**STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

NO. 2017-0080

2017 TERM

MAY SESSION

**Nicole Alward**

**v.**

**Emery Johnston, M.D., et al.**

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RULE 7 APPEAL OF FINAL DECISIONS OF THE HILLSBOROUGH COUNTY SUPERIOR COURT SOUTHERN DISTRICT

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# BRIEF OF NICOLE ALWARD (Appellant)

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## QUESTIONS PRESENTED

**I.** Did the lower court erroneously rule that judicial estoppel applied where the plaintiff unintentionally omitted her personal injury claim in her prior Chapter 7 bankruptcy proceeding?

*Preserved:* PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS (November 15, 2016); PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R.CIV. PROC. RULE 12(E) (December 14, 2016).

**II.** Did the lower court abuse its discretion by denying a motion for reconsideration of its ruling dismissing Plaintiff's claim based on the failure to list a personal injury claim in a Chapter 7 bankruptcy proceeding?

*Preserved:* PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS (November 15, 2016); PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R.CIV. PROC. RULE 12(E) (December 14, 2016).

**III.** Did the lower court abuse its discretion by rejecting Plaintiff's argument that the Chapter 7 Trustee has now taken control of the instant lawsuit for the benefit of the estate, not the benefit of the Plaintiff/debtor, and thus judicial estoppel does not apply because the Trustee cannot be held accountable for the Plaintiff's prior assertions?

*Preserved:* PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS (November 15, 2016); PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R.CIV. PROC. RULE 12(E) (December 14, 2016).

## STATEMENT OF FACTS

On July 12, 2013, Plaintiff Nicole Alward-Pace ("Plaintiff" or "Ms. Alward") went to the Elliot Hospital Emergency Department complaining of severe lower back pain which was radiating down her right leg, causing numbness and weakness. PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY TRIAL (June 24, 2016), *Appx*.[1] at 1.

Despite having not ordered an MRI or other radiological screening, the Emergency Department physician attempted to alleviate Ms. Alward's pain and determine the cause of that pain. Ms. Alward was discharged from the Emergency Department the next day. COMPLAINT, *Appx*. at 2-3.

One day later, still in pain, Ms. Alward tried to find relief at the Southern New Hampshire Medical Center Emergency Department, where an MRI was performed which revealed an extruded disc in Ms. Alward's back. COMPLAINT, *Appx*. at 3. Ms. Alward was treated at that time with various medications and was examined by multiple doctors. COMPLAINT, *Appx*. at 3-4.

On July 15, 2013, Ms. Alward underwent surgery at Southern New Hampshire Medical Center, where Dr. Tung Thuy Nguyen diagnosed a right L4-5 HNP with radiculopathy, and Dr. Nguyen extracted the extruded disc. COMPLAINT, *Appx*. at 4.

"At 8:30 P.M. a postoperative examination of the nervous system revealed increased weakness in the right lower extremity, urinary retention requiring catheterization and apparently increased sensory loss. While an inpatient on 7/17/2013, an examination showed definitive loss of further motor function. Throughout the remainder of this hospitalization Ms. Alward

[1] Citations to the separately bound Appendix filed with this brief shall be abbreviated *Appx*. Citations to the two superior court orders addended to this brief shall be abbreviated *Supp.*

continued to have severe back and radicular pain, major motor weakness causing her to be unable to walk and urinary retention requiring catheterization." COMPLAINT, *Appx*. at 4.

Despite numerous visits to various medical providers in the weeks following her surgery, Ms. Alward continued to be plagued not only by the pain she had experienced prior to surgery, but also by a host of other problems which had developed post-surgery. COMPLAINT, *Appx*. at 4-5.

On August 7, 2013, Ms. Alward underwent a second surgery at Elliot Hospital. Sadly, that surgery did not alleviate Ms. Alward's pain or other ailments. "Today Ms. Alward ambulates with an antalgic gait pattern. She has decreased feeling in her right lower extremity and requires straight catheterization. She still has problems with incontinence and her condition appears to be at baseline." COMPLAINT, *Appx*. at 5.

Shortly after sustaining these injuries, Ms. Alward sought legal advice as to whether she might have a claim against the various doctors and medical institutions who worsened Ms. Alward's condition as a result of their treatment. Specifically, Ms. Alward consulted with two attorneys, both of whom declined, after an initial inquiry, to take on Ms. Alward as a client with respect to a potential medical malpractice action. EX PARTE MOTION OF DEBTOR FOR ORDER REOPENING CASE TO ADMINISTER POTENTIAL ASSET AND AUTHORIZING APPOINTMENT OF CHAPTER 7 TRUSTEE, EXHIBIT A TO PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS, *Appx*. at 100. As part of her consultations with those attorneys, Ms. Alward executed authorizations which were sent to at least some of her medical providers, requesting copies of her medical records. DEFENDANTS' JOINT MOTION TO DISMISS (October 27, 2016), *Appx.* at 28.

Over a year after her surgeries and the unsuccessful consultations with two medical malpractice attorneys, Ms. Alward filed for Chapter 7 bankruptcy protection on July 23, 2015. MOTION TO REOPEN, *Appx.* at 99. Ms. Alward disclosed the events surrounding her injuries to her bankruptcy attorney, Mark P. Cornell, Esq., and informed him of her consultations with two personal injury attorneys, but she believed (based on those consultations), and apparently Attorney Cornell also believed, that she had no claim against the medical providers. *Id*.; AFFIDAVIT OF NICOLE ALWARD and INITIAL BANKRUPTCY CLIENT INTERVIEW, EXHIBIT 2 TO PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R. CIV. PROC. RULE 12(E) (December 14, 2016), *Appx*. at 137. As a result, no claims against the Defendants were listed on Ms. Alward's bankruptcy schedules. MOTION TO REOPEN, *Appx*. at 100. However, at a meeting of the creditors, Ms. Alward did testify that she had suffered an injury. MOTION FOR RECONSIDERATION, *Appx*. at 119.

On December 22, 2015, Ms. Alward received a discharge in her bankruptcy case. On June 13, 2016, the bankruptcy Trustee filed a report stating his determination that there were no assets available for creditors, and the bankruptcy case was closed on July 16, 2016. MOTION TO REOPEN, *Appx*. at 99.

Although Ms. Alward had long since given up on any medical malpractice claim against the Defendants, her ex-husband had not. On his own initiative, Ms. Alward's ex-husband consulted with the law firm of Swartz and Swartz in February 2016 regarding potential claims Ms. Alward might have against the Defendants. *Id*. at 100; MOTION FOR RECONSIDERATION, *Appx*. at 119; AFFIDAVIT OF NICOLE ALWARD, *Appx.* at 138.

Unlike the prior two attorneys, Swartz and Swartz agreed to take on Ms. Alward's case, and she filed the instant action on June 24, 2016. *Id*.; MOTION TO REOPEN, *Appx*. at 100.

## STATEMENT OF THE CASE

On June 24, 2016, Ms. Alward filed a Complaint and Demand for Jury Trial in Hillsborough County Superior Court South, based on the facts described above. Ms. Alward brought the following claims: Negligence Against Defendant Emery Johnston, M.D.; Negligence Against Defendant, Gary Fleischer, M.D.; Negligence Against Defendant, Tung Thuy Nguyen, M.D.; Negligence Against Defendant Elliot Hospital; Negligence Against Defendant, Southern New Hampshire Medical Center; Negligence Against Defendant, EJAP, L.L.C. (Vicarious Liability); Negligence Against Defendant, Ikyn Surgical L.L.C. (Vicarious Liability); Negligence Against Defendant, Fleischer Spine, P.L.L.C. (Vicarious Liability); Negligence Against Defendant, USUB Medical, L.L.C. (Vicarious Liability); Negligence Against Defendant, New Hampshire Neurospine Institute, P.A. (Vicarious Liability); Negligence Against Defendant, Spine Realty, L.L.C. (Vicarious Liability). COMPLAINT, *Appx*. at 5-11.

On October 27, 2016, the Defendants filed a Joint Motion to Dismiss, arguing that Ms. Alward was judicially estopped from pursuing her claims in this case due to the failure to list the claims on her bankruptcy schedule and her filing of the lawsuit before the bankruptcy case was closed (but after discharge). MOTION TO DISMISS, *Appx*. at 12.

On November 9, 2016, Ms. Alward moved to reopen her bankruptcy case. MOTION TO REOPEN, *Appx*. at 99. Her motion to reopen was granted on November 14, 2016, and Steven M. Notinger was re-appointed as bankruptcy Trustee. ORDER GRANTING EX PARTE MOTION OF DEBTOR FOR ORDER REOPENING CASE AND NOTICE OF APPOINTMENT OF TRUSTEE AND FIXING OF BOND IN REOPENED CASE (November 14, 2016), EXHIBIT B TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (November 15, 2016), *Appx*. at 103.

Ms. Alward filed her opposition to the motion to dismiss on November 15, 2016, arguing that judicial estoppel was not appropriate in this case due to the fact that Ms. Alward's failure to schedule the claims as a bankruptcy asset resulted from a "mistake or oversight." PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, *Appx*. at 90. Ms. Alward also argued that judicial estoppel was "moot" in this case because the bankruptcy case had been reopened, the Trustee had been re-appointed, and the Trustee had expressed his intent to employ the law firm of Swartz and Swartz to continue as counsel in the case. *Id*. at 97; LETTER FROM STEVEN M. NOTINGER (November 15, 2015), EXHIBIT C TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, *Appx*. at 105.

The superior court granted the motion to dismiss on December 5, 2016, finding that "…the plaintiff here was never mistaken about the existence of a potential lawsuit….The timeline demonstrates that she knew of these potential claims prior to submitting her schedule of assets in her bankruptcy proceedings. She was certainly aware of the claims when she filed this medical malpractice action…". ORDER ON THE DEFENDANTS' MOTION TO DISMISS (December 5, 2016), *Supp.* at 1.

In response to the order, Ms. Alward filed a PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R. CIV. PROC. RULE 12(E) on December 14, 2016. Ms. Alward's primary argument for reconsideration was that the superior court abused its discretion by failing to consider the evidence presented by Ms. Alward that she had told her bankruptcy attorney, Mark P. Cornell, Esq., about her injuries and consultations with medical malpractice attorneys, and he had not included the claims on Ms. Alward's bankruptcy schedules. MOTION FOR RECONSIDERATION, *Appx*. at 117. Ms. Alward also argued that the court erroneously relied on cases which concerned *deliberate* failure to disclose potential claims, rather than mistaken failure

to disclose. *Id*. at 121. Ms. Alward emphasized that estoppel was "…not only moot in this case given the Chapter 7 Bankruptcy Court reopened the case, but rather the only 'equitable' remedy that derives from this Court's decision is one which permits each Defendant to escape the prosecution and responsibility of their negligence." *Id.* at 123.

On January 12, 2017, the superior court denied Ms. Alward's motion for reconsideration. ORDER ON THE PLAINTIFF'S MOTION FOR RECONSIDERATION (January 12, 2017), *Supp.* at 8. The court noted that it was "sympathetic" to Ms. Alward's argument that her attorney failed to schedule the claims as an asset, but relied on the general rule that a client is held accountable for her attorney's negligence and reaffirmed its holding that judicial estoppel bars Ms. Alward's claims. *Id*. at 11. The superior court also rejected Ms. Alward's mootness argument, based on the fact that the Trustee has not been formally "substituted as the real party in interest." *Id*. at 12-13. The court incorrectly stated, "[o]ther than the plaintiff's bald assertion that her bankruptcy trustee has taken over the instant case, there is nothing in the record to support this contention." *Id*. at 13.

## SUMMARY OF ARGUMENT

Judicial estoppel is meant to be applied only in egregious cases to bar claims by individuals who have deliberately sought to manipulate the judicial system by purposefully, with an intent to conceal, taking directly inconsistent positions in the same or a subsequent legal proceeding.

As such, inadvertence or mistake remains a defense to the application of judicial estoppel. Particularly at this phase in the case, where the question comes before this court following a motion to dismiss, and therefore the facts asserted by Ms. Alward must be taken as true, it was an abuse of discretion for the superior court to apply judicial estoppel.

The evidence and assertions presented by Ms. Alward demonstrate that she was not attempting to defraud the court at any time, but rather mistakenly believed that her injuries and the causes of those injuries were not sufficient for a medical malpractice action. She believed it because she had been told as much by two attorneys, and because when she disclosed the underlying facts to her bankruptcy attorney, he did not see fit to include any potential claims on her bankruptcy schedule. The lower court applied a rigid, narrow test for inadvertence or mistake which simply does not align with the history of the doctrine of judicial estoppel.

Judicial estoppel is particularly inappropriate in this case where the bankruptcy case has been reopened, the Trustee has been reappointed, and the Trustee has asked Ms. Alward's attorneys, the law firm of Swartz and Swartz, to pursue the claim on behalf of the bankruptcy estate. Given this history, and the fact that the Trustee never abandoned these claims in the bankruptcy case, the Trustee is the real party in interest. The Trustee cannot be bound by the prior statements of Ms. Alward, and judicial estoppel of the claims will only harm Ms. Alward's creditors, and provide an unwarranted windfall to the Defendants.

## ARGUMENT

### I. The Superior Court Abused Its Discretion by Applying the Wrong Test for Inadvertence or Mistake, and Applying Judicial Estoppel Even When Ms. Alward's Omission Was at Worst Due to Inadvertence or Mistake.

The United States Supreme Court articulated the doctrine of judicial estoppel in *New Hampshire v. Maine*, 532 U.S. 742 (2001). "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id*. at 749. The *New Hampshire* Court explained that, for judicial estoppel to apply, the positions taken must be "clearly inconsistent," *Id*. at 750-51. Furthermore, "[a] third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*.

The Court emphasized, however, that the doctrine should be a flexible one, and noted: "[w]e do not question that it may be appropriate to resist the application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *Id.* at 751, 753. The New Hampshire Supreme Court follows this restrained approach, as it must. "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) (quoting *31 C.J.S. Estoppel and Waiver*, § 188 (2008)). "The contours of the doctrine are hazy, and there is no mechanical test for determining applicability." *Alternative System Concept, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004); *see also Perry v. Blum*, 629 F.3d 1, 8 (1st Cir. 2010).

Although not binding on this court, the First Circuit, like many other courts, has ruled that judicial estoppel can bar a plaintiff's claim when the plaintiff failed to include that claim on his filings in a prior bankruptcy proceeding. *Guay v. Burack*, 677 F.3d 10 (1st Cir. 2012).

Within the bankruptcy context, however, many courts have stressed the importance of making an exception for inadvertence or mistake. "Asserting inconsistent positions does not trigger the application of judicial estoppel unless '*intentional self-contradiction* is…used as a means of obtaining unfair advantage.'" *Ryan Operations v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (quoting *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953) (emphasis added)). "Thus, the doctrine of judicial estoppel does not apply 'when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court….An inconsistent argument sufficient to invoke judicial estoppel *must be attributable to intentional wrongdoing*.'" *Id*. (quoting *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980) (emphasis added)). *See also Alternative System Concept*, 374 F.3d at 35; *In re Coastal Plains*, 179 F.3d 197, 206-07 (5th Cir. 1999); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corporation*, 337 F.3d 314, 319 (3d Cir. 2003); *Ah Quin v. County of Kauai Department of Transportation*, 733 F.3d 267, 271 (9th Cir. 2013); *Barger v. City of Cartersville, Georgia*, 348 F.3d 1289, 1294 (11th Cir. 2003); *Seymour v. Collins*, 2015 IL 118342 (2015). "…the guiding principle of judicial estoppel is that it should apply when a litigant is playing fast and loose with the courts." *GE HFS Holdings, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 520 F.Supp.2d 213, 222 (D. Mass. 2007); *see also Payless Wholesale Distributors, Inc. v. Alberto Culver Inc.*, 989 F.2d 570, 571 (1st Cir. 1993); *Bejarano v. Bravo! Facility Services, Inc.*, No. 16-962 (RBW), 2017 WL 1450570 at *7 (D.D.C. April 24, 2017).

As the Ninth Circuit explained in *Ah Quin*, some courts, "…have asked not whether the debtor's omission of the pending claim from the bankruptcy schedules was inadvertent or mistaken; instead, they have asked only whether the debtor knew about the claim when he or she filed the bankruptcy schedules and whether the debtor had a motive to conceal the claim." *Ah Quin*, 733 F.3d at 271. In *Ah Quin*, the court reversed a lower court grant of summary judgment based on judicial estoppel because the district court had rigidly applied this narrow test, despite the plaintiff's assertions that she omitted the claims from her bankruptcy schedule in good faith. *Id*. at 272.

The superior court in Ms. Alward's case similarly, and erroneously, applied a rigid, narrow test for judicial estoppel. "The facts of the instant case similarly do not meet the *requirements* of the proposed exceptions to judicial estoppel. Like the plaintiff in *Hall*, the plaintiff here was never mistaken about the existence of a potential lawsuit." ORDER ON THE DEFENDANTS' MOTION TO DISMISS, *Supp*. at 5.

The test used by the superior court in this case, and the district court in *Ah Quin*, is not justified in light of the history of judicial estoppel. Despite the fact that the plaintiff in *Ah Quin* conceded that she knew about the existence of the action when she filed for bankruptcy, and despite the fact that she had an undisputed motive to conceal the claim, the Ninth Circuit found the district court in error for applying judicial estoppel on those bases without considering the plaintiff's assertion of good faith. *Ah Quin*, 733 F.3d at 272-73. Where good faith is asserted, "a *presumption* of deceit no longer comports with *New Hampshire*." *Id*.

Furthermore, a court has abused its discretion if it expresses or demonstrates a conclusion that it is somehow bound to apply judicial estoppel if it finds knowledge and motive. "And numerous sister courts have agreed that the inference of intent drawn from the existence of

knowledge and motive is *permissive only, not mandatory*. *See Melton v. National Dairy Holdings, L.P.,* 2009 WL 653024 at *5 (M.D. Ala. 2009); *Roots v. Morehouse School of Medicine, Inc.,* 2009 WL 4798217 at *7 (N.D. Ga. 2008); *Thompson v. Quarles*, 392 B.R. 517, 527 (S.D. Ga. 2008); *Jackson v. Advanced Disposal Services, Inc.,* 2008 WL 958110 at *4 (M.D. Fla. 2008); *Snowden v. Fred's Stores, Inc*., 419 F.Supp.2d 1367, 1373 (M.D. Ala. 2006); *Wheeler v. Florida Department of Corrections*, 2006 WL 2321114 at *6 n.7 (M.D. Fla. 2006)." *Smith v. Werner Enterprises, Inc.*, 65 F.Supp.3d 1305, 1310 (S.D. Ala. 2014) (emphasis added) (justices' names in internal citations omitted).

Although Ms. Alward asserts that she meets even the narrow test for inadvertence or mistake (as discussed below), the superior court should have abandoned the narrow test once Ms. Alward made a good faith defense. The superior court further abused its discretion by not *exercising* that discretion.

Typically, courts have held that the application of judicial estoppel by a lower court should be reviewed for an abuse of discretion. *Guay*, 677 F.3d at 15. Importantly, however, " 'an abuse of discretion standard does not mean a mistake of law is beyond appellate correction', because a district court by definition abused its discretion when it makes an error of law. *Koon v. United States*, 518 U.S. 81, 100 (1996). Accordingly, '[t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions'." *In re Coastal Plains*, 179 F.3d at 205 (quoting *Koon*, 518 U.S. at 100)); *see also Ah Quin*, 733 F.3d at 270; *Kane v. National Union Fire Insurance Company*, 535 F.3d 380, 384-85 (5th Cir. 2008); *In re Kreutzer*, 344 B.R. 634, 639 (Bankr. N.D. Okla. 2006); *Seymour*, 2015 IL 118342.

A. *Even under the narrow test for inadvertence or mistake, judicial estoppel was not appropriate*.

"In practice, even those courts of appeals that have followed the Fifth Circuit's lead have not been as 'rigid as one would expect' in practice." *Marshall v. Honeywell Technology Systems, Inc.*, 828 F.3d 923, 932 (D.C. Cir. 2016) (quoting *Ah Quin*, 733 F.3d at 277). A review of some of the cases where the narrow test has been applied reveals how dissimilar they are to this case.

In *Moses v. Howard University Hospital*, 606 F.3d 787 (D.C. Cir. 2010), the court upheld the application of judicial estoppel where the actions in the case were "live in the District Court," *Id*. at 793, during two bankruptcy proceedings, and where the debtor failed to schedule the case in question while at the same time, "list[ing] pending lawsuits that, unlike the instant case, reduced the overall value of his assets through wage garnishment." *Id*. at 800.

In *Eastman v. Union Pacific Railroad Company*, 493 F.3d 1151 (10th Cir. 2007), the plaintiff was judicially estopped from pursuing his personal injury action. The action had been filed in September 2003, and thus was actively proceeding when he filed for bankruptcy in May 2004. The debtor failed to disclose the lawsuit in his bankruptcy filings. *Id*. at 1153. He was then specifically asked by the trustee at a meeting of the creditors whether he had a personal injury suit pending and responded, "no." *Id*. The debtor's actions in that case are in stark contrast to the actions of Ms. Alward in this case, who did not have a personal injury suit in progress at the time she filed for bankruptcy or at any time prior to her discharge (although she did file the suit approximately 6 months after the discharge, and about 3 weeks before the bankruptcy case was closed).

In *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002), the Eleventh Circuit barred the plaintiff's claims on a theory of judicial estoppel. In that case, however, the

plaintiff/debtor filed a discrimination lawsuit while his bankruptcy case was proceeding, more than a year before his discharge. *Id*. at 1284. Furthermore, after he filed suit, but before discharge, the plaintiff/debtor requested a conversion from Chapter 11 to Chapter 7, which necessitated his filing amended, updated schedules, on which he failed to list the active lawsuit. *Id*. *See also Robinson v. Tyson Foods*, 595 F.3d 1269 (11th Cir. 2010) (judicial estoppel applied where debtor sued while approximately 4 years into a 5-year Chapter 13 bankruptcy plan).

In *Guay*, 677 F.3d 10 (1st Cir. 2012), the judicially estopped plaintiff not only failed to amend his schedule of assets when he brought a suit while in the midst of his Chapter 7 proceeding, but he also *affirmatively* misrepresented that there were no changes to be made to his bankruptcy filings. *Id*. at 13-15. In that case, the debtors filed for bankruptcy protection in 2008 (under Chapter 11, later converted to Chapter 7), at which time the events leading to the lawsuit had not yet taken place. *Id*. at 13. In June 2009, the debtors filed a lawsuit in federal court based on events that had taken place in early 2009. *Id*. at 14. Subsequently, in August 2009, in response to a motion for contempt in the bankruptcy case, the debtors filed an affidavit stating that their assets had not changed since their initial filings. *Id*. at 14-15. They filed another affidavit to the same effect in October 2009. *Id*. at 14-15. Thus, they affirmatively misrepresented their assets to the bankruptcy court *twice* after filing suit. The circumstances in this case are unlike those in *Guay*.

*Payless*, 989 F.2d 570 (1st Cir. 1993), also does not determine the outcome of this case. First, it does not appear that an inadvertence/mistake defense was raised in *Payless*. Second, the bankruptcy in *Payless* was *caused by* the actions of the defendants which were the basis for the subsequent civil suit, *id*. at 571, leading the First Circuit to conclude that Payless had "play[ed] fast and loose with the courts," *id*. (internal quotations omitted), and to remark on the

"brazenness" of Payless. *Id*. At no time did the superior court in this case find that Ms. Alward was playing "fast and loose" with the courts; in fact, the court noted that it was "sympathetic" to Ms. Alward. ORDER ON THE PLAINTIFF'S MOTION FOR RECONSIDERATION, *Supp.* at 11.[2] *See also Brooks v. Beatty*, 25 F.3d 1037, No. 93-1891, 1994 WL 224160 at *2 (1st Cir. May 27, 1994) (unpublished) ("Nothing in its decision suggests that the *Payless* court wrenched the prudential doctrine of judicial estoppel from its traditional moorings.").

Even under the narrow test adopted by some courts, and especially in light of the restrained application of that narrow test as shown in the cases described above, judicial estoppel is not appropriate in this case because Ms. Alward did not have sufficient knowledge of her claims at the time she filed for bankruptcy to warrant including them on her bankruptcy filings.

*In re FV Steel and Wire Company*, 349 B.R. 181 (Bankr. E.D. Wis. 2006), is also instructive. In that case, the bankruptcy court did not apply judicial estoppel. In September 2002, the debtor/plaintiff in that case had filed a discrimination claim at the EEOC. *Id*. at 183. The EEOC had not yet taken action when the debtor/plaintiff filed for Chapter 7 bankruptcy protection in December 2002. *Id*. The debtor/plaintiff did not list the claim on her bankruptcy filings. *Id*. In March 2003, she received a no-asset discharge, and in June 2004 (after receiving a favorable response from the EEOC in May 2004), she filed a lawsuit. *Id*. The bankruptcy court

[2] *Schomaker v. United States*, 334 Fed.Appx. 336, No. 08-1915, 2009 WL 1587780 (1st Cir. June 9, 2009) (unpublished), also is not persuasive in this case. In that case, the unscheduled asset was property which had been seized and which the debtor believed was forfeited. Therefore, there was a tangible asset in existence, but there was a question as to ownership. By contrast, a personal injury claim does not exist in any form if it is not a claim which can be brought by the injured, and therefore it would be nonsensical to include it on a bankruptcy schedule if no claim existed. MOTION TO REOPEN, *Appx*. at 99. Although later discussions with a new attorney informed Ms. Alward of her potential claim, at the time she filed for bankruptcy she had been convinced by two attorneys that no claims existed. Debtors are not required to schedule claims which are "extremely remote and unlikely." *In re FV Steel and Wire Company*, 349 B.R. 181, 187 (Bankr. E.D.Wisc. 2006).

ruled in favor of the debtor/plaintiff in part because she had not yet received a positive response from the EEOC at the time she filed for bankruptcy. *Id*. at 187. The plaintiff/debtor presumably knew about the underlying discriminatory events by the time she filed for bankruptcy (as she had already submitted a claim to the EEOC), but the court focused instead on the timeline for her knowledge of the potential validity of her claim.

Similarly, in *In re Combs*, No. 11-21183, 2015 WL 3778030 (Bankr. D. Kan. June 16, 2015), when the debtor/plaintiff filed for bankruptcy, he had already experienced one of the discriminatory incidents which prompted his subsequent lawsuit. *Id*. at *1. That incident occurred in August 2010, and the debtor/plaintiff filed for Chapter 7 bankruptcy protection in April 2011. *Id*. While the bankruptcy case was pending, before his discharge in August 2011, the plaintiff/debtor experienced the two other relevant discriminatory incidents. *Id*. at *1-2. At no time during his bankruptcy case did the plaintiff/debtor disclose the incidents or any potential claims. *Id*.

The bankruptcy court cited the narrow test for inadvertence or mistake: "[i]nadvertence can be established by showing, among other things, either (1) the debtor had no knowledge of the undisclosed event, or (2) the debtor had no motive to conceal it." *Id*. at *6. Although Combs clearly knew about the underlying discriminatory incidents when he filed for bankruptcy and during his bankruptcy case, the court did not apply judicial estoppel because, although "he immediately felt that he had been discriminated against and that he felt harmed by the discrimination…he had no idea that this incident could be considered a legal claim at that time." *Id*. at *6. *See also Johnson v. Trust Company Bank*, 223 Ga.App. 650 (Ga. Ct. App. 1996).

Ms. Alward did not know that her injuries could be considered a legal claim at the time she filed for bankruptcy and throughout most of her bankruptcy case; in fact, she had been

expressly told by two attorneys that she did not have a case. AFFIDAVIT OF NICOLE ALWARD, *Appx.* at 100. Therefore, even under the narrowest interpretation of the inadvertence or mistake exception to judicial estoppel, Ms. Alward should have prevailed. *See, e.g. Doe v. Henke*, No. 278763, 2008 WL 4927256 at *3 (Mich. Ct. App. Nov. 18, 2008) (unpublished) (no judicial estoppel where plaintiffs had been told by attorney investigating medical malpractice that plaintiffs had no claim, and therefore plaintiffs legitimately believed at time of bankruptcy filing that they had no valid claim).

"Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity." *Ryan Operations*, 81 F.3d at 365 (internal quotations and citations omitted).

B. *Ms. Alward rebutted any presumption of intentionality, and therefore judicial estoppel did not apply.*

Under the test set forth in *Ah Quin*, wherein the presumption of intentionality is rebuttable, a test which aligns with the underpinnings of judicial estoppel as expressed by the Court in *New Hampshire*, Ms. Alward presented ample evidence to defeat the application of judicial estoppel. Ms. Alward: 1) had been told by two attorneys that she did not have a viable personal injury claim; 2) disclosed the background of her injuries and legal consultations to her bankruptcy attorney, and reasonably relied on her attorney to do his job; 3) noted her injuries in a meeting of the creditors, showing that she had no intent to conceal; 4) did not know she was supposed to inform her personal injury attorneys of her bankruptcy case or her bankruptcy attorney of her personal injury case, 5) moved to reopen her bankruptcy case once she discovered that she needed to include her personal injury claims on her bankruptcy schedules; 6) submitted an affidavit to the superior court attesting to the facts described above; 7) submitted a copy of the initial interview form from Attorney Cornell's office, which shows that Ms. Alward disclosed

her injuries and prior legal consultations to her attorney; and 8) submitted a letter from the re-appointed Trustee showing his intent to continue with the case on behalf of the bankruptcy estate. PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS, *Appx*. at 90, 94; MOTION FOR RECONSIDERATION, *Appx*. at 117; AFFIDAVIT OF NICOLE ALWARD, *Appx*. at 137-38; MOTION TO REOPEN, *Appx*. at 99; INITIAL BANKRUPTCY CLIENT INTERVIEW, *Appx.* at 133; LETTER FROM STEVEN M. NOTINGER, *Appx*. at 105. *See also Vehicle Market Research, Inc. v. Mitchell International, Inc.*, 767 F.3d 987, 994 (10th Cir. 2014) (cautious application of judicial estoppel, particularly with respect to duty to update value of asset); *In re Adair*, 253 B.R. 85, 86, 91-92 (B.A.P. 9th Cir. 2000) (taking into consideration uncertainty of liability when assessing duty to update value of cause of action); *Smith*, 65 F.Supp.3d at 1311 (failure to disclose existing claim in original filing treated with more suspicion than failure to disclose a new claim in an amended filing).

The timing of Ms. Alward's reopening of her bankruptcy case does not weigh against her. "… 'Judicial estoppel does not operate because a party did not move as quickly as she could have; it operates only against cold manipulation…' *Snowden v. Fred's Stores of Tennessee, Inc.*, 419 F.Supp.2d 1367, 1373-74 (M.D. Alabama 2006) (finding a delay of four months, standing alone, too short to be conclusive as to intent)." *Smith*, 65 F.Supp.3d at 1311-12.

"While knowledge and motive are important in establishing judicial estoppel, the inquiry does not end there if the debtor-plaintiff comes forward with evidence indicating that the non-disclosure was made in good faith….In applying the burden-shifting test, it is important to remember that the ultimate purpose of the test is to determine the *actual presence of bad faith*." *Morgan County Hospital v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008) (emphasis added).

In *Eubanks v. CBSK Financial Group*, 385 F.3d 894 (6th Cir. 2004), the Sixth Circuit would not apply judicial estoppel to bar the plaintiffs' claim where the debtors/plaintiffs had amended their bankruptcy schedules to include the defendant as a creditor, but inadvertently did not disclose their claim. *Id*. at 896. "The record established that Plaintiffs amended the bankruptcy schedule once, and attempted to amend it a second time, to finally place Defendant on the schedule as a creditor and potential asset. Defendant, however, provides no additional evidence that Plaintiffs demonstrated fraudulent intentions towards the court." *Id*. at 898-99.

Because the test is meant to determine the actual presence of bad faith, the general rule that a client is bound by the negligent actions of her attorney, *Butler v. Morse*, 66 N.H. 429 (1891), does not determine the outcome in this case. The *Butler* rule concerns situations where a showing of *negligence* is sufficient. Here, the Defendants must show an *intentional* effort to mislead the courts, *Ryan Operations*, 81 F.3d at 362, and therefore the actions of Attorney Cornell are not imputed to Ms. Alward. Even if the actions of the attorney were imputed, those actions still do not evidence the necessary *intentional* effort. *See, e.g., Berkowitz v. Berkowitz*, 817 F.3d 809, 814 (1st Cir. 2016) (no judicial estoppel in part because attorney had advised plaintiff he did not need to list the asset in his prior divorce pleading); *GE HFS Holdings*, 520 F.Supp.2d at 222.

C. *Judicial estoppel is particularly inappropriate on a motion to dismiss*.

Ms. Alward is confident that she has presented adequate evidence to defeat the application of judicial estoppel at any phase of this case, but the application of judicial estoppel is particularly inappropriate here where the superior court applied the doctrine to dismiss Ms. Alward's claim pursuant to a motion to dismiss. The superior court recited what is usually the proper standard for reviewing a motion to dismiss:

> "Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiff's] pleadings are sufficient to state a basis upon which relief may be granted." *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183 (2014) (citations omitted). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiff] as true, construing them most favorably to the [plaintiff]." *Id*.

ORDER ON THE DEFENDANTS' MOTION TO DISMISS (December 5, 2016), *Supp.* at 3. The superior court then explained, " 'When a motion to dismiss…raises certain defenses…the trial court must…determine, based on the facts, whether the [plaintiff] ha[s] sufficiently demonstrated [his] right to claim relief.'" *Id*. at 3-4 (citing *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183 (2014)). While this may be true, in this case the court then abused its discretion by failing to recognize that the burden of proving an affirmative defense, such as estoppel, rests on the party asserting that defense, *see Gray v. Kelly*, 161 N.H. 160, 164 (2010), and failing to construe the facts presented (which went beyond "unsubstantiated allegations," *K.L.N. Constr. Co.*, 167 N.H. at 183) in the light most favorable to the Plaintiff. *See Beane v. Beane & Co.*, 160 N.H. 708, 711 (2010). Importantly, in *K.L.N. Constr. Co.*, there was no dispute over the facts. *Id*. at 183.

The superior court was not in a position to make a final determination against Ms. Alward with regard to her intent at this stage of the case. "The Court is not permitted to choose between competing inferences on summary judgment. *See Samples v. City of Atlanta*, 846 F.2d 1328, 1330-33 (11th Cir. 1988). This is true even where the factual questions raised would ultimately be decided by the judge, as in the case of Advanced Disposal's equitable defense." *Jackson v. Advanced Disposal Services, Inc.*, No. 307-CV-773-J-33TEM, 2008 WL 958110 at *4 (M.D. Fla. April 8, 2008). *See also Spaine v. Community Contacts, Inc.*, 756 F.3d 542, 544 (7th Cir. 2014) (fact issue as to intent to conceal precluded summary judgment on basis of judicial estoppel); *Smith*, 65 F.Supp.3d at 1312; *Seymour*, 2005 IL at 977 (noting that normally judicial estoppel would be reviewed for abuse of discretion, but where its application would terminate

the litigation, it is reviewed *de novo*); *Morgan County Hospital*, 844 N.E.2d at 283 ("…the ultimate issue to be decided is the plaintiff/debtor's intent to play fast and loose with the courts…Generally, issues concerning a party's state of mind are improper for summary judgment." (internal citation omitted)).

At this stage, Ms. Alward's affidavit was in and of itself enough to preclude the application of judicial estoppel. "…viewing the evidence in the light most favorable to Plaintiff, and thus crediting her affidavit, *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987), her bankruptcy filing was inadvertent." *Ah Quin*, 733 F.3d at 278.

The superior court abused its discretion by: making a judicial estoppel ruling against Ms. Alward at this stage of the case, given that she has asserted good faith and presented evidence of her good faith; failing to place the burden on the Defendants, when they were asserting an affirmative defense; and improperly applying a narrow interpretation of the inadvertence/mistake defense to judicial estoppel.

## II. The Superior Court Abused Its Discretion by Applying Judicial Estoppel Despite the Reopening of the Bankruptcy Case and the Trustee's Intent to Retain Counsel.

Regardless of the reasons for Ms. Alward's omissions on her bankruptcy schedules, the superior court erred in applying judicial estoppel where the bankruptcy case had been reopened and the Trustee had asserted his interest in the case.

In *Philbrick v. Burbank*, 101 N.H. 311 (1958), the New Hampshire Supreme Court endorsed the view that a bankruptcy asset, if not abandoned by the Trustee, continues to be an asset of the estate, and therefore an action with respect to that asset can proceed, regardless of whether it was disclosed in the bankruptcy proceedings. In that case, the claimant obtained a discharge in bankruptcy subsequent to the incurrence of a $288 debt owed to him, but did not

include the debt in his bankruptcy filings. *Id*. at 311. He did not schedule the debt because "he 'had forgotten all about it,' since he considered it 'dead' and worthless." *Id*. at 312. It does not appear from the ruling that the bankruptcy case had yet been reopened at the time of the lawsuit. *Id*.

> "As noted previously, the legal title to such an asset, while necessarily resting in the bankrupt for such purpose as the bringing of the suit thereon, is *in custodia legis* in the bankruptcy court if the property in question was never abandoned or disposed of. The bankrupt merely holds bare legal title for the trustee who is appointed upon the reopening and for the benefit of such creditors as may be entitled thereto."

*Id*. at 312 (citing *4 Collier on Bankruptcy* (14th ed.) s.70.07, pp.973-74).

The court found that because the asset was not scheduled in the bankruptcy case, it had not been abandoned by the Trustee. *Id*. This consideration of the interest of the Trustee regardless of whether the Trustee is yet named as a party is in accord with *Foster v. Ela*, 69 N.H. 460 (1899), where the New Hampshire Supreme Court precluded the "real party in interest" from testifying (based on a rule against parties testifying in the type of case at issue) even though it was "not a party to the record." *Id*. at 460. The legitimate interest and status of parties does not always depend on a formal substitution of the party before that interest can be asserted and protected.

In this case, the bankruptcy case has been reopened, the Trustee re-appointed, and the Trustee has asked Ms. Alward's attorney to pursue the case on behalf of the bankruptcy estate. MOTION FOR RECONSIDERATION, *Appx*. at 117; MOTION TO REOPEN, *Appx.* at 99; LETTER FROM STEVEN M. NOTINGER, *Appx*. at 105. According to *Philbrick*, these steps are not strictly necessary to consider the Trustee's position, as the claim is automatically pursued on behalf of the Trustee, *Philbrick*, 101 N.H. at 312, but they lend even more support to Ms. Alward's position that it is the bankruptcy estate, not Ms. Alward individually, who is the actual potential

beneficiary of these claims. Oddly, the superior court found, "[o]ther than the plaintiff's bald assertion that her bankruptcy trustee has taken over the instant case, there is nothing in the record to support this contention," ORDER ON THE PLAINTIFF'S MOTION FOR RECONSIDERATION, *Supp*. at 13, despite the fact that Ms. Alward clearly had submitted other evidence of the Trustee's role, specifically the MOTION TO REOPEN, *Appx*. at 99, and the LETTER FROM STEVEN M. NOTINGER, *Appx*. at 105.

The *Philbrick* view is mirrored by many other courts. "Judges understandably favor rules that encourage full disclosure in bankruptcy. Yet pursuing that end by applying judicial estoppel to debtors' self-contradiction would have adverse effects on third parties: the creditors." *Biesek v. Soo Line Railroad Company*, 440 F.3d 410, 413 (7th Cir. 2006). "…a debtor's failure to schedule a prepetition action may only be a speedbump, not a roadblock, on the road to recovery….The debtor or another party in interest may attempt to avert dismissal by seeking to reopen the bankruptcy case and amend the schedules to list the action…" *In re Arana*, 456 B.R. 161, 170 (Bankr. E.D.N.Y. 2011). *See also Rogers v. Ford Motor Company*, No. 12 C 7220, 2015 WL 2097679 at *4 (N.D. Ill. May 4, 2015) (when debtor realizes, in good faith, that her claim has potential value, she can go back to the bankruptcy court so the bankruptcy trustee can decide whether to pursue the case); *In re Kreutzer*, 344 B.R. at 639; *Johnson*, 223 Ga.App. at 652.

Even where the bankruptcy trustee has not been formally substituted as a party, courts have declined to apply judicial estoppel. "Here, the Trustee has considered the claim, authorized litigation to proceed in his name if necessary, and determined the extent to which the estate has an interest in the litigation….In light of these facts, the application of judicial estoppel would not serve its over-all purpose….Instead, applying the doctrine in this case would create a potential

windfall for the defendants…" *GE HFS Holdings*, 520 F.Supp.2d at 226; *see also Brooks*, 1994 WL 224160 at *3.

Similarly, in *Graupner v. Town of Brookfield*, 450 F.Supp.2d 119 (D. Mass. 2006), the court stated:

> …rather than dismiss the claims outright at this time, the Court will in the first instance provide an opportunity for the bankruptcy court to determine whether it has any interests it wishes to assert or protect. The court will stay the lawsuit to allow for a reasonable time for the bankruptcy court to consider whether to reopen the case and, if so, whether to appoint a trustee, and for any such trustee to decide whether to pursue the claim as the real party in interest on behalf of the estate.

*Id*. at 129. *See also Kane*, 535 F.3d at 386-88; *In re JZ*, 371 B.R. 412, 421 (B.A.P. 9th Cir. 2007); *Wood v. Household Finance Corporation*, 341 B.R. 770, 774 (Bankr. W.D. Wash. 2006); *Riseman v. United States*, No. 2:14-cv-02656-MCE-CKD, 2016 WL 1108937 at *5 (E.D. Cal. March 21, 2016); *Houpt v. Wells Fargo Bank*, 160 Idaho 181, 187 (2016) (action cannot be dismissed until plaintiffs have opportunity to join or substitute the real party in interest); *Arikson v. Ethan Allen, Inc.*, 160 Wash.2d 535, 541 (2007); *Wolfork v. Tackett*, 214 Ga.App. 633 (Ga. Ct. App. 1999) (tort claim is judicially estopped because debtor did not petition to reopen bankruptcy case); *Bartley-Williams v. Kendall*, 134 Wash.App.95 (Wash. Ct. App. 2006) (where debtor forgets to schedule a cause of action and then pursues it, solution is often to reopen bankruptcy case).

In *In re FV Steel*, 349 B.R. 181 (Bankr. E.D. Wisc. 2006), it was the trustee who moved to reopen the case, and the court noted that (even though it does not appear that the trustee had been substituted as a party), "[a]ccordingly, [plaintiff's counsel] represents [plaintiff's] bankruptcy trustee with respect to Keystone's Objection to Clark's proof of claim." *Id*. at 184.

In *In re Riazuddin*, 363 B.R. 177 (B.A.P. 10th Cir. 2007), the court declined to apply judicial estoppel, and therefore allowed reopening of the bankruptcy case, because the bankruptcy trustee could not be said to have administered or abandoned an unscheduled claim. "Even if the bankruptcy court had been correct in finding that the elements of judicial estoppel were met with respect to the Debtors, there was no basis to apply the doctrine to the Trustee. None of the *New Hampshire* factors applied to the Trustee." *Id*. at 187-88.

The District of New Hampshire has also adopted this view. "There is a potential solution to this problem, however. Locapo may file a motion in the bankruptcy court…to reopen his bankruptcy case to schedule his claims….the trustee will decide whether to press the claims or otherwise dispose of them…" *Locapo v. Colsia*, 609 F.Supp.2d 156, 161 (D.N.H. 2009).

By allowing the case to go forward, there is no enhanced disadvantage to the Defendants which might weigh in favor of estoppel. "There can be no doubt that Mount Sinai views itself as disadvantaged if this case is reopened, because it will be required to defend the Malpractice Action on the merits. But that is not the same as legal prejudice, and it is difficult to conclude that the obligation to defend the Malpractice Action amounts to legal prejudice against Mount Sinai." *In re Arana*, 456 B.R. at 177. *See also In re Riazuddin*, 363 B.R. at 187 (no unfair detriment in declining to apply judicial estoppel, appellee will only be "denied the windfall it had hoped to receive by avoiding further litigation and any potential liability on the claim.").

## CONCLUSION

It is not uncommon for a court to find a bankruptcy debtor judicially estopped from pursuing a claim which he failed to disclose in his bankruptcy case, but the fundamentals of judicial estoppel must not be abandoned. The Supreme Court in *New Hampshire* recognized the doctrine of judicial estoppel, but emphasized that it is meant to be a flexible doctrine aimed at intentional misrepresentation. The superior court in this case has abused its discretion by abandoning the underlying purposes of judicial estoppel, instead unlawfully binding itself to a rigid test for inadvertence or mistake (which Ms. Alward, in any event, passes). The error was especially egregious at this stage of the proceedings, ruling on a motion to dismiss, and where the Defendants bore the burden of proving their affirmative defense.

Ms. Alward was permanently and severely injured by the actions of the Defendants in this case. She has suffered through years of pain, rejection, and financial turmoil, all the while attempting to be upfront and fulfill her responsibilities, and relying on the advice of experienced counsel. Ms. Alward gains no unfair advantage if the court allows continuation of this action, particularly given that her bankruptcy case has been reopened and the Trustee has asserted his interest in the case. By contrast, if judicial estoppel is applied to bar Ms. Alward's claims, the Defendants will escape accountability for their actions, and will receive an unwarranted windfall.

For the foregoing reasons, the decisions of the Hillsborough Superior Court Southern District should be reversed.

## REQUEST FOR ORAL ARGUMENT AND DECISIONS BEING APPEALED

Ms. Alward requests that her attorney, David P. Angueira, Esq., of the law firm of Swartz and Swartz, be allowed 15 minutes of oral argument before the full court because this case involves important issues regarding the application of judicial estoppel in New Hampshire.

Counsel certifies that the written orders being appealed are addended to this brief.

Respectfully submitted,

Nicole Alward-Pace
By her attorney,
Swartz and Swartz, P.C.

Dated: May 23, 2017

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## CERTIFICATION OF DELIVERY

I hereby certify that on May 25, 2017, 2 copies of the foregoing will be forwarded to Todd J. Hathaway, Esq., Peter A. Meyer, Esq., Jay M. Surdukowski, Esq., Martin C. Foster, Esq., and Stephen M. Fiore, Esq., via First Class US Mail.

Dated: 5/23/17

David P. Angueira, Esq.

## SUPPLEMENT TO APPENDIX

**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.**
**SOUTHERN DISTRICT**

**SUPERIOR COURT**
**No. 226-2016-CV-00317**

Nicole Alward

v.

Emery Johnston, M.D.; Gary Fleischer, M.D.; Tung Thuy Nguyen, M.D.; Elliot Hospital; Southern New Hampshire Medical Center; EJAP, L.L.C.; IKYN Surgical L.L.C.; Fleischer Spine, P.L.L.C.; USUB Medical, L.L.C.; New Hampshire Neurospine Institute P.A.; and Spine Realty, L.L.C.

## ORDER ON THE DEFENDANTS' MOTION TO DISMISS

The plaintiff, Nicole Alward, brings this action against the above-captioned defendants ("the defendants"), seeking damages for negligence in providing her medical care. Currently pending before the Court is the defendants' joint motion to dismiss, to which the plaintiff objects. For the reasons set forth herein, the motion to dismiss is GRANTED.

### Background

The Court assumes the following facts from the complaint and other relevant pleadings are true. During the summer of July 2013, the plaintiff suffered from persistent and severe pain in her lower back and numbness and weakness in her right leg. (Compl. ¶ 13.) She visited the emergency departments of three different medical centers on three separate occasions. On July 12, 2013, she presented to the Elliot Hospital Emergency Department. (Id.) On July 14, 2013, she presented to the Southern New Hampshire Medical Center Emergency Department (SNHMC) with the same complaints. (Id. ¶ 19.) The plaintiff underwent surgery at SNHMC on July 15, 2013. (Id. ¶ 27.) She was discharged from SNHMC on July 26, 2013. (Id. ¶ 32.) Lastly, the plaintiff presented to the Elliot Hospital Emergency Department on August 5,

2013, and underwent a second surgery there on August 7, 2013. (Id. ¶ 36.) Throughout these attempts to treat her symptoms, the plaintiff's pain remained consistent and at times worsened. Today, the plaintiff "suffers from severe pain, bilateral weakness and numbness, and both bowel and urinary incontinence." (Id. ¶ 39.) As a result, she is unable to work. (Id.)

The plaintiff began looking into legal recourse for her allegedly negligent medical treatment in the months following her second surgery. She initially retained the law firm Sweeney & Sweeney for legal representation. (Defs.' Joint Memo. Law Supp. Mot. Dismiss at 3.) On October 2, 2013, the plaintiff executed an authorization requesting that medical providers supply medical records of her care dating from the initial emergency department admission on July 12, 2013. (Id.) These requests were sent to SNHMC and several doctors' office practices. More requests were sent in February 2014. (Id.) These letters, sent by Attorney Edward Sweeney, state in the first line: "Please be advised that our office represents Nicole Alward in a claim for injuries." (Id., Ex. A.) The plaintiff also "consulted with two [different] medical malpractice attorneys who advised her that they were unwilling to represent her in a malpractice claim . . . against the treating physicians and hospitals." (Pl.'s Opp. Defs.' Joint Mot. Dismiss, Ex. A.) As a result of this advice, the plaintiff "believed that [her] potential claim had no value." (Id.)

On July 23, 2015, the plaintiff filed for Chapter 7 bankruptcy in the United States Bankruptcy Court, District of New Hampshire. (Defs.' Mot. Dismiss, Ex. B.) The plaintiff did not list her potential claim against the medical providers in her schedule of assets.[1]

[1] 11 U.S.C.A. § 521(a) states, in pertinent part: "The debtor shall . . . file . . . a list of creditors; and . . . unless the court orders otherwise . . . a schedule of assets and liabilities." 11 U.S.C.A. § 521(a). Actual

(Id., Ex. C.) The Bankruptcy Court closed the plaintiff's case on July 14, 2016. (Id., Ex. B.) However, the plaintiff filed this lawsuit on June 27, 2016, while the bankruptcy proceedings were still ongoing. (Id.) The plaintiff did not alert the bankruptcy court that she had initiated a lawsuit at that time.

The defendants jointly filed this motion to dismiss based on judicial estoppel on October 28, 2016. The defendants argue that the plaintiff is judicially estopped from pursuing these claims because she did not schedule them as assets in her Chapter 7 bankruptcy. On November 9, 2016, the plaintiff filed a motion in the Bankruptcy Court to reopen the bankruptcy proceedings and allow her to amend her schedule of assets to include this lawsuit. The Bankruptcy Court allowed the motion on November 14, 2016. The plaintiff then filed her objection to the defendants' motion to dismiss on November 16, 2016, arguing: (1) that the issue of judicial estoppel is moot because of her amendment to her schedule of assets, and (2) that the doctrine of judicial estoppel does not mandate dismissal when the party's failure to disclose was based on inadvertence or mistake.

Standard of Review

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiff's] pleadings are sufficient to state a basis upon which relief may be granted." K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 183 (2014) (citation omitted). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiff] as true, construing them most favorably to the [plaintiff]." Id. (citation omitted). "When the motion to dismiss does not

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and potential civil claims are uniformly considered to be "assets" that must be listed as such in a bankruptcy proceeding. See Guay v. Burack, 677 F.3d 10, 17 (1st Cir. 2012).

challenge the sufficiency of the [plaintiff's] legal claim but, instead, raises certain defenses, the trial court must look beyond the [plaintiff's] unsubstantiated allegations and determine, based on the facts, whether the [plaintiff] ha[s] sufficiently demonstrated [his] right to claim relief." Id. (citation omitted).

Analysis

"The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case using one argument and then relying upon a contradictory argument to prevail in another phase. 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 and citation omitted). see also New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001).

"While the circumstances under which judicial estoppel may be invoked vary, . . . it is well-established that a 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." Guay v. Burack, 677 F.3d 10, 17 (1st Cir. 2012). In fact, "every [federal] 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." Moses v. Howard Univ. Hosp., 606 F.3d 789, 798 (D.C. Cir. 2010).

The plaintiff seems to acknowledge this rule, but argues that dismissal is not warranted because the doctrine of judicial estoppel does not mandate dismissal when the party's failure to disclose was based on inadvertence or mistake. In support of this

argument, the plaintiff cites Hall v. Bank of America, N.A., in which the New Hampshire District Court noted that "[e]xceptions to judicial estoppel may arise when the party's position was based on inadvertence or mistake, or when a change in the governing law causes a change in legal positions." Hall v. Bank of Am., N.A., No. 13-CV-387-JD, 2014 WL 2608119, at *2 (D.N.H. June 11, 2014).

The court in Hall, however, determined that such exceptions were not applicable to the facts of that case, finding that "[b]ased on the complaint, [the plaintiff] knew the facts that he alleges in support of his claims in 2011 when he filed for bankruptcy protection and before he received the discharge in bankruptcy in January of 2012. [The plaintiff] does not suggest he was mistaken during the bankruptcy proceeding about the claims he now asserts or that the law has changed." Hall, No. 13-CV-387-JD, 2014 WL 2608119, at *3. The facts of the instant case similarly do not meet the requirements of the proposed exceptions to judicial estoppel. Like the plaintiff in Hall, the plaintiff here was never mistaken about the existence of a potential lawsuit. Her alleged difficulty in securing representation for said lawsuit is immaterial. Regardless of any such difficulty, her persistence in attempting and eventually succeeding in securing such representation demonstrates that she was clearly aware of her potential civil claims against the defendants. The timeline demonstrates that she knew of these potential claims prior to submitting her schedule of assets in her bankruptcy proceedings. She was certainly aware of the claims when she filed this medical malpractice action while her bankruptcy proceedings were still ongoing, and yet she failed to immediately revise her schedule of assets to include this lawsuit. Thus, there is no question that the

plaintiff knew of her potential claims at all relevant times. As such, the Court does not find that her failure to include her claims was based on mistake or inadvertence.

Second, the plaintiff argues that dismissal is not warranted because the issue of judicial estoppel was rendered moot by her reopening the bankruptcy case to amend her schedule of assets to include this lawsuit. The Court disagrees. The facts of this case are very similar to those of Moses v. Howard University Hospital. In Moses, the plaintiff secured a discharge of his debt from the Bankruptcy Court on January 5, 2004. Moses, 606 F.3d at 797. As with the plaintiff in the instant case, Moses had not listed the civil claim at issue in his schedule of assets. "[I]t was not until early 2008, after [the defendant] had uncovered Moses's failures to disclose [the pending lawsuit], that Moses moved to reopen his Chapter 7 bankruptcy proceeding . . . to amend his original 'Statement of Financial Affairs' to reflect the existence of this lawsuit." Id. The plaintiff in Moses then argued that the defendant's motion to dismiss based on his failure to originally include the lawsuit in his schedule of assets for the bankruptcy proceeding should fail because he essentially cured the defect. The Circuit Court of the District of Columbia disagreed:

> Moses's argument that he cured his failure to disclose by reopening his Chapter 7 case, amending his 'Statement of Financial Affairs,' and inviting [the defendant] to intervene in the suit, is wholly unpersuasive. As the Eleventh Circuit noted, allowing such 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,' and would similarly diminish the doctrine's ability to deter the debtor from pursuing claims in the District Court to which he is not entitled.

Moses, 606 F.3d at 800 (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002)); see also Eastman v. Union Pacific R. Co., 493 F.3d 1151, 1160 (10th Cir. 2007); Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1297 (11th Cir. 2003); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 321 (3d Cir. 2003).

The Court finds the plaintiff's argument in the instant case similarly unpersuasive. Like the plaintiff in Moses, the plaintiff here only moved to reopen her bankruptcy proceedings to amend her schedule of assets *after* the defendants filed their motion to dismiss based on judicial estoppel. The defendants filed their motion on October 28, 2016. 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 condemned. This Court joins in that judicial condemnation. As the plaintiff failed to disclose her monetary claim for damages in the bankruptcy proceeding in a timely manner, she is judicially estopped from bringing that claim in court now. As such, the defendants' motion to dismiss is GRANTED.

So ordered.

Date: December 5, 2016.

Charles S. Temple,
Presiding Justice

**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.**
**SOUTHERN DISTRICT**

**SUPERIOR COURT**
**No. 226-2016-CV-00317**

Nicole Alward

v.

Emery Johnston, M.D.; Gary Fleischer, M.D.; Tung Thuy Nguyen, M.D.; Elliot Hospital; Southern New Hampshire Medical Center; EJAP, L.L.C.; IKYN Surgical L.L.C.; Fleischer Spine, P.L.L.C.; USUB Medical, L.L.C.; New Hampshire Neurospine Institute P.A.; and Spine Realty, L.L.C.

**ORDER ON THE PLAINTIFF'S MOTION FOR RECONSIDERATION**

The plaintiff, Nicole Alward, brings this action against the above-captioned defendants ("the defendants"), seeking damages for negligence in providing her medical care. Currently pending before the Court is the plaintiff's motion to reconsider the Court's decision to grant the defendants' joint motion to dismiss. For the reasons set forth herein, the motion to reconsider is DENIED.

Background

The Court finds the following facts relevant for the purposes of this order. During the summer of July 2013, the plaintiff visited the emergency departments of three different medical centers complaining of persistent and severe pain in her lower back and numbness and weakness in her right leg. (Compl. ¶ 13.) Doctors at each medical center attempted to treat her pain. However, the plaintiff's pain remained consistent and at times worsened. Today, the plaintiff "suffers from severe pain, bilateral weakness and numbness, and both bowel and urinary incontinence." (Id. ¶ 39.) As a result, she is unable to work. (Id.)

The plaintiff began looking into legal recourse for her allegedly negligent medical treatment in the following months. She initially retained the law firm Sweeney &

Sweeney for legal representation. (Defs.' Joint Memo. Law Supp. Mot. Dismiss at 3.) On October 2, 2013, the plaintiff executed an authorization requesting that medical providers supply medical records of her care dating from the initial emergency department admission on July 12, 2013. (Id.) These requests were sent to SNHMC and several doctors' office practices. More requests were sent in February 2014. (Id.) These letters, sent by Attorney Edward Sweeney, state in the first line: "Please be advised that our office represents Nicole Alward in a claim for injuries." (Id., Ex. A.) The plaintiff also "consulted with two [different] medical malpractice attorneys who advised her that they were unwilling to represent her in a malpractice claim . . . against the treating physicians and hospitals." (Pl.'s Opp. Defs.' Joint Mot. Dismiss, Ex. A.) As a result of this advice, the plaintiff "believed that [her] potential claim had no value." (Id.)

On April 1, 2015, the plaintiff met with her (now former) bankruptcy attorney, Mark P. Cornell. At this meeting, the plaintiff informed Attorney Cornell of the potential for a personal injury lawsuit based on medical malpractice. (See Pl.'s Mot. Reconsideration, Ex. 1.) Despite this information, Attorney Cornell failed to pursue the legal requirement of listing this potential lawsuit as a "Potential Non-Exempt Asset" in the plaintiff's schedule of assets. Attorney Cornell also did not advise the plaintiff to disclose this potential claim to her Bankruptcy Trustee, Steven M. Notinger. (Id. ¶ 3.) On July 23, 2015, the plaintiff filed for Chapter 7 bankruptcy in the United States Bankruptcy Court, District of New Hampshire. (Defs.' Mot. Dismiss, Ex. B.) The plaintiff did not list her potential claim against the medical providers in her schedule of assets.[1]

[1] 11 U.S.C.A. § 521(a) states, in pertinent part: "The debtor shall . . . file . . . a list of creditors; and . . . unless the court orders otherwise . . . a schedule of assets and liabilities." 11 U.S.C.A. § 521(a). Actual and potential civil claims are uniformly considered to be "assets" that must be listed as such in a bankruptcy proceeding. See Guay v. Burack, 677 F.3d 10, 17 (1st Cir. 2012).

(Id., Ex. C.) The Bankruptcy Court closed the plaintiff's case on July 14, 2016. (Id., Ex. B.) However, the plaintiff filed this lawsuit on June 27, 2016, while the bankruptcy proceedings were still ongoing. (Id.) The plaintiff did not alert the bankruptcy court that she had initiated a lawsuit at that time.

The defendants jointly filed a motion to dismiss based on judicial estoppel on October 28, 2016. The defendants argued that the plaintiff was judicially estopped from pursuing these claims against them because she failed to schedule them as assets in her Chapter 7 bankruptcy. On November 9, 2016, the plaintiff filed a motion in the Bankruptcy Court to reopen the bankruptcy proceedings and allow her to amend her schedule of assets to include this lawsuit. The Bankruptcy Court allowed the motion on November 14, 2016. This Court granted the defendants' motion to dismiss on December 5, 2016. Currently before the Court is the plaintiff's motion for reconsideration.

Standard of Review

"A motion for reconsideration allows a party to present, [with particular clarity,] points of law or fact that a court has overlooked or misapprehended." Broom v. Cont'l Cas. Co., 152 N.H. 749, 752 (2005) (citing Webster v. Town of Candia, 146 N.H. 430, 444 (2001)); see also Super. Ct. Civ. R. 12(e). The Court's decision on such a motion will be upheld "absent an abuse of discretion." Webster, 146 N.H at 444. In addition, a trial court may simply decline to consider a motion for reconsideration in the first instance. See Nottingham v. Bonser, 131 N.H. 120, 135 (1988); Redlon Co. v. Franklin Square Corp., 91 N.H. 502, 505 (1941).

## Analysis

The plaintiff argues that the Court abused its discretion by failing to consider evidence of Attorney Cornell's negligence. The plaintiff did inform Attorney Cornell at their initial meeting that she had consulted with attorneys about pursuing a potential medical malpractice claim and that those attorneys had declined to represent her. (See Pl.'s Mot. Reconsideration, Ex. 1.) Attorney Cornell then apparently sat on this information, failing to inform the plaintiff of her obligation to disclose such a potential claim as a Non-Exempt Potential Asset. The plaintiff thus argues, essentially, that it is error for the Court to hold her accountable for her former attorney's mistake.

The Court is sympathetic to this aspect of the plaintiff's circumstance and recognizes that dismissal is a harsh penalty. However, the law is clear. "[T]he neglect of the attorney must be regarded as the neglect of the petitioner himself. . . . [T]he rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable where the neglect is that of his attorney employed in the management of the case." Butler v. Morse, 66 N.H. 429, 429 (1891) (citations omitted). Unfair as it may seem to the plaintiff, the law holds her accountable for her attorney's mistakes.[2] Thus the Court did not abuse its discretion in holding the plaintiff

[2] See, e.g., Eastman v. Union Pac. R. Co., 493 F.3d 1151, 1157 (10th Cir. 2007) (finding that the plaintiff was judicially estopped from bringing his civil claim despite having relied on his attorney's advice not to disclose the potential lawsuit); Cannon-Stokes v. Potter, 453 F.3d 446, 448-49 (7th Cir. 2006) (finding that the plaintiff was judicially estopped despite having disclosed the administrative claim to her bankruptcy attorney who "instructed her to omit the information." "[B]ad legal advice does not relieve the client of the consequences of her own acts. A lawyer is the client's agent, and the client is bound by the consequences of advice that the client chooses to follow"); Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1294 (11th Cir. 2003) ("Although it is undisputed that [the plaintiff's] attorney failed to list [the plaintiff's] discrimination suit on the schedule of assets despite the fact that [the plaintiff] specifically told him about the suit, the attorney's omission is no panacea"); Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 601 (5th Cir. 2005) (finding that the plaintiff was judicially estopped from pursuing her EEOC claim despite the fact that "she relied on her bankruptcy attorney's advice that those claims were irrelevant").

accountable for Attorney Cornell's negligence when granting the defendants' motion to dismiss.

Second, the plaintiff argues that the Court abused its discretion "by failing to recognize the effect of the judicial estoppel in its December 5, 2016 decision." (Pl.'s Mot. Reconsideration at 8.) The Court disagrees. In finding that the plaintiffs' reopening of the bankruptcy case did not render moot the issue of judicial estoppel in its December 5th order, the Court relied heavily on Moses v. Howard University Hospital, 606 F.3d 789 (D.C. Cir. 2010). The plaintiff contends that the Court should not have relied on this case because the court in Moses "failed to reference in any way whether the Plaintiff had representation or was pro se during the pending litigation, which is clearly distinguishable from the instant case." (Pl.'s Mot. Reconsideration at 6.) The plaintiff is merely reiterating her argument that, because she was represented by counsel in her bankruptcy case, she cannot be held responsible for anything that her attorney did or failed to do. For the reasons explained above, this argument must fail. See Butler, 66 N.H. at 429. The plaintiff's argument thus has no effect on the Court's determination that the issue of judicial estoppel was not rendered moot by the reopening of her bankruptcy case.

Lastly, the plaintiff claims that the Chapter 7 Trustee "has now taken control of the instant lawsuit for the benefit of the estate, not for the benefit of Plaintiff/debtor," and thus the issue of judicial estoppel is moot because the Trustee cannot be held accountable for the plaintiff's prior assertions. (Pl.'s Mot. Reconsideration at 7.) In support of her position, the plaintiff cites Wood v. Household Finance Corp., et al., 341 B.R. 770 (W.D. Wash. 2006), in which the court held that "there is a difference between

a debtor attempting to pursue an action for his own benefit, and a trustee pursuing an action for the benefit of creditors." Wood, 341 B.R. at 774. However, in Wood, the trustee had been "substituted as the real party of interest in the instant action," entirely replacing the original plaintiff. Id. at 771. There has been no such replacement in the instant case. The Trustee has not filed an appearance, a motion to be substituted as the real party in interest, or a motion to intervene. Other than the plaintiff's bald assertion that her bankruptcy trustee has taken over the instant case, there is nothing in the record to support this contention. Accordingly, the Court does not find reconsideration is warranted on that basis.

For the reasons outlined above, the plaintiff's motion for reconsideration is DENIED.

So ordered.

Date: January 12, 2017.

Charles S. Temple,
Presiding Justice