No. _____

In the Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Judicial estoppel is an equitable doctrine designed "'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions'" to gain an unfair advantage. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). The doctrine targets those who "'deliberately'" mislead courts, not those whose inconsistent positions stem from "inadvertence or mistake." *Id.* at 750, 753.

Courts regularly apply judicial estoppel when a debtor-plaintiff pursues a claim he failed to disclose to the bankruptcy court. The Eleventh, Ninth, Seventh, Sixth, and Fourth Circuits require courts to look at the totality of the circumstances and find that a debtor subjectively intended to mislead the bankruptcy court before applying judicial estoppel to bar a claim outside of the bankruptcy. In stark contrast, the Fifth and Tenth Circuits have embraced a "rigid" and "unforgiving" judicial estoppel rule in the bankruptcy context that bars claims regardless of whether there is evidence that a plaintiff actually intended to mislead. App. 55a. In those circuits, a debtor's failure to disclose a lawsuit to a bankruptcy court triggers judicial estoppel whenever the debtor knew the facts relevant to the undisclosed claim and had a *potential* motive for concealment—which is virtually always present in the bankruptcy context.

The question presented is:

Whether the doctrine of judicial estoppel can be invoked to bar a plaintiff who fails to disclose a civil claim in bankruptcy filings from pursuing that claim simply because there is a *potential* motive for nondisclosure, regardless of whether there is evidence that the plaintiff in fact acted in bad faith.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Thomas L. Keathley, Sr. was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Buddy Ayers Construction, Inc. was the defendant in the district court and the appellee in the court of appeals.

Connie Keathley was a plaintiff in the district court but did not participate in the court of appeals. Daniel Fowler was a defendant in district court but did not participate in the court of appeals.

RELATED PROCEEDINGS

There are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Keathley (Mr. Keathley) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is not reported but available at 2025 WL 673434. The court of appeals' denial of rehearing (App. 57a) is unreported. The decision of the district court denying reconsideration (App. 24a-38a) is published at 706 F. Supp. 3d 628, and the district court's order granting summary judgment (39a-56a) is published at 686 F. Supp. 3d 495.

JURISDICTION

The court of appeals entered its judgment on March 3, 2025 (App. 1a-23a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Going through a personal bankruptcy is hard enough. This case presents an opportunity to resolve an entrenched circuit conflict over an unforgiving rule applied by a small minority of circuits—including the Fifth Circuit below—that unnecessarily penalizes debtors for honest mistakes. The question is whether a debtor who fails to disclose a civil claim in bankruptcy filings should be permanently barred under the doctrine of judicial estoppel from pursuing that claim—whether it be a personal injury claim, as here; an employment discrimination claim; or other claim, even against a defendant unrelated to the bankruptcy—even when there is no showing that the debtor intended to mislead the bankruptcy court.

Five circuits—the Eleventh, Ninth, Seventh, Sixth, and Fourth—require that the debtor intended to mislead the bankruptcy court before they will bar the debtor from pursuing an undisclosed claim, and consider a wide range of evidence bearing on intent before holding that the claim is barred. In contrast, two circuits—the Fifth and the Tenth—employ a "rigid" and "unforgiving" rule that permits judicial estoppel whenever the debtor knew the facts underlying his claim and there is a *plausible* motive to conceal it, which is virtually always present given the financial implications of bankruptcy. App. 55a (describing the Fifth Circuit's rule). That test almost always leads to the claim being barred under judicial estoppel—even where there is evidence indicating that the failure to disclose the claim was an honest mistake. And the upshot of this rule is that it can hand an "unwarranted windfall" to the defendant in the separate action when a case is dismissed. *Id.* at 21a-22a (Haynes, J, concurring in the judgment).

The debtor in this case, Mr. Keathley, filed personal injury claims against respondent after suffering serious injuries when a truck driven by respondent's employee collided with the truck Mr. Keathley was driving. In the decision below, the Fifth Circuit—applying its outlier judicial estoppel rule—barred Mr. Keathley from pursuing his personal injury claims because he did not immediately disclose them in his pending Chapter 13 bankruptcy proceedings, even though the claims arose well after he filed for bankruptcy, he promptly told his bankruptcy attorney about the basis for them, respondent was in no way adversely impacted by the delay in disclosing the claims, and the attorney's failure to immediately disclose them to the

bankruptcy court (which was in line with the typical practice in that district) did not impact the bankruptcy estate or Mr. Keathley's creditors.

Judge Haynes "concurred in the judgment only," stating that she "would have dissented" if not for the Fifth Circuit's rigid judicial estoppel rule, given evidence that "Keathley's failure to disclose the personal injury claim[s] . . . was an honest mistake" and "the bankruptcy proceedings [would] not suffer" from his nondisclosure. App. 21a-22a. As she explained, "[o]ther circuits take a more holistic approach than [the Fifth Circuit]" in deciding whether the debtor's failure to disclose a claim in bankruptcy warrants the invocation of judicial estoppel to bar that claim. *Id.* at 22a. And, she disagreed with the Fifth Circuit rule that permits "potentially bad actors to reap a windfall" when, as here, there is "evidence that [the] failure to disclose the . . . claim . . . was an honest mistake." *Id.* at 21a.

This circuit split is entrenched, acknowledged, and highly consequential. Commentators and courts, including the en banc Eleventh Circuit, have highlighted the clear "circuit split" on the question presented. *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1189 (11th Cir. 2017) (en banc). The issue arises with great frequency across the country, unnecessarily stripping debtors of claims—and redress—based on real harms. The minority position embodied by the Fifth Circuit below is grossly out of step with this Court's precedent, which recognizes that the doctrine of judicial estoppel is designed to thwart "deliberate[]" and "intentional" switches in a litigant's position aimed at securing an unfair advantage. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (citations omitted). It is also at odds

with the doctrine's flexible nature. Only this Court can resolve this entrenched circuit split on this important issue, and this case provides an ideal vehicle in which to do so.

The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Hundreds of thousands of Americans file for bankruptcy each year. Chapter 13 of the Bankruptcy Code lets individuals with regular income develop a plan to repay part or all of their debts over three to five years. U.S. Courts, Chapter 13 – Bankruptcy Basics, https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited June 26, 2025). A debtor initiates a Chapter 13 bankruptcy by filing a petition with the bankruptcy court. *Id.* The debtor must generally also file a repayment plan and schedules of assets and liabilities. 11 U.S.C. §§ 1321-1322; Fed. R. Bankr. P. 1007(b). Creditors then have an opportunity to object to the repayment plan. And the plan ultimately must be approved by the court. *See* 11 U.S.C. §§ 1324-1325. A plan can be modified after confirmation at the initiative of the debtor, the bankruptcy trustee, or an unsecured creditor. *Id.* § 1329.

2. Judicial estoppel is an equitable doctrine that prevents a party who has successfully advanced a position in one court from later taking an incompatible position before a different court. *See New Hampshire*, 532 U.S. at 749-50. It is designed to "protect the integrity of the judicial process" and prevent "the perception that either the first or the second court was misled." *Id.* (citations omitted).

The doctrine is not susceptible to "inflexible prerequisites or an exhaustive formula." *Id.* at 750-51; *see also Zedner v. United States*, 547 U.S. 489, 504 (2006) (judicial estoppel "is equitable and thus cannot be reduced to a precise formula or test"). But this Court has identified several factors that inform "whether to apply the doctrine in a particular case." *New Hampshire*, 532 U.S. at 750. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* (citation omitted). Second, courts consider "whether the party has succeeded in persuading a court to accept" its earlier position. *Id.* Finally, courts ask "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.*

Undergirding this analysis is the desire to "prohibit[] parties from *deliberately* changing positions according to the exigencies of the moment." *Id.* at 749-50 (emphasis added) (citation omitted). But because "[t]he vice which judicial estoppel prevents is the cold manipulation of the courts to the detriment of the public interest," courts have recognized that "[i]t is inappropriate . . . to apply the doctrine when a party's prior position was based on inadvertence or mistake." *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995); *see also New Hampshire*, 532 U.S. at 753 (citing cases).

3. When a debtor in a bankruptcy proceeding fails to disclose the existence of a potential or pending claim outside of the bankruptcy, courts apply the doctrine of judicial estoppel to determine whether the separate action must be dismissed on the ground that it amounts to a manipulation of the courts. There is consensus that judicial estoppel generally bars a

debtor from pursuing a cause of action if (1) a debtor failed to disclose the claim in his bankruptcy proceedings, (2) the bankruptcy court accepted that nondisclosure, and (3) the nondisclosure was not inadvertent or a mistake. However, as detailed below, the circuits sharply disagree on how to analyze that third element—whether a nondisclosure resulted from inadvertence or mistake. *Infra* at 13-20. And this is the dispositive factor in most cases in deciding whether a claim that was not disclosed in a bankruptcy proceeding is estopped.

B. Factual And Procedural Background

1. Like many Americans, Thomas Keathley and his wife found it difficult to make ends meet. In December 2019, they filed for Chapter 13 bankruptcy in the Eastern District of Arkansas to get out of debt and regain control of their affairs. App. 2a. The bankruptcy court confirmed a modified repayment plan in April 2020. *Id.* The Keathleys' confirmed plan provided for 100%, interest-free repayment of the Keathleys' creditors. *See id.* at 14a, 22a.

In August 2021—more than a year after the bankruptcy court had approved the Keathleys' Chapter 13 plan—Mr. Keathley suffered injuries to his neck, back, and hands after the truck he was driving was struck by a truck driven by David Fowler, an employee of respondent Buddy Ayers Construction, Inc. *Id.* at 1a-2a. Fowler blamed the crash on faulty brakes. CA5 Record on Appeal (ROA) 727. As a result of the injuries he sustained, Mr. Keathley required surgery, injections, and physical therapy. ROA.494-95. His lingering physical limitations have permanently reduced his earning capacity. ROA.496-98.

Mr. Keathley informed his bankruptcy counsel of the accident and the basis for his personal injury claims a few weeks after the accident occurred. ROA.1217. His bankruptcy counsel, however, did not inform the bankruptcy court. App. 3a.

In December 2021, Mr. Keathley filed this personal injury suit against respondent in the United States District Court for the Northern District of Mississippi, alleging negligence and vicarious liability for respondent's role in the crash and seeking damages to compensate for his injuries. *Id*.

In 2022, Mr. Keathley's bankruptcy counsel filed amended bankruptcy plans in the bankruptcy court, which did not include a schedule of assets or list the lawsuit. *See* No. 19-bk-16848 (Bankr. E.D. Ark.) (Bankruptcy Case), Dkt. Nos. 51, 61, 62; ROA.1215.

In March 2023, respondent moved for summary judgment in this action based on judicial estoppel. App. 3a-4a. It asked the district court to categorically bar Mr. Keathley from pursuing his personal injury lawsuit simply because he had not disclosed his claims to the bankruptcy court. *Id*. at 4a.

Less than a week later, Mr. Keathley filed an amended schedule notifying the bankruptcy court of the pending personal injury suit. *Id.* No creditor moved to modify Mr. Keathley's existing repayment plan in light of his personal injury claims, and the bankruptcy court did not sanction Mr. Keathley for any delay. *See generally* Bankruptcy Case Dkt. Nos. 66-110; *see also* App. 22a.

Mr. Keathley then submitted an affidavit in the district court attesting that he "never intended to make any misrepresentations" about the existence of his personal injury claims and that, after he told his

bankruptcy attorney about the claims, he "believed [he] had done everything [he] needed to do." ROA.1217. He also submitted an affidavit from his bankruptcy counsel attesting that disclosing the claims to the bankruptcy court "would have had no material effect" on the confirmation of Mr. Keathley's amended bankruptcy plan, and that Mr. Keathley "received no benefit monetarily, or otherwise, from the nondisclosure." ROA.1215.

2. In August 2023, the district court granted respondent's summary judgment motion and dismissed this action, holding that judicial estoppel barred Mr. Keathley from pursuing his personal injury claims given his failure to promptly disclose the claims to the bankruptcy court. App. 39a-56a.

Noting that the case presented "a factual scenario which has arisen frequently in the Fifth Circuit," the district court acknowledged that, as a policy matter, it would be "legitimate" to "give [Mr. Keathley] the benefit of the doubt and to allow him to submit amended bankruptcy filings, based partly upon the belief that it would be better for the bankruptcy creditors to be paid from the eventual proceeds of the lawsuit than to dismiss the action outright." *Id.* at 40a-41a. But the court stated that the merits of such an approach were "irrelevant," because "the Fifth Circuit has clearly opted" for a harsher approach, which considers only whether a debtor knew of the facts underlying his claim and had a possible motive for concealing the claim before concluding that an omission was not inadvertent and applying judicial estoppel. *Id.* at 41a.

"[R]eiterat[ing]" that it was "simply following the directives of the Fifth Circuit," the district court held that Mr. Keathley's failure to disclose his personal

injury suit was not inadvertent. *Id.* at 44a. The court emphasized that, beyond knowledge of the underlying claim, respondent needed to show only that some "'*potential* financial benefit . . . *could* result from concealment.'" *Id.* at 49a-50a (citation omitted). The court concluded that respondent had satisfied this element because the Keathleys' 100% repayment plan did not provide for payment of interest on claims. *Id.* at 50a-52a. The court explained that Mr. Keathley's "arguments of inadvertent error and mistakes of counsel" were irrelevant under the Fifth Circuit's "consciously . . . rigid and unforgiving standards," and the court "ha[d] no choice but to follow those standards." *Id.* at 55a; *see also id.* at 52a-53a.

In reaching its decision, the district court acknowledged that the Fifth Circuit's "stringent approach" would "no doubt[] result in many debtors who did, in fact, make an honest mistake being barred from pursuing potentially meritorious tort claims." *Id.* at 55a-56a. While the court did not determine whether Mr. Keathley "f[ell] in this category," it noted that, if he did, the outcome in his case was "a regrettable yet unavoidable result of the policy decision" the Fifth Circuit made when adopting its "stringent" non-disclosure rule. *Id.* at 55a-56a.

3. Mr. Keathley moved for reconsideration, this time introducing an affidavit from a staff attorney for the Chapter 13 trustee assigned to the Keathleys' case, Kellie Emerson. *Id.* at 58a-60a. Emerson attested that there was "nothing unusual or misleading abut Mr. and Mrs[.] Keathley not disclosing the personal injury action while the personal injury action [was] ongoing," and that it was "not uncommon" in the Eastern District of Arkansas "for debtors to amend their bankruptcy filings to

disclose post-petition claims for personal injury actions prior to the settlement or resolution of the personal injury action." *Id.* at 59a. Emerson further stated that the Keathleys "ha[d] received no benefit from the non-disclosure" and that, even if they had notified the bankruptcy court of the personal injury claims "immediately after the wreck," "it would not have had any effect on the administration of the bankruptcy" or "the amount the Keathleys would have had to pay or the time they would have had to pay it." *Id.* at 59a-60a.

The district court nonetheless denied Mr. Keathley's reconsideration motion. In doing so, the court emphasized that it "ha[d] no power to change the Fifth Circuit's approach" to judicial estoppel in the bankruptcy context "even if it wished to do so," and that Mr. Keathley "should argue in favor of any change in the governing law on appeal, rather than before [the district] court." *Id.* at 34a.

4.a. A panel of the Fifth Circuit affirmed. The court reiterated that, in considering whether Mr. Keathley's nondisclosure was "inadvertent," it was bound by Fifth Circuit precedent to consider only whether he either "lack[ed] knowledge of the undisclosed claims" or "stood to potentially benefit" from their concealment. *Id.* at 12a-14a. As a result, the court dismissed as irrelevant Mr. Keathley's argument that he did not realize he had a duty to disclose his claims to the bankruptcy court. *See id.* at 13a. The court was equally unmoved by Mr. Keathley's evidence that such non-disclosure was routine in the Eastern District of Arkansas in the early stages of a personal injury case. *Id.* at 13a-14a.

The court of appeals then concluded that Mr. Keathley had a plausible motive to mislead—

despite Emerson's affidavit—because his multi-year repayment plan was interest-free and had been extended. *Id.* at 14a. In reaching this conclusion, the panel emphasized circuit precedent "ma[king] clear" that "'the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court.'" *Id.* (citation omitted). The court dismissed Mr. Keathley's arguments for adopting "a more lenient approach" to judicial estoppel, explaining that it was "bound by the law in this circuit as it currently exists." *Id.* at 18a-19a.

b. Judge Haynes concurred in the judgment, "only because it [was] based upon [Fifth Circuit] precedent"—precedent without which she "would have dissented." *Id.* at 20a, 23a. Judge Haynes made clear that she "disagree[d] with [the circuit's] precedent in cases like the present." *Id.* at 20a.

Judge Haynes registered her "doubt that the goals" of judicial estoppel "ha[d] been advanced" by applying the doctrine to bar Mr. Keathley's personal injury action given "evidence that Keathley's failure to disclose the personal injury claim on his bankruptcy schedules was an honest mistake" that "was of little concern to the bankruptcy court and would not impact Keathley's creditors." *Id.* at 21a. She further opined that it made "little sense" for respondent "to benefit from something it ha[d] no involvement in and for which the bankruptcy court [did] not appear to think the plaintiff should be sanctioned." *Id.* at 22a. As she explained, under the Fifth Circuit's rule, respondent would receive an "unwarranted windfall," assuming it caused the crash injuring Mr. Keathley. *Id.*

In addition to "disagree[ing]" with the Fifth Circuit's own precedent, *id.* at 20a, Judge Haynes

observed that "[o]ther circuits take a more holistic approach" to judicial estoppel in the bankruptcy context, under which "judicial estoppel is inappropriate when the bankruptcy proceedings will not suffer and when the alleged bad actors will receive a windfall." *Id.* at 22a (citing cases from the First, Seventh, Ninth, and Eleventh Circuits).

c. The panel denied Mr. Keathley's petition for rehearing. *Id.* at 57a.

5. In late 2024, while this case was pending, the Keathleys completed their Chapter 13 repayment plan. Bankruptcy Case, Dkt. No. 99. Their eligible debts were discharged, and their bankruptcy case was closed. Bankruptcy Case, Dkt. Nos. 106, 110. Yet this action remains barred under the Fifth Circuit's extreme judicial estoppel rule, even though Mr. Keathley continues to suffer from injuries that he sustained as a result of respondent's negligence.

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle for resolving a deeply entrenched circuit split over whether a debtor who fails to disclose a civil claim in bankruptcy filings should be barred from pursuing that claim regardless of whether there is evidence that the omission was made in bad faith. At least five circuits require courts to conclude that a debtor acted in subjective bad faith—and will consider a range of evidence on that question—before applying judicial estoppel. By contrast, the Fifth and the Tenth bar such claims without requiring any evidence concerning the debtor's subjective intent to mislead the bankruptcy court, based on a presumption of deceit whenever there is a *plausible* motive to mislead, which is basically always present given the bankruptcy. Only

this Court can resolve this clear split on a recurring issue of critical importance to debtors and creditors.

I. THERE IS A CLEAR, ACKNOWLEDGED, AND INTRACTABLE CIRCUIT CONFLICT ON THE QUESTION PRESENTED

The question presented has divided the federal courts of appeals. Five circuits require courts to find that a debtor did not subjectively intend to mislead the bankruptcy court before applying judicial estoppel. In direct conflict, two circuits—including the Fifth Circuit below—will apply judicial estoppel to bar an undisclosed claim when a debtor knew of the facts underlying his claim and had some hypothetical motive to conceal it, regardless of his subjective intent to mislead the bankruptcy court. Courts and commentators, including Judge Haynes in the decision below (App. 22a), have recognized this split.

1. At least five circuits—the Eleventh, Ninth, Seventh, Sixth, and Fourth Circuits—hold that courts must find that a debtor had a subjective intent to mislead the court before barring his claims, even if the debtor knew about his underlying claim and had some theoretical motive to conceal it.

a. *Eleventh Circuit.* In *Slater v. United States Steel Corp.*, the en banc Eleventh Circuit revisited—and then overturned—its prior precedents on the question presented, which were "consistent with" the approach still taken in the Fifth and Tenth Circuits. 871 F.3d 1174, 1189 & n.18 (11th Cir. 2017) (en banc). Specifically rejecting the position of the Fifth and Tenth Circuits, the en banc court unanimously concluded that judicial estoppel "may not be applied" when a debtor "intended no deception"—regardless of

whether he "knew about the undisclosed claim[] and had a motive to conceal [it]." *Id.* at 1184-87.

The Eleventh Circuit repudiated its prior rule, under which—like the Fifth Circuit's rule—the mere fact that "the plaintiff could *potentially* benefit from the nondisclosure" was "sufficient to establish that the plaintiff, in fact, intended to deceive the court and manipulate the proceedings." *Id.* at 1182 (emphasis added). In doing so, the court explained that considering "all the facts and circumstances" would "reduce the risk that the application of judicial estoppel will give the civil defendant a windfall at the expense of innocent creditors." *Id.* at 1186.

Citing cases from the Fifth and Tenth Circuits, the Eleventh Circuit acknowledged that "[o]ther circuits . . . have endorsed the inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system." *Id.* at 1189. But the en banc court rejected that approach and explained that it found "the analysis of the Sixth, Seventh, and Ninth Circuits to be more persuasive and conclude[d] that theirs is the better approach." *Id.*

Under *Slater*, courts in the Eleventh Circuit "must consider *all the facts and circumstances*" concerning a debtor's subjective intent to mislead before barring his claim, such as "the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after

the omission was discovered," as well as "any [other] fact or factor [the district court] deems relevant." *Id.* at 1180, 1185 & n.9 (emphasis added).

b. *Seventh Circuit.* The Seventh Circuit likewise has held that, for judicial estoppel to apply, a defendant must establish that the plaintiff "filed incomplete schedules with the subjective intent to conceal her lawsuit." *Spaine v. Community Contacts, Inc.*, 756 F.3d 542, 548 (7th Cir. 2014). As the court held in *Spaine*, "[h]onest mistakes and oversights" cannot trigger judicial estoppel. *Id.* Applying this rule, the Seventh Circuit has reversed the grant of summary judgment for a defendant because the defendant "made no effort to establish that [the plaintiff] had filed incomplete schedules with the subjective intent to conceal her lawsuit." *Id.* Citing Ninth Circuit precedent, the court held that "the universal motive to conceal" an asset in bankruptcy is insufficient to establish a subjective intent to mislead. *Id.* (quoting *Ah Quin v. County of Kauai Dep't of Transp.,* 733 F.3d 267, 276-77 (9th Cir. 2013)).

c. *Sixth Circuit.* The Sixth Circuit similarly asks "not only whether the debtor had a motive to conceal undisclosed claims, but also whether that failure to disclose was done in bad faith" before applying judicial estoppel. *Stanley v. FCA US, LLC*, 51 F.4th 215, 221 (6th Cir. 2022); *see also, e.g.*, *id.* (explaining that the Sixth Circuit's test is "much like" *Slater*'s framework); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476-77 (6th Cir. 2010) (explaining that, in assessing inadvertence, the court considers the "absence of bad faith," not merely any "knowledge of the factual basis of the undisclosed claims," and "motive for concealment" (citations omitted)). Thus, in *Stanley,* the court considered whether "the

omission was made in bad faith," looking to the surrounding circumstances. 51 F.4th at 221.

d. *Fourth Circuit.* The Fourth Circuit has also held that courts weighing judicial estoppel in this context must undertake "a full analysis of all the 'specific facts and circumstances'" of a plaintiff's case to determine whether the plaintiff "'intentionally misled the court to gain [an] unfair advantage.'" *Martineau v. Wier*, 934 F.3d 385, 393-96 (4th Cir. 2019) (alteration in original) (citations omitted). In so holding, the court specifically rejected the Fifth Circuit's "bankruptcy-specific presumption" of bad faith and the Tenth's Circuit's "similar rule," explaining that "debtors always have a motive to conceal" and "the nature of the judicial estoppel inquiry does not lend itself to" such "blanket presumption[s]." *Id.* at 389, 393-94. The court also explained that "reliance on a presumption of bad faith runs the risk of producing a decidedly non-equitable result"—"a potential 'windfall'" to the civil defendant. *Id.* at 396 (citation omitted). The court further observed that "the last two circuit courts to consider the presumption both have rejected it in thoroughly reasoned opinions." *Id.* at 394 (citing Eleventh and Ninth Circuit cases).

e. *Ninth Circuit.* The Ninth Circuit has also rejected the Fifth and Tenth Circuits' "narrow interpretation" of "'inadvertence,'" at least where a debtor reopens his bankruptcy proceedings and files an amended schedule. *Ah Quin*, 733 F.3d at 271, 276. In those circumstances, "[t]he relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset." *Id.* at 276. Instead, the court "must determine whether the omission occurred by accident or was

made without intent to conceal" by probing "the plaintiff's subjective intent when filling out and signing the bankruptcy schedules." *Id.* at 276-77.

2. In sharp contrast, the Fifth and Tenth Circuits hold that judicial estoppel is essentially always warranted when a debtor fails to disclose a claim to the bankruptcy court, irrespective of the debtor's subjective intent to mislead.

a. *Fifth Circuit.* The Fifth Circuit deems a debtor's failure to disclose a lawsuit "inadvertent" or a "'mistake'" only when "the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206-07, 210 (5th Cir. 1999) (emphasis and citation omitted). The debtor's subjective intent is irrelevant under this framework. Instead, the fact that a plaintiff had a "*possible* financial motive for the nondisclosure" is sufficient to trigger estoppel, regardless of whether there is any evidence that the debtor actually harbored bad faith. App. 21a (Haynes, J., concurring in the judgment) (emphasis added); *see id.* at 14a (panel opinion) (emphasizing that Mr. Keathley "stood to *potentially* benefit by concealing his personal injury claim" (emphasis added)). So arguments that a debtor did not intend to mislead the bankruptcy court—for example, that he "relied on the advice of [his] attorney" in not disclosing a claim—are "unavailing." *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 130 (5th Cir. 2013).

The Fifth Circuit has never found its inadvertence test satisfied in a precedential decision. That is unsurprising; the "exception" is all but illusory. In particular, debtors are "almost never" able to show that they have "no motive for . . . concealment."

William H. Burgess, *Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds*, The Federal Lawyer 56 (May 2015), https://www.fedbar.org/wp-content/uploads/2015/05/feature7-may15-pdf-1.pdf (alteration in original). That is because, under the Fifth Circuit rule, it is enough that some "*potential* financial benefit . . . *could* result from concealment." *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 273 (5th Cir. 2015) (emphasis added). And that is an incredibly low bar—the Fifth Circuit considers "a motive to conceal [to be] 'self-evident'" in bankruptcy cases given the "'potential financial benefit resulting from the nondisclosure.'" *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 628 (5th Cir. 2018) (citation omitted); *see also* App. 14a (debtor "almost always" has a sufficient motive to conceal (citation omitted)).[1]

Given the nearly insurmountable standard for showing inadvertence in the Fifth Circuit, judicial estoppel is "virtually mandatory in all cases of non-disclosure where a party could be said to 'know the facts of' his claim." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 271 (5th Cir. 2012) (Haynes, J., dissenting); *see, e.g.*, *Superior Crewboats, Inc. v. Primary P&I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 336 (5th Cir. 2004) (concluding that judicial estoppel applied as a matter of law and remanding with instructions to dismiss personal injury claim).

b. *Tenth Circuit.* The Tenth Circuit likewise considers a debtor's failure to disclose claims to the

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[1] The only other way to show inadvertence is if the debtor did not know "the facts underlying" his claim when he failed to disclose it, *In re Flugence*, 738 F.3d at 131—which is almost never shown.

bankruptcy court inadvertent only when "a debtor has both knowledge of the [undisclosed] claims and a motive to conceal them." *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *accord, e.g.*, *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1093-95 (10th Cir. 2013) ("knowledge and a motive to conceal" is enough to "'infer deliberate manipulation'" and thus defeat a claim of "inadvertence or mistake" (citation omitted)). In the Tenth Circuit, as in the Fifth, a debtor's "assertion that he simply did not know better and his attorney 'blew it' is insufficient to withstand application of" judicial estoppel. *Eastman*, 493 F.3d at 1159.

3. Courts and commentators recognize the circuit split on this issue. In 2017, the Eleventh Circuit, previously in the minority, switched its position and recognized that a "circuit split exist[ed]" on whether courts must find bad faith before barring a claim. *Slater*, 871 F.3d at 1189. The Fourth and Ninth Circuits have highlighted the split as well and expressly confronted and rejected what is now the minority view. *See Martineau*, 934 F.3d at 394; *Ah Quin*, 733 F.3d at 271-77; *see id.* at 279-80 (Bybee, J., dissenting) (arguing that the Ninth Circuit's approach is "contrary" to that of other "circuits, as the majority admits"). Judge Haynes below acknowledged that "[o]ther circuits take a more holistic approach than [the Fifth Circuit]." App. 22a (concurring in the judgment). And as the above discussion demonstrates, courts of appeals considering this issue have regularly borrowed from—*and disagreed with*—cases from other circuits.

Academic commentators and practitioners likewise have highlighted that "courts of appeals are split" on how to analyze "inadvertence" in the

bankruptcy context, meaning the chances of "avoid[ing]" "dismiss[al]" when a debtor fails to disclose a claim "depend on which jurisdiction she is in." Burgess, *supra*, at 1, 54, 58-59; *see also Current Circuit Splits*, 14 Seton Hall Circuit Rev. 279, 282 (2018); Michael Reiss et al., *Judicial Estoppel Can Bar a Former Debtor From Recovering for Meritorious Litigation Claims* at n.1, Ass'n of Bus. Trial Laws. Rep. - Los Angeles (Summer 2023), https://www.lw.com/people/admin/upload/SiteAttachments/Galdes-Reiss-Schneer_summer2023.pdf. The conflict, in short, is clear.

Whether a debtor who failed to disclose a potential or pending lawsuit to the bankruptcy court but had no subjective intent to mislead should nonetheless be barred from pursuing his claims should not vary based on geographic circumstance. Mr. Keathley strongly believes that the Fifth Circuit's position on the question presented is wrong. But if the Court disagrees, then there is no basis for allowing these undisclosed claims to proceed in five other circuits. Either way, there should be one national rule on this important and frequently recurring question. That is particularly true given the Constitution's explicit call for "uniform" rules "on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Only this Court can resolve this split.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

The exceptional practical importance of the question presented underscores the need for review.

1. The question presented arises with enormous frequency. Over 7 million Chapter 7 and Chapter 13

bankruptcies have been filed since 2015.[2] During that period, district courts around the country regularly confronted bankruptcy-related judicial estoppel arguments. One commentator observed that "whether to judicially estop a plaintiff from continuing to prosecute a lawsuit that was not disclosed in bankruptcy . . . appears to arise several times each week in the federal and state courts." Burgess, *supra*, at 55; *see also Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 643 n.3 (11th Cir. 2019) (stating that over 80% of a set of 237 cases within the Eleventh Circuit considering judicial estoppel over roughly fourteen years arose in the bankruptcy context). Since 1999, the Fifth Circuit alone has issued more than *twenty* decisions concerning judicial estoppel in the bankruptcy context.[3] Whatever the

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[2] *See* U.S. Courts, Bankruptcy Filing Statistics, https://www.uscourts.gov/data-news/reports/statistical-reports/bankruptcy-filings-statistics (follow link to "Data Visualizations"; then select "Cases Filed By Chapters"; then filter for Chapters 7 and 13) (last visited June 26, 2025).

[3] *In re Coastal Plains, Inc.*, 179 F.3d 197; *Kamont v. West*, 83 F. App'x 1 (5th Cir. 2003); *In re Superior Crewboats, Inc.*, 374 F.3d 330 (5th Cir. 2004); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598 (5th Cir. 2005); *Banks v. Corrections Corp. of Am.*, 218 F. App'x 366 (5th Cir. 2007); *Kane v. National Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008); *Kaufman ex rel. Kaufman v. Robinson Prop. Grp. L.P.*, 373 F. App'x 494 (5th Cir.), *cert. denied*, 562 U.S. 927 (2010); *Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Texas Wyoming Drilling, Inc.)*, 647 F.3d 547 (5th Cir. 2011); *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011); *Love*, 677 F.3d 258; *Strujan v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 532 F. App'x 551 (5th Cir.), *cert. denied*, 571 U.S. 1059 (2013); *In re Flugence*, 738 F.3d 126; *Jackson v. Goins Underkofler Crawford & Langdon, L.L.P. (In re Jackson)*, 574 F. App'x 317 (5th Cir. 2014); *Long*, 798 F.3d 265; *Allen v. C & H*

precise number, the frequency with which this issue arises—and number of cases impacted—is great.

The frequency with which the question presented recurs is hardly surprising: People who file for bankruptcy are, by definition, insolvent and rarely able to afford to pay sophisticated counsel to spend extensive time preparing their filings. And mistakes on bankruptcy filings are inevitable and commonplace. *See, e.g.*, *Slater v. United States Steel Corp.*, 820 F.3d 1193, 1240 (11th Cir. 2016) (Tjoflat, J., specially concurring) (noting that "[o]missions frequently occur in the Statement of Financial Affairs and Schedules of Assets and Liabilities"), *vacated on reh'g en banc*, 871 F.3d 1174 (11th Cir. 2017); *Cadle Co. v. Mitchell (In re Mitchell)*, No. 03-CV-281, 2003 WL 22016948, at *6 (N.D. Tex. July 28, 2003) (similar), *aff'd and remanded*, 102 F. App'x 860 (5th Cir. 2004).

The Fifth and Tenth Circuits' rigid stance on the question presented has profound consequences for innocent debtor-plaintiffs like Mr. Keathley. Under their framework, debtor-plaintiffs can automatically lose claims for discrimination, personal injuries, and other wrongs, as well as the dignitary value of having their day in court, simply because they did not disclose a claim to the bankruptcy court. *See, e.g.*,

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Distributors, L.L.C., 813 F.3d 566 (5th Cir. 2015); *Smith v. Dallas Cnty. Hosp. Dist.*, 651 F. App'x 279 (5th Cir. 2016); *Simpson v. Kelly Servs., Inc.*, 689 F. App'x 351 (5th Cir. 2017); *Feuerbacher v. Wells Fargo Bank Nat'l Ass'n*, 701 F. App'x 297 (5th Cir. 2017); *Fornesa*, 897 F.3d 624; *Cox v. Richards*, 761 F. App'x 244 (5th Cir. 2019); *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 F. App'x 38 (5th Cir.), *cert. denied*, 140 S. Ct. 75 (2019); *Wal-Mart Stores, Inc. v. Parker (In re Parker)*, 789 F. App'x 462 (5th Cir. 2020); App. 1a-23a.

Grainger v. Meritan, Inc., No. 09-CV-271, 2011 WL 824484, at *4 (S.D. Miss. Mar. 2, 2011) (claims for sex and pregnancy discrimination, among others); *Smith v. Dallas Cnty. Hosp. Dist.*, No. 13-CV-792, 2014 WL 6991482, at *6 (N.D. Tex. Dec. 9, 2014) (claims for race discrimination and retaliation); *Simpson v. Kelly Servs., Inc.*, No. 14-cv-972, 2016 WL 9450593, at *1 (S.D. Miss. Sept. 26, 2016) (claims for violations of Americans with Disabilities Act and Family Medical Leave Act ("FMLA")), *aff'd*, 689 F. App'x 351 (5th Cir. 2017); *Fornesa*, 897 F.3d at 627 (claim for wrongful foreclosure); *Gifford v. Lowe's Home Centers, LLC*, No. 20-CV-102, 2022 WL 501743, at *1 (N.D. Okla. Jan. 5, 2022) (claims for violation of and retaliation under the FMLA). And innocent creditors lose out, too, when applying judicial estoppel "vaporiz[es] assets that could be used for the creditors' benefit." *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006) (Easterbrook, J.).

The question presented also has important implications for the public more broadly. Judicial estoppel can provide "an unwarranted windfall" to wrongdoers, App. 22a (Haynes, J., concurring in the judgment)—either by barring claims altogether or by limiting a defendant's liability, *see Reed v. City of Arlington*, 650 F.3d 571, 573, 579 (5th Cir. 2011). That result "do[es] nothing to protect the integrity of the courts." *Ah Quin*, 733 F.3d at 276. It not only leaves victims without redress, but also eliminates a deterrent against future misconduct against others. This "undermines enforcement of the substantive law." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4477.9 (3d ed. 2025, Westlaw). At the very least, a court should have to

find that a plaintiff *actually* intended to manipulate the legal system before dismissing such claims.

This case illustrates the pernicious consequences of the Fifth Circuit's approach. Because Mr. Keathley did not immediately disclose his claims to the bankruptcy court, he has been barred from receiving *any* compensation from respondent for serious injuries that required costly medical care and which continue to impact his daily life. *See* ROA.2410-16. It made zero difference under the Fifth Circuit's rigid rule that "there was evidence that Keathley's failure to disclose the personal injury claim[s] on his bankruptcy schedules was an honest mistake," or that the delay in disclosing the claims did "not impact Keathley's creditors." App.21a (Haynes, J., concurring in the judgment). Meanwhile, respondent—the party allegedly responsible for Mr. Keathley's injuries—gets off scot-free for tortious conduct, even though respondent was indisputably not harmed by Mr. Keathley's delay in disclosing the claims because respondent is "totally unrelated to the bankruptcy." *Id.* This makes no sense.

2. This case presents an ideal vehicle for resolving the circuit conflict. Both lower courts reached a result that they believed was required by the Fifth Circuit's "rigid and unforgiving" precedents. App. 55a (district court August 2023 opinion); *see id.* at 18a-19a (panel opinion). Judge Haynes wrote separately to note her disagreement with the Fifth Circuit's rule, explaining that "preventing Keathley's personal injury action might undermine the judicial system the [judicial estoppel] doctrine claims to protect" and result in an "unwarranted windfall" to the defendant allegedly "responsible for the car crash." *Id.* at 21a-22a. And this case would have come out differently in circuits

that follow the majority rule, which would have required subjective bad faith on Mr. Keathley's part.

Despite his injuries, Mr. Keathley promptly notified his bankruptcy attorney of his motor vehicle accident and the basis for his resulting personal injury claims and reasonably relied on his bankruptcy counsel to take any necessary steps. ROA.1217. Mr. Keathley also submitted evidence that his bankruptcy counsel's failure to promptly bring the personal injury claims to the bankruptcy court's attention was in line with the regular practice of attorneys and debtors in the relevant district. App. 59a. And he filed a sworn affidavit attesting that he "never intended to make any misrepresentations" about the existence of his personal injury claims. ROA.1217. These sorts of mitigating facts would preclude the application of judicial estoppel under a test like the Eleventh Circuit's. *See, e.g.*, *Ryder v. Lifestance Health Grp., Inc.*, No. 22-cv-2050, 2024 WL 1119821, at *4-5 (M.D. Fla. Feb. 12, 2024) (rejecting application of judicial estoppel where, among other things, the debtor had "discussed the possibility of suing [the defendant] with his bankruptcy lawyer" and "relatively 'quickly amended'" his bankruptcy schedule "'once [his] counsel discovered the issue with the initial disclosure'" (alteration in original) (citation omitted)).

Not only is this case an ideal vehicle—this is also the right time for this Court to resolve this issue. Most circuits have weighed in on the question presented. *See supra* Section I*, see also, e.g.*, *Slater*, 871 F.3d at 1189 (recognizing that the Fifth and Tenth Circuits apply tests "consistent" with the Eleventh Circuit's previous caselaw but "find[ing] the analysis of the Sixth, Seventh, and Ninth Circuits to be more persuasive"). And the minority view of the

Fifth and Tenth Circuits—which the Fifth Circuit has followed for decades—is entrenched and not going away without this Court's intervention.

III. THE DECISION BELOW IS WRONG

The Fifth Circuit's minority position on the question presented is wrong. It flouts this Court's precedents, the equitable principles judicial estoppel seeks to vindicate, and Congress's policy decisions about the bankruptcy system.

1. As this Court has explained, the doctrine of judicial estoppel is designed to thwart "deliberate[]" and "intentional" switches in a litigant's position aimed at securing an unfair advantage. *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 753 (2001) (citations omitted). In other words, "[t]he essential function of judicial estoppel is to prevent *intentional* inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery." *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (emphasis added); *see, e.g.*, *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001) ("[J]udicial estoppel is unwarranted unless the party changed his or her position 'in bad faith—i.e., with intent to play fast and loose with the court.'" (citation omitted)).

Yet the Fifth Circuit's test ignores evidence of subjective intent *altogether*—instead relying of the mere existence of a *potential* motive to mislead. *See supra* at 9-10. That misdirected inquiry fails to "advance[]" "the goals of the [judicial estoppel] doctrine." App. 21a (Haynes, J., concurring in the judgment). As the unanimous en banc Eleventh Circuit explained, "equity cannot condone a defendant's avoidance of liability through a doctrine

premised upon intentional misconduct without establishing such misconduct." *Slater*, 871 F.3d at 1188. The Fifth Circuit's approach unfairly presumes the worst of individual debtors as a class, harkening back to long-ago discredited views of bankruptcy—and those who find themselves in bankruptcy.

The Fifth Circuit's approach violates the animating rationales of judicial estoppel in other ways, too. As an equitable doctrine, judicial estoppel is—by definition—supposed to yield *equitable* results. *E.g.*, *New Hampshire*, 532 U.S. at 749-51. But the Fifth Circuit's unforgiving rule often "produc[es] a decidedly non-equitable result"—benefitting alleged wrongdoers that have engaged in conduct ranging from discrimination in violation of federal law to tortious acts, *see supra* at 22-23, at the expense of innocent debtors and innocent creditors—"counter to the very underpinnings of judicial estoppel." *Martineau*, 934 F.3d at 396; *see supra* at 23.[4] Moreover, dismissing claims that may have real value to innocent creditors does far more to undermine the "integrity of the [courts]" than does permitting a debtor to temporarily adopt (and then clarify or

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[4] The harsh consequences of the Fifth Circuit's rule are especially troubling in the Chapter 13 context because Chapter 13 debtors in different parts of the country may have different obligations for disclosing post-petition or post-confirmation claims. *See In re Boyd*, 618 B.R. 133, 147-57 (Bankr. D.S.C. 2020) (explaining that the Bankruptcy Code and Rules do not impose such a duty, but that some courts have done so); *see also* 9 *Collier on Bankruptcy* ¶ 1007.08 (16th ed. 2025) (noting that Bankruptcy Rule 1007(h) does not require scheduling all post-petition property and opining that such a requirement "would be completely impracticable").

correct) two allegedly contrary positions. *New Hampshire*, 532 U.S. at 749-50 (citation omitted).

The Fifth Circuit's rigid "inadvertence" test also contradicts the flexible nature of the equitable judicial estoppel doctrine. This Court has held time and again that "[e]quity eschews mechanical rules." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Instead, the "exercise of a court's equity power" generally "must be made on a case-by-case basis"—considering *all* the relevant factors. *Holland v. Florida*, 560 U.S. 631, 649-50 (2010) (citation omitted). Moreover, this Court has emphasized that the equitable doctrine of judicial estoppel is not amenable to "inflexible prerequisites or an exhaustive formula." *New Hampshire*, 532 U.S. at 751; *see also Zedner*, 547 U.S. at 504. The Fifth Circuit's "rigid" and "unforgiving" presumption of bad faith, App. 55a, exemplifies one such forbidden "mechanical rule."

2. The Fifth Circuit's rule also undermines Congress's policy decisions about the bankruptcy system. "[T]he Bankruptcy Code and Rules liberally permit debtors to amend their disclosures when an omission is discovered." *Slater*, 871 F.3d at 1186. It is "inconsistent" with that regime—"which recognize[s] that omissions occur and liberally allow[s] amendment and correction of disclosures—to infer that a debtor who failed to disclose a lawsuit necessarily meant to manipulate the bankruptcy proceedings." *Id.* at 1187.

Nor is the Fifth Circuit's rigid rule justified in the name of deterrence, as bankruptcy courts already have a number of tools in their arsenal for "punish[ing] a debtor who [they] determine[] purposefully tried to hide assets." *Id.* For example, a "bankruptcy court or trustee can impose sanctions,

including denial of a discharge." *Ah Quin*, 733 F.3d at 275; *see* Fed. R. Bankr. P. 9011(c). "And, of course, a case may be referred to the United States Attorney's office for criminal prosecution." *Ah Quin*, 733 F.3d at 275; *see* 18 U.S.C. § 152 (criminalizing the knowing and fraudulent concealment of assets and making of false oaths or claims). Given the "extensive range of perfectly adequate criminal and civil legal remedies" Congress has provided for "punish[ing] oath-breaking debtors," *Slater*, 820 F.3d at 1239 (Tjoflat, J., specially concurring), deterrence does not justify loading the dice in favor of applying estoppel to bar civil claims unrelated to the bankruptcy.

Finally, the Fifth Circuit's rule is contrary to bankruptcy's policy of granting debtors a "'fresh start.'" *Harris v. Viegelahn*, 575 U.S. 510, 513 (2015). The debtor here successfully completed his court-approved bankruptcy plan, repaying his creditors. Yet the Fifth Circuit's harsh rule has terminated a personal injury action against a defendant with no connection to the bankruptcy, depriving Mr. Keathley of a damages remedy that would redress the personal and economic hardship inflicted on him by respondent's tortious conduct in the form of medical expenses, lasting pain, and a more limited ability to secure gainful employment. All that severely dampens the fresh start to which Mr. Keathley is entitled under the bankruptcy laws.

The Fifth Circuit's erroneous rule is eliminating the potentially valid claims of ordinary Americans who, having found themselves in bankruptcy, already face enough hardship in righting their affairs, or, as is true here, have successfully navigated bankruptcy to seek a fresh start. This Court's review is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 27, 2025

APPENDIX

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[2025 WL 673434]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States
Court of Appeals
Fifth Circuit
FILED
March 3, 2025
Lyle W. Cayce
Clerk

No. 24-60025

THOMAS KEATHLEY,

Plaintiff—Appellant,

versus

BUDDY AYERS CONSTRUCTION, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:21-CV-261

Before HIGGINBOTHAM, STEWART, and HAYNES, *Circuit Judges*.

PER CURIAM:*

In August 2021, Thomas Keathley was involved in a motor vehicle collision with a driver employed by

* This opinion is not designated for publication. *See* 5th CIR. R. 47.5.

Buddy Ayers Construction, Inc. ("BAC"). As a result, Keathley filed this personal injury suit against BAC alleging claims of negligence and vicarious liability. BAC then moved for summary judgment on grounds of judicial estoppel because Keathley had failed to disclose his cause of action against BAC in his pending bankruptcy proceedings. The district court granted BAC's summary judgment motion and dismissed Keathley's lawsuit. Keathley moved for reconsideration of the district court's judgment and the district court denied his motion. Keathley now appeals the district court's summary judgment in favor of BAC dismissing his lawsuit on grounds of judicial estoppel. He also appeals the district court's denial of his motion for reconsideration. Because we conclude that the district court did not abuse its discretion in dismissing Keathley's lawsuit and in denying his motion for reconsideration, we AFFIRM.

I. FACTUAL & PROCEDURAL BACKGROUND

On December 27, 2019, Keathley filed a Chapter 13 Voluntary Petition for Bankruptcy and a Chapter 13 Plan in the United States Bankruptcy Court for the Eastern District of Arkansas. A few months later in March 2020, Keathley filed an Amended Plan, and the bankruptcy court confirmed the plan in April 2020. According to the record and Keathley's deposition testimony, he had also previously filed for bankruptcy in 2001, 2003, and 2015.

On August 23, 2021, Keathley was involved in a motor vehicle collision with David Fowler in Alcorn, Mississippi. At the time of the collision, Fowler was employed as a truck driver for BAC. Keathley claimed that within hours of the collision he began experiencing pain in his back and neck and sought

medical treatment. One day later, Keathley retained a personal injury attorney. Then on December 29, 2021, Keathley filed his personal injury lawsuit against BAC and Fowler in the United States District Court for the Northern District of Mississippi.[1] Although Keathley claims that he informed his bankruptcy attorney, Bart Ziegenhorn, that he had filed a personal injury lawsuit, neither Keathley nor Ziegenhorn disclosed the personal injury cause of action to the bankruptcy court. Several months later on March 1, 2022, Keathley filed a Modified Chapter 13 Plan with the bankruptcy court, but again failed to disclose his personal injury lawsuit. On June 27, 2022, Keathley filed two additional Amended/Modified Plans with the bankruptcy court, and once again, failed to disclose his pending personal injury lawsuit. The bankruptcy court confirmed Keathley's Modified Plan on July 20, 2022.

In December 2022, Keathley filed his first amended complaint in the personal injury lawsuit against BAC, requesting additional damages but again, failed to advise the bankruptcy court of the personal injury lawsuit. On March 30, 2023, BAC moved for summary judgment on Keathley's personal

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[1] Keathley's personal injury lawsuit was filed in federal district court pursuant to 28 U.S.C. § 1332. Because the existence of diversity jurisdiction under § 1332 was not clear from the record when this case was originally submitted on appeal, this court issued a limited remand for the district court to make a determination as to whether diversity jurisdiction exists in this case. On remand, the district court determined that complete diversity exists among the parties herein, so we now proceed to the merits.

injury claims on grounds of judicial estoppel.[2] In its motion, BAC argued that Keathley should be judicially estopped from pursuing his personal injury lawsuit due to his failure to notify the bankruptcy court of the pending cause of action. In support, BAC pointed to Keathley's continuing duty to disclose all assets to the bankruptcy court, which included all contingent and unliquidated claims. BAC argued that Keathley breached this duty by failing to disclose his personal injury lawsuit, even though he had filed to amend his Chapter 13 Plan at least three times after he filed his lawsuit against BAC.

Four days later, on April 4, 2023, Keathley filed an Amended Schedule notifying the bankruptcy court that he had a pending personal injury lawsuit against BAC. On April 12, 2023, Keathley responded to BAC's motion for summary judgment. Then on April 14, 2023, Keathley filed a motion in the bankruptcy court seeking approval of a settlement that he had received in December 2022 for a workers' compensation claim that he filed after the August 2021 vehicle collision with BAC.

On August 8, 2023, the district court granted summary judgment in favor of BAC on grounds of judicial estoppel. In its order, the district court observed that, although Keathley "was aware of his cause of action in [the personal injury] case, . . . he nevertheless filed Second, Third and Fourth Amended Chapter 13 Bankruptcy Plans which failed to list this cause of action as an asset of his

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[2] Fowler also moved for summary judgment on Keathley's personal injury claims on grounds of judicial estoppel. On June 6, 2023, however, the parties stipulated to the dismissal with prejudice of Keathley's claims against Fowler.

bankruptcy estate." The district court then concluded that, under controlling Fifth Circuit precedent, Keathley's failure to disclose his pending personal injury cause of action as an asset in the bankruptcy proceedings resulted in his being judicially estopped from proceeding with his lawsuit against BAC. The district court explained that it was bound by longstanding Fifth Circuit jurisprudence which had been developed to protect "the integrity of the bankruptcy process and the federal courts as a whole[.]" The district court further noted that this court's approach "give[s] clear warning to any debtors thinking of failing to disclose lawsuits [because] if their deception is discovered, they will not simply be allowed to plead an honest mistake and file an amended disclosure." The district court then issued a final judgment dismissing Keathley's lawsuit against BAC.

On September 9, 2023, pursuant to Rule 59(e), Keathley filed a "Motion to Alter or Amend Judgment" requesting that the district court reconsider its prior ruling and deny BAC's motion for summary judgment. *See* FED. R. CIV. P. 59(e). In his motion, Keathley contended that "newly discovered evidence" demonstrated that judicial estoppel was not appropriate in his case. To that end, he attached the affidavit of Kellie Emerson, a staff attorney for the office of the Chapter 13 Trustee for the Eastern and Western Districts of Arkansas. In her affidavit, Emerson stated that "there is nothing unusual or misleading about [Keathley] not disclosing [to the bankruptcy court] the personal injury action while the personal injury action is ongoing." She continued that "[i]n the Eastern District of Arkansas, it is not uncommon for debtors to amend their bankruptcy

filings to disclose post-petition claims for personal injury actions prior to the settlement or resolution of the personal injury action." According to Keathley, Emerson's affidavit supported his "position that the non-disclosure of the personal injury claims was inadvertent."

On December 14, 2023, the district court issued an order denying Keathley's Rule 59(e) motion for reconsideration. In its order, the district court made two key observations. First, it noted that, as far as it could discern, Emerson's affidavit was not "newly discovered evidence" because nothing prevented Keathley from obtaining and submitting it prior to the district court issuing its ruling on BAC's summary judgment motion. As such, it determined that Emerson's affidavit failed to constitute a proper basis for a rehearing motion. The district court then proceeded to offer dicta rejecting Keathley's argument that Emerson's affidavit supported his position that his non-disclosure of his personal injury suit was "inadvertent." To the contrary, the district court reasoned that Emerson's affidavit, if true, suggested that "it is a common practice among bankruptcy attorneys in the Eastern District of Arkansas, presumably with full knowledge of what they are doing, not to list tort claims until shortly before they are settled or otherwise resolved." Consequently, the district court explained, "bankruptcy debtors in that district, acting through their attorneys, routinely make a conscious and intentional decision *not* to list tort claims which they know about until such time as those claims are close to being resolved." According to the district court, bringing this common practice to light undermined, rather than supported, Keathley's position that his non-disclosure was inadvertent. If

anything, the district court reasoned, Emerson's affidavit suggested that Keathley's non-disclosure may have been intentional which cut against him given "that a crucial factor in deciding judicial estoppel issues in the Fifth Circuit is whether a debtor can be inferred to have acted *intentionally* in failing to list a tort claim as an asset of the bankruptcy estate."

Keathley appealed the district court's summary judgment order and judgment dismissing his case, as well as its order denying his Rule 59(e) motion for reconsideration.

II. STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). However, "because judicial estoppel is an equitable doctrine, and the decision whether to invoke it is within the court's discretion, we review for abuse of discretion the lower court's decision to invoke this doctrine." *Allen v. C & H Distrib., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (cleaned up). We will conclude that "[a] district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Id.* (citations omitted).

We also review a district court's denial of a Rule 59(e) motion to alter or amend a judgment for abuse of discretion. *See Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 184 (5th Cir. 2018). "However, if a party appeals from the denial of a Rule 59(e) motion that is solely a motion to reconsider a judgment on its merits, *de novo* review is appropriate." *Piazza's Seafood*

World, L.L.C. v. Odom, 448 F.3d 744 749 (5th Cir. 2006). The applicable standard depends on whether the district court considered the "newly discovered" materials attached to the motion. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004). "If the materials were considered by the district court, and the district court still grants summary judgment, the appropriate appellate standard of review is *de novo*." *Id.* "However, if the district court refuses to consider the materials, the reviewing court applies the abuse of discretion standard." *Id.* "Under this standard of review, the district court's decision and decision-making process need only be reasonable." *Id.*

III. DISCUSSION

Keathley raises a number of issues on appeal, many of which are encompassed in his broader argument that the district court abused its discretion in concluding that BAC was entitled to summary judgment on the basis of judicial estoppel. Keathley also contends that the district court abused its discretion in declining to consider Emerson's affidavit in his Rule 59(e) motion. Finally, he urges this court to reconsider its judicial estoppel jurisprudence and "bring it more in line with other [c]ircuits." We are unpersuaded.

A. Judicial Estoppel

We first address Keathley's argument that the district court abused its discretion in granting summary judgment in favor of BAC on grounds of judicial estoppel. In support of his position, he contends that the district court "made errors of law and misapplied the law to the facts by failing to conduct a specific fact-based inquiry into whether the elements of judicial estoppel had been met and

instead applying judicial estoppel as an inflexible *per se* rule." He further argues that he submitted evidence to the trial court establishing that his failure to disclose his personal injury claim to the bankruptcy court was inadvertent and in good faith which "create[d] a genuine factual dispute on the question of inadvertence such that summary judgment was inappropriate." He also asserts that the facts of his case are distinguishable from prior Fifth Circuit caselaw applying judicial estoppel and thus summary judgment in favor of BAC was improper in this case. We disagree in all respects.

"Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation." *Allen*, 813 F.3d at 572 (citations omitted). The purpose of the doctrine "is to protect the integrity of the judicial process, by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." *Id.* (cleaned up). "Judicial estoppel has three elements: (1) The party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Id.* (citation omitted).

"[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) (internal quotation marks and citation omitted). For this reason, "the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims." *Id.* (alteration omitted); *see* 11 U.S.C. § 521(1). "The obligation to disclose pending and unliquidated claims in

bankruptcy proceedings is an ongoing one." *Id.* Relevant here, "[t]he disclosure requirement pertains to potential causes of action as well." *Id.*

"[J]udicial estoppel is not governed by inflexible prerequisites or an exhaustive formula for determining its applicability, and numerous considerations may inform the doctrine's application in specific factual contexts." *Id.* (cleaned up). Nevertheless, "[t]his court has noted that judicial estoppel is particularly appropriate where a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Id.* at 261–62 (cleaned up). Still, "[j]udicial estoppel will not apply if the non-moving party's failure to disclose was inadvertent, meaning that he did not know of his inconsistent position or had no motive to conceal it from the court." *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 F. App'x 38, 43 (5th Cir. 2019) (unpublished) (citing *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 601 (5th Cir. 2005)). "Whether a debtor's failure to disclose claims was inadvertent presents a question of fact." *Love*, 677 F.3d at 262 (citation omitted).

We now turn to the first two elements of judicial estoppel: (1) whether Keathley has "asserted a legal position that is plainly inconsistent with a prior position"; and (2) whether the bankruptcy court "accepted the prior position[.]" *Allen*, 813 F.3d at 572. Keathley argues that he did not take a position in his bankruptcy proceedings that was inconsistent with his personal injury claims against BAC because (1) his personal injury suit was not pending at the time he originally filed his Chapter 13 Petition with the bankruptcy court and (2) none of the Amended Chapter 13 Plans that he submitted after his personal

injury lawsuit was pending contained any statements regarding his assets. He further argues that "[g]iven that no such inconsistent positions were taken, it would be impossible for the bankruptcy court to have accepted any inconsistent positions." His arguments, however, do not withstand the controlling law of this circuit.

As this court has consistently held, "the law on disclosure [is] well settled: Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action." *In re Flugence*, 738 F.3d 126, 129 (5th Cir. 2013) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 207–08 (5th Cir. 1999) ("The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action."); *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004) ("The duty to disclose is continuous."); *Jethroe*, 412 F.3d at 600 ("The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one."); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384–85 (5th Cir. 2008) ("Pursuant to the Bankruptcy Code, debtors are under a continuing duty to disclose all pending and potential claims.")). Thus, it makes no difference that Keathley's personal injury lawsuit was not pending at the time he initially filed his Chapter 13 Petition with the bankruptcy court because the duty of disclosure is a continuing one. *See id.* As the record reflects, he filed three Amended/Modified Chapter 13 Plans with the bankruptcy court *after* he filed his personal injury lawsuit against BAC. Accordingly, even if Keathley failed to notify the bankruptcy court of his personal injury suit when he initially filed it, each of these

post-petition filings represented another opportunity for him to make the disclosure. Yet he chose not to disclose his cause of action not only when he originally filed it, but also three additional times thereafter. Because Keathley "had an affirmative duty to disclose [his] personal-injury claim to the bankruptcy court and did not do so, [he] impliedly represented that [he] had no such claim." *In re Flugence*, 738 F.3d at 130. His position, therefore, was "plainly inconsistent" with his later assertion of his personal injury claims in his lawsuit against BAC. *Id.*

Further, the bankruptcy court confirmed Keathley's Amended Plan. It thus accepted his prior position of having no pending personal injury cause of action "by omitting any reference to [Keathley's] personal-injury claim in the modified plan." *Id.* "Had the [bankruptcy] court been aware of [his] claim, it may well have altered the plan." *Id.*; *see also Tangipahoa Par. Sch. Bd.*, 766 F. App'x at 42 ("This continuing obligation exists because the inclusion of assets in the bankruptcy estate is often a contested issue, and the debtor's duty to disclose assets—even where he has a colorable theory for why those assets should be shielded from creditors—allows that issue to be decided as part of the orderly bankruptcy process.") (internal quotation marks omitted) (citing *Allen*, 813 F.3d at 572 (quoting *Flugence*, 738 F.3d at 130)). Thus, we conclude here—as we have before on nearly identical facts—that "the first two elements of judicial estoppel apply." *Id.*

Finally, we turn to the third element of judicial estoppel: whether Keathley's failure to disclose his personal injury lawsuit to the bankruptcy court was inadvertent. *See Allen*, 813 F.3d at 572. As we have stated, "in considering judicial estoppel for

bankruptcy cases, the debtor's failure to satisfy its statutory disclosure duty is inadvertent only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *In re Coastal Plains, Inc.*, 179 F.3d at 210 (internal quotation marks and citations omitted). Although Keathley does not argue that he had no knowledge of his personal injury lawsuit against BAC, he contends that he had no motive to conceal his claims from the bankruptcy court because he did not realize he had a duty to disclose them. In support, he cites to Emerson's affidavit, contending that it "it offers evidence that [his] non-disclosure was not unusual and is, in fact, routine in the Eastern District of Arkansas."

As an initial matter, this court has held that "the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions." *In re Flugence*, 738 F.3d at 130–31 ("[A] [party's] lack of awareness of a statutory disclosure duty for [ ] legal claims is not relevant."). We thus reject as meritless Keathley's argument that he did not realize he had a duty to disclose his personal injury cause of action to the bankruptcy court. *Id.* Moreover, as Keathley conceded in his deposition testimony, this is his fourth time to file for bankruptcy. We are thus hard pressed to accept his representation that he was unaware that he had a continuing duty to disclose his personal injury cause of action given his familiarity with the bankruptcy process.

Additionally, with respect to Keathley's contentions regarding Emerson's affidavit, we agree with both the district court and BAC that the affidavit, if anything, cuts against Keathley's

argument that his nondisclosure was inadvertent. Pointing out that "non-disclosure was not unusual and is, in fact, routine in the Eastern District of Arkansas," suggests that Keathley's nondisclosure was actually intentional—not inadvertent as he claims.

We are further unpersuaded by Keathley's argument that Emerson's affidavit demonstrates his lack of motive for concealment "by establishing that the non-disclosure of the personal injury case was completely inconsequential to the administration of the bankruptcy [because he] stood to gain nothing, and has gained nothing, by the non-disclosure." As the district court pointed out, under the terms of his Chapter 13 Plan, Keathley has an interest-free repayment plan which is spread over five years. And as the record indicates, Keathley has filed multiple times to have his interest-free repayment plan extended. If he had disclosed his personal injury claims to the bankruptcy court, his creditors would have had an opportunity to object to his interest-free plan on grounds that his personal injury suit, if successful, would have generated enough revenue to cover the interest he owed on his debts. *See In re Watts*, 2012 WL 3400820, at *8 (Bankr. S.D. Tex. Aug. 9, 2012). Thus, we agree with the district court that Keathley stood to potentially benefit by concealing his personal injury case from the bankruptcy court. Additionally, as this court has made clear, "the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court"—as Keathley has failed to do in this case. *Love*, 677 F.3d at 262. For these reasons, we conclude that the third element of judicial estoppel applies because Keathley cannot show that his failure

to disclose his personal injury lawsuit was inadvertent. *In re Coastal Plains, Inc.*, 179 F.3d at 210.

In sum, we hold that the district court did not abuse its discretion in granting summary judgment in favor of BAC on grounds of judicial estoppel. *See Allen*, 813 F.3d at 572.

B. Rule 59(e) Motion

Keathley further argues that the trial court abused its discretion in denying his Rule 59(e) motion. Specifically, he argues that the district court erred in failing to consider Emerson's affidavit because the facts contained therein "demonstrate that none of the elements of judicial estoppel have been established." Again, we disagree.

"A Rule 59(e) motion calls into question the correctness of a judgment." *Templet*, 367 F.3d at 478 (internal quotation marks and citation omitted); *see also* FED. R CIV. P. 59(e). As this court has consistently held, "such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id.* at 478–79 (citation omitted). "Rather, Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 479 (cleaned up). We have further acknowledged that "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Id.* (citation omitted).

As a preliminary matter, we note that our review of the district court's judgment denying Keathley's Rule 59(e) motion is for abuse of discretion because the district court refused to consider the "newly

discovered evidence" that Keathley sought to admit in support of his motion, *i.e.*, Emerson's affidavit. *Id.* at 477. We therefore only need to decide if "the district court's decision and decision-making process" were "reasonable." *Id.*

According to Keathley, Emerson's affidavit was not available to him or his counsel before he responded to BAC's summary judgment motion because he only had fourteen days to respond. In support, he claims that acquiring Emerson's affidavit "was not a simple task" because it required "[c]ontacting [ ] Emerson, securing approval from her supervisors for her cooperation, consulting with her to discover what information she possessed, the preparation and revision of an [a]ffidavit, and several rounds of review of the [a]ffidavit by [ ] Emerson and her supervisor" all of which "took a substantial amount of time and effort." But as the district court recognized, Emerson's affidavit was not "newly discovered evidence" just because it was difficult for Keathley to obtain it. As Emerson's affidavit explains, she is employed as a staff attorney for the office of the Chapter 13 Trustee for the Eastern and Western Districts of Arkansas and she is personally assigned to Keathley's bankruptcy case. She further states that "[t]hroughout the duration of their bankruptcy, [she] ha[s] communicated with Mr. and Mrs. Keathley directly and through their attorney, Bart Ziegenhorn."

Assuming Emerson's affidavit is accurate, she and Keathley have been in contact both directly and indirectly "throughout the duration of [Keathley's] bankruptcy" which he filed on December 27, 2019, and had been pending for at least two years before Keathley filed his personal injury lawsuit against

BAC in December 2021. Accordingly, Keathley had been aware of Emerson's "specialized knowledge of the customs and practices of bankruptcy courts" in the Eastern District of Arkansas for nearly four years before he moved for reconsideration in September 2023 on grounds that this information was "newly discovered evidence." And as BAC points out on appeal, if this was not enough time to obtain Emerson's affidavit, Keathley could have moved for additional time to respond to BAC's summary judgment motion as he had done before during the pendency of the proceedings. He could have also moved to supplement his response to BAC's motion between March and August 2023, when BAC's summary judgment motion was pending before the district court. But Keathley did none of this. We therefore reject his arguments as too little and too late.

As the district court explained, its "rulings are not an invitation for an ongoing dialogue with the parties; to the contrary, both sides are obligated to collect and present whatever evidence they feel is relevant *before* [the district] court has issued its ruling." Moreover, as we have stated herein *supra*, we agree with the district court that, had it considered Emerson's affidavit, it would have only undermined Keathley's position that his nondisclosure was inadvertent. This is because the affidavit for the most part merely explains that the usual practice in the Eastern District of Arkansas is not to disclose pending personal injury lawsuits to the bankruptcy courts until shortly before they are resolved or settled. This suggests that Keathley's failure to disclose his personal injury cause of action to the bankruptcy court was likely intentional, not inadvertent, which

further supports the district court's application of judicial estoppel in this case.

For these reasons, we hold that the district court did not abuse its discretion in denying Keathley's Rule 59(e) motion on grounds that Emerson's affidavit was not "newly discovered evidence" and thus not a proper basis for a rehearing motion. *Templet*, 367 F.3d at 478–79.

C. Fifth Circuit Jurisprudence

Finally, in his brief on appeal Keathley engages in a lengthy discussion about the evolution, history, purpose, and general application of this court's judicial estoppel jurisprudence. He further requests that we reconsider our judicial estoppel jurisprudence and "bring it more in line with other [c]ircuits." In other words, he urges us to take a more lenient approach in our application of judicial estoppel so that he can obtain a more favorable outcome in these proceedings. Given our holding herein, however, it is unnecessary for us to address Keathley's arguments on this issue. And even if we did, we would still reject them because we are bound by the rule of orderliness to apply the applicable, controlling caselaw in this circuit. *See United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (internal citations and quotation marks omitted) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." (citation omitted)). Indeed, even Keathley concedes on appeal that he "is unaware of any Fifth Circuit opinion allowing a plaintiff's claim to survive a challenge under judicial estoppel when there is an issue of non-disclosure to a bankruptcy court." We are

thus bound by the law in this circuit as it currently exists and reject Keathley's invitation to circumvent our longstanding precedent to achieve an outcome in his favor.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment dismissing Keathley's lawsuit against BAC, as well as its order granting summary judgment in favor of BAC on grounds of judicial estoppel. We also AFFIRM the district court's order denying Keathley's Rule 59(e) motion.

HAYNES, *Circuit Judge*, concurring in the judgment:

I concur in the judgment only because it is based upon our precedent. *See, e.g., United States ex rel. Long v. GSDMidea City, LLC*, 798 F.3d 265, 270 (5th Cir. 2015). However, I respectfully disagree with our precedent in cases like the present. Although Keathley's bankruptcy case was ongoing, it was the district court that determined he should be judicially estopped from proceeding with his unrelated personal injury claim. In a situation like this one, where the personal injury lawsuit was filed in a different district (and even a different circuit) and involves a defendant unrelated to the ongoing bankruptcy proceedings, I believe it best to defer to the bankruptcy court's evaluation regarding whether the plaintiff should be allowed to proceed.[1]

"[W]e apply judicial estoppel against the backdrop of the bankruptcy system and the ends it seeks to achieve." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) (internal quotation marks and citation omitted). The doctrine aims to "deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system," while "protecting the rights of creditors to an equitable distribution of the assets of the debtor's estate." *Id.* At its core, judicial estoppel is equitable in nature. It focuses on whether a party's change in position "would adversely affect the proceeding or constitute a fraud on the court." *Judicial Estoppel*, Black's Law Dictionary (12th ed. 2024); *see New Hampshire v. Maine,* 532 U.S. 742, 750 (2001) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process." (quotation omitted)).

In this instance, I doubt that the goals of the doctrine have been advanced. Here, there was evidence that Keathley's failure to disclose the personal injury claim on his bankruptcy schedules was an honest mistake. He also asserted (and the bankruptcy trustee agreed) that the delay in disclosing his lawsuit was of little concern to the bankruptcy court and would not impact Keathley's creditors. Nevertheless, the defendant, who was totally unrelated to the bankruptcy, moved for summary judgment. Without citing to any evidence of an actual financial benefit that Keathley experienced, the defendant argued that his motive for concealment was "self-evident under Fifth Circuit precedent." This hypothetical motive was enough; the district court granted the motion, citing this circuit's "stringent application of the judicial estoppel rules."

Although the district court faithfully applied our precedents and determined that the plaintiff had a possible financial motive for the nondisclosure, I have a concern that district courts, especially those sitting in a different circuit from the bankruptcy court, are not in the best position to evaluate the impact of precluding suit when the bankruptcy court itself has not weighed in on the situation.

In fact, preventing Keathley's personal injury action might undermine the judicial system the doctrine claims to protect. The defendant here is in

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[1] *See Flugence v. Axis Surplus Ins.* (*In re Flugence*), 738 F.3d 126, 132 (5th Cir. 2013) (Dennis, J., concurring) ("[W]hether judicial estoppel is invoked and, if so, what is the remedy crafted may differ. The bankruptcy court, *which is closest to the facts*, operates in a zone of discretion in crafting the appropriate remedy." (emphasis added) (citation omitted)).

no way impacted by the delay in disclosure to the bankruptcy court. Yet, assuming arguendo it is responsible for the car crash,[2] it receives an unwarranted windfall: it will owe nothing for its tort. Even further, Keathley is currently repaying his debts to his creditors in full (albeit, over time). If he receives no remedy for his injuries, it could harmfully impact his creditors' chance of recovery.

Other circuits take a more holistic approach than ours, suggesting that judicial estoppel is inappropriate when the bankruptcy proceedings will not suffer and when the alleged bad actors will receive a windfall. *See, e.g., Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc); *Botelho v. Buscone* (*In re Buscone*), 61 F.4th 10 (1st Cir. 2023); *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014); *Ah Quin v. County of Kauai Department of Transportation*, 733 F.3d 267 (9th Cir. 2013).

At bottom, the doctrine of judicial estoppel exists to "protect the integrity of the judicial process, by prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self-interest." *Allen v. C & H Distribs., LLC*, 813 F.3d 566, 572 (5th Cir. 2015) (alteration in original) (internal quotation marks and citation omitted). It is not a tool in the arsenal of potentially bad actors to reap a windfall. To me, it makes little sense for the defendant here to benefit from something it has no involvement in and for which the bankruptcy court does not appear to think the plaintiff should be sanctioned. In situations

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[2] The defendant before us is the employer of the person who, while working, caused the car crash. Thus, this defendant has potential vicarious liability.

like this one—where the district court is in a different district and the case is still pending in bankruptcy court—I think the district court should defer to the bankruptcy court on whether a sanction is appropriate and, if so, whether it should be in the form of judicial estoppel benefiting a completely unaffected defendant.[3]

Thus, while I concur in the judgment in light of our precedent, I disagree with this outcome and would have dissented if we did not have prior precedents.

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[3] Some other options: The bankruptcy court might wish to fine the debtor or grant additional benefits to the bankruptcy creditors. Regardless, the sanction inquiry should belong to the bankruptcy court.

[706 F. Supp. 3d 628]

United States District Court,
N.D. Mississippi, Oxford Division.

Thomas KEATHLEY, Plaintiff

v.

BUDDY AYERS CONSTRUCTION, INC., Defendant

NO. 3:21CV261 M-P

Signed December 14, 2023

ORDER

Michael P. Mills, UNITED STATES DISTRICT JUDGE

This cause comes before the court on the motion of plaintiff Thomas Keathley, seeking for this court to reconsider its ruling dismissing this case on the basis of judicial estoppel. The court, having considered the memoranda and submissions of the parties, is prepared to rule.

In his motion for rehearing, plaintiff cites what he characterizes as "newly discovered evidence," namely an affidavit which he obtained from Ms. Kellie M. Emerson after this court's adverse judicial estoppel ruling in this case. In her affidavit, Emerson describes herself as "a staff attorney for the Office of Mark T. McCarty, a Chapter 13 Trustee for the Eastern and Western Districts of Arkansas." [Affidavit at 1]. In his brief, plaintiff cites Emerson's affidavit for the proposition that "[i]n the Eastern District of Arkansas, it is not unusual for post-petition personal injury claims to be disclosed shortly before the settlement or resolution of the personal injury action," and he argues that this court should

consider this alleged fact in granting his motion for rehearing. [Brief at 4].

This court notes that the practice alleged by Ms. Emerson is, apparently, a long-standing one in the Eastern District of Arkansas, and, as far as it can discern, nothing prevented plaintiff from obtaining and submitting that same affidavit before this court's ruling. This court's rulings are not an invitation for an ongoing dialogue with the parties; to the contrary, both sides are obligated to collect and present whatever evidence they feel is relevant *before* this court has issued its ruling. This court is simply not able to function as a trial court if the parties fail to follow this basic litigation practice.

While this court thus does not believe that Emerson's affidavit constitutes a proper basis for a motion to rehearing, it will offer some dicta addressing it, partly in order to offer guidance for future cases. In offering its views on this issue, this court begins with its belief that Emerson's affidavit actually *hurts* plaintiff's position in this case. In so stating, this court notes that a crucial factor in deciding judicial estoppel issues in the Fifth Circuit is whether a debtor can be inferred to have acted *intentionally* in failing to list a tort claim as an asset of the bankruptcy estate. As discussed in this court's order dismissing this case, the Fifth Circuit's stringent judicial estoppel jurisprudence means that a debtor who fails to disclose a tort claim is "almost always" inferred to have acted with intent. *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012), citing *Thompson v. Sanderson Farms, Inc.*, 2006 WL 7089989, at *4, 2006 U.S. Dist. LEXIS 48409, at *12–13 (S.D. Miss. May 31, 2006).

If Emerson's affidavit is to be believed, then it is a common practice among bankruptcy attorneys in the Eastern District of Arkansas, presumably with full knowledge of what they are doing, not to list tort claims until shortly before they are settled or otherwise resolved. In other words, bankruptcy debtors in that district, acting through their attorneys, routinely make a conscious and intentional decision *not* to list tort claims which they know about until such time as those claims are close to being resolved. The litigation process is often a very slow one, and it thus seems clear that the practice described by Emerson will often result in a debtor/plaintiff keeping important information to himself for a very long period of time. As discussed below, this practice seems to be motivated by a belief on the part of debtors and their attorneys that they can "get away with" late disclosure in Arkansas bankruptcy court, which is governed by Eighth Circuit judicial estoppel standards.

Plaintiff's brief appears to offer confirmation that the Eighth Circuit's judicial estoppel standards are more lenient than the Fifth Circuit's, listing the Eighth Circuit alongside the Third, Seventh and D.C. Circuits as the more permissive circuits in this regard. [Brief at 23]. Plaintiff's problem in this case is that he filed this action in a state within the jurisdiction of the Fifth Circuit, and the judicial estoppel law in this circuit is completely unsupportive of such a permissive "wait and disclose" approach. *See, e.g. Allen v. C&H Distributors, LLC*, 813 F.3d 566, 572 (5th Cir. 2015). In light of this fact, the proper course of action for plaintiff's bankruptcy attorney was to recognize that his Mississippi tort claim fell under the judicial estoppel jurisprudence of

the Fifth Circuit, not the Eighth Circuit, and to research this circuit's law before deciding how to proceed. This court is well aware that lawyers are busy people, and it is certainly arguable that an Arkansas lawyer's failure to fully research these issues does not represent a particularly egregious form of neglect. Nevertheless, even a cursory review of the Fifth Circuit's judicial estoppel jurisprudence would have revealed that plaintiff's Mississippi tort claim was subject to a highly rigorous duty of disclosure, and it is difficult to excuse a lawyer not making himself aware of that fact.

This court notes that the Eastern District of Arkansas borders two states in the Fifth Circuit: Mississippi and Louisiana, and it believes that bankruptcy attorneys in that district would be well advised to learn their legal obligations when dealing with causes of actions which are being litigated in those states. In addition, it seems clear that the Fifth Circuit's approach gives a debtor's Mississippi *tort* counsel every motivation to get in contact with bankruptcy counsel and ensure that prompt disclosure of the lawsuit's existence is made, lest it be dismissed based on a finding of judicial estoppel. There thus exist multiple attorneys with a motivation to research and apply the applicable law in this context, and this court has serious doubts that the Fifth Circuit would conclude that a lawyer's failure to research that law represents one of the exceedingly rare instances in which a debtor's non-disclosure of a tort claim in bankruptcy may be excused.

Plaintiff's own evidence, in the form of Emerson's affidavit, suggests that the most likely reason for his failure to disclose the existence of his tort claim was that his Arkansas attorneys were acting—quite

intentionally—in accordance with the more lenient disclosure practices which prevail in that state and federal circuit but which do *not* govern this case. At the end of the day, litigants act through their attorneys, and courts would not be able to function if they addressed the arguments and filings raised by counsel only to have to subsequently address different arguments and evidence offered by the parties themselves. Moreover, it seems clear that plaintiff would have this court do something which, judging by his briefing, the Fifth Circuit itself has never actually done: namely, hold that a particular case represents an exception to the "almost always" rule in this circuit relating to judicial estoppel. This court is confident that the Fifth Circuit would conclude that, while other judicial circuits are free to adopt more lenient judicial estoppel rules, lawsuits filed in Mississippi, Louisiana or Texas are subject to the judicial estoppel rules of *this* circuit. It further seems likely that the Fifth Circuit would interpret and apply its own law in such a manner as to encourage attorneys to research the law of this circuit before deciding whether or not to disclose a tort lawsuit to a bankruptcy court. Any holding otherwise would simply encourage attorneys not to research the applicable law before making important legal decisions.

In his reply brief, plaintiff argues that this court should regard the judicial estoppel issues in this case as presenting fact issues for a jury, since he insists that his failure to disclose was inadvertent and "summary judgment is particularly inappropriate in cases involving motivation and intent." [Reply brief at 3-4]. This argument is problematic on multiple levels. First, this court notes that plaintiff cites no Fifth Circuit decision which actually held that jurors

should decide judicial estoppel issues under facts even remotely comparable to those here. Moreover, while plaintiff seeks to characterize his inadvertence arguments in this case as unique ones which are distinguishable from other judicial estoppel cases, the exact opposite is true, in this court's experience. Indeed, this court cannot recall a judicial estoppel case in which the plaintiff did *not* argue that his failure to disclose was a simple mistake, and, if making this argument were sufficient to render judicial estoppel a jury issue, then plaintiff would presumably be able to cite a long line of case law in which juries decided similar issues. He has failed to cite even one. Once again, the Fifth Circuit has made it clear that judicial estoppel "almost always" applies when a plaintiff fails to disclose a tort claim to a bankruptcy court, and, in so stating, it gave no indication that *jurors* should decide whether a particular case presents the "almost" scenario.

The Fifth Circuit's "almost always" language in *Love* leads this court to believe that the basic premise of plaintiff's argument that a jury should decide intent in this case is erroneous. Indeed, in arguing that motivation is a fact issue for jurors, plaintiff relies upon case law which arose in contexts where intent is an issue for the factfinder's resolution under a preponderance of the evidence standard, with no presumption involved. For example, plaintiff cites *Thornbrough v. Columbus and Greenville R. Co.*, 760 F. 2d 633, 640-41 (5th Cir. 1985) for the proposition that "summary judgment is generally inappropriate in employment discrimination cases because such cases involve nebulous questions of motivation and intent." In employment discrimination cases, however, jurors are simply asked to determine

whether an employer intentionally discriminated against the plaintiff on the basis of his race, sex or other protected characteristic, with no legal presumption tying their hands. In the bankruptcy estoppel context, by contrast, the Fifth Circuit's use of the "almost always" language, and the actual results of their decisions in bankruptcy estoppel cases, suggests that something approaching an absolute presumption of intent exists in cases where a debtor fails to disclose a tort lawsuit to a bankruptcy court. In arguing that this court should simply assign this issue to jurors, plaintiff ignores this fact.

It strikes this court that, in establishing such a strong presumption in favor of intent, the Fifth Circuit has recognized that, since neither courts nor jurors are mind readers, it will generally be impossible for any factfinder to determine what was going through a debtor's mind when he chose not to disclose a tort claim to a bankruptcy court. In light of this reality, it is incumbent upon appellate courts to make a policy decision regarding whether they will err on the side of encouraging prompt disclosure of tort claims or whether they will err on the side of not unduly punishing debtors who may have simply made an honest mistake in failing to do so. It seems inevitable that, whichever way an appellate court decides, it will, in fact, "err" in some cases, by either allowing unscrupulous debtors to get away with intentional non-disclosure of claims or by inferring intent on the part of a debtor where no such intent actually exists. As discussed below, federal appellate courts have made different evaluations of the policy considerations in this context, but it seems clear that, for better or worse, the Fifth Circuit has come down on the side of encouraging full disclosure of tort

claims. Plaintiff's argument that this court should regard intent in the bankruptcy estoppel context as a "fifty-fifty" fact issue for jurors to decide ignores this fact.

Fifth Circuit precedent aside, this court believes that asking jurors to make findings regarding motivation would be particularly problematic in the bankruptcy estoppel context, since it would be asking non-attorneys to rule upon the motivations of attorneys and parties who themselves may have been motivated by complex considerations of legal strategy. In its initial order, this court emphasized the Fifth Circuit's statement that "[a] motivation to conceal may be shown by evidence of a potential financial benefit that could result from concealment." *U. S. ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 273 (5th Cir. 2015). Clearly, determining whether or not a particular litigant stood to potentially benefit from a particular non-disclosure in his Chapter 13 filings often, if not inevitably, requires extensive knowledge of bankruptcy law, at least if this determination is to be made with any degree of reliability.

In its order, this court relied upon *In re Watts*, 2012 WL 3400820, at *8 (Bankr. S.D. Tex. Aug. 9, 2012), in which the Bankruptcy Court for the Southern District of Texas considered a plaintiff's arguments, virtually identical to those here, that since his bankruptcy plan provided for 100% repayment of claims without interest, he had no potential motivation to conceal his lawsuit. In rejecting this argument, the Bankruptcy Court emphasized that:

> The Plan provides for 100% repayment of all claims, but these claims are being paid out over

> five years, and the Plan does not provide for payment of interest on those claims. [Finding of Fact No. 5]. Had the Debtors disclosed the Claim prior to confirmation, both the Trustee and the creditors would have had the opportunity to object to the Plan on the grounds that the Claim, if successful, would generate enough funds to pay interest on claims; and that the Plan, as proposed, should not be confirmed, when it was not filed in good faith-i.e. the projected disposable income available for unsecured claims would be higher if the Debtors modified the Plan to include use of any proceeds generated from the Claim to pay interest on the creditors' claims under § 1329(a)(3). See § 1325(a)(3) (". . . the court shall confirm a plan if—the plan has been proposed in good faith . . ."). By failing to disclose the Claim, the Debtors obtained confirmation of the Plan without having to pay interest.

Watts, 2012 WL 3400820, at *8.

Without question, the bankruptcy judge in *Watts* made findings of law and fact which relied heavily upon his extensive knowledge and experience in applying bankruptcy law, and it seems likely that this will very often be the case in resolving these matters. This court therefore believes that bankruptcy judges are in a much better position to make findings in this regard than district judges, and it frankly believes that assigning these issues to laypersons on a jury would virtually guarantee unreliable results. In so stating, this court notes that plaintiff relies heavily upon affidavits from attorneys regarding the alleged lack of benefits of non-disclosure in this case, and it is

unclear how he expects laypersons on a jury to reliably evaluate the credibility and accuracy of these attorney affidavits. Indeed, this court has cast a critical eye upon these attorney affidavits in its orders, but it has only been able to do so because it is itself an attorney and is thus able to recognize what it believes to be factual and legal weaknesses in those affidavits. Jurors, by contrast, would likely be forced to simply accept the representations in those affidavits at face value. Thus, while this court agrees with plaintiff that jurors are generally best suited to decide questions of motivation and intent, it believes that the present context presents a clear exception to this general rule. This court therefore submits that bankruptcy estoppel issues can most reliably be decided by judges rather than jurors, and it is difficult to discern a reasonable argument otherwise.

In assessing the most likely motivation of plaintiff's attorneys in this case, this court reiterates that plaintiff's own evidence, in the form of Emerson's affidavit, strongly suggests that their non-disclosure was intentional, albeit based upon a misunderstanding of the applicable law. Once again, Emerson contends that bankruptcy attorneys in the Eastern District of Arkansas are able to get away with delaying disclosure of tort claims for a lengthy period of time, which seems unsurprising considering the more lenient judicial estoppel standards which prevail in the Eighth Circuit. Nevertheless, Fifth Circuit law clearly controls the judicial estoppel issues in this case, and it seems likely that plaintiff's attorneys made an intentional decision not to disclose his tort claims based upon a misunderstanding of the applicable law. Clearly, a conscious decision based upon a misunderstanding of the law remains a

conscious one, and this court therefore believes that Emerson's affidavit undercuts plaintiff's own inadvertence arguments in this case.

This court notes that, in his motion for rehearing, plaintiff offers open criticism of the Fifth Circuit's judicial estoppel jurisprudence, writing that "[t]he Fifth Circuit's relatively frequent application of the doctrine of judicial estoppel has begun to leave it somewhat isolated from its sister Circuits." [Brief at 22]. Plaintiff then proceeds to cite the judicial estoppel decision of more lenient circuits before arguing that "these other circuits' application of the doctrine of equitable estoppel are more in line with Supreme Court precedent than this Court's Order." [Brief at 25]. In so arguing, plaintiff merely confirms that this court has correctly applied the Fifth Circuit's equitable estoppel jurisprudence in this case, harsh though it may be. As a district court, this court has no power to change the Fifth Circuit's approach even if it wished to do so, and plaintiff should argue in favor of any change in the governing law on appeal, rather than before this court.

While this court's agreement or disagreement with Fifth Circuit law is thus irrelevant, it does submit, for the record, that Emerson's affidavit, if accepted as accurate, offers tacit support for the Fifth Circuit's more stringent approach in this context. In so stating, this court must wonder: if a bankruptcy debtor or his attorney is well aware of the existence of a tort claim (which clearly represents an asset of the bankruptcy estate) then what is the point in waiting months or years before disclosing it? The existence of a valuable tort claim is clearly an important legal fact which is entirely relevant to the bankruptcy action, and it takes mere minutes for an attorney to type up a notice

which allows creditors to protect their interests and for the bankruptcy court to make fully informed rulings. That being the case, why should bankruptcy debtors or their attorneys be allowed to make a conscious decision to "sit on" this important information for a lengthy period of time when they consider it to be in their interests to do so?

In his brief, plaintiff attempts to characterize the non-disclosure issues in this case as involving a mere question of "timing," writing that:

> Plaintiff concedes that he has a duty to disclose his assets to bankruptcy. However, at the heart of the issue, is the *timing* of the disclosure. Notably, none of the cases that Defendant cited actually explain when disclosure is required. Ms. Emerson clarifies this issue for the Court. Per her affidavit, it is common for individuals in bankruptcy to disclose their post-petition claims prior to the settlement or resolution of the personal injury action. As this Court is well aware, this matter was still in the discovery stage of litigation.

[Reply brief at 6-7]. In addressing these arguments, this court notes at the outset that there is no way of knowing whether plaintiff *ever* would have disclosed his tort claim in this case to the bankruptcy court, had defendant not raised this issue first. This court is therefore unwilling to simply assume that plaintiff's Arkansas attorneys would have eventually disclosed it, when there is no way of knowing whether or not that is the case. That aside, plaintiff's urging that debtors be allowed to follow the alleged Arkansas practice of waiting for "the settlement or resolution of the personal injury action" makes clear that he is

advocating a very long delay in disclosure indeed, since personal injury actions can take many months or years to resolve.

That brings this court to the fact that the bankruptcy process is, to a large extent, a "zero sum game," in which the debtor and creditors are each trying to obtain as large a share of the assets of the bankruptcy estate as possible. That being the case, it seems self-evident that, if a debtor concludes that it is to his *advantage*, in a particular case, to wait months or years to disclose a tort claim to the bankruptcy court, then that same delay tends to work to the *disadvantage* of creditors, who lose valuable time to protect their legal rights. Clearly, the fact that the bankruptcy estate includes a valuable tort claim increases the potential "pot" of recovery and makes it more likely that it will be worth it to creditors to take steps to obtain as large a share of that pot as possible. Moreover, it is indisputable that things like hiring counsel to file and argue motions before bankruptcy courts takes time, and it is thus apparent that, in this context, time truly is money. That being the case, on what basis should the law permit debtors to keep the existence of a tort claim to themselves for months or years, rather than spending the minimal time and effort which is required to disclose it? None which this court can discern.

Considered in this context, the Arkansas approach described by Emerson strikes this court as a cautionary tale of sorts and an indication that lackadaisical enforcement of rules often leads to lackadaisical litigation practices. Plaintiff appears set to argue before the Fifth Circuit that it should be more like the Eighth Circuit as it relates to bankruptcy estoppel issues, but his own evidence

regarding Arkansas disclosure practices casts serious doubt, at least in this court's mind, regarding whether the Eighth Circuit approach is something to which this circuit should aspire. This court submits that the Fifth Circuit approach is also supported by another important consideration, relating to the predictability of the law. In so stating, this court notes that, as harsh as the Fifth Circuit's judicial estoppel jurisprudence may be, it leaves debtors and their attorneys (who care to research the law beforehand) in little doubt regarding what they are required to do: promptly disclose any lawsuits which they may have to the bankruptcy court. In this case, by contrast, plaintiff appears to endorse a rather *ad hoc* judicial estoppel analysis, based upon ambiguous standards, whereby a plaintiff who submits the right affidavit from the right staff attorney, stating that "a lot of people" are doing something forbidden by Fifth Circuit law, will be let off with a warning.

In this vein, the competing approaches of the Fifth Circuit and the Eighth Circuit strike this court as being analogous to two different speeding enforcement standards adopted by two different towns. One town has adopted a "zero tolerance" standard whereby traffic police are instructed to ticket speeders, regardless of any attempts they may make to persuade the officer otherwise. Another town has adopted a more lenient process whereby traffic police have the discretion to consider any mitigating factors or pleas for mercy that the speeder sees fit to offer. The Eighth Circuit has apparently chosen the latter approach, and it is entirely unsurprising to learn from Emerson's affidavit that this approach has resulted in a situation where speeding is more prevalent in that circuit than in this one. The Fifth

Circuit clearly foresaw this consequence of adopting more lenient standards, writing in a 2015 decision that "[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 personal assets only if he is caught concealing them." *U. S. ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 273 n 6 (5th Cir. 2015).

While this court therefore regards the Fifth Circuit's approach as a quite defensible one, the crucial point in this context is that, in choosing to litigate a federal case in this circuit, plaintiff subjected himself to its rules, regardless of whether they are defensible or not. This court remains of the view that its dismissal of this action based upon judicial estoppel was the correct decision under Fifth Circuit law, and plaintiff's motion for reconsideration will therefore be denied.

In light of the foregoing, it is ordered that plaintiff's motion to reconsider is denied.

[686 F. Supp.3d 495]

United States District Court,
N.D. Mississippi, Oxford Division.

Thomas KEATHLEY, Plaintiff

v.

BUDDY AYERS CONSTRUCTION, INC., Defendant

NO. 3:21CV261 M-P

Signed August 9, 2023

ORDER

Michael P. Mills, UNITED STATES DISTRICT JUDGE

This cause comes before the court on the motion of defendant Buddy Ayers Construction, Inc. for summary judgment, based on judicial estoppel. Plaintiff Thomas Keathley has responded in opposition to the motion, and the court, having considered the memoranda and submissions of the parties, is prepared to rule.

The underlying lawsuit in this case involves simple negligence claims arising out of an automobile accident. In the instant motion, however, defendant Ayers seeks for this court to grant it summary judgment based not upon the substantive merits of plaintiff's negligence claim, but, rather, based on the fact that he failed to list it as an asset in his bankruptcy filings. On December 27, 2019, Plaintiff filed a Chapter 13 Petition for Bankruptcy and a Bankruptcy Plan, an amended version of which was confirmed by the bankruptcy court on April 20, 2020. [Affidavit of Bart Ziegenhorn, para. 4.] On August 23, 2021, plaintiff was involved in the automobile

accident which gave rise to the instant lawsuit. Plaintiff concedes that, as of this date, he was aware of his cause of action in this case, but, acting through his bankruptcy attorney, he nevertheless filed Second, Third and Fourth Amended Chapter 13 Bankruptcy Plans which failed to list this cause of action as an asset of his bankruptcy estate. [Plaintiff's brief at 3]. Having learned of plaintiff's omissions in this regard, defendant has filed the instant motion for summary judgment based on judicial estoppel.

The instant motion presents a factual scenario which has arisen frequently in the Fifth Circuit, namely a plaintiff who failed to disclose a tort claim as an asset in his bankruptcy proceedings. As in many such cases in this circuit, the plaintiff has submitted an affidavit in which he assures this court that his failure to disclose this lawsuit was an honest mistake and that he had no intent to deceive the bankruptcy court or to gain any benefit through his mistake. [Docket entry 154-2] As is also generally the case, this court is unable to state one way or the other whether plaintiff's representations are accurate or not, since it has no way of ascertaining his subjective intent in this regard.

It strikes this court that, when confronted with this scenario, there are two approaches which a court might legitimately take in considering any judicial estoppel arguments. In the absence of proof of an intent to deceive, the first legitimate approach would be to give the plaintiff the benefit of the doubt and to allow him to submit amended bankruptcy filings, based partly upon the belief that it would be better for the bankruptcy creditors to be paid from the eventual proceeds of the lawsuit than to dismiss the action

outright. The second legitimate approach would be to view this scenario from the perspective of protecting the integrity of the bankruptcy process and the federal courts as a whole and, accordingly, to give clear warning to any debtors thinking of failing to disclose lawsuits that, if their deception is discovered, they will not simply be allowed to plead an honest mistake and file an amended disclosure.

It is irrelevant which of these two approaches this court would prefer, since the Fifth Circuit has clearly opted for the second one. Indeed, this court is struck by the fact that, in its briefing in this case, defendant is able to counter every argument from plaintiff with a Fifth Circuit decision rejecting a similar argument by a debtor/plaintiff. Plaintiff, by contrast, offers this court nothing more than state court decisions or other non-binding authority, and the decisions he cites are generally based on a very different weighing of the competing policy considerations in this context than those made by the Fifth Circuit. As a district court sitting in the Fifth Circuit, this rather glaring disparity in the parties' citations to authority cannot help but have a very significant impact upon its resolution of this motion for summary judgment.

In considering plaintiff's arguments, this court notes at the outset that the fact that his cause of action had not yet arisen when he made his initial Chapter 13 filing is immaterial, since the law is clear that a debtor has a continuing duty to disclose contingent and unliquidated claims, even if they did not arise until after the debtor had filed for bankruptcy. *See United States ex rel. Bias v. Tangipahoa Parish School Bd.*, 766 Fed. Appx. 38, 42 (5th Cir. 2019) ("But our precedent is clear; Chapter 13 debtors must disclose post-petition causes of

action"); *Allen v. C&H Distributors, LLC*, 813 F.3d 566, 572 (5th Cir. 2015) ("Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action."); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) ("The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one.")

Plaintiff does not appear to dispute that he had an ongoing duty to disclose his cause of action in this case,[1] arguing instead that:

> Plaintiff's cause of action for this instant matter accrued on the date of the wreck, August 23, 2021. Within a few weeks of the subject wreck, Mr. Keathley informed his bankruptcy attorney, Bart Ziegenhorn, of the wreck and his resulting personal injury claims. [See Affidavit of Thomas Keathley, para 6, marked as Exhibit 2] Mr. Keathley believed that all he needed to do was inform his bankruptcy attorney of his personal injury claims and that his attorney would handle whatever additional steps were necessary. [See Affidavit of Thomas Keathley, para 7.] Mr. Keathley never intended to make any misrepresentations concerning the existence of his personal injury claims. [See Affidavit of Thomas Keathley, para 8.] Mr. Keathley does not know why his personal injury claims were not disclosed to the

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[1] Indeed, plaintiff writes in his brief that, at the time of his initial bankruptcy filing, he "was not under any obligation or legal duty to disclose this claim at that time, because this claim had not yet accrued." [*Id.* at 2]. This strikes this court as a tacit admission by plaintiff that he was legally required to disclose his cause of action in his post-accident bankruptcy filings.

> bankruptcy court. [See Affidavit of Thomas Keathley, para 9.]

[Brief at 2-3]. Plaintiff further notes that, after defendant raised its judicial estoppel arguments, he filed an amended bankruptcy plan which included this lawsuit as an asset. [Brief at 9].

In arguing that he made an honest mistake in failing to list his cause of action among his bankruptcy assets and that he has now corrected that mistake, plaintiff is treading a well-worn path which has proven to be an inhospitable one for non-disclosing debtor/plaintiffs in the Fifth Circuit. This court notes that, in his brief, plaintiff provides a rather selective description of the legal framework for resolving this issue, writing that:

> "Whether a debtor's failure to disclose claims was inadvertent presents a question of fact." *Love* 677 F. 3d at 262. "A debtor's failure to satisfy its statutory disclosure duty is 'only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 2019 [1999]). Plaintiff does not contest Defendant's position that he had knowledge of the undisclosed claims; however, Defendant cannot demonstrate that Plaintiff had motive for their concealment.

[Brief at 10]. While plaintiff correctly cites *Love* in stating that the key issue in this case is whether he had a "motive for the[ ] concealment" of his claims, he fails to acknowledge that, in that same decision, the Fifth Circuit approvingly cited a Mississippi district court decision for the proposition that "[a]s one court

has stated, 'the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of potential financial benefit resulting from the nondisclosure.'" *Love*, 677 F.3d at 262, *citing Thompson v. Sanderson Farms, Inc.*, 2006 WL 7089989, at *4, 2006 U.S. Dist. LEXIS 48409, at *12–13 (S.D. Miss. May 31, 2006).

This court reiterates that, in ruling upon these issues, it is simply following the directives of the Fifth Circuit, as best as it can understand them. Moreover, while it appears that neither side is able to cite a Fifth Circuit decision dealing with the exact same arguments and factual scenario as are presented here, that court's admonition that "the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court" necessarily weighs heavily in this court's mind. In so stating, this court notes that it is undisputed that plaintiff did, in fact, "fail to disclose a claim or possible claim to the bankruptcy court" and he should thus have been prepared to argue why this case falls within the "almost always" exception to *Love*'s general rule. In reality, however, plaintiff does not confront this language in *Love* at all, choosing instead to conveniently omit it from his citation to that decision's holding.

As always when considering an issue lacking a Fifth Circuit decision directly on point, this court tends to favor the side which fully and accurately cites the authority which does exist, rather than the side which selectively quotes from it. In this case, plaintiff clearly falls within the latter category. This court further notes that, while defendant is able to cite one U.S. Bankruptcy Court decision, discussed below,

which is very closely on point, plaintiff's primary authority is a Louisiana state court decision which strikes this court as contrary to Fifth Circuit precedent. Specifically, plaintiff relies upon *Tates v. Integrated Production Servs., Inc.*, 244 So. 3d 716, 720-21 (La. Ct. App. 2017) for the proposition that "[t]o the extent any inconsistency exists, it has been cured by the filing of the amended schedule." [Brief at 8]. In so arguing, plaintiff relies upon *Tates'* holding that:

> In this case, protection of the judicial process is not necessary because the bankruptcy court has been informed of plaintiffs' pending tort suit. Additionally, plaintiffs' creditors could be harmed if this suit does not proceed, which would cause them to lose out on any potential recovery that might be owed to them.

Tates, 244 So. 3d at 720-21. (citation to another Louisiana state court decision omitted).

In *Tates*, as in this case, the plaintiff only filed an amended bankruptcy plan *after* the defendant had filed a motion to dismiss his tort action based on judicial estoppel. *Id.* at 717. The Louisiana Court of Appeals nevertheless found that this was good enough, based partly upon its belief that plaintiff's creditors would "lose out on any potential recovery that might be owed to them" if the tort action were dismissed. *Id.* at 721. It strikes this court that, in seeking to protect the bankruptcy creditors by increasing the pool of bankruptcy assets, the Louisiana Court of Appeals has made a fundamentally different policy choice than the one made by the Fifth Circuit in this context. In so stating, this court emphasizes that it will (seemingly)

always be the case that allowing a late filing of an amended complaint will increase the pool of bankruptcy assets and thus work to the benefit of bankruptcy creditors in a particular case. While this may be regarded as a positive result, it also seems clear that adopting such a forgiving approach would greatly reduce a debtor's incentive to list any potential legal claims among his bankruptcy assets. This would, no doubt, result in an increase in fraudulent bankruptcy filings, with all the harm to the integrity of the bankruptcy process which that entails.

It is likely for this reason that, contrary to *Tates'* finding that "protection of the judicial process is not necessary because the bankruptcy court has been informed of plaintiffs' pending tort suit," the Fifth Circuit has made it clear that a debtor cannot cure his failure to disclose a personal injury claim to a bankruptcy court after his omission has been challenged by an adversary. *See U. S. ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 273 (5th Cir. 2015). Specifically, the Fifth Circuit wrote in *Long* that

> Even if Long's failure to disclose would not have actually harmed his creditors because he offered to reopen the bankruptcy to include the FCA claims, it would not change the outcome here. "'Allowing [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 personal assets only if he is caught concealing them.'"

Long, 798 F.3d at 273, fn. 6, *citing In re Superior Crewboats, Inc.*, 374 F.3d 330, 336 (5th Cir. 2004).

This court has no doubt that the Fifth Circuit was correct when it concluded that a rule of law which allowed a plaintiff to disclose a lawsuit only after being caught in a non-disclosure would provide perverse incentives for debtors to keep their potential tort actions to themselves and "wait and see" if they were caught in the act. This court further believes that it would be unfair to defendants who had gone to the effort and expense of uncovering the bankruptcy non-disclosure and paying attorneys to file a motion for judicial estoppel if the only consequence of "catching the plaintiff in the act" were that he simply filed an amended bankruptcy plan. Indeed, this court doubts that tort defendants would bother to incur the effort and expense in this regard if there were no potential benefit to them, and a major enforcement mechanism for uncovering bankruptcy fraud would thereby be lost. Moreover, it strikes this court that *Tate*'s rather myopic focus on the interests of the bankruptcy creditors in *one particular case* fails to acknowledge the broader harm which would be done to bankruptcy creditors *in general* if it became generally known among bankruptcy debtors that they faced no serious consequences for failing to disclose tort claims in bankruptcy filings. In that scenario, it seems highly likely that there would be many cases where bankruptcy debtors deliberately chose not to list legal claims among their assets and where such a deceit was never discovered, due partly to the absence of a party with sufficient incentive to make inquiries in this regard. In this scenario, it seems clear that bankruptcy creditors *in general* would lose out on an important source of recovery, and, that being the case,

Tates' focus on the creditors in one specific case seems rather short-sighted.

It strikes this court that, as with any difficult issue of law and equity, the policy arguments in this context are not completely one-sided, and plaintiff does, in fact, have a reasonable argument that a stringent application of the judicial estoppel rules would result in cases where plaintiffs who did, in fact, make an "honest mistake" will see their tort claims disappear. It further seems clear that, in such cases, tort defendants may obtain an undeserved windfall. Nevertheless, the fact remains that the Fifth Circuit has made a policy judgment that its highest priority is ensuring that debtors do not have an incentive to lie in their bankruptcy filings, and it is this court's obligation to follow that authority. By the same token, the fact that plaintiff's primary authority in this case is a Louisiana state court decision which is based upon a very different evaluation of the competing public policy considerations than that made by the Fifth Circuit makes it clear that he is swimming against a heavy current of adverse precedent in this circuit.

This court believes that it is incumbent upon an appellate court to make a broad policy judgment one way or the other on this issue, since the vast majority of these cases do not lend themselves to a clear finding either way regarding a bankruptcy debtor's intent. Simply stated, courts are not mind-readers, and it does not strike this court as being a productive line of inquiry for them to attempt to ascertain what a plaintiff may or may not have been thinking when he failed to list a tort claim as an asset in a particular bankruptcy case. In this case, plaintiff would have this court look at the recovery that his creditors seem

poised to receive and conclude that, since they will be paid in full, he had no motive not to disclose his claim. Plaintiff's arguments seem to presuppose 1) that this court is sufficiently well-versed in Chapter 13 bankruptcy law and practice to make reliable factual findings regarding how much credence to give to the representations of his bankruptcy attorney regarding the impact of non-disclosure in this case and 2) that a similar degree of knowledge should be imputed to plaintiff when he failed to list his civil claim in his amended bankruptcy returns. This court does not believe that either of these presuppositions applies in this case. As to the first presupposition, this court certainly does not consider itself knowledgeable regarding Chapter 13 bankruptcy law, and it doubts that most district courts are. That being the case, it strikes this court as suspect judicial policy to place district courts in the position of having to divine a particular plaintiff's intent based upon assumptions regarding the bankruptcy effects of non-disclosure versus disclosure. As to the second presupposition, it strikes this court as similarly suspect to pretend that the average Chapter 13 debtor is, effectively, in the position of a chess grand master thinking several moves ahead regarding what the bankruptcy effects of his disclosure or non-disclosure might be. This court simply does not believe that the typical bankruptcy debtor is in a position to make such precise calculations regarding the potential risks and benefits of disclosure versus non-disclosure.

That brings this court to two important holdings in this context which further inform its ruling today. The first is the Fifth Circuit's statement in *Long* that "[a] motivation to conceal may be shown by evidence of a *potential* financial benefit that *could* result from

concealment." *Long*, 798 F.3d at 273 (emphasis added). The fact that the Fifth Circuit used this "potential" and "could" language makes it exceedingly difficult for any district court lacking expertise in bankruptcy law to simply accept representations from a plaintiff or his bankruptcy attorney regarding what the potential risks and benefits of non-disclosure were. Indeed, even if this court were to give credence to plaintiff's bankruptcy counsel's description of the impact of non-disclosure, it would not change the fact that most debtors are not similarly well-versed in bankruptcy law and, in many cases, they may simply conclude that the safer practice would be to keep their civil claims to themselves to ensure that they do not have to share it with their creditors.

The second holding which informs this court's ruling today is a US Bankruptcy Court decision from this circuit, which involves facts and arguments remarkably similar to those here. *See In re Watts*, 2012 WL 3400820, at *8 (Bankr. S.D. Tex. Aug. 9, 2012). This court finds *Watts* highly persuasive not only because it applies Fifth Circuit law but also based on the fact that it is written by a US Bankruptcy Judge who is (presumably) highly knowledgeable regarding the bankruptcy effects of non-disclosure of claims. In *Watts*, the Bankruptcy Court for the Southern District of Texas considered a plaintiff's arguments, virtually identical to those here, that since the Bankruptcy Plan provides for 100% repayment of claims without interest, he had no potential motivation to conceal his lawsuit. In rejecting this argument, the Bankruptcy Court emphasized that:

> The Plan provides for 100% repayment of all claims, but these claims are being paid out over

> five years, and the Plan does not provide for payment of interest on those claims. [Finding of Fact No. 5]. Had the Debtors disclosed the Claim prior to confirmation, both the Trustee and the creditors would have had the opportunity to object to the Plan on the grounds that the Claim, if successful, would generate enough funds to pay interest on claims; and that the Plan, as proposed, should not be confirmed, when it was not filed in good faith-i.e. the projected disposable income available for unsecured claims would be higher if the Debtors modified the Plan to include use of any proceeds generated from the Claim to pay interest on the creditors' claims under § 1329(a)(3). *See* § 1325(a)(3) (". . . the court shall confirm a plan if—the plan has been proposed in good faith . . ."). By failing to disclose the Claim, the Debtors obtained confirmation of the Plan without having to pay interest.

Watts, 2012 WL 3400820, at *8.

In its brief, defendant notes that the Chapter 13 Bankruptcy Plan in this case similarly involved a virtually identical payment of creditor claims over five years *without interest.* Specifically, defendant writes that:

> The Bankruptcy Court's order confirming Plaintiff's amended plan gave him five (5) years/sixty (60) months from the June 27, 2022 date on which he filed his amended plan to make monthly, interest-free payments. Cf. Amended Plans, Doc. 142-4 and 142-5, to Bankruptcy Order, Doc. 142-6. Based on the

> precedent discussed hereinabove, Plaintiff's motive to conceal is self-evident. His interest-free payment plan spread over five years (from June 27, 2022) provides sufficient motive for Plaintiff in this case to conceal just as the interest-free payment plan spread over five years provided the plaintiff/debtor sufficient motive in *In re Watts* to conceal.

[Reply brief at 10].

This court finds defendant's argument persuasive, and it agrees that, under *Long*, there was "a potential financial benefit that could result from concealment" in this case. *Id.* This court further reiterates that the Fifth Circuit has made it clear that "the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court," *Love*, 677 F.3d at 262, and there is, once again, no dispute that plaintiff failed to disclose his claim to the bankruptcy court in this case. As to plaintiff's argument that he told his attorney of his civil claim, the Fifth Circuit has held in related contexts that "mistake of counsel" generally does not suffice to demonstrate "good cause" to excuse non-compliance with the requirements of the Federal Rules of Civil Procedure. *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir. 1985). Plaintiff offers this court no authority suggesting that this general rule is inapplicable in the present context, and the fact that Fifth Circuit's holdings in bankruptcy non-disclosure cases make no mention of "mistake of counsel" as providing an effective defense to a finding of judicial estoppel suggests otherwise. In the court's view, mistake of counsel arguments are so common in cases where parties are seeking to have a court excuse a failure to comply with various rules

that it seems quite unlikely that such arguments are what the Fifth Circuit had in mind when it used the "almost always" language in *Long*. Otherwise, cases where a debtor was excused for failing to disclose bankruptcy assets would not be rare ones, but common indeed. The general rule in this context appears to be based on the reality that parties in civil cases generally act through attorneys, and, that being the case, allowing them to escape negative consequences for failing to comply with applicable rules based on mistakes of counsel would, no doubt, lead to widespread failure to comply with those rules.

This court further notes that plaintiff's argument that he failed to make an explicit representation to the bankruptcy court that he had no civil claims is rendered irrelevant by the Fifth Circuit holding in *Tangipahoa* that "[b]ecause he had an affirmative duty to disclose post-petition causes of action, [the debtor] impliedly represented that he did not have such a claim when he failed to disclose this litigation to the bankruptcy court." *Tangipahoa*, 766 Fed. Appx. at 41. In this case, plaintiff similarly made an implied representation to the bankruptcy court that he had no post-petition cause of action when he filed multiple amended plans making no mention of such claim. Moreover, defendant's reliance upon *Tangipahoa* illustrates, once again, how it is seemingly able to respond to each of plaintiff's arguments with a helpful Fifth Circuit decision on point.

The Fifth Circuit in *Tangipahoa* did not dispute that its judicial estoppel precedent is rather harsh and unforgiving, but it expressly declined pleas from the plaintiff and *amicus curiae* to relax its standards

in this context. Specifically, the Fifth Circuit wrote in that decision that:

> [Appellant] and amici make various equitable and policy arguments that this standard is overly rigid. But our precedent is clear: Chapter 13 debtors must disclose post-petition causes of action. *See, e.g., Allen*, 813 F.3d at 572; *[In re] Flugence*, 738 F.3d [126] at 129 n.1 [(5th Cir. 2013)] ("The continuing duty of disclosure is a longstanding gloss required by our caselaw."); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one."); *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004) ("The duty to disclose is continuous."). [Appellant] and amici also argue that this "heightened disclosure" requirement is unduly burdensome, as it would require debtors to modify their bankruptcy plans each time they receive a paycheck or their property appreciates. These examples are inapt, however, because those paychecks and properties would already have been included in the debtor's original schedules. Thus, they would not need to be disclosed again. In contrast, [appellant] never disclosed this cause of action to the bankruptcy court. As the Eleventh Circuit has recognized, "The bankruptcy court is entitled to learn about a substantial asset that the court had not considered when it confirmed the debtors' plan." *Waldron v. Brown* (*In re Waldron*), 536

> F.3d 1239, 1245 (11th Cir. 2008). Thus, Bias's and amici's arguments are without merit.

Tangipahoa, 766 F. App'x at 42. It is thus apparent that the Fifth Circuit has quite consciously adopted rigid and unforgiving standards in this context, and, that being the case, this court has no choice but to follow those standards. Of course, the day may eventually come when the Fifth Circuit clarifies exactly what sort of case properly falls under the "almost always" language in *Long*, but plaintiff has provided this court no authority suggesting that this case, containing quite typical arguments of inadvertent error and mistakes of counsel, should be recognized as falling within the scope of this language.

In the court's view, the "bottom line" in this context is that, since courts are not, in fact, mind-readers, they will inevitably be forced to make a broad policy decision regarding whether a permissive or stringent approach to non-disclosure should be adopted, and, whichever way they decide, there may be unfair results which flow from that decision. It seems clear that, if a court adopts a permissive approach, then, as noted by the Fifth Circuit, a simple risk-benefit analysis would "suggest[ ] that a debtor should consider disclosing personal assets only if he is caught concealing them." *Long*, 798 F.3d at 273, fn. 6. The Fifth Circuit clearly believes that providing such perverse incentives for debtors to defraud their creditors is an unacceptable result, and it has accordingly adopted a stringent approach which "almost always" presumes that a failure to disclose assets was intentional. This stringent approach will, no doubt, result in many debtors who did, in fact, make an honest mistake being barred from pursuing

potentially meritorious tort claims. It is unclear to this court whether the plaintiff in this case falls in this category, but, if so, then then this is a regrettable yet unavoidable result of the policy decision which the Fifth Circuit was forced to make. This court is bound to follow the Fifth Circuit's decisions in this context, and it accordingly finds that defendant's motion for summary judgment on the basis of judicial estoppel is well-taken and should be granted.

It is therefore ordered that defendant's motion for summary judgment is granted.

A separate judgment will be entered this date, pursuant to Fed. R. Civ. P. 58.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-60025

United States
Court of Appeals
Fifth Circuit
FILED
March 31, 2025
Lyle W. Cayce
Clerk

THOMAS KEATHLEY,

Plaintiff—Appellant,

versus

BUDDY AYERS CONSTRUCTION, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:21-CV-261

Before HIGGINBOTHAM, STEWART, and HAYNES, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI
OXFORD DIVISION

THOMAS KEATHLEY,

Plaintiff,

v.

BUDDY AYERS
CONSTRUCTION, INC.

Defendant.

CIVIL ACTION NO.:
3:21-CV-261-MPM-RP

AFFIDAVIT OF KELLIE M. EMERSON

STATE OF ARKANSAS
COUNTY OF PULASKI

Personally appeared before me, the undersigned authority, Kellie M. Emerson, after being first duly sworn makes oath and states:

1. I, Kellie M. Emerson, am an adult resident of Pulaski County, Arkansas, over the age of eighteen, and otherwise competent to execute this Affidavit.

2. I have personal knowledge of the facts recited in this Affidavit.

3. I am a staff attorney for the office of Mark T. McCarty, a Chapter 13 Trustee for the Eastern and Western Districts of Arkansas.

4. Thomas Keathley and Connie Keathley are debtors in a Chapter 13 bankruptcy proceeding in the United State Bankruptcy Court for the Eastern District of Arkansas.

5. Mr. and Mrs. Keathley's bankruptcy is in the Eighth Circuit Court of Appeals of the United States.

6. Mr. And Mrs. Keathley's bankruptcy is proceeding under case number 2:19-bk-16848.

7. The current payoff amount of Mr. And Mrs. Keathley's debts is $5,691.06 through the end of August 2023.

8. I am the staff attorney assigned to Mr. and Mrs. Keathley's bankruptcy.

9. Throughout the duration of their bankruptcy, I have communicated with Mr. and Mrs. Keathley directly and through their attorney, Bart Ziegenhom.

10. Over the course of the communications, I am unaware of Mr. Keathley, Mrs. Keathley, and Mr. Ziegenhron having lied or made any misrepresentations to me.

11. Furthermore, there is nothing unusual or misleading about Mr. and Mrs Keathley not disclosing the personal injury action while the personal injury action is ongoing.

12. In the Eastern District of Arkansas, it is not uncommon for debtors to amend their bankruptcy filings to disclose post-petition claims for personal injury actions prior to the settlement or resolution of the personal injury action.

13. Even if Mr. and Mrs. Keathley had notified the bankruptcy court of the personal injury claim immediately after the wreck of August 23, 2021, it would not have had any effect on the administration of the bankruptcy as the bankruptcy case will pay 100% to creditors.

14. Even if Mr. and Mrs. Keathley had notified the bankruptcy court of the personal injury claim immediately after the wreck of August 23, 2021, it

would not have had any impact on the amount the Keathleys would have had to pay or the time they would have had to pay it.

15. Mr. and Mrs. Keathley have received no benefit from the non-disclosure of the personal injury claim in the bankruptcy case.

16. It would be in the best interests of the bankruptcy estate and the Keathey's creditors if Mr. Keathley's personal injury action were allowed to proceed as it could possibly result in creditors being paid in full in a more timely manner.

FURTHER AFFIANT SAITH NOT.

s/ K. Emerson
Kellie M. Emerson

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, this the 17th day of August, 2023.

My commission expires: 4-06-2028

s/ [illegible]
Notary Public
[notary stamp omitted]