident and Insurance Information**

14. Are you applying for sickness benefits because you were injured at work or have a work-related illness? ☑ Yes ☐ No

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**

(App. 221; R.Doc. 125-2, at 1). In the Application for Sickness Benefits Hughes signed on August 22, 2017, he answered these unambiguous questions as follows:

Section C **Accident and Insurance Information**

14. Are you applying for sickness benefits because you were injured at work or have a work-related illness? ☑ Yes ☐ No

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**

(App. 223; R.Doc. 125-3 at 1). Hughes states in both applications that he was injured at work, and that he had filed or "expect[s] to file a lawsuit or claim … for personal injury." Nowhere does it say he was merely seeking payment of medical bills. He was admitting he expected to file lawsuits or claims for personal injury.

Additionally, the applications for benefits directed Hughes to complete Items A-D, identifying whether he had received wages from other sources. Hughes knew he was seeking not only medical bills, but also income loss, and that he would be filing lawsuits or claims for personal injury. The bankruptcy filing required that he disclose "Information and documents related 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***." Even if Hughes had never even considered a lawsuit, he knew when he signed applications for sickness benefits he was making claims for sickness benefits, including medical bills and income loss. In fact, he obtained payment for medical expenses and received additional income benefits from the Railroad Retirement Board. Hughes had a duty to disclose these claims and benefits in the bankruptcy court.

Hughes also argues his failure to disclose his injury claims in bankruptcy court was due to inadvertence or mistake; as he has only a high school education, had no lawsuits at the time of filing for bankruptcy, his lawyer never asked him to disclose lawsuits, he was not aware of any claims until October 2019, and he never had any intent to defraud creditors or "impugn the integrity of the judicial system." (App. 194; R. Doc. 98, p. 9). However, the court rejected similar arguments in *Cover v. J.C. Penney Corporation, Inc.,* 187 F.Supp.3d 1079, (D. Minn. 2016). In *Cover,* plaintiff was fired from her job, filed an EEOC claim, and failed to disclose the

claim in her bankruptcy case. *Id. at* 1085-86. She argued her inconsistent positions were "asserted in good faith" and without "intent or malice" and "she relied on her counsel's advice". *Id. at* 1088-89.

The court rejected these arguments, finding Cover took inconsistent positions, stating: "The rationale is simple—by not disclosing her EEOC claim against JCP, the bankruptcy estate could discharge her creditors and she could reap the (potential) financial rewards of the discrimination lawsuit. For this reason, in cases such as this, motive is essentially assumed." *Id. at* 1088. Similarly, Hughes' failure to disclose claims meant the bankruptcy estate could discharge creditors and he could reap the potential financial rewards of this lawsuit. Therefore, ***his motive is assumed***. Judicial estoppel "serves to offset such motive[s and induce] debtors to be completely truthful in their bankruptcy disclosures." *Eastman v. Union Pac. R.R. Co.,* 493 F.3d 1151, 1159 (10th Cir. 2007).

The *Eastman* court reviewed several decisions from different Federal Circuit Courts of Appeal where bankrupt debtors' failure to disclose claims resulted in application of judicial estoppel, even with claims of inadvertence or mistake. Citing the "overwhelming weight of authority," the court found judicial estoppel applied to bar plaintiff Wayne Gardner's claims, explaining:

> The ever present motive to conceal legal claims and reap the financial rewards undoubtedly is why so many of the cases applying judicial estoppel involve debtors-turned-plaintiffs who have failed to disclose such claims in bankruptcy. The doctrine of judicial estoppel serves to offset such motive,

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> inducing debtors to be completely truthful in their bankruptcy disclosures. * * * We think Gardner's case is indistinguishable from the overwhelming majority of cases where debtors, who have failed to disclose legal claims to the bankruptcy court without credible evidence of why they did so, have been judicially estopped from pursuing such claims subsequent to discharge. ***A large portion of debtors who file for chapter 7 bankruptcy surely are as "unsophisticated" and "unschooled" as Gardner, yet have little difficulty fully disclosing their financial condition to the bankruptcy court.*** Gardner's assertion that he simply did not know better and his attorney "blew it" is insufficient to withstand application of the doctrine.

Eastman v. Union Pac. R.R., 493 F.3d 1151, 1158 (10th Cir. 2007) (emphasis added; citations omitted). Similarly, Hughes' claims that he is unsophisticated and meant no harm does not distinguish his case from the overwhelming weight of authority, that his motive is assumed, and judicial estoppel applies to bar his claims.

Hughes failed to list or identify his claims arising from the accidents while his bankruptcy case was pending. In doing so, he represented to the bankruptcy court that no such claims existed. His filing of a lawsuit claiming injuries from the accidents is "clearly inconsistent" with his prior position in bankruptcy court. When the bankruptcy court discharged Hughes' debts, the bankruptcy court accepted Hughes' position that he had no claims against the Defendants in this case. By having debts discharged and then being allowed to proceed with the present lawsuit, Hughes would effectively avoid paying any of his creditors. This court should reject that injustice. The district court did not abuse its discretion here, so this court should affirm dismissal of this case.

Hughes relies on an outdated Ninth Circuit rule, that application of judicial

estoppel only applies when the "incompatible positions are based on … chicanery." Appellant's brief at 26, citing *Johnson v. Oregon,* 141 F.3d 1361, 1369 (9th Cir. 1998). *Johnson* was decided prior to the United States Supreme Court case of *New Hampshire v. Maine*, 532 U.S. 742 (2001), and the Ninth Circuit later overruled the *Johnson* "chicanery" requirement, stating:

> [T]o the extent that we have suggested, as in *Johnson,* that a showing of chicanery is an "inflexible prerequisite" to judicial estoppel, *Wyler Summit* and *Johnson* are inconsistent with *New Hampshire*. In the wake of *New Hampshire,* we have treated fraud on the court as a factor rather than as a requisite element of the judicial estoppel analysis. * * * We acknowledge that we have also continued to describe judicial estoppel as inapplicable "when a party's prior position was based on inadvertence or mistake." * * * However, in *Ibrahim,* despite discussing and relying in part on the lack of chicanery, we nonetheless applied the *New Hampshire* test to find against a party asserting judicial estoppel. ***We now clarify that chicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the judicial estoppel analysis and not an "inflexible prerequisite" to its application.***

Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 985 (9th Cir. 2012) (emphasis added; citations omitted). Simply because Hughes may not have acted with "chicanery" or intent doesn't prevent application of judicial estoppel. In cases where a debtor has both knowledge of the claims and a motive to conceal, courts infer deliberate manipulation. *Eastman v. Union Pac. R.R. Co.,* 493 F.3d 1151, 1159 (10th Cir. 2007).

Hughes also claims his side agreement to pay the Chapter 13 Trustee out of the proceeds of this litigation corrects any harm done. Of course, there is no evidence the creditors are still active corporations or would actually benefit from such

payments, and the agreement does nothing to correct the harm to the judicial system. Simply because Hughes belatedly attempts to correct his mistake should not be a sufficient reason to overlook the harm to the judicial system.

III. Hughes' Late Attempt to Correct the Bankruptcy Filing is Insufficient to Avoid the Harm he Created.

Hughes' claims accrued on October 24, 2016 and August 8, 2017, during the pendency of his bankruptcy. Those claims became property of his bankruptcy estate under 11 U.S.C. §§ 541 and 1306. Hughes had an affirmative duty to disclose his interest in these claims by filing an amended Schedule B - Property in the Bankruptcy Court. He failed to do this during the pendency of his bankruptcy case. He only took efforts to correct his omission when it was brought to his attention in this court, and only as an attempt to avoid dismissal.

Hughes seeks to be excused from taking inconsistent positions in separate court proceedings, because he attempted to correct the harm by making a late Bankruptcy Court filing. However, this doesn't prevent the damage that judicial estoppel is designed to prevent; indeed, allowing Hughes to proceed in this fashion instead has the opposite effect of encouraging it. "Allowing [a plaintiff] to 'back up' and benefit from the reopening of his bankruptcy only after his omission had been exposed would 'suggest that a debtor should consider disclosing potential assets only if he is caught concealing them.'" *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1159–60 (10th Cir. 2007) (citations omitted).

Now seeing his mistake, Hughes has attempted to reopen the bankruptcy case, but the attempted correction is too late. The Hughes bankruptcy plan, dated April 30, 2012, called for the initial payment on May 30, 2012. 11 U.S.C. Section 1329 (c), which governs modification of bankruptcy plans, prohibits modification after five years. After Hughes failed to notify the bankruptcy court of the existence of his injury claims, he waited until getting the benefits of bankruptcy discharge, and now attempts to correct the record after it is too late for the bankruptcy court to modify the plan. The court should reject this tardy attempt to avoid the effects of non-disclosure of assets.

CONCLUSION

Defendant–Appellee Racine Railroad Products, Inc. respectfully requests that this court affirm the district court's grant of summary judgment of dismissal.

LAW OFFICES OF STEVEN G. PILAND

Dated: July 26, 2023

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitations of Fed.R.App.P. 32(A)(7)(B) because this brief contains 4525 words, excluding the parts of the brief exempted.

2. This brief complies with typeface and type-style requirements of Fed.R.App.P. 32(a)(5) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. This brief has been scanned for viruses and the brief is virus-free.

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Dated: July 26, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 26, 2023

/s/Raymond L. Tahnk-Johnson

Raymond L. Tahnk-Johnson (#178585)

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