No. 25-6

IN THE

Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INCORPORATED,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Is the Fifth Circuit's application of the doctrine of judicial estoppel to bar a bankruptcy debtor from pursuing a claim for personal injuries consistent with *New Hampshire v. Maine* when the evidence showed that the debtor, who deliberately and repeatedly omitted the existence of separately pending personal injury and workmen's compensation claims in his bankruptcy schedules, finally disclosed the claims only after the defendant in the personal injury case filed a motion for summary judgment based on the non-disclosure?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

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., the defendant in the district court and the appellee in the court of appeals, is a Mississippi corporation with a principal place of business in Corinth, Mississippi. Buddy Ayers Construction, Inc. does not have a parent company and no publicly held company owns ten percent or more of the stock of Buddy Ayers Corporation, Inc.

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INTRODUCTION

Petitioner, Thomas Keathley, is no stranger to bankruptcy and the Bankruptcy Code's filing requirements. In addition to filing a Chapter 13 Voluntary Petition for Bankruptcy and a Chapter 13 Plan in the United States Bankruptcy Court for the Eastern Division of Arkansas in 2019, Keathley had previously filed for bankruptcy protection in 2001, 2003 and 2015. ROA. 2544-50. During the pendency of the 2019 bankruptcy case, Keathley was involved in a motor vehicle accident on August 23, 2021, and retained an attorney one day later who filed a personal injury lawsuit on December 29, 2021 which named the Respondent, Buddy Ayers Construction, Inc. (BAC) as a defendant. Although Keathley readily acknowledged his affirmative obligation to disclose his claim—clearly an asset of the bankruptcy estate—to the bankruptcy court (Pet. App. 42a), he waited until BAC filed a motion for summary judgment on March 30, 2023 on the grounds of judicial estoppel to make the disclosure. BAC's motion prompted Keathley's filing of an Amended Schedule on April 4, 2023 finally notifying the bankruptcy court that he had a pending personal injury lawsuit against BAC. ROA. 2550. On April 14, 2023, Keathley also finally revealed to the bankruptcy court that he had earlier filed, and eventually settled a workers' compensation claim four months earlier in December 2022 for the injuries sustained in the August 2021 accident. ROA. 2551.

The district court granted summary judgment based on the doctrine of judicial estoppel, a doctrine designed to protect the integrity of the judicial process and invoked by a court at its discretion. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). ROA. 2551. The district court's decision

and the Fifth Circuit's affirmance were consistent with *New Hampshire's* observation that, although "additional considerations may inform the doctrine's application in specific contexts," typically the doctrine requires evidence that the party's position in successive proceedings was "clearly inconsistent," the party succeeded in persuading a court to accept the party's earlier position, and that the party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751. The Court added that evidence that the prior position was "based on inadvertence or mistake" may be appropriately considered when deciding whether the "prior position" could be disregarded as a matter of equity and thereby undermine the invocation of judicial estoppel. *Id*. at 753.

There was ample evidence in the record supporting the district court's exercise of discretion to bar the Respondent's civil claim. Keathley failed to include his personal injury claim (and workers' compensation claim) in the bankruptcy disclosures until *after* his omission was made known by BAC's motion for summary judgment. With evidence that the omission was knowing and deliberate, together with the timing and motivation for the eventual disclosure, and the obvious motives for concealment, the district court did not abuse its discretion.

In framing the issue before this Court, the Petitioner does not dispute that he knew of the facts underlying his personal injury claims (indeed, he filed two undisclosed lawsuits) and that he had an affirmative duty to inform the bankruptcy court of these post-petition personal injury and workers' compensation claims. There was no "honest mistake" here. Neither does he disagree that the failure to

disclose these assets constituted an "inconsistent position" with the position he took by pursuing his claims in this case, and that by failing to disclose these assets while the bankruptcy court considered and approved several amendments to the Chapter 13 Plan, he thereby gained an advantage, or disadvantaged his bankruptcy creditors, concerning the potential terms of the Chapter 13 Plan.

According to the Petitioner, the only issue presented for review is whether, in this narrow bankruptcy context, his knowing failure to disclose prior to BAC's filing of the motion for summary judgment was in "bad faith," that is, whether the failure to disclose was *subjectively* intended to mislead the courts[1]. To support certiorari review, the Petitioner adds that there is an alleged circuit split on the kind of evidence bearing on intent, characterizing the Fifth and Tenth Circuit's approach as "too rigid" and out of sync with several sister circuits because it is not sufficiently "holistic" in its weighing of the evidence bearing on intent. Unsurprisingly, a review of the alleged "majority" rule cases cited by the Petitioner shows that the nature and extent of the "circuit split" is overplayed here and the perceived differences in outcome are fact specific. Were it the case that the Fifth Circuit regarded the mere omission of an asset in a pending bankruptcy proceeding as conclusive on the issue of intent, the Petitioner would have a stronger argument concerning the existence of a circuit split worthy of certiorari review, but that is not the case here. But regardless of how the facts bearing on "intent" should be weighed as a matter

1. The Respondent acknowledges that whether the issue as stated by the Petitioner involves the proper standard to be applied in determining the application of judicial estoppel goes to the substantive merits, not whether the petition should be granted.

of discretion, under the particular facts in this record, the Petitioner's personal injury claim was properly barred by the doctrine of judicial estoppel because of the direct and circumstantial evidence of intent.

STATEMENT OF THE CASE

A. Legal Framework

1. As observed by this Court in *New Hampshire*, the doctrine of judicial estoppel is equitable in nature and is designed to prevent a party from asserting a claim in a legal proceeding that is inconsistent with the claim taken by that party in a previous proceeding. *New Hampshire*, 532 U.S. at 749. The purpose of the doctrine is to "protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants." *Heston v. Austin Indep. Sch. Dist.*, 816 Fed. Appx. 977, 984 (5th Cir. 2020). As a function of its equitable nature, the decision whether to apply the doctrine will likely depend on different considerations unique to the facts of each case, although the Court in *New Hampshire* did offer several non-exhaustive factors worthy of common application. Consistent with *New Hampshire*, the Fifth Circuit has acknowledged and applied *New Hampshire's* equitable approach and its suggested non-exhaustive factors in a number of contexts, including bankruptcy. *U.S. ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 Fed. Appx 38, 41 (5th Cir. 2019); *Aldous v. Darwin Nat'l Assur. Co.*, 851 F. 3d 473, 478 (5th Cir. 2017); *Love v. Tyson Foods, Inc.*, 677 F. 3d 258, 261 (5th Cir. 2012); *Reed v. City of Arlington*, 650 F. 3d 571, 574 (5th Cir. 2011). In *Tangipahoa*, for example, the Fifth Circuit applied *New Hampshire* in the bankruptcy context, stating "a court

may apply judicial estoppel if (1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the party did not act inadvertently." 766 Fed. Appx. at 41.

2. Under the Bankruptcy Code, Chapter 13 debtors have an affirmative and continuous duty to disclose all of their assets, including "contingent and unliquidated claims." 11 U.S.C. § 521(1); *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999). The duty of disclosure includes post-petition causes of action. *Allen v. C & H Distrib., LLC.*, 813 F.3d 566, 572 (5th 2015). The debtor must disclose post- confirmation assets to the bankruptcy court regardless of whether the assets are treated as property of the estate or vested in the debtor. *Flugence v. Axis Surplus Ins. Co.*, 738 F.3d 126, 130 (5th Cir. 2013). The 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 when he has a colorable theory for why those assets should be shielded from creditors-allows the issue to be decided as part of the orderly bankruptcy process." *Allen*, 813 F. 3d at 572.

3. Judicial estoppel, as an equitable remedy, must be consistent with the law. *I.N.S. v. Pangillinan*, 486 U.S. 875, 883 (1988). When a debtor fails to disclose a personal injury claim in bankruptcy court, it implies that no such claim exists. *Id.* The Fifth Circuit, like its sister circuits, has repeatedly held that filing a personal injury suit in one court without notifying the bankruptcy court is a blatant inconsistency that readily satisfies the first prong of judicial estoppel. *Allen v. C & H Distributors, LLC*, 813 F.3d 566, 572 (5th Cir. 2015). Under the second element

of judicial estoppel, a bankruptcy court's acceptance of a bankruptcy plan based on a schedule which fails to include a potential or pending personal injury claim constitutes the court's acceptance of that position. *Flugence*, 738 F. 3d at 130.

4. Regarding the issue raised in the Petition, the Fifth Circuit approach to the evaluation of intent or inadvertence is not based on "formulaic presumptions." Instead, the Fifth Circuit has aptly recognized that "judicial estoppel is not governed by inflexible prerequisites for an exhaustive formula for determining its applicability, and numerous considerations may inform the doctrine's application in specific factual context." *Tyson Foods*, 677 F. 3d at 261. Against the backdrop of the Bankruptcy Code's affirmative disclosure requirements, however, the court has noted that "judicial estoppel is particularly appropriate where a party fails to disclose an asset to the bankruptcy court, but then pursues a claim in a tribunal based on that undisclosed asset." *Id*. Yet, mere nondisclosure is not enough in the Fifth Circuit's view. "Judicial estoppel will not apply if the nonmoving 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." *Tangipahoa*, 766 Fed. Appx. at 43. Rather, in a series of cases, as well as the case here, the court has engaged in a review of all the facts surrounding the debtor's nondisclosure, including their knowledge of the claim, and whether the debtor disclosed the claim only after facing the dismissal of their claim on judicial estoppel grounds. *Tangipahoa*, 766 Fed. Appx. at 44; *Superior Crewboats, Inc. v. Primary P & I Underwriters*, 374 F. 3d 330, 335 (5th Cir. 2004). The existence of motive in the bankruptcy context is evaluated

by reference to the benefit to the debtor, and detriment to the creditor, arising from the nondisclosure—matters of common sense. Motivation in this context is "self-evident because of the potential financial benefits resulting from the nondisclosure." *Tyson Foods*, 677 F. 3d at 262. Typically, the Fifth Circuit examines the facts of each case to determine whether the terms of the court-adopted plan would have been likely impacted had the asset been disclosed. *In re Watts*, 2012 WL 3400820 (Bankr. S.D. Tex. 2012).

B. Factual and Procedural Background

1. 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. ROA. 2544. Keathley had filed for bankruptcy on at least three prior occasions—in 2001, 2003 and 2015. A few months later in March 2020, Keathley filed an amended plan in the bankruptcy court which affirmed the plan in April 2020. The plan, as confirmed by the Bankruptcy Court, provided for 100% interest free the payments spread out over five years. Pet. App. 51a.

On August 23, 2021, Keathley was involved in an automobile accident with David Fowler, a driver for BAC. On the same day, Keathley spoke with a personal injury attorney regarding the prospects of filing a lawsuit for personal injuries sustained in the accident. 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. ROA.1. Neither Keathley nor his attorney notified the bankruptcy court or his creditors that he had filed a personal injury suit.

On March 1, 2022, Keathley filed a modified Chapter 13 plan but, again, did not notify the Bankruptcy Court or his creditors of the existence of the personal injury claim. ROA.2549. Three months later, Keathley filed two separate documents with the Bankruptcy Court, a Chapter 13 Amended Plan and a Chapter 13 Modified Plan. ROA.2550. Yet Keathley maintained his silence regarding the pending personal injury lawsuit. The bankruptcy court confirmed Keathley's Modified Plan on July 20, 2022.

On December 16, 2022, Keathley filed a First Amended Complaint in his personal injury lawsuit, asserting a new demand for punitive damages. ROA. 496. One week later, Keathley entered into an agreement settling his workers' compensation claim he had filed following the August 23, 2021 accident. ROA. 2557. That same day, the Tennessee Court of Workers Compensation Claims approved the settlement. ROA. 2562. Keathley again failed to disclose his personal injury claim and his workers compensation claim and award to the bankruptcy court.

BAC filed a motion for summary judgment in the personal injury lawsuit on March 30, 2023. BAC asserted that Keathley failed to list the injury claims in the schedule of assets filed in the bankruptcy court and that he should therefore be judicially estopped from pursuing the claims. ROA. 916. In support, BAC pointed out that Keathley had a 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 the 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.

On April 4, 2023, Keathley responded to BACs motion for summary judgment by filing an amended schedule in his bankruptcy proceeding, finally revealing his personal injury claim to the bankruptcy court. ROA. 2550. Ten days later, Keathley filed a motion with the bankruptcy court advising of the filing of the worker's compensation claim and seeking approval of the December 2022 settlement. In his response to the motion for summary judgment before the district court, Keathley argued two diametrically opposed positions regarding his "intent." First, he claimed that the failure to disclose was simply unintentional and in good faith. On the other hand, he argued that the nondisclosure was intentional and would have been cured once the personal injury lawsuit was at the point of settlement[2].

2. The district court granted BACs motion for summary judgment based on the doctrine of judicial estoppel on August 8, 2023. ROA. 1267. The district court exercised its discretion and found 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 bankruptcy estate," concluding that the repeated failure to disclose the asset while seeking modification of the plans, and given the apparent motive to conceal an asset in the bankruptcy context, justified invoking the doctrine of judicial estoppel. Pet. App. 52a. The district court explained that it was bound by long-standing Fifth Circuit jurisprudence which had

2. Of course, the reality that Keathley also did not disclose the December 2022 workers' compensation settlement until April 2023, well after the date of settlement, belies that explanation.

been developed to protect "the integrity of the bankruptcy process and the federal courts as a whole" and gave "clear warning to any debtors thinking of failing to disclose lawsuits because if their deceptions discovered, it would not simply be allowed to plead an honest mistake and file an amended disclosure." Pet. App. 41a.

On September 9, 2023, Keathley filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), contending that "newly discovered evidence" in the form of an affidavit by the Chapter 13 Trustee's staff attorney (Emerson) showed that it was not unusual, according to the local bankruptcy court practice, for a debtor not to disclose a personal injury lawsuit while it remained pending. ROA. 1863-2443. The staff attorney's affidavit explained that it was "not uncommon for debtors to amend their bankruptcy filings to disclose post-petition personal injury actions prior to the settlement or resolution of the personal injury action." Keathley took the position that the affidavit supported his "position that the nondisclosure of the personal injury claim was inadvertent."

On December 14, 2023, the district court denied the motion for reconsideration[3]. Pet. App. 24a. First, it noted that, as far as it could discern, the affidavit was not "newly discovered evidence." The district court went on to comment that the affidavit actually supported the view that the nondisclosure was in fact intentional. Keathley appealed the grant of summary judgment and the denial of the motion to amend. ROA. 2617.

3. The district court's denial of the Motion for Reconsideration was a function of Rule 59(e), not the doctrine of judicial estoppel, and therefore does not fall within the question presented for review in this Petition.

3. The Fifth Circuit affirmed the district court's rulings, finding that the court did not abuse its discretion when invoking the doctrine of judicial estoppel and denying the motion to amend. Pet. App. 1a. After concurring with the district court's evaluation of the first two *New Hampshire* elements (the assertion of inconsistent positions and the prior court's acceptance of the prior inconsistent position), the court turned its attention to the issue of whether Keathley's failure to disclose was inadvertent. The court observed that "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." Noting that Keathley did not suggest that he lacked knowledge of his personal injury lawsuit against BAC, the court examined Keathley's argument that he nonetheless lacked a motive to conceal his claims from the bankruptcy court "because he did not realize he had a duty to disclose them," citing the affidavit submitted in support of the Motion for Reconsideration. Pet. App. 13a.

Starting with the proposition that "the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions," the court found that Keathley's argument that he did not realize he had a duty to disclose was meritless because ignorance of the law was not relevant to the inquiry. On this point, the court considered the degree of Keathley's experience in bankruptcy matters and the substance of the Emerson affidavit which plainly showed that the nondisclosure was intentional. Pet. App. 14a. Regarding motive, the court concurred with the district court's observation that "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 the grounds that his personal injury suit, if successful, would have generated enough revenue to cover the interest he owed on his debts." Pet. App. 14a. The court concluded therefore that "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."[4]

REASONS FOR DENYING THE WRIT

A. No Element of Supreme Court Rule 10 is Present

There is no fundamental conflict in the Circuits regarding the basic rule of *New Hampshire.* Assessing the existence of intent, "inadvertence" or "mistake" is addressed by all circuits based on the necessarily unique factual circumstances of each case. Evidentiary rulings

4. Judge Haynes concurred in the judgment while expressing doubt that the affirmance "advanced the goals of the doctrine." However, Haynes' also took issue with the procedural posture of the case given the pendency of the bankruptcy proceeding in the Eastern District of Arkansas which sits in a different circuit than the district court. In her view, the district court should have deferred to the bankruptcy court on the question of remedy for the nondisclosure.

based on the weight of evidence relating to the application of judicial estoppel are reviewed for abuse of discretion and can be handled by the courts below. Consistent with its sister Circuits, the Fifth Circuit considers the totality of evidence bearing on intent when applying the doctrine of judicial estoppel. Indeed, the Tenth and D.C. Circuits have recognized that the alleged circuit split on this issue is "artificial because, in practice, , even those courts of appeals that have followed the Fifth Circuit's lead, like the Tenth Circuit, have not been as rigid as one would expect in practice." *Marshall v. Honeywell Tech. Sys.*, 828 F.3d 923, 932 (D.C. Cir. 2016); *Anderson v. Seven Falls Co.*, 696 Fed. Appx. 341, 348 (10th Cir. 2017).

Even if the perceived differences in the weight accorded evidence relevant to "intent" might be deemed worthy of certiorari review, this is not the case to address that issue. Essentially, under the unique facts and the totality of the circumstances of this case, every circuit considering the issue of inadvertence or mistake in this bankruptcy context would reach the same conclusion that Keathley's nondisclosure was not unintentional and that the doctrine of judicial estoppel is properly invoked here.

B. There is No Fundamental Split in the Circuits to Resolve

Keathley wrongly asserts that there is a fundamental and outcome determinative conflict among the Circuits concerning the kind of proof necessary to determine whether a bankruptcy debtor's failure to disclose an asset was intentional or inadvertent. Keathley exaggerates the alleged conflict and leads off his argument with a discussion of the Eleventh Circuit decision *Slater v.*

United States Steel Corporation, 871 F. 3d 1174, 1189 (11th Cir. 2017). But the Fifth Circuit in *Tangipahoa* took issue with the *Slater* court's characterization of the Fifth Circuit approach to judicial estoppel, stating that *Slater* mischaracterized Fifth Circuit case law as "permitting an inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system." *Tangipahoa*, 766 Fed. Appx. at 44 n.3. The Court in *Tangipahoa* continued: "a summary of our case law in this manner is a hazardous undertaking, and one that the Eleventh Circuit got wrong. Unlike the Eleventh Circuit, our case law has always required courts to consider the facts before them in determining whether a debtor acted inadvertently. Take, for example, the very case the 11th circuit cites in support of its erroneous proposition: *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.*), 374 F. 3d 330 (5th Cir. 2004). There, we did not draw an "inference" from the debtor's omission that they had intended to 'manipulate the judicial system.' Instead, we considered the facts surrounding the debtor's nondisclosure such as their knowledge of the claim; that they had initiated the suit only months after filing for bankruptcy and requesting service of process during the pendency of the bankruptcy petition; and their continued silence. [citation omitted] we have undertaken a fact-specific inquiry in this case as well. In sum, *Slater* altered the Eleventh Circuit's case law to make it more like our own precedent, not less." *Id.*

The Eleventh Circuit in *Slater* emphasized that the district courts should review the "totality of the circumstances" when assessing intention and inadvertence for purposes of the doctrine of judicial estoppel. In doing so, it offered the following factors to consider: (1) the

debtor's level of sophistication; (2) whether and under what circumstances the debtor corrected the failure to disclose; (3) whether the debtor told his bankruptcy attorney about the civil claims before filing bankruptcy disclosures; (4) whether the trustee or creditors were aware of the civil lawsuits or claims before the debtor amended his filings to correct the failure to disclose; (5) whether the debtor identified other lawsuits to which he was a party; and (6) any findings or actions by the bankruptcy court after the debtor's failure to disclose was discovered. *Slater*, 871 F. 3d at 1185.

These factors offer nothing new to the Fifth Circuit's approach, and their application to the facts in our case lead to same result. Here, Keathley was a sophisticated and experienced bankruptcy debtor; Keathley never attempted to correct the failure to disclose at any time prior to BACs motion for summary judgment, even though there were a number of opportunities to make the disclosure when Keathley filed successive bankruptcy plan amendments; Keathley clearly knew of the existence of his personal injury claim (and the workers compensation claim); there is no evidence that Keathley advised any of his creditors or the bankruptcy trustee of either of the pending injury claims; and Keathley delayed advising the bankruptcy court of his workers compensation claim settlement for 4 months and only after the filing of BACs motion for summary judgment.

The remaining cases cited by Keathley to illustrate an alleged Circuit split are plainly factually distinguishable. For example, in the Seventh Circuit decision *Spain v. Community Context, Inc.*, 756 F. 3d 542 (7th Cir. 2014), the district court found that the plaintiff intended to

conceal her employment discrimination claim from the bankruptcy court and tried to correct her failure to disclose only after the omission was revealed by the defendant's motion for summary judgment based on judicial estoppel. The Court of Appeals reversed based on the following factual findings: (1) the plaintiff was proceeding without a lawyer in her bankruptcy case; (2) the plaintiff had orally disclosed her discrimination claim to the bankruptcy court long before the employer filed its summary judgment motion; and (3) the trustee knew about the plaintiff's employment discrimination claim before the employer moved for summary judgment. The Court of Appeals faulted the district court for overlooking plaintiff's testimony that she had orally disclosed her employment discrimination claim to the bankruptcy court. Id. at 544. Significantly, the court went on to find that "if the facts were as described by the district court, we would affirm." *Id*. at 544.

Likewise, in the Sixth Circuit decisions, *Stanley v. FCA US, LLC*, 51 F.4th 215 (6th Cir. 2022) and *White v. Wyndham Vacation Ownership, Inc*., 617 F.3d 472 (6th Cir. 2010), the court affirmed the district court's grant of summary judgment based on judicial estoppel. In Stanley, the debtor filed a Chapter 13 bankruptcy petition and 7 months later filed a modified bankruptcy plan. A week later, the bankruptcy court confirmed the plan. *Stanley*, 51 F.4th at 218. Three months later, the plaintiff filed a discrimination claim but did not amend his bankruptcy filings to include that asset. After the plaintiff was repeatedly questioned about the nondisclosure during the discrimination lawsuit, he updated his bankruptcy asset disclosure to include the discrimination claim. On

these facts, the district court granted the defendant's motion for summary judgment, finding that the plaintiff's amendment to the bankruptcy disclosure was "too little, too late." *Id*. The Sixth Circuit affirmed, noting that "it is the non-reporting petitioner's burden to provide evidence showing an absence of bad faith." *Id* at 221. Further noted that the plaintiff submitted a corrected disclosure to the bankruptcy court only after being questioned about the omission during his deposition in the discrimination lawsuit and only after receiving a settlement letter which also raised the nondisclosure. *Id*. The Sixth Circuit concluded "this late, perfunctory disclosure does not demonstrate an absence of bad faith."

The Sixth Circuit reached the same result in *White.* There, the evidence showed that the debtor made two attempts to disclose a personal injury claim before, and one attempt after the defendant moved to dismiss on the basis of judicial estoppel. Reviewing the circumstances of the attempts at disclosure, the court found that the alleged pre-dispositive motion attempts at disclosure were too vague and ultimately ineffectual, and that the post-dispositive motion disclosure, although effective, was done only in response to the motion for summary judgment. On these facts, the *White* court held that the debtor had not demonstrated the absence of bad faith or that the nondisclosure was inadvertent.

Finally, the Petitioner cites the Ninth Circuit decision *Ah Quin v. County of Kauai DOT*, 733 F. 3d 267 (9th Cir. 2013) for the proposition that a court must find that the bankruptcy debtor acted with "subjective" intent to deceive before applying judicial estoppel and that the failure to do so constitutes an abuse of discretion. The Tenth Circuit in *Anderson*, criticizing *Ah Quin*, rejected

this approach to "intent" finding that *New Hampshire* "gives courts flexibility to to apply this equitable doctrine as needed to protect the courts from fraud. [citation omitted] Courts are certainly free to consider , or not to consider,the debtor's subjective intent under the flexible factors analysis" but "requiring" proof of "subjective beliefs solidifies an otherwise flexible analysis, which cuts against the Supreme Court's description of the doctrine." *Anderson*, 696 Fed. Appx. at 348.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Circuit decisions, including the Fifth Circuit, do not reflect a fundamental split in how they approach the question of intent in the bankruptcy context and have faithfully adhered to *New Hampshire*'s equitable approach to the doctrine of judicial estoppel. The district court and the Fifth Circuit here correctly invoked the doctrine based on the facts and circumstances of Keathley's repeated nondisclosure of his personal injury and workers' compensation claims.

Respectfully submitted,

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