THE STATE OF NEW HAMPSHIRE
SUPREME COURT

SUPREME COURT DOCKET NO. 2017-0080

Nicole Alward v. Emery Johnston, M.D. et al.

Brief of Appellees Gary Fleischer, M.D., Emery Johnston, M.D., Elliot Hospital, Tung Thuy Nguyen M.D. and Southern New Hampshire Medical Center

---

Peter Meyer, Esquire, N.H. Bar No. 1745
Jay Surdukowski, Esquire, N.H. Bar No. 17763
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
Concord, NH 03301
(603) 224-2341
Counsel for Gary Fleischer, M.D.

Todd J. Hathaway, Esquire, N.H. Bar No. 12012
Wadleigh Starr & Peters PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140
Counsel for Emery Johnston, M.D. and Elliot Hospital

Martin C. Foster, Esquire, N.H. Bar No. 17289
Stephen M. Fiore, Esquire, N.H. Bar No. 14008
Foster & Eldridge LLP
One Canal Park, Suite 2100
Cambridge, MA 02141
(617) 252-3366
Counsel for Tung Thuy Nguyen M.D. and Southern New Hampshire Medical Center

Oral argument by: Todd J. Hathaway, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

QUESTION PRESENTED

Judicial estoppel guards the integrity of the judicial system as a whole by preventing parties from taking legally inconsistent positions. Was judicial estoppel proper here where Appellant denied the existence of a medical malpractice claim in bankruptcy court only to bring suit shortly after her debts were discharged?

See Trial Court Order dated December 5, 2016

STATEMENT OF THE CASE

Invoking the doctrine of judicial estoppel, the trial court (Temple, J.) dismissed Appellant's Complaint because she had previously failed to disclose the existence of this medical malpractice lawsuit as an asset in a Chapter 7 bankruptcy where she was absolved of $1,236,887.73 in debts in a no-asset estate.[1] The Trial Court, citing First Circuit guidance and other cases, concluded that Appellant could not take the inconsistent position, several months after her bankruptcy discharge, that she had a medical malpractice claim after all, and that the bar of judicial estoppel — which protects the integrity of the judicial system as a whole — was applicable. This appeal followed.

STATEMENT OF THE FACTS

This case arose in July of 2013 when Appellant developed cauda equina syndrome[2] and presented for a series of emergency department visits. Appellant knew at that time, or shortly thereafter, of a potential claim against a number of her care-givers for alleged failure to diagnose and treat her condition. Among other things, and as described more fully below, she proceeded to go to three different law firms over several years to pursue her claim.

The following is a linear chronology of the events surrounding Appellant's investigation of a claim and her bankruptcy:

August 5, 2013: After her awareness of a bad medical outcome in the weeks immediately prior, Appellant requested a complete copy of her medical records. *See Appellant's Appendix* at 41. Appellant had previous experience with the process of bringing a claim for money damages as she has in the past retained counsel and brought a Human Rights Commission case and was

[1] The Bankruptcy Trustee concluded after relevant exemptions that there were no assets for distribution to the creditors.

[2] Cauda equina syndrome is when the spinal cord is compressed and a patient loses sensation in the lower extremities, which can affect motor function and continence. Appellees vigorously deny Appellant's allegations of negligence.

awarded damages. *See Nicole Alward v. The Green Forrest Inn, Ltd. et al.*, N.H. Hum. Rights. Comm. (July 12, 1999).

Summer of 2013: In the aftermath of her injuries, Appellant retained the law firm of Sweeney & Sweeney in connection with claims for injuries following the emergency department visit on July 12, 2013.

October 2, 2013: Appellant executed an authorization requesting that medical providers supply medical records relative to her care to her attorneys. *See Appellant's Appendix* at 29.

October, 2013: Southern New Hampshire Medical Center and several physician offices received requests from the Sweeney & Sweeney attorneys attaching the authorizations for medical records. *Id.* at 39-40.

February, 2014: Additional authorizations seeking records in connection with a claim for her injuries are submitted to health care providers. The cover letters from attorney J. Edward Sweeney indicated in the first line: "Please be advised that our office represents Nicole Alward in *a claim for injuries*." See *id.* at 29-40 (emphasis added).

Sometime between February, 2014 and July of 2015: Appellant consulted a second law firm after Sweeney & Sweeney apparently declined to take the case. As Appellant's second bankruptcy counsel noted in November of 2016, "Debtor consulted with two medical malpractice attorneys who advised her that they were unwilling to represent her in a malpractice claim (the "Potential Claim") against the treating physicians and hospitals." *See Appellant's Appendix* at 100, ¶ 5.

July 23, 2015: Appellant filed Chapter 7 bankruptcy and did not list the medical malpractice claim as a contingent or unliquidated claim, as she was required to do under 11 U.S.C. §§ 521(a)(1) and 541(a)(1), no matter if the claim has value or not.[3] Notably, Appellant's bankruptcy counsel, Mark Cornell, listed another contingent asset — interest in a limited liability company (LLC) — which Appellant believed had unknown and "unlikely" value, as well as five other LLC interests with zero value. *See, Appellant's Appendix* at 57-59. The Appellant testified under oath at the Creditor's Meeting that she had no lawsuits. *See* Transcript of August 25, 2015 Creditors Meeting available from the Office of the United States Bankruptcy Trustee (informal transcript appended to this brief at A1-9).

December 22, 2015: Appellant is given a fresh start by grant of an Order of discharge. *See Appellant's Appendix* at 61-62.

February, 2016: Appellant retained a third law firm, Swartz & Swartz, to prosecute her unscheduled medical malpractice claim. *See Appellant's Appendix* at 100, ¶ 6.

---

[3] *See* Section A below on this strict requirement to disclose assets, no matter their perceived value or lack thereof.

February-June, 2016: Despite now having her case accepted by a third law firm, Appellant did not inform her bankruptcy attorney or otherwise take steps to cure the omission from her bankruptcy schedules.

June 13, 2016: The Bankruptcy Trustee petitioned to close the bankruptcy case and concluded that it was a "no asset" case. *See Appellant's Appendix* at 46. The Bankruptcy Trustee is not aware that Appellant had retained a third law firm that proceeded to file the medical malpractice suit at issue within days.

June 27, 2016: Appellant brings her lawsuit while the bankruptcy case is still open and just two weeks after the Bankruptcy Trustee had moved to close the case by citing an absence of assets in the bankruptcy estate for distribution. Appellant's counsel was copied on this motion, which indicated that this was an asset-less bankruptcy estate ripe for closure. Appellant did not file a motion to correct the record.

July 14, 2016: The Bankruptcy Court, ignorant of Appellant's pursuit of a potentially valuable asset, closed the case, while Appellant's malpractice lawsuit is pending. *Id.* Appellant did not disclose the suit during the five months since she has retained Swartz & Swartz.

October 27, 2016: Appellee-Defendants move to dismiss after discovering Appellant's bankruptcy filing and her retention of other lawyers to pursue her malpractice claim well before the bankruptcy filing.

November 9, 2016: Appellant moves *ex parte* to reopen her bankruptcy case and her new bankruptcy counsel admits on her behalf in a verified pleading that she spoke about her potential medical malpractice claim with three law firms and, allegedly, her bankruptcy counsel as well, and did not schedule the claim as she was obligated to do under penalty of perjury. *See Appellant's Appendix* at 99-101. Subsequently, Appellant strikes a deal with the bankruptcy trustee to receive half of any proceeds she should obtain through the lawsuit that she previously did not disclose to the detriment of her creditors. *See* Trustee's Motion in *In re: Nicole Alward*, Case No. 15-11155 JMD (appended to this brief at A10-12).

November 14, 2016: Appellant's case is reopened by the bankruptcy court. *See Appellant's Appendix* at 103. The bankruptcy trustee did not file an appearance, intervene, or otherwise substitute himself as a party in interest to this case.

December 5, 2016: The Hillsborough County Superior Court grants the Defendants' Joint Motion to Dismiss, noting in the Order's conclusion:

> The plaintiff filed the motion to reopen her bankruptcy case on November 9, 2016, which strongly suggests that the plaintiff's motion to amend her schedule of assets was prompted entirely by the defendants' motion to dismiss. This is exactly the type of behavior that the court in *Moses*[4] condemned. This Court joins in that judicial condemnation. As the plaintiff failed to disclose her monetary

[4] A leading District of Columbia Circuit case discussed *infra.*

claim for damages in the bankruptcy proceeding in a timely manner, she is judicially estopped from bringing that claim in court now.

Order dated December 5, 2016 (Appellant's Supplement at 1-7).

December 14, 2016: Appellant moves to reconsider claiming that her bankruptcy counsel advised her not to schedule her claim and that his negligence should not be imputed to her. No affidavit of bankruptcy counsel was included and unsworn and unsigned intake forms purporting to support Appellant's claim were appended to the motion without foundation.

January 13, 2017: The Trial Court declines to reconsider its Order and notes that it is black letter law that clients are responsible for the actions of their agents, including lawyers, acting in the scope of their agency. Order dated January 13, 2017 (Appellant's Supplement at 8-13).

SUMMARY OF ARGUMENT

The Trial Court correctly ruled that judicial estoppel bars Appellant's claim. Judicial estoppel is consistently applied in every Federal Circuit in cases where plaintiffs do not disclose potential lawsuits in bankruptcy but then bring suit later. This is also the rule in at least thirty-six states.[5] The purpose of judicial estoppel is prophylactic — the doctrine is applied to guard the integrity of the judicial system as a whole, not based on the equities of an individual litigant's life circumstances or any windfall that may redound to defendants. Indeed, in the First Circuit, the omission need not be intentional, and this Court should follow the First Circuit's well-reasoned rule, which at least three Justices of the New Hampshire Superior Court have found persuasive.

Even if the Court were to adopt an exception to judicial estoppel for cases of inadvertence or mistake, there is more than sufficient basis for finding lack of inadvertence or mistake here.

---

[5] Benjamin J. Vernia, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding*, 85 A.L.R 5TH 353 (2017).

Appellant's claim should be barred regardless of whether it is pursued by Appellant or the bankruptcy trustee. The bankruptcy trustee never appeared, intervened, or substituted himself in this case as the real party in interest. Even if the trustee had appeared, the better rule for the integrity of the judicial system as a whole is that estoppel should bind the trustee as well; especially in a case like this one where a deal was apparently struck with the trustee for the Appellant to share in half of the proceeds of a lawsuit she previously swore did not exist when she filed her bankruptcy.

STANDARD OF REVIEW

This Court has not before provided the applicable standard of review for the dismissal of a complaint on the basis of judicial estoppel. The First Circuit has held that when "reviewing a trial court's application of the doctrine of judicial estoppel," the "applicable rubric is abuse of discretion." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 30 (1st Cir. 2004). The Court identified several reasons for applying that standard, including: "1) the discretionary nature of judicial estoppel, 2) the district court's closer relationship to the facts of the case and the litigants' conduct, 3) the flexibility of the abuse of discretion standard, and 4) the fact that other circuits that have addressed the question have unanimously settled on abuse of discretion as the appropriate standard." *Guay v. Burack*, 677 F.3d 10, 15-16 (1st Cir. 2012) (explaining *Alternative Sys. Concepts, Inc.*, 374 F.3d at 30-31). The First Circuit held that the abuse of discretion standard is appropriate even in the context of reviewing a grant of summary judgment. *Alternative Sys. Concepts, Inc.*, 374 F.3d at 31. This Court should adopt the same standard in this case and review the trial court's order for abuse of discretion. *See Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005) (reviewing trial court's barring of evidence pursuant to judicial estoppel "under an unsustainable exercise of discretion standard").

"In applying [the] unsustainable exercise of discretion standard of review, [this court] determine[s] only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *Osman v. Lin*, 169 N.H. 329, 336 (2016) (quotation omitted). Under this standard, this Court's "task is not to determine whether [it] would have found differently, but only to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." *Id.* (quotation omitted).

ARGUMENT

A. Full Disclosure of Assets is Required in Bankruptcy Court, Even if the Asset has Little or No Value, and Appellant Failed to Do So.

The legal principle underlying the Trial Court's application of judicial estoppel is the strict bankruptcy rule that all assets, including potential lawsuits, must be scheduled in a federal bankruptcy case.

Under federal law, a debtor in bankruptcy is strictly required to disclose all assets to the bankruptcy court. *See* 11 USC §§ 521(a)(1) ("The debtor shall—file—a schedule of assets and liabilities"). The sworn disclosure of assets takes the form of a schedule identifying all assets of the debtor regardless of their form or how contingent or remote they may be. *See Appellant's Appendix* at 57-59 [*Schedule B of Chapter 7 Voluntary Bankruptcy Petition*, which calls for the listing of all contingent or unliquidated claims, among other classes of property].

Lawsuits and potential lawsuits must be scheduled because they are assets of the debtor. *See* 11 USC §§ 521(a)(1); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 793 (D.C. Cir. 2010) ("A debtor is required to disclose all potential claims in a bankruptcy petition."); *Howe v. Richardson*, 193 F.3d 60, 61 (1st Cir. 1999).

The Bankruptcy Code strictly requires the disclosure of all assets, even if a plaintiff thinks they have no value. *See Tennyson v. Challenge Realty (In re Tennyson)*, 313 B.R. 402,

406 (Bankr.W.D. Ky. 2004) (stating that debtors must schedule pre-petition causes of action even if the claim is contingent or the debtors perceived that the action had no value to the bankruptcy estate). As the Bankruptcy Court found in *Tennyson*:

> Box twenty (20) of Schedule B specifically asks for all contingent and unliquidated claims. Every debtor in bankruptcy has an absolute obligation to schedule every asset on their bankruptcy schedules. The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court. Full and honest disclosure in a bankruptcy case is crucial to the effective functioning of the federal bankruptcy system.

Id. (citations and quotation omitted).

It is undisputed here that the Appellant did not disclose her suit — and still did not do so when a third lawyer took her case just two months after her discharge and then filed suit while the bankruptcy case was still open, even though the Appellant was under a continuing duty to disclose pre-petition assets. *See id.*

B. The Trial Court Properly Applied Judicial Estoppel.

In light of Appellant's failure to schedule her potential lawsuit in her bankruptcy case, the Trial Court properly applied the doctrine of judicial estoppel to bar her claim.

The doctrine of judicial estoppel prevents a party from prevailing in the first phase of a case on one argument and then relying on the contradictory argument to prevail in another. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Stated another way, "[w]here one succeeds in asserting a certain position in a legal proceeding, one may not assume a contrary position in a subsequent proceeding simply because one's interests have changed." *Guay*, 677 F.3d at 16. "The general function of judicial estoppel is to prevent abuse of the judicial process, resulting in an affront to the integrity of the courts." *Pike v. Mullikin,* 158 N.H. 267, 270 (2009) (quotation omitted). Universally-agreed-upon conditions for the application of the doctrine are:

1. Two positions are directly inconsistent and mutually exclusive; and

2. The responsible party must have successfully persuaded a Court to accept the prior position.

See id.

Judicial estoppel is widely applied where bankruptcy petitioners neglect to schedule claims — in effect such an omission constitutes an affirmative denial of a claim's existence. Appellant failed to cite this authority, but as the U.S. Court of Appeals for the First Circuit has succinctly noted:

> [I]t is well-established that the failure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel, barring the debtor from pursuing the claim in a later proceeding. Every circuit that has addressed the issue has found that judicial estoppel is justified to bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case.

Guay, 677 F.3d at 17 (citation, quotation, and brackets omitted). In other words, having obtained judicial relief in the bankruptcy court on the representation that no claim exists, an appellant cannot then "resurrect" such a claim and obtain relief on the opposite basis. *Id.*

It does not matter if the failure to schedule was due to neglect or intentional design as the First Circuit noted in an influential case followed by the three New Hampshire Superior Court justices known to have ruled on this issue. Judicial estoppel is warranted to maintain the integrity of "honors-system" bankruptcy proceedings and the high degree of diligence debtors and their counsel must devote to disclosing all assets for the review of the bankruptcy court and creditors. "A party is not automatically excused from judicial estoppel if the earlier statement was made in good faith." *Id.* at 16 (quotation and brackets omitted). Moreover, "deliberate dishonesty" is not a prerequisite to application of judicial estoppel. *Id.* at 20 n.7. Estoppel has been held to be appropriate "whether plaintiff has taken an intentionally inconsistent position . . . or failed to disclose an asset in the bankruptcy proceeding because he mistakenly believed it was

subject to forfeiture." *Id.* (citing *Schomaker v. United States*, 334 F. Appx. 336, 340 (1st Cir. 2009) (brackets omitted)).

Like Appellant here, plaintiffs in *Guay* failed to disclose a civil claim on their bankruptcy schedules. *Guay*, 677 F.3d at 13-14. Applying the doctrine of judicial estoppel, the First Circuit determined that the appellants, having obtained a favorable discharge in bankruptcy based on the information disclosed in their schedules, could not later maintain an action that was not disclosed on those schedules. *Id.* at 18. In effect, the omission falsely made under oath had deprived the plaintiff's creditors of the potential benefits of the claim. *Id.* at 19.

In *Schomaker*, the First Circuit held that failing to understand that property qualified as an asset to be scheduled is immaterial to a finding of judicial estoppel; both neglectful and intentional non-disclosure justify application of the doctrine. As the *Schomaker* Court concluded: "[W]hether Schomaker has taken an intentionally inconsistent position with regard to the value of the seized property in this action or failed to disclose its value in the bankruptcy proceeding because he mistakenly believed it was subject to forfeiture, he is not entitled to seek compensation for its loss." *Schomaker*, 334 F. Appx. at 340; *see also Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993). Notably, the New Hampshire District Court recently observed that an exception on account of mistake is a question *Guay* left open, but *Guay* "strongly suggested that the exception would not be recognized in this circuit." *Hall v. Bank of America, N.A.* 2014 U.S. Dist. LEXIS 79560, at *7 (D.N.H. June 11, 2014).

As noted above, the New Hampshire Superior Court has applied the principles of judicial estoppel as articulated in the *Guay* decision in at least two other cases, which were not cited by Appellant. In *Kerri Furtado, et al. v. Liberty Mutual Group, Inc.*, 218-2012-cv-00029

(McHugh, J. –June 29, 2012), the Furtados, like the *Guay* plaintiffs, had obtained a discharge in bankruptcy based on schedules that failed to disclose a potential claim that had accrued while the bankruptcy case was pending. There, as in the present case, plaintiffs knew of the underlying facts of the claim as well as their relationship to the injury for which they later sought damages. The Superior Court dismissed the case and, in a later order adopting the reasoning of *Guay*, applied the principles of judicial estoppel and "the equitable principle of fundamental fairness" in dismissing the Furtados' case with prejudice. *Furtado*, Order dated June 29, 2012, at 2 (order available in Appellant's Appendix at 87-89). The Superior Court also declined plaintiffs' request to allow them to retrospectively reopen their bankruptcy to cure their failure to disclose the claim, as the Appellant has tried to do in this case. In doing so, the court cited and applied the First Circuit's decision in *Guay,* and explained its decision as follows:

> The Guay case speaks at length about the importance of the doctrine of judicial estoppel and why seeking relief from a bankruptcy trustee in the form of an abandonment of a personal injury claim should not be permitted. The Court agrees with the holding in Guay. Although it does not suggest that these are the facts in the case at bar, it is not difficult to imagine a situation where a party knows it has a personal injury claim, and purposely does not report it to the bankruptcy trustee in the hope of not "getting caught". Then, if the claim is later brought and the bankruptcy issue surfaces, the plaintiff can feign surprise and seek to have the trustee abandon the claim. In such a scenario a plaintiff would be awarded for being less than candid with the bankruptcy trustee at the outset. Courts simply cannot reward that behavior by allowing a party that "got caught", to seek to capitalize on their wrongdoing by asking the trustee after the fact to abandon the claim. For all the reasons set forth herein, the plaintiff's Motion for Clarification is granted and the Court's dismissal of the within lawsuit is with prejudice.

Id. at 2-3.

In *Finnegan, et al. v. Mel's Funway, LLC* a child's personal injury lawsuit was barred on the grounds of judicial estoppel because her parents who held legal title to a minor's claim had neglected to disclose it during their bankruptcy proceeding. The Superior Court, citing *Guay*,

ruled that the bankruptcy disclosure rules are so strict that even claims held for another, such as a minor child, must be disclosed. *See*, *Finnegan, et al. v. Mel's Funway, LLC*, 226-2016-cv-00392 (Colburn, J. –December 1, 2016) (appended to this brief at A13-19).

The Trial Court properly applied these principles here. Although assisted by bankruptcy counsel, Mark Cornell, Appellant failed to disclose the claim against the Defendants on her personal bankruptcy schedule, and continued to do so for nine months after her filing. *See Appellant's Appendix* at 57-59. The bankruptcy court accepted Appellant's sworn representation that she had no unliquidated or contingent claims and granted a discharge on December 22, 2015. *See Appellant's Appendix* at 61-62. Judicial estoppel should bar the claim whether nondisclosure was intentional, or the result of neglect. *See Guay*, 677 F.3d. at 20 n.7.

Accordingly, the Trial Court correctly found that the Appellant is now judicially estopped in this proceeding from prosecuting a claim — a claim she effectively denied under oath existed and then brought while the bankruptcy case was still open.

C. Even if this Court Adopted a Lack of Knowledge or Inadvertence Exception to Judicial Estoppel, Appellant's Actions Were Not the Product of Inadvertence or Mistake.

Appellant urges that her failure to schedule her claim should be excused because she lacked knowledge or a motive to conceal her potentially valuable lawsuit. As noted above, the First Circuit has rejected a lack of knowledge or lack of intent to conceal exception to judicial estoppel, also termed an inadvertence or mistake exception in various jurisdictions. *Id.* ("We have never recognized such an exception and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel."). Such an exception should not be adopted by this Court for the reasons set forth above.

Even if this Court is inclined to adopt an exception to judicial estoppel for lack of knowledge or inadvertent mistake, the Trial Court had ample, undisputed evidence here that the omission was not a simple mistake. Indeed, there were at least six pieces of undisputed evidence before the Trial Court in the Appellant's own pleadings that made summary judgment proceedings unnecessary.

1. Appellant's Nine Months of Silence

Appellant, who has a history as a litigant in monetary damages claims, sought copies of her medical records almost immediately after her emergency room visit in July of 2013. She took her malpractice case to three different law firms before one finally accepted it, and does not deny that she had knowledge of a claim, let alone facts giving rise to a claim. Even if her version of events is credited, she failed to correct the record to disclose the asset for at least nine months after the lawsuit was accepted by her present attorneys. (Although the bankruptcy statute mandates it to be scheduled no matter how remote or whether the value is thought to be *de minimus* or even nothing, as discussed in Section A above). No explanation was offered to the Trial Court as to why the claim was not scheduled once it was deemed viable and worthy of advancing a lawsuit. This silence alone is dispositive.

2. The Appellant Had an Objective Financial Incentive to Prosecute Her Medical Malpractice Claim and Keep the Proceeds for Herself

As one United States District Court has concluded, mere professions of absence of bad faith are insufficient when there is an objective motive to conceal claims: "from the standpoint of objective analysis, [plaintiff] plainly had motive to conceal her claims, of which she had knowledge, and her current professed lack of bad faith and unintentional non-disclosure do not amount to 'inadvertence'" *Benton v. Ryan's Family Steak house*, 222 F.R.D. 112, 114 (S.D. Miss. 2004); *see also De Leon v. Comcar Indus.*, 321 F.3d 1289, 1291 (11th Cir. 2003) ("[A]

financial motive to secret assets exists under Chapter 13 as well as under Chapter 7 because the hiding of assets affects the amount to be discounted and repaid [to creditors]").

Here, the Trial Court could have correctly concluded that Appellant had an objective motive to conceal a claim because proceeds from the suit would redound solely to her and no creditors since she did not amend her bankruptcy schedules to alert creditors and the trustee to the potential asset. As indicated above, whether Appellant did actually intend to conceal the claim is immaterial — she had an objective incentive to conceal, which is sufficient to defeat a claim of inadvertence.

3. Appellant Consulted Lawyers Both Before Discharge and Quickly After Discharge

The Trial Court could have also properly found that the timing of the attorney consults also did not support a finding of inadvertence or mistake. Appellant consulted attorneys both before and then quickly after her discharge. Despite the Appellant's assertions to the contrary, the Trial Court was well within its discretion to find the timing of the retention of the third law firm so quickly on the heels of a seven figure discharge to be highly suspect on its face.

4. Appellant Filed Her Lawsuit While Her Bankruptcy was Still Open

The fact that Appellant filed suit while the bankruptcy case was still open and she had a continuing duty to truthfully account for pre-petition assets, *see In re Tennyson,* 313 B.R. at 406, is another basis upon which the Trial Court could have found a lack of inadvertence or mistake. Again, Appellant did not inform anyone of the malpractice claim's viability which, if not disclosed at the time a third law firm accepted the case, certainly should have been disclosed when the lawsuit was filed. The bankruptcy case was still open, and "[t]he duty to disclose is continuous." *In re: Superior Crew Boats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004). The failure to do so even after the suit was filed is an inconsistent position that rightfully triggers estoppel.

5. Appellant Only Moved to Reopen and Amend Her Schedules When A Dispositive Motion was Filed by the Appellee-Defendants

The Trial Court in the conclusion to its Order explicitly referenced the fact the Appellant only sought to reopen her bankruptcy case when Defendants filed a dispositive motion. Other courts have found that such timing is reasonably suggestive of absence of inadvertence or mistake in a judicial estoppel bankruptcy case. *See, e.g., White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 480 (6th Cir. 2010); *De Leon*, 321 F.3d at 1291-92 (plaintiff did not move to reopen bankruptcy case until defendant moved to dismiss case); *Barker v. Asset Acceptance, LLC*, 874 F.Supp. 2d 1062, 1067-1069 (D. Kan. 2012) (endorsing another district court's view of a negative answer to this blunt rhetorical question upon a plaintiff reopening a bankruptcy proceeding after a dispositive motion has been filed by a defendant: "should judicial estoppel apply nevertheless since the plaintiff is 'fessing up' only because his adversary exposed his omission?" (quotation and brackets omitted)). The Sixth Circuit Court of Appeals provides an especially useful analysis of whether and when a debtor seeks to correct an omission and how that informs the application of judicial estoppel:

> Since the bankruptcy system depends on accurate and timely disclosures, the extent of these efforts, together with their effectiveness, is important. Furthermore, since judicial estoppel seeks to prevent parties from abusing the judicial process through cynical gamesmanship, the timing of [the debtor's] effort is also significant. Consequently, efforts to correct an omission that came before the Defendants filed their motion to dismiss are more important than efforts that came after the Defendants filed their motion to dismiss.

White, 617 F.3d at 480.

The Trial Court properly took note of the trigger for Appellant's remedial measures and concluded this is exactly the conduct judicial estoppel condemns. Dec. 5, 2016 Order at 7.

6. If Appellant Claims She was Told by Counsel not to Schedule a Claim with Value; the Reverse Would Then be True — That a Claim Would Need to be Timely Scheduled if it Turned Out to Have Value

Finally, the Trial Court could have reasonably weighed Appellant's own averments about her belief about the viability of the claim and the necessity to schedule it in rejecting the view that the failure was due to inadvertence or mistake. If Appellant's view is accepted, she was told by counsel to not schedule a worthless claim. If true, the reverse would also be true: that she understood a claim with value *would* need to be scheduled. The failure to do so after her malpractice case was accepted and filed and only after Defendants filed a dispositive motion weights the equities heavily in favor of estoppel, as the Trial Court properly found.

D. For the Integrity of the Judicial System, Neither the Bankruptcy Trustee Nor the Appellant Should Be Allowed to Now Prosecute a Previously Undisclosed Claim

Some courts have allowed a bankruptcy trustee to prosecute a personal injury claim even when the debtor is estopped by allowing the trustee to become the real party in interest to such a claim. This view should be rejected in general, and based on the specific facts of this case.

In this case, the trustee apparently struck a deal with the Appellant to allow her to collect 50% of any recovery on top of the seven figure discharge she has already received. *See* Trustee's Motion in *In re: Nicole Alward*, Case No. 15-11155 JMD (appended to this brief at A10-12).

The trustee, however, did not affect any substitution or intervention in the case while the Superior Court had jurisdiction. The appeal has been brought by Appellant, not the trustee. At least one Circuit Court has applied judicial estoppel where the trustee failed to intervene. *See Pavlov v. Ingles Mkts., Inc.*, 236 Fed. Appx. 549, 549 (11th Cir. 2007) ("The district court correctly determined that judicial estoppel could be applied against the Pavlovs' claims, despite any interest of the bankruptcy Trustee . . . . in this case there has been no appearance of any

Trustee, through intervention or otherwise."). The Trial Court properly applied estoppel despite Appellant's bald assertion that the trustee would pursue the case.[6]

Even if the trustee had intervened below (and he did not), the better rule is that neither the debtor nor the trustee should be allowed to reopen for the integrity of the judicial system. *See Moses,* 606 F.3d at 800 (debtor barred from reopening claim); *Marshall v. Electrolux Home Pools*, 2006 U.S. Dist. LEXIS 91886, at *8-9 (M.D. Fla. 2006) (trustee and debtor both precluded from reopening bankruptcy case); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002) (debtor barred from reopening claim); *Guay*, 677 F.3d at 21; *In re Superior Crewboats, Inc.*, 374 F.3d at 336 (debtor barred from reopening claim and trustee's claim to be substituted rendered moot). As the Bankruptcy Court for the Eastern District of Pennsylvania concluded, "the doctrine of judicial estoppel can be applied against a party in a present lawsuit who was a party to a prior lawsuit *or* against a person who is in privity with the party to the prior lawsuit." *In re Fineberg*, 202 B.R. 206, 227 (Bankr. E.D. Pa. 1996) (Emphasis in original). The Bankruptcy Court held that:

> In the instant Proceeding, it can easily be concluded that the Debtor and the Trustee herein are in a relationship of privity with each other, and that the Trustee is thus bound by the Debtor's actions. Thus, the Debtor's failure to list the debts owed to him by the Answering Partners arising out of the Agreement on his bankruptcy Schedules could easily be found to constitute a statement by the Debtor, binding on the Trustee, that he did not have any such claims. The Trustee's filing of the Proceeding is contrary to, and contradicts this assertion.

Id. at 227-228 (citation omitted).

The First Circuit, citing the Circuit Court for the District of Columbia, has also described the important policy justification for not reopening when judicial estoppel is invoked:

---

[6] And, of course, it is not even clear that the trustee would have even objected to Defendants' estoppel argument. At least one reported case saw the bankruptcy trustee side with a defendant asserting judicial estoppel due to concern for the smooth operation of the broader bankruptcy system. *See In re Galerie Des Monnaies of Geneva, Ltd.*, 62 B.R. 224, 225 (S.D.N.Y. 1986).

> [A]llowing a debtor to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive for the debtor to provide the bankruptcy court with a truthful disclosure of his assets.
>
> Furthermore, allowing such conduct would similarly diminish the doctrine's ability to deter the debtor from pursuing claims in the District Court to which he is not entitled.

Guay, 677 F.3d at 21 (citations and quotations omitted); *see also Furtado* at 2 (Appellant's Appendix at 88).

For these reasons, this Court should decline to open a path for debtors to frustrate the strict and bright-line disclosure requirements of the bankruptcy court by allowing trustees to advance previously concealed claims. The incentive for truthfulness on the part of all debtors would be diminished should judicial estoppel be softened in this way. This is especially true here where the Appellant and the trustee apparently struck a deal to give Appellant 50% of any recovery from the malpractice action she previously did not disclose for many months, even after filing a lawsuit. Debtors in New Hampshire will have no incentive to be honest if they can take their chances on resurrecting their case in whole or in part, alone or with the cooperation of a trustee that will share significant recovery with them — after enormous debts have been wiped clean in the first instance. As the Fifth Circuit Court of Appeals noted in a similar context:

> The [reversed] district court's rationale allows these debtors to have their cake and eat it too, as they retain the enormous benefit of bankruptcy discharge while standing in line to receive funds from the injury lawsuit after the creditors are paid. Because judicial estoppel is designed to prevent such guile, we reverse.

In re Superior Crewboats, Inc., 374 F.3d at 333.

In this case, the debtor received the "enormous benefit" of a seven figure discharge and would now also stand to collect proceeds from the claim that was concealed — actively or passively — from the bankruptcy court. Judicial estoppel is reasonably applied in this instance.

E. Appellant's Failure to Disclose Her Claim is Not Excused by the Alleged Advice of Counsel

In her Motion to Reconsider the Trial Court's dismissal, Appellant appended new documents purporting to show that she had informed her bankruptcy counsel of her claim and that he told her it did not need to be scheduled. Appellant argued that her counsel's advice excused her failure to schedule the claim. The Trial Court flatly rejected this argument, and this Court should decline to overrule its long-standing precedents in this area.

Under long-standing New Hampshire law, a litigant is bound by any neglect of his or her counsel. "Professional negligence of counsel is imputed to the client when the attorney is acting within the scope of his authority." *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 491 (1947); *see also Brady v. Duran*, 117 N.H. 275, 277 (1977) (neglect of attorney in failing to file a claim imputed to plaintiff/appellant); *Attleboro Mfg. Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.*, 240 F. 573, 581 (1st Cir. 1917) ("[Attorney] was the defendant's agent for whose conduct, while in its service and acting within the scope of his employment, it was responsible. The mere fact that he was also an attorney at law did not excuse the defendant from responsibility in this respect."); *Butler v. Morse,* 66 N.H. 429, 429 (1891) ("[T]he neglect of the attorney must be regarded as the neglect of the petitioner himself. When a party selects an attorney of the court to conduct his cause in his stead and place, he confers upon the attorney authority to take such action in its prosecution or defence as he may decide to be legal, proper, and necessary in the management of the cause; his acts are, in the absence of fraud, the acts of his client; and the rule that a party cannot in equity find relief from the consequences of his own

negligence is equally applicable with the neglect as that of his attorney employed in the management of the case." (citation omitted)).

Indeed, it has long been the rule that there is a unity between clients and attorneys owing to their special relationship and clients are bound to the acts of their attorneys, even when they depart from client's wishes. For example, in the context of settlement agreements made by attorneys, this Court has observed "[o]ur rule regarding the power of an attorney to bind his client by settlement is, perhaps, the most liberal in the country." *Ducey v. Corey*, 116 N.H. 163, 164 (1976). Another example is meeting deadlines and procedural requirements. "[I]t is well established that a client may not generally have relief from the consequences of an attorney's negligent failure to meet deadlines and other procedural requirements.... [W]e recognize that counsel's actions and omissions within the scope of his authority are in essence actions and omissions of his client." *Cass v. Ray*, 131 N.H. 550, 554 (1989) (citing 7 AM. JUR.2D *Attorneys at Law* § 139 (1980)). While the result may be harsh, it is justified because "[a] client receives great privileges when dealing with his lawyer, and he must assume burdens commensurate with such privileges." *Halstead v. Murray*, 130 N.H. 560, 566 (1988).

Courts in other jurisdictions have agreed with the Trial Court's view that judicial estoppel cannot be avoided in cases like this one based on attorney advice. *See, e.g., White*, 617 F.3d at 483 (holding, in a case where a bankruptcy attorney submitted an affidavit noting his client did tell him about a personal injury claim and it was unclear to counsel why it was not scheduled, that an "attorney's omission was no panacea" and "litigants are bound by the actions of their attorneys" (quotation and brackets omitted)); *Eastman v. Union Pac. RR*, 493 F.3d 1151, 1159 (10th Cir. 2007) ("[The plaintiff]'s assertion that he simply did not know better and his attorney 'blew it' is insufficient to withstand application of the doctrine."); *Copeland v. Birmingham*

Nursing & Rehab. Ctr. East, LLC, 2015 U.S. Dist. LEXIS 85297, at *17 ("Plaintiff's attempt to blame her bankruptcy attorney similarly fails. The fact that Plaintiff informed her counsel of the potential claims in this case and that counsel allegedly de-valued those claims and failed to amend the bankruptcy schedule is no defense against the application of judicial estoppel. . . . Keeping the suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant." (quotation, citation, and brackets omitted)).

F. Judicial Estoppel Should be Applied Strictly to Preserve the Integrity of the Judicial System as a Whole

The public policy considerations at issue here weigh strongly in favor of strict application of judicial estoppel.

The purpose of judicial estoppel is to prevent inconsistent representations in different courts, which can have broad consequences for unsuspecting creditors, trustees, parties, and judges. The judicial system as a whole — and not the individuals in a given case, whether plaintiff or defense — is the focus of judicial estoppel. As one court explained:

> Judicial estoppel differs from companions, equitable estoppel and quasi-estoppel, in several respects. First, judicial estoppel seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system. Second, due to its inherent flexibility as a discretionary equitable doctrine, judicial estoppel plays an important role as a gap-filler, providing courts with a means to protect the integrity of judicial proceedings where doctrines designed to protect litigants might not adequately serve that role.

Angell v. Meherrin Agric. & Chem. Co. (In re Tanglewood Farms, Inc.), 2013 Bankr. LEXIS 1849, at *25-26 (Bankr. E.D.N.C. May 1, 2013) (quotations and citations omitted). The integrity of the judicial system suffers if a plaintiff may swear that he or she does not have a claim in one forum and then in very short order advance that claim in another, as the Appellant did here.

The First Circuit has concluded that rigorous application of judicial estoppel in the bankruptcy context is necessary, even when a windfall may accrue to a defendant, because "the integrity of the judicial system is paramount." *Guay*, 677 F.3d at 19 n.5. The Court stated:

> [W]e should not hesitate to apply judicial estoppel even where it creates a windfall for an undeserving defendant. We concluded that this may not be strictly equitable estoppel indeed, defendants may have a windfall. However, the plaintiff's conduct is an unacceptable abuse of judicial proceedings. A doctrine that induces debtors to be truthful in their bankruptcy filings will assist creditors in the long run (though it will do them no good in the particular case)—and it will assist most debtors too, for the few debtors who scam their creditors drive up interest rates and injure the more numerous honest borrowers.

Guay, 677 F.3d at 19-20 (quotations, citations, brackets, and ellipsis omitted).

To announce any less of a doctrine then that in *Guay*, a doctrine endorsed by at least three Superior Court Justices over the last five years, would erode the doctrine of judicial estoppel in New Hampshire on the very first day it is announced by this Court.

CONCLUSION

Appellees respectfully request that the Court affirm the Trial Court's well-reasoned Order of dismissal. Appellant failed to follow strict bankruptcy law and the Trial Court properly found that the doctrine of judicial estoppel mandated dismissal of her unscheduled malpractice claim. Inadvertence or mistake is no excuse, but regardless, was not applicable here as Appellant failed to schedule the claim for many months, even after the claim was accepted by a third set of attorneys and suit was filed.

The Appellees respectfully request oral argument of fifteen (15) minutes to be conducted by Todd J. Hathaway, Esquire.

Dated: July 10th, 2017

Respectfully submitted,

Gary D. Fleischer, M.D.

By his attorneys,

SULLOWAY & HOLLIS, PLLC

By: _____
Peter A. Meyer (NHB #1745)
Jay Surdukowski (NHB #17763)
9 Capitol Street
Concord, NH 03301
603-224-2341
pmeyer@sulloway.com
jsurdukowski@sulloway.com

Emery Johnston, M.D. and Elliot Hospital

By their attorneys,

Wadleigh Starr & Peters PLLC

By: _____
Todd J. Hathaway, Esquire, N.H. Bar No. 12012
95 Market Street
Manchester, NH 03101
(603) 669-4140

Tung Thuy Nguyen M.D. and
Southern New Hampshire Medical Center

By their attorneys,

Foster & Eldridge LLP

By: _____
Stephen M. Fiore, Esquire, N.H. Bar No. 14008
Martin C. Foster, Esquire, N.H. Bar No. 17289
One Canal Park, Suite 2100
Cambridge, MA 02141
(617) 252-3366

CERTIFICATION AND STATEMENT OF COMPLIANCE

Pursuant to Rule 26(7) of the Supreme Court Rules, I hereby certify that:

Two copies of this Brief and Appendix have been served by first class mail, postage prepaid upon:

David P. Angueira, Esquire
James A. Swartz, Esquire
Kathryn Wickenheiser, Esquire
Swartz & Swartz
10 Marshall Street
Boston, MA 02108-2405
Counsel for plaintiff

Todd J. Hathaway, Esquire
Wadleigh Starr & Peters PLLC
95 Market Street
Manchester, NH 03101
Counsel for defendants Emery Johnston, M.D. and Elliot Hospital

Stephen M. Fiore, Esquire
Martin C. Foster, Esquire
Foster & Eldridge LLP
One Canal Park, Suite 2100
Cambridge, MA 02141
Counsel for defendants Tung Thuy Nguyen M.D. and Southern New Hampshire Medical Center

Date: July 14, 2017

Jay Surdukowski