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

REPLY BRIEF OF PLAINTIFF-APPELLANT

MICHAEL B. GUNZBURG
RIDGE & DOWNES
230 W. MONROE, SUITE 2330
CHICAGO, IL 60606
(312) 372-8282 – OFC
(312) 372-8560 – FAX
MGUNZBURG@RIDGEDOWNES.COM

RUSSELL A. INGEBRITSON
INGEBRITSON & ASSOCIATES
7141 AMUNDSON AVENUE
EDINA, MN 55439
612-251-7715 – OFC
612-342-2990 – FAX
RUSS@INGEBRITSON.COM

Counsel for Plaintiff-Appellant

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ARGUMENT

I. This case is factually distinguishable from every case cited by the Defendants where judicial estoppel was applied.

As the district court noted when it initially ruled in favor of the Plaintiff on the issue of judicial estoppel, *this case presents unique facts*. All of the cases cited by the Defendants in their briefs are distinguishable from the facts in this case.

Virtually every case cited by the Defendants in support of the application of judicial estoppel involved a debtor who either failed to disclose a pending lawsuit or the receipt of a right to sue letter at the time of the filing of the bankruptcy petition or who subsequently filed a lawsuit during the pendency of the bankruptcy proceedings and failed to disclose the same prior to being discharged.[1] There are no such facts in the instant case.

The evidence is undisputed that Mr. Hughes did not have a pending lawsuit either before or during the bankruptcy proceedings. Moreover, he did not file a FELA lawsuit until at least 1 ½ years after he was discharged in bankruptcy.

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[1] See, *Van Horn v. Martin,* 812 F.3d 1180, 1181–82 (8th Cir.2016) (Discrimination suit filed during pendency of bankruptcy.); *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016) (Discrimination suit filed during pendency of bankruptcy.); *Tokheim v. Georgia-Pacific Gypsum L.L.C.*, 606 F.Supp.2d 988,997 (Discrimination suit filed during pendency of bankruptcy.); *Raml v. Raml*, No. 4:15-CV-04154-RAL, 2017 U.S. Dist. LEXIS 156307, at *23 (D.S.D. Sep. 25, 2017) (unpublished) (letters/affidavits establishing knowledge of claims prior to filing bankruptcy petition.); *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (Knowledge of water damage claim prior to filing bankruptcy petition.);

II. Inadvertence is a complete defense to judicial estoppel

Defendants have not cited a single case holding that a plaintiff in a civil action for monetary damages may be judicially estopped from pursuing his claims where he *inadvertently* fails to disclose them in a Chapter 13 bankruptcy proceeding. In *New Hampshire v. Maine*, the Supreme Court did "not question that it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." 532 U.S. 742, 752. Indeed, Portaco specifically acknowledges on Page 38 of its brief that the courts apply a two-prong test for determining whether a debtor's failure to disclose his claims is inadvertent. The first inadvertence prong is whether he had *knowledge of his claims*. The second inadvertence prong is whether he had a *motive to conceal his claims*.

Portaco further agrees that on summary judgment the question of whether Mr. Hughes had both knowledge of his claims and a motive to conceal them must be viewed in the light most favorable to Mr. Hughes.

Plaintiff asserts that his failure to disclose his claims during the Chapter 13 proceedings was inadvertent and the result of a good faith mistake. Hence, there was no basis for the district court to apply the doctrine of judicial estoppel.

Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1159 (10th Cir. 2007) (FELA lawsuit pending at time of filing bankruptcy petition.)

Plaintiff submits that the district court erred in several respects. First, it misconstrued the case law, including the *Eastman* decision, in ruling that a finding of *intent* is not required for the application of judicial estoppel. Additionally, the court erroneously relied on *Eastman* to infer that Mr. Hughes had a motive to conceal. Second, it failed to view the evidence in the light most favorable to Mr. Hughes. Third, it drew inconsistent factual inferences from the same evidence, having first stated that a) *the record does not suggest that Plaintiff acted with any intent to defraud creditors or to intentionally mislead or manipulate the judicial system* and then subsequently stating that b) it disagreed that Plaintiff acted in *good faith* and, further, that *Plaintiff's motive to conceal may be inferred*. This arbitrary, capricious, and inconsistent interpretation of the evidence ultimately led to the court erroneously changing its prior ruling and misapplying the doctrine of judicial estoppel. All of this constituted an abuse of the court's discretion and prejudicial error.

III. Viewed in the light most favorable to Ricky Hughes, the district court could not reasonably infer from the evidence that he had knowledge of his FELA or product liability claims.

WCL states on Page 9 of its brief that Mr. Hughes was aware of his FELA personal injury claims at the time each incident occurred. In support of this contention, WCL cites to Plaintiff's sworn interrogatory answer, to-wit:

> …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, sometime 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 I 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*…

However, this answer to the interrogatory merely establishes that Mr. Hughes was aware of his injury. It states nothing about Mr. Hughes having knowledge of potential FELA claims or any other claims. Thus, it has no probative value relating to the issue of judicial estoppel.

Next, on Page 10 of its brief, WCL directs the Court's attention to an affidavit signed by its risk mitigation officer, Stephen Moller, stating that "…. 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." (Emphasis added.) This affidavit is essentially meaningless and has no probative value with respect to WCL's contention that Mr. Hughes had knowledge of his FELA claims. Unless Mr. Moller possessed super-natural powers which allowed him to peer into the mind of Mr. Hughes, he was wholly incapable of "observing" what Mr. Hughes was thinking or what he knew or didn't know. There is simply no foundation for

this statement. To be sure, nowhere in the affidavit does Mr. Moller state that Mr. Hughes ever told him that he was aware that he had a FELA claim. Nor does he state in the affidavit that he ever discussed a potential FELA claim with Mr. Hughes at the time that he filled-out the Application for Sickness Benefits, even though Mr. Moller was present at the time. Rather, they discussed payment of the medical expenses submitted by Mr. Hughes.

Viewing the "evidence" in the light most favorable to Mr. Hughes, Plaintiff submits that none of the so-called evidence tendered by WCL provided the district court with a basis to reasonably infer that Mr. Hughes had knowledge of his FELA claims during the pendency of the bankruptcy.

As discussed in Plaintiff's opening brief, the Application for Sickness Benefits is ambiguous and the district court was required to construe that ambiguity in the light most favorable to Mr. Hughes. Initially, the court did precisely that. However, for reasons unknown, the court subsequently reversed course and construed the language in the light most favorable to the Defendants. This was an abuse of its discretion.

Having been provided copies of the Applications for Sickness Benefits (R. Doc. 124-2) on September 14, 2021, the district court declined to apply the doctrine of judicial estoppel on October 29, 2021, stating that *the record does not suggest that Plaintiff acted with any intent to defraud creditors or to intentionally*

mislead or manipulate the judicial system. Obviously, the court did not believe at that time that the language of the application established that Mr. Hughes had knowledge of a FELA claim or that he intended to file a lawsuit.

Nevertheless, in its February 2, 2023 order (R. Doc. 195-9), Footnote 3, the district court stated that "…the bankruptcy file represented Plaintiff's assets as not including the pending FELA claims at the time the time discharge was granted, despite Plaintiff's *knowledge of his claims* and *intent to file a lawsuit*." (Emphasis added.) As discussed in Plaintiff's opening brief, because of the ambiguity of the language in the Application for Sickness Benefits, there was no clear statement that Plaintiff intended to file a lawsuit of any kind, let alone a FELA action. In construing the language as it did, the court erroneously viewed the evidence in the light most favorable to the Defendants.

For the district court to change its ruling on judicial estoppel between October 29, 2021 and February 2, 2023, it had to completely reconstrue the language of the Application for Sickness Benefits. From initially determining that the application did not manifest any knowledge of a FELA claim or intent to file a lawsuit, the Court then totally reversed course in finding that Mr. Hughes knew of his FELA claim and intended to file a lawsuit. This was arbitrary and capricious and constituted reversible error.

With respect to the first inadvertence prong, Plaintiff submits that there was insufficient evidence for the district court to infer that he had *knowledge of his claims*, particularly when viewing the evidence in the light most favorable to Mr. Hughes.

IV. The district court erroneously interpreted the *Eastman* decision when it inferred that Mr. Hughes had a motive to conceal his claims despite there being no evidence of intent to mislead his creditors or the court.

With respect to the second inadvertence prong, namely *motive to conceal his claims*, the district court once again erroneously reversed its position without any new evidence to consider. On this issue, the court relied primarily on the Tenth Circuit's decision in *Eastman v. Union Pac. R.R. Co.* 493 F.3d 1151 (10th Cir. 2007), a case which had been previously cited by WCL in its reply brief on September 14, 2021, *prior* to the court declining to apply the doctrine of judicial estoppel on October 29, 2021.

As discussed in Plaintiff's opening brief, the facts in *Eastman* bear no resemblance to those in the instant case. In *Eastman*, the Plaintiff had a pending FELA lawsuit seeking damages for personal injuries arising out of a motor vehicle accident during the pendency of his bankruptcy case. Not only did he fail to disclose the lawsuit in the schedule of assets, but he then blatantly lied to the bankruptcy trustee at a creditors meeting when he specifically denied that he had a pending personal injury lawsuit. The court noted that plaintiff's conduct was

egregious and that it was impossible to believe that he could have overlooked his claim when filing his bankruptcy schedules. Id. at 1159. In affirming the lower court's application of judicial estoppel, the Tenth circuit stated:

> Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times *sub silentio*, infer deliberate manipulation.

Id. at 1157

Motive is defined as "Something, esp. willful desire, that leads one to act." *Black's Law Dictionary*, 11th Ed. Plaintiff submits that without evidence that Mr. Hughes had knowledge of his FELA claims, there can be no motive to conceal. Unlike the *Eastman* case, there was no pending lawsuit and nothing to suggest that Mr. Hughes had knowledge of any claims, except his claim for sickness benefits and to have his medical bills paid.

Contrary to ruling of the district court in this case, the Tenth Circuit did not hold that a finding of intent was unnecessary for judicial estoppel. Instead, the court held that where the debtor had both knowledge of his claim and a motive to conceal, *deliberate manipulation could be inferred*. In other words, it is the deliberate or intentional manipulation of the judicial system that triggers the application of judicial estoppel.

However, in the present case, the district court had already made a finding that *the record does not suggest that Plaintiff acted with any intent to defraud*

creditors or to intentionally mislead or manipulate the judicial system. It strains logic to understand how the district court could cite *Eastman* in support of its position that a showing of intent is not necessary for the application of judicial estoppel when that *Eastman* court clearly held that a showing of deliberate manipulation was necessary. Deliberate manipulation and intentional manipulation are one and the same.

Plaintiff submits the district court erred in its interpretation of the *Eastman* decision and its application to the case at bar. The district court having previously found that there was no evidence that Mr. Hughes acted with any intent to defraud his creditors or to manipulate the judicial system, the *Eastman* decision is distinguishable on its facts and inapplicable. Nevertheless, the underlying holding in *Eastman*, i.e., that there must be a showing of deliberate manipulation of the judicial system, is consistent with Plaintiff's position that it was error for the district court to apply judicial estoppel in this case.

The district court seemed to be stating in its February 2, 2023 order that a showing of intent or malice is not necessary when there is a motive to conceal. Plaintiff submits that the court is wrong in this regard. First, there was no evidence that Mr. Hughes had a motive to conceal a FELA claim of which he had no knowledge. Second, virtually all of the cases applying the doctrine of judicial estoppel have required some showing of bad faith, i.e., intent to defraud creditors

or to manipulate the judicial system. See, *Ryan Operations G.P. v. Santiam-Midwest Lumber*, 81 F.3d 355 (3d Cir. 1996); *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1988); *IN THE MATTER OF COASTAL PLAINS, INC. v. MIMS*, 179 F.3d 197 (5th Cir. 1999); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006)

With respect to the second inadvertence prong, Plaintiff submits there was no evidence from which the district court could reasonably infer a motive or "willful desire" to conceal. Without evidence that Mr. Hughes had knowledge of his potential FELA or product liability claims, what was he motivated to conceal? Simply put, there was nothing for him to conceal.

Portaco argues that the "District Court did not improperly infer a motive to conceal because no inference is necessary when a Chapter 13 debtor always has a motive to conceal." WCL similarly argues that "motive is essentially assumed," citing *Eastman*, Id. This is not a correct statement of the law. If motive to conceal need only be assumed, there could never be a defense of inadvertence or good faith mistake, as recognized by the Supreme Court in *New Hampshire v. Maine*, Id. A court could simply assume a motive to conceal in every case. Further, the *Eastman* court did not assume a motive to conceal, but rather it noted that there was a finding of egregious conduct on the part of the debtor and that it was "impossible

to believe" that the debtor could have overlooked his claim when filing his bankruptcy schedules. Such facts are entirely missing from the instant case.

For the reasons stated above, as well as those set forth the opening brief, Plaintiff respectfully submits that the district court erred in granting summary judgment based on judicial estoppel.

V. Defendants have failed to address the bankruptcy court's finding that the creditors suffered no harm.

Defendants have failed to refute the finding of the bankruptcy court that there was no harm to the creditors. As more than five years had elapsed since Mr. Hughes made his first payment made under the Chapter 13 plan, the creditors would not have been entitled to any reimbursement from a recovery in the lawsuit, even if the underlying claims had been properly disclosed during the pendency of the bankruptcy.

The district court attempted to circumvent the bankruptcy court's finding by suggesting that even though the creditors had not been harmed, Mr. Hughes derived an unfair advantage because he was free to pursue his lawsuit. Plaintiff respectfully disagrees. If the creditors would never have been entitled to any money from the proceeds of the lawsuit, then there was no *unfair* advantage derived by the Plaintiff. The lawsuit vested in Mr. Hughes upon discharge. Any money that he might receive from the Defendants in this case would not coming out of the pocket of the creditors.

VI. Portaco is correct that the agreement between Mr. Hughes and the bankruptcy trustee is null and void.

Plaintiff stands corrected on his previous statement that the agreement between the Plaintiff and the bankruptcy trustee to reimburse the creditors from the proceeds of any recovery remains in effect. Portaco is correct that the agreement automatically became null and void once the petition to approve the settlement was denied by the bankruptcy court. This was an inadvertent oversight on the part of Plaintiff's counsel.

VII. Defendants' arguments that Plaintiff lacked standing are without merit.

As discussed in Plaintiff's opening brief, the bankruptcy court clearly held that the lawsuit vested in the debtor upon discharge. Portaco attempts to distinguish vesting from ownership and cites *Annese v. Kolenda (In re Kolenda)*, 212 B.R. 851, 854 (W.D. Mich. 1997) (quoting *In re Fisher*, 198 B.R. 721, 733 (Bankr. N.D. Ill. 1996). However, those cases involved the meaning of vesting during a very specific time period in the bankruptcy proceedings, namely *after* confirmation of the plan but *before* discharge. Here, the bankruptcy court specifically held that vesting occurred upon discharge. In other words, the lawsuit vested in the debtor at the time that he was discharged, at which point he was free to file suit in his own name. The case cited by Portaco are not applicable to this case.

Additionally, many of the cases cited by the Defendants on the issue of standing involved Chapter 7 bankruptcies and therefore are also inapplicable to this case which involves Chapter 13.

Plaintiff submits that the district court improperly ignored the ruling of the bankruptcy court in finding that Mr. Hughes lacked standing to file the lawsuit.

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

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CERTIFICATE OF COMPLIANCE

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

1. The plaintiff's reply 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 3,366.

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

Dated: August 21, 2023

Respectfully submitted,

By: /s/ Michael B. Gunzburg
MICHAEL B. GUNZBURG

RIDGE & DOWNES
Michael B. Gunzburg
230 West Monroe Street, Suite 2330
Chicago, Illinois 60606
312-372-8282 – Ofc
312-372-8560 – Fax
mgunzburg@ridgedownes.com
mgunzburg@msn.com

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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 August 21, 2023.

Leslie A. Gelhar
Donna Law Firm
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
lgelhar@donnalaw.com
eholman@donnalaw.com
sbarland@donnalaw.com
Attorneys for Wisconsin Central, Ltd.

Todd Nissen
Zurich American Insurance Company
1299 Zurich Way
Suite 320
Schaumburg, IL 61096
todd.nissen@zurichna.com
Attorney for Portaco, Inc.

Raymond L. Tahnk-Johnson
7400 College Boulevard
Suite 550
Overland Park, KS 66210
raymond.tahnk-johnson@thehartford.com
Attorney for Racine Railroad Products, Inc.

Russell A. Ingebritson
Ingebritson & Associates
7141 Amundson Avenue
Edina, MN 55439
russ@ingebritson.com
Attorney for Plaintiff

Lydia Vega, Legal Assistant

RIDGE & DOWNES
Michael B. Gunzburg
One of Plaintiff's Attorneys
230 West Monroe Street, Suite 2330
Chicago, Illinois 60606
312-372-8282 – Ofc ◆ 312-372-8560 – Fax
mgunzburg@ridgedownes.com