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
No. 0:19-cv-02733

BRIEF OF DEFENDANT–APPELLEE WISCONSIN CENTRAL LTD.

Leslie A. Gelhar (MN Bar #014017X)
DONNA LAW FIRM, P.C.
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
Telephone: (952) 562-2460
Facsimile: (952) 562-2461
lgelhar@donnalaw.com

Counsel for Appellee-Wisconsin Central Ltd.

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant, Ricky Hughes (referred to herein as "Mr. Hughes"), claims he suffered injuries on two occasions while employed by Defendant-Appellee, Wisconsin Central Ltd. (referred to herein as "Wisconsin Central" or "WCL"). Mr. Hughes is asserting FELA claims against Wisconsin Central for both incidents. At the time the injuries allegedly occurred, Mr. Hughes was a party to a pending Chapter 13 bankruptcy proceeding. He subsequently obtained a Chapter 13 discharge which, among other things, eliminated over $80,000 in unsecured debt. Mr. Hughes's FELA claims are now barred by judicial estoppel, as well as a lack of standing, because he failed to properly disclose those claims in the bankruptcy proceeding, depriving the bankruptcy Trustee any opportunity to collect additional funds for the benefit of his creditors.

If this Court determines that oral argument is necessary, twenty minutes for each party should be sufficient.

CORPORATE DISCLOSURE STATEMENT

Per F.R.A.P. 26.1, Defendant, Wisconsin Central Ltd., discloses that it is a Delaware corporation, is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of North American Railways, Inc. which is a wholly owned subsidiary of Canadian National Railway Company. No publicly held corporation owns 10% or more of the stock of Wisconsin Central Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES

I. Did the District Court properly exercise its discretion when applying judicial estoppel, where Mr. Hughes failed to timely inform the Bankruptcy Court and Trustee of his FELA claims, where Mr. Hughes obtained the benefit of the Bankruptcy Court's Order, discharging over $80,000 in unsecured debt, where Mr. Hughes now contends those FELA claims are his and are worth hundreds of thousands of dollars, and where an attempt to reopen the bankruptcy case was denied as time-barred?

Most apposite authority:

New Hampshire v. Maine, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)

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

Van Horn v. Martin, 812 F.3d 1180, 1183 (8th Cir. 2016)

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

II. Did the District Court properly exercise its discretion when it found Mr. Hughes had knowledge of his FELA claims and motive to conceal during the pendency of his Chapter 13 bankruptcy proceedings?

Most apposite authority:

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

Van Horn v. Martin, 812 F.3d 1180, 1183 (8th Cir. 2016)

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

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

III. Does Mr. Hughes lack standing to pursue his injury claims, for his own benefit, when he failed to disclose those claims during the pendency of his Chapter 13 case, and the Trustee is now unable to pursue those claims for the benefit of the bankruptcy estate?

Most apposite authority:

Van Horn v. Martin, No. 5:13-CV-74-DPM, 2015 WL 925895, at *1 (E.D. Ark. Mar. 3, 2015), aff'd, 812 F.3d 1180 (8th Cir. 2016)

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

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

STATEMENT OF THE CASE

A. Case Summary

Mr. Hughes claims he suffered permanent injuries while working as a track maintainer for Wisconsin Central on two separate dates, October 24, 2016, and August 8, 2017. He has alleged negligence against Wisconsin Central in failing to provide a reasonably safe workplace under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51, et seq. Additionally, he has asserted pendant state law claims against the manufacturer and distributor of a hydraulic tool he claims malfunctioned in connection with his alleged August 8, 2017, injury incident.

At the time of both claimed injuries, Mr. Hughes had an open Plan for Chapter 13 bankruptcy protection which was not discharged until February 9, 2018. Despite having knowledge of his now pending personal injury claims and being under an order requiring disclosure, Mr. Hughes never informed the Bankruptcy Court or Trustee of their existence. A discharge order was entered which relieved Mr. Hughes of, among other things, unsecured debts totaling $80,689.42.

Appellees filed initial MSJs based on judicial estoppel and lack of standing, which the District Court denied without prejudice. Before deciding the estoppel and standing issues, the District Court allowed Mr. Hughes time to attempt to reopen his Chapter 13 case to determine if the Trustee could pursue the injury claims for the benefit of the estate.

Despite this belated effort to properly identify and schedule his personal injury claims, Mr. Hughes's attempt was denied because further Chapter 13 proceedings were time-barred under applicable bankruptcy law. Wisconsin Central, and the other Appellees, then renewed their MSJs seeking dismissal of Mr. Hughes's case based on judicial estoppel and standing, which motions were properly granted by the District Court.

B. Factual Background

1. Basis for Mr. Hughes' injury claims:

At Count I of his Second Amended Complaint, Mr. Hughes alleges that on October 24, 2016, he suffered "serious and permanent injuries" in the course of his work. His claimed injuries include past and future lost wages, diminished earning capacity, extensive medical treatment, and past and future disability "and/or loss of normal life." (App. 55-57; R. Doc. 33 at ¶¶ 9-16.)

A second FELA negligence count alleges a second incident on August 8, 2017. (App. 57-59; R. Doc. 33 at ¶¶ 18-26.) Mr. Hughes was working with a new "spike puller" which was alleged to have "failed and violently thrust him across the tracks." (App. 58; R. Doc. 33 at ¶ 23.) He claims that he suffered "serious and permanent injuries" because of the incident, including past and future lost wages, diminished earning capacity, extensive medical treatment, and suffered past and future disability "and/or loss of normal life." (App. 58-59; R. Doc. 33 at ¶¶ 23-24.)

Mr. Hughes further alleged claims for strict liability and negligence against Racine Railroad Products, Inc. ("Racine") and Portaco, Inc. ("Portaco"), the manufacturer and distributer of the "spike puller." He alleges a right to recover damages from Racine and Portaco for the same injuries he claims against Wisconsin Central. (App. 59-67; R. Doc. 33 at ¶¶ 27-54.) Monetary relief was sought against

each defendant exceeding $100,000 for each count of the six-count Second Amended Complaint. (App. 53-67; R. Doc. 33.)

2. Mr. Hughes' bankruptcy proceedings:

On May 2, 2012, Mr. Hughes filed a Joint Petition for Chapter 13 Bankruptcy protection with his spouse. (R. Doc. 71-7.) The Chapter 13 Plan was completed, and a Discharge Order was entered on February 9, 2018. (R. Doc. 71-6 and R. Doc. 71-12.) The bankruptcy Trustee's Final Report and Account, dated December 13, 2017, shows that unsecured debts originally amounting to $80,689.42, were discharged for payment of $23,317.57. (R. Doc. 71-11.)

Mr. Hughes's legal obligations in connection with his Chapter 13 proceeding are detailed in a four-page Notice signed by him on April 13, 2012, under the acknowledgment that he had read it and understood the requirements it imposed. (App. 196-200; R. Doc. 71-8.) The Notice of Responsibilities states that "after the case is filed" Mr. Hughes "shall…timely and promptly comply with all applicable bankruptcy rules and procedures and with the terms of the Chapter 13 plan…" (App. 199; R. Doc. 71-8 ¶ V.) A specific responsibility acknowledged by Mr. Hughes mandates that he "throughout the case, timely provide the attorney with full and accurate financial and other information" including "[i]nformation 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….” (App. 198-199; R. Doc. 71-8 at ¶ IV C. 14).

During the pendency of Mr. Hughes’s bankruptcy, the Trustee twice moved to have the case dismissed for failure to turn over relatively small sums, including by motion dated September 7, 2017, seeking tax refunds totaling $1201, and by motion dated August 14, 2014, seeking $455 in tax refunds. (R. Doc. 71-6, 71-9 and 71-10.).

In response to Defendant-Appellees’ MSJs based on judicial estoppel, Mr. Hughes attempted to reopen his bankruptcy case to allow scheduling of his injury claims as a contingent unliquidated asset. The District Court stayed, without prejudice to refiling, the MSJs “pending a decision in Bankruptcy Court on a Motion by Plaintiff to approve a stipulation with the Trustee reopening the bankruptcy case and allowing Plaintiff to schedule his action as a contingent unliquidated claim. (Doc. No. 135).” (App. 1019; Add. 27; R. Doc. No. 195 at p. 4.) The Bankruptcy Court denied Mr. Hughes’s motion as time barred. (App. 333-344; Add. 12-23; R Doc. 171.1.)

3. Mr. Hughes’ knowledge of his FELA/personal injury claims:

Mr. Hughes was aware of his FELA personal injury claims at the time each incident occurred. He worked directly with Wisconsin Central’s Risk Mitigation Officer to report the claims when they occurred, obtain payment of medical expenses

he related to the incidents, and obtain Railroad Retirement Board supplemental insurance sickness or disability benefits for lost working time, which created a lien against any recovery in this case. (*See* WCL Add. 001-002; R. Doc. 71-13; R. Doc. 71-1 at pp. 37-38, 122-124; R. Doc. 71-3, 71-4 and 71-5.).

That Mr. Hughes was aware of his present personal injury claims before his bankruptcy discharge, as well as their significance, is made abundantly clear in his sworn interrogatory answers, where he states:

> …I ended up getting referred down to the Twin Cities Spine Center by my orthopedic, Dr. Kenji Sudoh. I went down there *on November 6th [2017]*and saw Dr. Garvey for the consult.… He told me to try and avoid any prolonged full body impact type activities. I told him that my line of work has that every day, sometimes all day long. He told me that I would never make it to retirement age doing my line of work anymore. At best maybe three to four more years before needing surgery. My wife and I left there very concerned about my future…*I called my CN Risk Mitigation officer, Stephen Moller and told him, like I had told him in the past,* that the pain I am having and the fact that I am now looking at one for sure, and possibly two surgeries, is definitely more than just an aggravation of my last accident on October 24, 2016. I was at least getting by and back to work until this spike puller incident occurred. I told him *I have no idea when I will get back to work*…
>
> (WCL Add. 010-011; R. Doc. 71-2 at pp. 6-7(emphasis added)).

Mr. Moller explained that he knows Mr. Hughes was fully aware of his claims and believed they had substantial value *prior to December 2017*: "… I observed that prior to December 2017 he was fully aware that he had claims under the FELA, and that he viewed those claims as having substantial value." (WCL Add. 002; R. Doc. 71-13 at ¶ 6.) As a Risk Mitigation Officer, Mr. Moller's duties "…include handling

all aspects of defense of FELA claims including investigation, payment of claim related medical expenses, assisting injured employees as needed with obtaining sickness benefits and disability benefits from the Railroad Retirement Board ("RRB") or applicable disability carriers, negotiating settlement of claims with injured employees, and litigation support, should the claim be placed in suit." (*Id.* at ¶ 2.) Mr. Moller was also monitoring Mr. Hughes's applications for sickness benefits submitted to the RRB. (*Id.* at ¶¶ 2-4.)

Mr. Hughes filed an Affidavit as part of his summary judgment opposition, stating that he had no knowledge of the claims and causes of action now being litigated until he obtained legal counsel on October 12, 2019. (App. 194-195; R. Doc. 98 (Affidavit of Ricky Hughes) at ¶¶ 10-11.) He further alleged he "…had no pending claims for monetary damages" when his bankruptcy discharge was granted on February 9, 2018. (*Id.*)

For its Reply to Mr. Hughes's Affidavit, Wisconsin Central placed in the record copies of his RRB applications which directly contradict his allegations in the Affidavit. (R. Doc. 125.) Mr. Hughes applied for RRB sickness benefits within days of each incident. (*See* App. 221-222, 223-224; WCL Add. 005-008; R. Doc. 125-2 and R. Doc. 125-3.) On November 7, 2016, two weeks after his first injury incident, and over sixteen months before his bankruptcy case was closed, Mr. Hughes answered "[y]es" to the question "[h]ave you filed or do you expect to file

a lawsuit or claim against any person or company for personal injury?" He then identified the "person or company" against whom he had a claim as being Canadian National Railroad Co. (i.e., Defendant Wisconsin Central). (App. 221-222; WCL App. 005; R. Doc.125-2.) On August 22, 2017, two weeks after the second injury incident, and over six months before his bankruptcy case was closed, Mr. Hughes provided the same answer on his second RRB application. (App. 223-224; WCL App. 007; R. Doc.125-3.) Both applications were signed by Mr. Hughes and certified to be "true, correct and complete." (App. 222, 224; WCL App. 006 and 008; R. Doc.125-2; R. Doc.125-3.)

C. Procedural Background

Wisconsin Central's MSJ was originally filed as R. Doc. 69 and was heard by the District Court on September 23, 2021. By Order dated October 29, 2021, the Court denied the motion, *without prejudice*. (App. 313-321; Add. 3-9; R. Doc. No. 135.) All further District Court proceedings were stayed pending completion of Bankruptcy Court proceedings on Mr. Hughes's motion to reopen his Chapter 13 case. (*Id.*) The Bankruptcy Court filed its Order denying Mr. Hughes's motion on April 13, 2022. (App. pp. 333-344; Add. 12-23; R. Doc 171-1.) No appeal was taken from that Order.

Wisconsin Central re-filed its MSJ on September 23, 2022. (App. 809-828; R. Doc. 163, 164, 169, 184.) Racine and Portaco also refiled their MSJs at the same

time (App. 829; R. Dc. 165, 166, 178, 179.) The District Court heard these motions on November 4, 2022 (App. 907-1008.). Its decision granting summary judgment based on judicial estoppel and lack of standing was filed on February 2, 2023. (App. 1016-1024; R. Doc. 195).

D. The Present Appeal

Mr. Hughes now appeals the District Court's dismissal of his claims. He contends the District Court specifically found there was no proof of "any intent to intentionally mislead creditors or manipulate the judicial system" when it dismissed the first MSJs. (Hughes Brief at p. 18.) Despite this dismissal being without prejudice, and regardless of contrary record evidence, Mr. Hughes now argues he did not have knowledge of his claims during the five-year pendency of the Chapter 13 Plan. He further argues that motive to conceal cannot be inferred and a knowing misrepresentation and engagement in "chicanery" must be proven. (Hughes Brief at pp. 25-26.) He further argues that it was legal error to determine he lacked standing to pursue his personal injury case. (Hughes Brief at pp. 13-16.)

SUMMARY OF ARGUMENT

The District Court acted well within its discretion in finding that judicial estoppel applied. All the *New Hampshire* factors were established with record evidence. A finding of subjective intent to conceal, construed as malice or "chicanery", is not required, where the debtor had knowledge of the claims or motive to conceal, and

motive to conceal can be inferred from the circumstances. Additionally, Mr. Hughes lacks standing to pursue his personal injury case because the claims belonged to the bankruptcy estate, and he is attempting to improperly pursue the claims (and monetary recovery) for himself.

ARGUMENT

I. MR. HUGHES'S CLAIMS WERE PROPERLY DISMISSED BASED ON JUDICIAL ESTOPPEL.

A. JUDICIAL ESTOPPEL BARS A LIABILITY CLAIM WHICH ARISES DURING THE PENDENCY OF A CHAPTER 13 FILING THAT IS NOT DISCLOSED BY THE DEBTOR PRIOR TO DISCHARGE.

In *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), the Supreme Court set out a three-factor test to determine whether judicial estoppel should be applied to prevent a party from asserting a claim in a legal proceeding which is inconsistent with one previously taken.

> First, a party's later position must be "clearly inconsistent" with its prior position. *Id*. 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." *Id*. (internal quotation marks omitted). 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." *Id*. at 751, 121 S.Ct. 1808.
>
> *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1033 (8th Cir. 2016)

In *Jones* , this Court held that failure to report an unliquidated employment discrimination lawsuit to the Bankruptcy Court during the pendency of a Chapter 13 proceeding supported dismissal of that lawsuit, based on judicial estoppel. Each *New Hampshire* factor justifying estoppel was present in *Jones*.

The first *New Hampshire* factor – taking inconsistent positions between a bankruptcy case and the subsequent tort claim – was established "because the plaintiff's failure to amend his bankruptcy schedules to include his discrimination claims '"represented to the bankruptcy court that no such claims existed," and his assertion of those claims in this case is inconsistent with that prior position." *Id*. at 1033. This Court went on to explain:

> … that a Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending…. We conclude that Jones' failure to report his claims to the trustee represented to the bankruptcy court that those claims did not exist regardless of whether he had an independent legal duty to amend his schedules.
>
> *Id*.

The second *New Hampshire* factor – acceptance of the prior position – was also satisfied in the context of a Chapter 13 proceeding. As the *Jones* court explained "the bankruptcy court, by discharging Jones' unsecured debts, adopted the position that his discrimination claims did not exist." 811 F.3d at 1033. This was true even though Jones later reopened his bankruptcy estate to add his discrimination claims

to his schedules, because '"the [bankruptcy] court's original discharge of the debt is sufficient acceptance of the debtor's position to provide a basis for judicial estoppel."' *Id*.

The third *New Hampshire* factor – whether the claimant could derive an unfair advantage or impose an unfair detriment if not estopped – is also applicable in the Chapter 13 context:

> … because Jones could have derived an unfair advantage in the bankruptcy proceedings by concealing his claims. If Jones had disclosed his claims, for example, the trustee could have moved the bankruptcy court to order him to make the proceeds from any potential settlement available to his unsecured creditors.
>
> 811 F.3d at 1034

Proof of the third *New Hampshire* factor does not require that defendants show that a claimant/debtor in fact benefited from nondisclosure; rather, what is important is that timely disclosure could have given the bankruptcy trustee an opportunity to secure potential settlement proceeds for the benefit of the creditors. *Id*.; *Van Horn v. Martin*, 812 F.3d 1180, 1183 (8th Cir. 2016) (The plaintiff "could have received an unfair advantage because her trustee could have asked the bankruptcy court to order her to make any proceeds from a potential settlement available to her unsecured creditors.")

In addition to the three *New Hampshire* factors, the court can also consider whether the failure to disclose was inadvertent and that the plaintiff had no intent to

mislead the court. A defendant seeking judicial estoppel does not, however, need to establish that the debtor acted in bad faith or with the subjective intent to deceive to rebut a claim of inadvertence:

> Nevertheless, "[a] debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment."
>
> *Jones,* supra.

Showing the debtor had knowledge of the tort claim while the bankruptcy case was open, is enough to establish he had "motive to conceal" the claims from the bankruptcy court:

> Van Horn argues that failure to amend her bankruptcy schedules was a good faith mistake so judicial estoppel should not apply. If a debtor does not have knowledge of undisclosed claims or lacks a motive to conceal them, any failure to disclose them would be a good faith mistake. See *Stallings*, 447 F.3d at 1048. Here, it is undisputed that Van Horn had knowledge of her claims while her bankruptcy case was pending. Our court has recognized in the past that a Chapter 13 debtor who receives a right to sue letter while her bankruptcy case is pending has a motive to conceal her employment discrimination claims from the bankruptcy court. *Id*. at 1048.
>
> *Van Horn v. Martin*, 812 F.3d 1180, 1183 (8th Cir. 2016)

Jones had knowledge of his claims while his bankruptcy case was pending, and he could not claim inadvertence because the trustee in his case previously moved to deny Plan confirmation for a different non-disclosure issue. *Jones*, 811 F.3d at

1033. Motive for concealment was established when Jones received confirmation of his right to sue from the EEOC. *Id*.

Motive for concealment is also found where the undisclosed lawsuit is of the type which frequently produces six or seven figure damage awards, like an EEOC case. As explained by Judge Kyle in a Minnesota U.S. District Court case, "[t]he rationale is simple—by not disclosing her … claim …, 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." *Cover v. J.C. Penney Corporation, Inc.*, 187 F.Supp.3d 1079, 1088 (D. Minn. 2016) (Citing *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1159 (10th Cir.2007) ("The doctrine of judicial estoppel serves to offset such motive[s and induce] debtors to be completely truthful in their bankruptcy disclosures.")

B. ALL ELEMENTS SUPPORTING APPLICATION OF JUDICIAL ESTOPPEL ARE SATISFIED IN THIS CASE.

1. The first *New Hampshire* factor is satisfied.

The first *New Hampshire* factor – taking inconsistent positions between a bankruptcy case and the subsequent personal injury claim – is established. Mr. Hughes never disclosed the existence of either the 2016 or 2017 FELA claims to the Bankruptcy Court by amending his schedules prior to entry of the Discharge Order. (*See* R. Doc.71-6, 71-7, 71-11 and 71-12.)

In this case, Mr. Hughes attempted to defeat the estoppel motions by reopening his Chapter 13 and moving for acceptance of a compromise with the Trustee to allow disbursement of a potential tort case recovery for the benefit of creditors. The Bankruptcy Court rejected this attempt and denied Mr. Hughes's motion as time barred. (App. 333-344; Add. 12-23; R. Doc. 171.1.)

2. The second *New Hampshire* factor is satisfied.

The second *New Hampshire* factor –judicial acceptance of the prior position –is also established. The Chapter 13 Discharge Order was entered on February 9, 2018. (*See* Doc. 71-12.) The Order resulted in a net reduction of Mr. Hughes's unsecured debt by approximately $57,000. (*See* Doc. 71-11.) This is sufficient acceptance to satisfy the second *New Hampshire* factor. *See e.g.*, *Jones*, supra. Mr. Hughes's late attempt to reopen the Chapter 13 case, when his failure to disclose was revealed was rejected and, accordingly, judicial acceptance of the prior position' remains undisturbed.[1]

This case is different from the situation presented in *Stallings v. Hussmann Corp*., where a district court's order dismissing a claim based on judicial estoppel was reversed. In *Stallings*, the second *New Hampshire* factor was not established because the Chapter 13 case was dismissed without a discharge having been granted:

[1] Regardless of Mr. Hughes's attempt to reopen his bankruptcy case, '"the [bankruptcy] court's original discharge of the debt is sufficient acceptance of the debtor's position to provide a basis for judicial estoppel."' *Jones*, 811 F.3d at 1033.

> Under the second factor, however, no judicial acceptance of Stallings's inconsistent position occurred. Unlike *Superior* and *Hamilton,* the bankruptcy court never discharged Stallings's debts based on the information that Stallings provided in his schedules. Instead, the bankruptcy court granted the bankruptcy trustee's motion to dismiss the case.
>
> 447 F.3d 1041, 1049 (8th Cir. 2006)

3. The third *New Hampshire* factor is satisfied.

The third *New Hampshire* factor –whether the claimant could derive an unfair advantage or impose an unfair detriment if not estopped – is also established in this case. Had Mr. Hughes informed the Bankruptcy Court he had two viable FELA claims, the Trustee most certainly would have insisted that sufficient funds be allocated from any recovery to pay the unsecured creditors in full. The Trustee could also have moved to dismiss the Plan or convert it to a Chapter 7 case, with the Trustee taking control of the claims. Instead, the discharge was granted, to the detriment of Mr. Hughes's creditors.

The Bankruptcy Court record shows that the Trustee would have acted on behalf of the estate had the injury claims been properly disclosed: on two occasions, the Trustee filed motions to dismiss the Plan for failure to transfer less than $2000 in tax refunds. (*See* R. Doc. 71-9 and 71-10.) One of those motions was filed on September 7, 2017, less than a month after the occurrence of Mr. Hughes's second injury incident. (R. Doc. 71-10.) If one was needed, this should have served as a timely reminder to Mr. Hughes of his legal obligation to the Bankruptcy Court.

4. Mr. Hughes's failure to disclose was not inadvertence excusing application of estoppel.

As noted in *Jones* and *Van Horn*, an 'inadvertent mistake" will not be found if the claimant either had knowledge of the claims or motive to conceal:

> Nevertheless, "[a] debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment."

Jones, 811 F.3d at 1034; see also *Van Horn*, 812 F.3d at 1183.

Mr. Hughes signed a written Notice of Responsibilities, certifying that he read and understood the requirements, including a continuing obligation to inform the Court of any "[i]nformation and documents relating to … claims [he] has or may have against third parties." (App. 196-200; R.Doc. 98 at pp. 31-35; R. Doc. 71-8.) He cannot claim his failure to disclose was due to inadvertence. He was aware of the existence of his FELA claims at the time both injury incidents occurred: he promptly provided written notice of the incidents as required by his employer; he worked directly with Wisconsin Central's Risk Mitigation Officer to obtain payment of his claimed medical bills; he filed for disability benefits from the RRB; and he acknowledged telling the Risk Mitigation Officer about the seriousness of his claims. (*See* App. 221-224; WCL Add. 002, 005-013; R. Doc. 71-13; R. Doc. 71-1 at pp. 37-38, 122-124; R. Doc. 71-2, 71-3, 71-4, 71-5, 125-2 and 125-3)

Mr. Hughes also cannot claim he lacked motive for concealment. Wisconsin Central does not need to prove Mr. Hughes had a subjective intent to defraud creditors or manipulate the judicial system when he failed to disclose his FELA claims; rather, knowledge of those claims during the pendency of the bankruptcy case is enough to establish motive to conceal. Motive for concealment is assumed in the context of third-party claims having a recognized potential for large damage recoveries. *See e.g.*, *Jones,* 811 F.3d at 1033; *Van Horn,* 812 F.3d at 1183; and *Cover,* 187 F.Supp.3d at 1088.

Mr. Hughes incorrectly claims that "'judicial estoppel applies when a party's position is 'tantamount to a knowing misrepresentation to or even fraud on the court…'" and "'the party wielding the sword of judicial estoppel must show that the "incompatible positions are based… on chicanery."' (*See* Hughes Brief at pp. 25-26.) As support for these propositions, he cites *Johnson v. State*, 141 F. 3d 1361, 1369 (9th Cir. 1998). Notably, *Johnson* was decided *before* the Supreme Court's *New Hampshire* decision. It has since been recognized that *Johnson's* suggestion – that proof of subjective mal intent is required to establish judicial estoppel – is incorrect:

> In *Johnson*, a case cited and relied upon by *Wyler Summit*, we explained that, "[i]f incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply."… However, to 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 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, 994–95 (9th Cir. 2012)

To avoid summary judgment, Mr. Hughes submitted an affidavit swearing he had no knowledge of the claims and causes of action now being litigated until he obtained legal counsel on October 12, 2019. (R. Doc. 98 (Aff. of Ricky Hughes) at ¶¶ 10-11.) He admits hiring a bankruptcy attorney in 2012 and signing the Notice of Responsibilities form prior to filing. (*Id.* at ¶¶ 4-5.) He avers that "[a]fter the case was filed … and up until the bankruptcy was discharged on February 9, 2018, I was not asked by my attorney to provide information about lawsuits or claims for monetary damages…." (*Id.* at ¶ 7). Apparently, Mr. Hughes is claiming that if he had been properly advised, he may have made a timely disclosure of the claims before the bankruptcy discharge was granted. Such an assertion has no bearing on the applicability of judicial estoppel:

> Reliance on legal advice does not constitute a good faith mistake for purposes of judicial estoppel. See, e.g., *Eastman*, 493 F.3d at 1159; *Cannon–Stokes v. Potter*, 453 F.3d 446, 449 (7th Cir.2006) ("[B]ad legal advice does not relieve the client of the consequences of her own acts."); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 601 (5th Cir.2005).
>
> *Cover,* 187 F. Supp. 3d at 1089.

Mr. Hughes's self-serving affidavit and its assertion that he had no knowledge of his potential claims prior to the bankruptcy discharge is contradicted by the prior declarations he gave to the RRB. His applications for Sickness Benefits, submitted to the RRB within days of each incident, leave no doubt he was fully aware of these claims and intended to pursue litigation. On November 7, 2016, two weeks after his first injury incident, Mr. Hughes answered "[y]es" to the question "[h]ave you filed or do you expect to file a lawsuit or claim against any person or company for personal injury?" He then identified the "person or company" against whom he had a claim as being Canadian National Railroad Co. (i.e., Defendant Wisconsin Central). (App. 221-222; WCL Add. 005; R. Doc. 125-2.) On August 22, 2017, two weeks after the second injury incident, he provided the same answer on his second RRB application. (App. 223-224; WCL Add. 007; R. Doc. 125-3.) Both applications were signed by Mr. Hughes and *certified* to be "true, correct and complete." (App. 222, 224; WCL Add. 006 and 008; R. Doc. 125-2 and 125-3.) Signing the certification on the federal agency form is no different than taking an oath to tell the truth in court or in an affidavit.

It would be entirely appropriate to exclude Mr. Hughes's self-serving affidavit (App. 194-195; R. Doc. 98) from the record of this proceeding:

> The question we must answer is whether Frevert's declaration made in opposition to summary judgment amounts to a self-serving affidavit. " '[A] properly supported motion for summary judgment is not defeated

> by self-serving affidavits.' " *Bacon v. Hennepin County Med. Ctr.,* 550 F.3d 711, 716 (8th Cir.2008) (quoting *Gander Mountain Co. v. Cabela's, Inc.,* 540 F.3d 827, 831 (8th Cir.2008)). … "We observed that '[i]f testimony under oath ... can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment.' " *Id.* (quoting *Camfield,* 719 F.2d at 1365).
>
> *Frevert v. Ford Motor Co.*, 614 F.3d 466, 473–74 (8th Cir. 2010)

Mr. Hughes now argues that his applications for RRB Sickness Benefits are ambiguous and do not establish he had knowledge of either his FELA claims or claims against "third parties." (Hughes Brief at pp. 16-18.) This argument is legally and factually specious. RRB Sickness Benefits are governed by 45 U.S.C.A. §362, the same title containing the FELA. 45 U.S.C.A. §362(o), "Liability of third party for sickness; reimbursement of Board," provides:

> Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement.
>
> 45 U.S.C.A. §362 (o) (2023).

Section 362 (o) creates a lien for recovery of sickness benefits from third-party tort claims, including an employee's claim against the railroad he works for,

under the FELA. *See, e.g. Tate v. Jacksonville Terminal Co.*, 127 So. 2d 702, 704 (Fla. Dist. Ct. App. 1961).

The context of the RRB benefits form reveals the extent to which Mr. Hughes's argument of "ambiguity" falls short of creating a *genuine* fact issue. Question 15 on the application form, where Mr. Hughes indicated his intention to file a "lawsuit or claim against any person or company for personal injury," appears within "Section C Accident and Insurance Information." (R. Doc. 125-2 and 125-3.) The "person or company" Mr. Hughes intended to file a lawsuit or claim against was identified as "Canadian National Railroad Co." (i.e., his employer, Wisconsin Central). He had no other claims against Wisconsin Central for his accidents outside of the FELA. *See Tate* 127 So. 2d at 704 (explaining that railroad employers' liability to injured employees arises under the FELA).

Mr. Hughes's ambiguity argument is also unsupported by the record evidence. His Affidavit (App. 194-195; R. Doc. 98) says nothing about his RRB benefit applications, or any alleged lack of understanding of the term 'claim' or 'lawsuit' when he certified that he intended to pursue them. His affidavit was filed in response to the affidavit of Risk Mitigation Officer Moller (WCL Add. 001-002; R. Doc. 71-13). The RRB benefit forms were placed in the record as part of Wisconsin Central's Reply to the Hughes Affidavit. Mr. Hughes did not introduce evidence during either the initial MSJ proceedings, or in response to Defendants' re-filings, to support his

present ambiguity argument that he lacked understanding of the terms on the form he certified was true and correct.

The ambiguity argument is just that, an argument only, taking out of context the significance of the RRB benefit forms and Mr. Hughes's contemporaneous certification that he intended to pursue a "lawsuit or claim" for each incident. His present argument, that he was unaware of his claims, is not tethered to record evidence, nor does it create a *genuine* fact question.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT MR. HUGHES LACKS STANDING TO PURSUE THESE CLAIMS.

Both of Mr. Hughes' injury claims arose during the pendency of his Chapter 13 bankruptcy proceedings. The claims therefore belong to his bankruptcy estate. See e.g., *Combs v. The Cordish Companies, Inc.*, 862 F.3d 671, 679 (8th Cir. 2017) (Chapter 13 estate includes not only the property the debtor had at the time of filing, but also wages and property acquired after filing but before discharge.). Therefore, Mr. Hughes could pursue the claims only on behalf of the estate, not for his own benefit. *Van Horn v. Martin*, No. 5:13-CV-74-DPM, 2015 WL 925895, at *1 (E.D. Ark. Mar. 3, 2015), aff'd, 812 F.3d 1180 (8th Cir. 2016) ("Van Horn's claims belong to her bankruptcy estate…. Here, Van Horn is bringing the claims for herself, not on behalf of the bankruptcy estate. She lacks standing to do so.")

In this case, Mr. Hughes' bankruptcy Trustee cannot pursue an action on behalf of the estate, because further action is barred by 11 U.S.C. §1329 (c), the five year time limit for completing Chapter 13 claims. Since Mr. Hughes failed to timely amend his bankruptcy schedules to include this case as an asset, the Trustee cannot pursue it for the benefit of the estate; and Mr. Hughes cannot pursue the case for his own benefit, either. *See Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2nd Cir. 2008) ("A debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for [his] own benefit."); *In re Brokaw*, 452 B.R. 770 (2011) (Debtor in Chapter 7 proceeding could not claim abandonment of personal injury case where personal injury case was not properly listed as an asset.).

CONCLUSION

The District Court acted within its discretion to dismiss Mr. Hughes's FELA claims based on judicial estoppel. The *New Hampshire* factors for application of estoppel have been satisfied. Mr. Hughes cannot plead ignorance to his responsibly to disclose assets acquired after approval of his Chapter 13 Plan. The District Court properly inferred his motive to conceal, and no genuine fact issue supports Mr. Hughes's claim that he lacked knowledge of his FELA claims before his bankruptcy discharge was granted.

While not required, the District Court also allowed Mr. Hughes an opportunity to attempt to reopen his bankruptcy case to see if the creditors could be protected

prior to making a final decision on Appellees' MSJs. Since the Bankruptcy Court could not reopen the bankruptcy case, the Trustee could not pursue the personal injury case for the benefit of Mr. Hughes's creditors. This confirms that the failure to disclose benefited Mr. Hughes to the detriment of his creditors.

Mr. Hughes's FELA claims are now barred by judicial estoppel because of his failure to disclose:

> A discharge in bankruptcy is sufficient to establish a basis for judicial estoppel, "even if the discharge is later vacated." … 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).

Providing an alternative basis for the grant of summary judgment, Mr. Hughes lacks standing to pursue the FELA claims for his own benefit. Because of the Chapter 13 filing, the alleged claims could only be pursued on behalf of the bankruptcy estate, and not for Mr. Hughes, personally.

This case highlights the importance of judicial estoppel. Mr. Hughes's failure to properly schedule his FELA claims deprived the bankruptcy Trustee, and ultimately his creditors, an opportunity to recover additional funds on substantial debts. Allowing Mr. Hughes to proceed with his FELA claims now would be particularly harmful because it would permit him (and other litigants) to take

inconsistent positions in different legal proceedings; moreover, it would also reward Mr. Hughes (and other litigants) who can wait out the Chapter 13 time-limit on Plans, to both conceal contingent claims and only bring those claims once further bankruptcy proceedings are time barred.

The District Court's grant of summary judgment was in all respects proper. Defendant–Appellee Wisconsin Central Ltd. respectfully requests that its decision be AFFIRMED.

Dated: July 26, 2023

DONNA LAW FIRM, P.C.

Leslie A. Gelhar MN Bar #014017X
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
Telephone: (952) 562-2460
Facsimile: (952) 562-2461
lgelhar@donnalaw.com
ATTORNEYS FOR DEFENDANT-APPELLEE WISCONSIN CENTRAL LTD.

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Dated: July 26, 2023

Respectfully submitted,

/s/ Leslie A. Gelhar

Leslie A. Gelhar (MN Bar #014017X)
DONNA LAW FIRM, P.C.
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
Telephone: (952) 562-2460
Facsimile: (952) 562-2461
lgelhar@donnalaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE WISCONSIN CENTRAL LTD.

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/ Leslie A. Gelhar
Leslie A. Gelhar (MN Bar #014017X)