No. 128141

In the

Supreme Court of Illinois

DARRIUS DUNIVER,

Plaintiff-Appellee,

vs.

CLARK MATERIAL HANDLING CO., BATTERY HANDLING SYSTEMS, INC., EQUIPMENT DEPOT OF ILLINOIS, INC. and NEOVA LOGISTICS SERVICES, INC.,

Defendants-Appellants.

On Appeal from the Illinois Appellate Court, First Judicial District, No. 1-20-0818.
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2019 L 000546.
The Honorable **Kathy M. Flanagan**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE DARRIUS DUNIVER

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NATURE OF THE CASE

Plaintiff Darrius Duniver, after losing his leg as a result of an accident while working as a forklift operator on July 30, 2017, filed a Workers' Compensation claim. He then filed this action against Defendants Clark Material Handling Co., Battery Handling Systems, Inc., and Equipment Depot of Illinois, Inc., on January 16, 2019, adding Neova Logistics Services, Inc., on July 12, 2019. Duniver filed for bankruptcy on February 8, 2019.

Defendants moved for summary judgment. They argued that Duniver's failure to list his personal injury case in the bankruptcy petition and his statement to the trustee that he was not suing anyone judicially estopped prosecution of this claim. He listed his Workers' Compensation claim in his bankruptcy petition, but not this claim. Duniver explained his nondisclosure was inadvertent and that he relied on his bankruptcy attorney to complete the petition.

The circuit court granted summary judgment based on judicial estoppel after concluding that Duniver intended to deceive the Trustee about his personal injury claim.

The appellate court, relying on *Seymour v. Collins*, 2015 IL 118432, reversed, finding that Duniver received no significant benefit from his failure to list this claim in the bankruptcy court, and alternatively, that he did not deliberately fail to disclose this claim.

No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the appellate court erred when it reversed the summary judgment in favor of Defendants, after finding (1) Plaintiff's failure to list this action in his bankruptcy petition did not invoke judicial estoppel because Defendants did not prove all five prerequisites for judicial estoppel and did not prove he acted with intent to deceive, and (2) the dismissal of his bankruptcy action for failure to make payments did not deny him standing to prosecute this claim.

STATEMENT OF FACTS

Plaintiff Darrius Duniver was injured on July 30, 2017, while operating a forklift, severing his leg. C388-90 (allegation and answer of Equipment Depot). He first filed a Worker's Compensation claim on August 22, 2017.[1] He then filed suit against Defendants Clark Material Handling Co., Battery Handling Systems Inc., and Equipment Depot of Illinois, Inc., on January 16, 2019, and converted Neova Logistics Services, Inc, from a respondent in discovery to a defendant on July 12, 2019. C20, C331 (complaints).

Motions for summary judgment

Defendant Neova moved for summary judgment and the other three defendants joined, based on judicial estoppel. C440 (Neova); C571 (Equipment Depot); C575 (Battery Handling); C579 (Clark Material). They relied on Duniver's petition and statement in his Chapter 13 bankruptcy proceeding, filed by separate bankruptcy counsel on February 8, 2019. C455 (Bankruptcy Court documents). The bankruptcy application consists of approximately 55 pages. He had filed two prior bankruptcy applications, both dismissed. C457.

On the bankruptcy form, Plaintiff checked the category for assets estimated from $0 to $50,000, and similarly checked the box for the category of liabilities ranging from $0 to $50,000. C460; App. at A14. He verified that section, as he had done for the other sections. Question 33 of that form asked

[1] That date is not in the record, but Plaintiff assumes it is not disputed, and the court can take judicial notice of it.

about claims against third parties, regardless of whether he had filed suit or made a demand for payment. He answered "no." C467; App. at A15. Question 34 asked about "other contingent and unliquidated claims of every nature," and he checked "yes," listing his Workers' Compensation claim arising out of the accident underlying this claim. C467; App. at A15.

Where the form asked for the value of all the assets listed in Part 4, which included the question about liquidated claims, he inserted only $800, representing a checking account. Schedule C asked for property which he claimed was exempt. C469; App. at A16. He listed his Workers' Compensation proceeding, but valued it at zero, and his answer also said the exemption claimed was zero. C469-70; App. at A16-17.

The bankruptcy form also asked whether, within a year of filing bankruptcy, he was a party to a lawsuit, court action or administrative proceeding. C493 (Part 4); App. at A18. His answer listed only a collection case.

The bankruptcy application instructed him to notify his attorney if he lost employment, had a significant change in income, or experienced "any other significant change in his financial situation (such as serious illness, marriage, divorce or separation, lottery winnings, or an inheritance)." He was also to notify his attorney if he was sued or wished to file a lawsuit. C503. His bankruptcy plan was confirmed on July 24, 2019. C538 (PACER docket entry), C545 (order).

At the creditors meeting for the bankruptcy proceeding, Duniver answered "no" when the Trustee asked him if he was suing anyone. C667.

Plaintiff's response

Responding to the motions, Duniver explained that he had relied on his bankruptcy counsel to file complete accurate schedules. C636-37. He had retained bankruptcy counsel in early February of 2019. C637 (referring to his affidavit at C650, ¶ 7); App. at A19 (affidavit). That attorney asked him about his debts, collection matters, and income, but did not inform him of an obligation to disclose pending lawsuits or claims for injury. *Id.* at ¶¶ 10-12. He relied on that attorney to tell him what information was needed for the bankruptcy forms. *Id.* at ¶¶ 8-9. When the amended plan was filed, the attorney did not ask about pending lawsuits or claims. *Id.* at ¶¶ 14-18.

He had not intended to deceive anyone. *Id.* at ¶¶ 20-21. Duniver directed his bankruptcy counsel to take steps to correct the plan when the omission (not listing the personal injury claim) was brought to his attention. *Id.* at ¶ 22. He argued that he had no intent to deceive. C640.

Circuit court ruling

The circuit court concluded that Plaintiff intended to deceive the Trustee, declared that he was judicially estopped from pursuing this case, and granted summary judgment against Plaintiff. C673; App. at A1.

Plaintiff filed a motion for reconsideration on March 24, 2020. C680. In that motion, Plaintiff informed the court that he had filed amended

bankruptcy schedules on January 22, disclosing this personal injury action. C827, C832 (Ex. E). The amended form shows his bankruptcy counsel reported the value of the entries in the section where the information about this claim was added at the amount of $800, the same value he had listed in this section in the original application. C833. His counsel also classified this personal injury case as exempt property, as he had done with the Workers' Compensation action earlier. C834-35.

Plaintiff also then notified the court that his bankruptcy had been dismissed on February 19, 2020, for failure to make the scheduled payments. C841 (Ex. F). He argued in his motion that because his bankruptcy case was dismissed, he could not have received a benefit from not disclosing this personal injury case in that proceeding.

Defendants objected (C847, C890, C1004), and the court denied the motion for reconsideration (C1018; App. at A7). The court refused to consider the amended schedule because it had been filed before the court ruled on the motions (the bankruptcy amendment was filed on January 22, and summary judgment was entered February 24). The court also noted that the bankruptcy had been dismissed five days before its summary judgment ruling. The court further said that while it had not considered the new evidence, Plaintiff benefitted from the bankruptcy despite the dismissal of his bankruptcy case, because the plan remained in effect until it was dismissed.

The court additionally ruled that while the technical error in bringing the claim personally rather than on behalf of the estate could be corrected, thus answering that ground for the summary judgment motion, it would be futile to do that in light of its ruling on judicial estoppel. App. at A6.

Appellate court decision

Plaintiff appealed and the appellate court reversed. *Duniver v. Clark Material Handling Co.*, 2021 IL App (1st) 200818, 186 N.E.3d 564. The court first noted that because the circuit court's application of judicial estoppel terminated the litigation, its review was *de novo*, pursuant to *Seymour. Duniver, supra* at ¶ 12.

The court then recited the five prerequisites for judicial estoppel set out in *Seymour*: a party must have (1) taken two positions, (2) factually inconsistent, (3) in separate judicial proceedings, (4) intended the finder of fact to accept the truth of the positions, and (5) succeeded in the first proceeding and received some benefit. *Id.* at ¶ 13, citing *Seymour v. Collins*, 2015 IL 118432, 39 N.E.3d 961. If those prerequisites have been met, the court next determines whether judicial estoppel is appropriate.

The court first found that Duniver had standing to prosecute his personal injury action in his own name. Defendants had argued in the trial court that he lacked standing, reasoning that because his bankruptcy case had been dismissed (because he did not make payments), he could not have asked the bankruptcy court to allow him to pursue the lawsuit on behalf of his estate.

Duniver had pointed out to the appellate court that the trial court acknowledged standing would not be a bar to his prosecution of the claim. The trial court had ruled that his technical error in bringing the claim personally rather than on behalf of the estate could be corrected. It did not allow that, which would satisfy standing, only because that would be futile in light of its dismissal of the claim based on judicial estoppel. App. at A6.

The appellate court pointed out that courts have found standing can revest in the debtor when the bankruptcy trustee abandons a personal injury claim. In this case, it noted that the trustee did not abandon the personal injury claim. Rather, the bankruptcy action was dismissed. The court held that the dismissal in effect revested Duniver's standing to prosecute the claim.

The court then examined the five elements of judicial estoppel. *Id.* at ¶ 16. It noted Duniver's contentions that (1) the fifth element had not been satisfied because he did not receive any benefit from not listing the personal injury claim, and (2) Defendants had not proved by clear and convincing evidence that Duniver intended to deceive the bankruptcy court. Duniver had also claimed that the circuit court used the wrong burden of proof in finding that he had received a benefit. *Id.* at ¶ 17.

In its review, the court first addressed Defendants' contention that Duniver waived the benefit argument because he first raised it in his motion for reconsideration. *Id.* at ¶ 18. The court chose "to overlook forfeiture because it is necessary to obtain a just result in this case."

Addressing the merits of the benefit issue, the court determined it would not apply Defendants' cited federal authority because Duniver's bankruptcy had been dismissed after only 11 months. *Id.* at ¶ 19. The court accepted Duniver's contention that because none of his debt was discharged and his Chapter 13 plan was dismissed for failure to make payments, he received no benefit. *Id.* at ¶ 20.

The court next addressed Duniver's alternative contention, that Defendants had not proven intent to deceive. The court noted that if all the elements of judicial estoppel are proven, *Seymour* required it to exercise its discretion in determining whether to apply judicial estoppel. *Seymour,* 2015 IL 118432, ¶ 47. In doing that, it would consider the significance of Duniver's benefit from the bankruptcy proceeding. *Id.* at ¶ 21. It also said the issue was whether Duniver deliberately failed to disclose his personal injury claim.

Duniver had argued that the bankruptcy forms themselves were the reason for his error, and also that the bankruptcy trustee should have recognized that his "no" answer was incorrect. He reasoned the trustee must have known he was suing someone because he had disclosed his Worker's Compensation claim under "other contingent and unliquidated claims of every nature." Duniver had also argued that the trustee's failure to acknowledge the apparent inconsistency in the application showed Duniver did not intend to deceive, but rather that no one in that proceeding put any emphasis on the importance of a personal injury claim. *Id.* at ¶ 22.

The appellate court, after viewing the evidence in a light most favorable to Duniver, found that he received no significant benefit in the bankruptcy court and, alternatively, that the evidence did not show intent to deceive. The court also found that dismissal of Duniver's bankruptcy action did not deny him standing to prosecute this action. *Id.* at ¶¶ 1, 26.

ARGUMENT

I. The appellate court properly found Darrius Duniver did not receive a significant benefit from his bankruptcy proceeding. It also properly found in the alternative that Defendants had not proved by clear and convincing evidence that his failure to list this claim showed an intention to deceive. Rather, there was at a minimum a question of fact as to whether the form caused Duniver to be legitimately confused by what claims were to be listed.

Standard of Review

In its Standard of Review, Defendants said there was no dispute of material fact. Def. br. at 16. The documents themselves are undisputed, as is Duniver's testimony that he did not intend to deceive the bankruptcy court and that he relied on his attorney there. However, the inferences a fact finder could draw from those facts cover a wide spectrum, and that situation makes summary judgment inappropriate. As the appellate court noted, the evidence is viewed in a light most favorable to Duniver (Opinion at ¶ 24), and that includes all inferences.

Argument

A. Defendants did not prove Darrius Duniver received a benefit as a result of not reporting this personal injury claim on his bankruptcy application.

The first question is whether the appellate court properly found that Defendants had not shown Duniver received a benefit as a consequence of not listing this personal injury claim in the bankruptcy proceeding. If the appellate court correctly found Duniver did not benefit by not timely listing this claim in his bankruptcy proceeding, that alone prevents application of judicial estoppel, making the "intent to deceive" question moot.

The appellate court chose to consider the benefit issue even though Duniver first raised it in his motion for reconsideration in the trial court. Opinion at ¶ 18. The court's decision to reject waiver and consider this issue followed the rule recited by this court on multiple occasions, and often by the appellate courts—forfeiture is a limitation on the parties and not the court. See, e.g., *Klaine v. S. Illinois Hosp. Services*, 2016 IL 118217, ¶ 41, 47 N.E.3d 966, 975–76; *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 28, 12 N.E.3d 530, 542.

Given that judicial estoppel is an equitable defense, fairness supports the appellate court's decision to allow this argument. In addition, because the point was raised in the trial court, Defendants had the opportunity to rebut it, further supporting the decision to consider it on appeal, because the delay did not cause any prejudice.

Addressing the point despite its not being raised initially was also in line with the fact that in cases like this, raising judicial estoppel as the result of a bankruptcy proceeding, Illinois has taken a different path than the federal courts. As one court noted when applying *Seymour*, this court there showed it felt very strongly about the need to deviate from federal courts' readiness to penalize debtors for what could be an honest mistake. *Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 46, 91 N.E.3d 537, 550, citing *Seymour v. Collins*, 2015 IL 118432, ¶¶ 61-62, 39 N.E.3d 961, 981. That same equitable approach applies to the waiver.

Turning to the merits of the benefit issue, Duniver did not succeed in the bankruptcy proceeding and did not receive any actual benefit from it. As the *Johnson* court noted, a bankruptcy petitioner receives a benefit if he or she is discharged. *Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 42, 91 N.E.3d 537, 549. Duniver was not discharged.

Although it is true some courts have found that the automatic stay imposed when a party initiates a bankruptcy can itself constitute a benefit in some circumstances, the stay here in reality provided no tangible benefit to Duniver. Defendants cite authority for the proposition that a bankruptcy stay is itself a benefit because it stays collection proceedings, giving the debtor unrestricted use of his money. Def. br. at 26. However, the distinction is that in those cases, there were or would have been collection proceedings absent the stay.

Here, as Plaintiff noted in his appellate court brief, the record reflects a workman missing a leg who was unable to work. Consequently, the reality is that no creditor was likely to pursue collection of a debt, and even if they had, they would not have received anything. Plaintiff was not going to be paying any bills regardless of any stay or any collection proceeding. Consequently, this is the unique case where the stay really had no value and thus produced no benefit, keeping in mind that receipt of a benefit must be proven by clear and convincing evidence. *Davis v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.*, 2021 IL App (1st) 200519, ¶ 39.

The court held in *Seymour* that the party to be estopped "must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Seymour v. Collins*, 2015 IL 118432, ¶ 47, 39 N.E.3d 961, 976. In light of the circumstances surrounding Duniver's bankruptcy, the appellate court correctly held the trial court erred when it found Defendants successfully proved he received a benefit, that being the fifth prerequisite for estoppel.

Defendants argue the appellate court erred because it wrongly held that a debtor receives no benefit until his debts are discharged. Def. br. at 28. But that is not a correct description of the court's ruling on the benefit question. The court did not lay down a bright line rule. Rather, it simply noted that Duniver did not receive a discharge of his debts, and also that his plan was dismissed for failure to make payments. Opinion at ¶ 20. It made those statements in the context of this case, with the benefit of a record showing that Duniver received nothing tangible from the bankruptcy.

But Defendants contend the automatic stay, even though just 11 months in place, was "unquestionably of benefit." They follow that with a claim that "most debtors would breathe a sigh of relief with just a few months' stay on debt collection." Def. br. at 30. But no court has said either of those things, either generally or in the somewhat unusual context of this case (where the

debtor really had no estate). An example of the kind of readily recognizable benefit from a stay seen in most such cases is *Cannon-Stokes v. Potter*, 453 F.3d 446, 447–48 (7th Cir. 2006), one of Defendants' star authorities. There, the debt was actually discharged, a clear benefit by any standard.

Defendants also cite *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 1, 80 N.E.3d 727, 729, but the bankruptcy court had discharged Barnes's debts and closed the bankruptcy case. There was a clear benefit. Defendants also cite *In re Amir*, 436 B.R. 1, 15 (B.A.P. 6th Cir. 2010), but that case involved changing the locks on property valued over a million dollars and a dispute over possession of luxury cars. The stay affecting those rights was presumably meaningful. The same thing is seen in *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 781 (9th Cir. 2001), where the debtor listed a $160,000 residential vandalism loss against his estate, but not his corresponding claims against State Farm as assets. Given the amounts involved, and the threat of foreclosure, the stay must have produced a tangible benefit to the debtor.

Defendants also cite *Smith v. Integrated Mgmt. Services, LLC*, 2019 IL App (3d) 180576, ¶ 21, 144 N.E.3d 1254, 1259, where a debtor offered to settle his personal injury case for $1.2 million but did not list it on the bankruptcy petition. The court, looking only at the draconian federal cases that apply a different standard for estoppel (as *Seymour* noted), reasoned that the debtor received a benefit by repaying his unsecured creditors interest free over five years, although that obviously never occurred. The summary judgment based

on judicial estoppel came just three months after the plan. *Id.* at ¶ 20. That court found that the confirmation of a plan by itself was a benefit sufficient to trigger estoppel. In doing that, the court actually created a bright line rule. It held, "Without Illinois law to the contrary, we agree that a debtor succeeds when the bankruptcy court confirms a Chapter 13 plan." *Id.* at ¶ 23.

The appellate court here provided that contrary law—there is no bright line rule. Given that judicial estoppel is an equitable doctrine, how could it be otherwise? Fairness, the basis for equity, is seldom reduceable to a bright line rule—it requires balancing the facts by looking at the circumstances of each case. *Seymour v. Collins*, 2015 IL 118432, ¶¶ 64, 39 N.E.3d 961, 982.

And in *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007) (Def. br. at 30), the debtor once again also received the benefit of a discharge. The court's reference there to disruption of the flow of commerce by the mere act of filing for bankruptcy was a lead-in to a discussion, not a holding. And in any event, the record here surely shows that no disruption of the flow of commerce occurred as a result of Duniver's bankruptcy filing. Rather, Defendants reference to the supposed benefits of the stay are purely hypothetical.

Defendants added a contention that not disclosing the claim left Duniver in control of the case, as if that were a benefit. Def. br. at 35, 39. But they do not and cannot explain why controlling a personal injury case, i.e., paying for investigation and counsel, could be a benefit to the debtor. Trustees do not

even want that responsibility; it is common knowledge they ordinarily keep on the same counsel the plaintiff used, but now under trustee control. *See*, *In re Bowker*, 245 B.R. 192, 200 (Bankr. D.N.J. 2000) (explaining why it made sense to have debtors (and their lawyers) responsible for litigating causes of action).

Keeping in mind that the burden was on Defendants to prove a benefit by clear and convincing evidence, they fell far short. They had the opportunity to discover whether any creditor was actually pursuing Duniver and whether any creditor's conduct changed as a consequence of the automatic stay. They did not do that. They claim creditors' efforts were stalled, but do not say which creditors or what efforts. Def. br. at 30, 36. There was a collection action (Def. br. at 36), but Defendants did not furnish any information about it to show that the stay actually affected it.

In the same vein, Defendants did not show the repayment plan would have differed if Duniver had listed the personal injury claim, or that anyone would have required a higher payout. Def. br. at 27. A recovery here, if any, was many years and huge costs away. No one asked the trustee about any of that. If the trustee asked Defendants about the value of Duniver's personal injury claim (assuming it had been listed), it surely seems likely they would claim it had no merit, yet here they seek to give it a solid predictable value that would have affected the progress of the bankruptcy case.

Plaintiff does not disagree with the general principle that a stay by itself could benefit a debtor in the right circumstance, as seen in some of the cases

above. But that is not always the case, and surely Defendants did not prove that case here. In this vein, Defendants close this point with a rhetorical question: What debtor would view a stay on collection of all outstanding debts as not beneficial? Def. br. at 39. The answer is one like Duniver, who has no money to pay those debts and no ability to earn that money.

The appellate court relied in part on *Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, ¶ 122, 992 N.E.2d 43, 72, under the signal "see." Opinion at ¶20. The petitioner's retaliatory discharge claim there did not arise until after his bankruptcy plan was confirmed. Defendants attempt to distinguish *Holland* for that reason (Def. br. at 37), but as that court pointed out, a debtor has a continuing duty to disclose potential causes of action. *Id.* at ¶ 118. The timing was irrelevant to that duty. The *Holland* court also noted the petitioner technically had not taken two positions under oath in the bankruptcy court, avoiding estoppel for that reason. *Id.* But it endorsed the proposition that the petitioner had not benefited from nondisclosure because the bankruptcy court dismissed his plan for failure to make payments, as occurred here.

Defendants take particular issue with the appellate court's use of the word significant when addressing whether Duniver received a benefit from the dismissed bankruptcy plan. Def. br. at 25. They point out that *Seymour* did not include that word when it discussed the benefit issue.

It is correct that this court did not add that word to its discussion, but neither did it indicate it intended to apply such a broad meaning for "benefit" that a defendant could point to any hypothetical benefit, regardless of whether it could be proven or was reasonably likely to occur. And the appellate court is not the only court to link "significant" with "benefit." *Terry v. Ethicon, Inc.*, 1:19-CV-00175-GNS, 2020 WL 3003051, at *6 (W.D. Ky. June 4, 2020) (bankruptcy petitioner has received 'significant financial benefits'); *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1209–10 (10th Cir. 2011) (Mathews's inconsistent statement resulted in receipt of significant benefits in the form disability payments); *Assasepa v JPMorgan Chase Bank*, 1:11-CV-156, 2012 WL 88162, at *15 (S.D. Ohio Jan. 11, 2012) ("Where, as here, a bankruptcy petitioner has received 'significant financial benefits'", in a case where holding several creditors meetings signaled significant assets); *Robinson v. Globe Newspaper Co.*, 26 F. Supp. 2d 195, 200 (D. Me. 1998) (debtor admitted he obtained substantial benefits); *Burruss v. Cook Cnty. Sheriff's Office*, 08 C 6621, 2013 WL 3754006, at *15 (N.D. Ill. July 15, 2013) (*defendants* pointed to the rule that estoppel can apply if the debtor received significant financial benefits).

It is also instructive to explore the dictionary meaning of benefit, to determine what might be meant by "some benefit." Merriam Webster defines benefit as something that produces good or helpful results or effects, promotes

well-being, or is of financial help.[2] As to "some", it defines that as an unknown, undetermined, or unspecified unit or thing, or being one of an unspecified number of something.[3]

Plaintiff's point is that having some benefit means a concrete benefit, a unit, something (as even Defendants acknowledge) tangible. There was nothing tangible about Duniver's supposed benefit. The appellate court got it right.

B. Defendants did not prove Darrius Duniver intended to deceive the bankruptcy court when he did not list his personal injury claim on his bankruptcy petition.

The appellate court also determined that judicial estoppel should not apply even if Defendants had proven all the elements for estoppel, because they did not prove Duniver intended to deceive the bankruptcy court. Opinion at ¶ 21. Defendants' first complaint about that ruling is that the court erroneously used its discretion, rather than reviewing the trial court's exercise of its discretion. Def. br. at 17.

The court did use the word "discretion", but nothing suggests it did not appreciate its role as a reviewing court, as described in *Seymour*. In all likelihood, it used that word to mean its power to review the trial court's decision that Duniver intended to deceive. After all, the three panel members

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[2] https://www.merriam-webster.com/dictionary/benefit.

[3] https://www.merriam-webster.com/dictionary/some.

had just applied *Seymour* and it clearly set out the standard of review. In that same vein, the court had pointed to *Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, ¶ 113 as analogous authority, and that court specifically noted the abuse of discretion standard, thus calling the court's attention to that standard. *Id.* at ¶ 114.

The trial court applied the wrong burden of proof.

Plaintiff argued in the appellate court that the trial court applied the wrong burden of proof when it found Duniver intended to deceive. The appellate court did not need to reach that contention, but it also supports the outcome. The circuit court began by stating that Plaintiff could not rely on counsel to inform him of the requirements for completing the bankruptcy petition, in response to his statement that he had done just that. App. at A4. It ruled that reliance on advice of counsel does not avoid judicial estoppel, citing only *Cannon-Stokes v. Potter*, 453 F.3d 446, 448–49 (7th Cir. 2006). But *Cannon* was a different breed of animal.

The plaintiff there did not disclose a $300,000 administrative claim, a liquidated amount, and she filed that claim only after her bankruptcy was concluded. The plaintiff did not claim her attorney had not clearly told her that a specific type of claim must be disclosed, but rather claimed she relied on the lawyer's advice to omit the claim. The court disregarded her explanation, noting that her lawyer had significant ethical problems and her remedy was to sue the lawyer. The court then emphasized that the plaintiff had repudiated

the core of her "bad advice from the lawyer" claim, because she acknowledged she did not even remember meeting that lawyer. And she obtained the benefit of a discharge and never tried to make her creditors whole. None of that exists here.

After its *Cannon* analysis, the trial court here concluded Duniver had a motive for concealment and said the facts were "suggestive" of an intent to deceive. App. at A5. That reflects that the court was applying the wrong burden of proof, using the "more probably true than not true" test rather than the "clear and convincing evidence" test required by Illinois law. *Seymour, supra* at ¶ 39 (judicial estoppel, like all estoppels, must be proved by clear and convincing evidence).

Where a court applies the wrong burden of proof, it by definition abuses its discretion. *Zavell & Associates, Inc. v. CCA Indus., Inc.*, 257 Ill. App. 3d 319, 322, 628 N.E.2d 1050, 1052 (1993) (abuse of discretion will be found where the wrong legal standard has been applied). That was an underpinning of *Seymour*. Although that court ultimately analyzed the evidence before concluding the defendant had not proven deliberate concealment by clear and convincing evidence, it first noted that the trial court had not really exercised its discretion and that alone constituted an abuse of discretion. *Seymour, supra* at ¶ 50. The similar error here in applying the wrong burden of proof supports the appellate court's decision.

Defendants did not prove by clear and convincing evidence that Duniver intended to deceive.

Turning to the merits of whether Defendants proved Duniver intended to deceive the bankruptcy court when he did not initially list this claim, the *Seymour* decision characterized the dispositive issue in determining whether to apply judicial estoppel in this scenario as whether the plaintiff deliberately changed positions according to the exigencies of the moment, using intentional self-contradiction as a means of obtaining unfair advantage. *Seymour v. Collins*, 2015 IL 118432, ¶ 51, 39 N.E.3d 961, 978. The evidence shows Defendants did not prove by clear and convincing evidence that Duniver intended to deceive anyone or otherwise intended to obtain an unfair advantage.

The explanation for Duniver's confusion begins with the bankruptcy form. His application consisted of approximately 55 pages, and its length and complexity alone might explain an incorrect answer. C455. The document is computer generated. Presumably some paralegal at the bankruptcy lawyer's office filled it out, after either speaking with Duniver or having him fill out a questionnaire. The sums involved are for the most part relatively minimal; the only significant debts are traffic tickets and a debt service loan. C472–C480. The person filling out the form checked the lowest category for liabilities, $0 to $50,000. C460; App. at A14.

As the circuit court emphasized, Duniver did answer no to Question 33 which asked about claims against third parties. C467; App. at A15. However,

he then answered the next question, about "other contingent and unliquidated claims of every nature," by listing his Workers Compensation claim arising out of this accident. C467. If he actually intended to hide claims, he would more likely have not listed either claim in that second answer. Instead, he listed one but not the other. That alone suggests confusion rather than deceit.

Later in the form, he did list the Workers' Compensation claim as exempt, but it seems a stretch to view that as part of a sophisticated scheme of listing only the claim that was exempt, and not the non-exempt claim. It is highly unlikely an unsophisticated person would even appreciate what "exempt" means in terms of a bankruptcy proceeding. C469-70; App. at A16-17. And his bankruptcy lawyer valued the Workers' Compensation claim at zero. If Plaintiff read the form, seeing the compensation claim valued at zero would surely suggest these kinds of claims either have no value for purposes of bankruptcy or at least no relevance. Indeed, at that point, both claims were speculative, although in different ways.

Further, the Workers' Compensation claim was surely going to lead to a significant recovery, given the nature of workers' compensation and the fact the accident clearly occurred at work and cost him his leg. Only the amount of the recovery was uncertain, yet the lawyer valued it at zero. The personal injury claim, involving the much more complex scenario of a personal injury action, and especially product liability cases, is speculative by comparison. If the Workers' Compensation claim had zero value, the lawyer would have

similarly listed this much more speculative personal injury as having zero value even if he included it on the form, and that would not have changed anything in that proceeding.

The point is that nothing about the bankruptcy process alerted Duniver that his personal injury claim had any significance there or any more significance than the Workers' Compensation claim listed, or that it was different than his Workers' Compensation claim. If this claim had separate significance, surely the bankruptcy lawyer or the trustee, seeing that Duniver was missing his leg and had a Workers' Compensation claim arising out of that loss, would have asked him about a potential lawsuit and then listed it.

In that same vein, when the bankruptcy lawyer listed the value of all the assets listed in Part 4, which included the question about liquidated claims, he listed only $800, representing a checking account. App. at A15. The lawyer once again did not include any value for the Workers' Compensation claim. Again, if we assume Duniver understood the form, that could have suggested that claims like the compensation claim or this claim were not legally important.

Similarly, the forms asked whether, within a year of filing bankruptcy, Duniver was a party to a lawsuit, court action or administrative proceeding. C493 (Part 4); App. at A18. He listed only a collection case, omitting both the Workers' Compensation proceeding that he and/or his bankruptcy counsel had just listed elsewhere, and this action. Again, the fact the bankruptcy lawyer

did not list either case could reasonably signal to the petitioner signing the form that neither case was relevant. Indeed, given that the personal injury claim is a public matter, anyone in Duniver's position would most likely assume there were no secrets even if the claim were not listed. The internet has surely removed any belief that a matter of public record can be kept hidden even if one wants to do that.

The context for inadvertently omitting this claim from the bankruptcy documents also includes the sequence of claims. Duniver's accident happened in 2017, and he filed this personal injury case in January of 2019. Only after this suit was filed did he move to the bankruptcy court, three weeks later. This is not the scenario the court was so critical of in *Cannon-Stokes* where the plaintiff first filed and concluded the bankruptcy claim, and only then filed her administrative claim. That court pointed to the sequence of claims as a basis for its finding that the claimant intended to deceive. That did not occur here.

A further relevant question is whether there even existed a motive for Duniver to deceive his creditors. The trial court said there is a motive for concealment if a possible money judgment could be kept from creditors. App. at A5. But that line of thought would have required someone in Duniver's position to risk undercutting what could potentially be a significant recovery if the personal injury claim can be proven, to reduce what were only relatively minimal financial claims by creditors. That would make no sense.

In addition, the risk of jeopardizing this claim by attempting to hide a separate public proceeding would make even less sense to anyone in his shoes, given that the bankruptcy forms repeatedly remind petitioners that making false statements or concealing property could result in fines up to $250,000 and 20 years in jail. C490, C521. Given the potential penalties, most reasonable persons reading that would never think about misleading creditors.

Finally, the application instructed Duniver to notify his attorney if he lost employment, had a significant change in income, or experienced "any other significant change in his financial situation (such as serious illness, marriage, divorce or separation, lottery winnings, or an inheritance." He was also to notify his attorney if he was sued or wished to file a lawsuit. C503. If the form had also simply told him to inform his attorney if he had filed a lawsuit, using plain language, the omission of the lawsuit might be viewed as intentional, but that was not the case.

The point is that the forms are complex and unclear to a lay person, further undercutting the idea that failure to disclose must necessarily lead to the conclusion that an omission was the result of an intent to deceive.

The trial court also emphasized Duniver's answer at the creditors meeting, where he answered "no" when asked if he was suing anyone. App. at A5, referring to C667. But that answer should have immediately been recognized as incorrect by the trustee, because the trustee knew about the Workers' Compensation case in which Duniver was essentially suing someone

at the Commission. And when Duniver was similarly asked if he was being sued, a point the circuit court also relied on in finding deceit because he had listed a collection suit against him, he still answered "no." The trustee also accepted that answer, even though he had to know that was also incorrect based on his answer to the question in the petition.

The transcription of that meeting and the obvious inconsistencies on the part of both sides thus suggest it was a perfunctory proceeding in what the lawyer and trustee likely viewed as a garden-variety minimal asset and debt matter. Both the bankruptcy lawyer and the trustee were facing a claimant missing a leg due to an accident that led to a known Workers' Compensation case, yet neither one pressed Duniver for an explanation when he answered no to the question about suing anyone. That sent the message to Duniver that any such claim was not relevant or separate, or that like the Workers' Compensation proceeding, this claim had no value there.

Duniver is not arguing his denial could not be construed as evidence of intentionally failing to disclose, but only that when taken in context, there is at least a question of fact about his intent. If that is the case, Defendants have not proven their defense by clear and convincing evidence, and the appellate court properly found that judicial estoppel is not appropriate.

That is particularly true where, as here, intent is involved. Intent may be gleaned from circumstances and actions, not simply words. *Seymour, supra* at ¶ 31. Courts have uniformly held that summary judgment generally should

not be used when a party's intent is a central issue. It is particularly inappropriate where the inferences which the parties seek to draw deal with questions of motive and intent. *Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc.*, 2011 IL App (2d) 101257, ¶ 30, 962 N.E.2d 29, 39.

Applying judicial estoppel is especially inappropriate because its application automatically cuts off Duniver's right to seek compensation. Strict application of judicial estoppel, requiring a higher than usual level of proof, is the rule because the corollary of the doctrine is that the trial court's role as fact finder is eliminated. "Accordingly, courts have warned that the doctrine of judicial estoppel is an extraordinary one which should be applied with caution [citation], because it precludes a contradictory position without examining the truth of either statement." *Moy v. Ng*, 371 Ill. App. 3d 957, 964, 864 N.E.2d 752, 758 (2007) (cleaned up).

The doctrine is extraordinary in its effect because it precludes a contradictory position without examining the truth of either statement. *Ceres Terminals, Inc. v. Chicago City Bank & Tr. Co.*, 259 Ill. App. 3d 836, 856–57, 635 N.E.2d 485, 499 (1994). That is why movants must prove estoppel by clear and convincing evidence, and the appellate court correctly found that was missing.

Reversal was consistent with Seymour.

The appellate decision is consistent and compatible with this court's analysis in *Seymour v. Collins*, 2015 IL 118432, 39 N.E.3d 961. The trial court

there granted summary judgment based on judicial estoppel where the claimant was injured on June 3, 2010, filed a workers' compensation claim on June 8, 2010, and sued defendants in 2011. *Id.* at ¶¶ 7,8. He had earlier filed a bankruptcy proceeding, in April of 2008. *Id.* at ¶ 4. The bankruptcy plan was confirmed in 2008 and the payment plan was completed on June 29, 2010. *Id.* at ¶¶ 4, 8.

Defendants moved for summary judgment based on judicial estoppel on the ground that the plaintiff had not disclosed the injury claims to the bankruptcy trustee. The plaintiffs responded that they had not intentionally failed to disclose those claims and did not benefit. *Id.* at ¶ 10. The plaintiffs said the trustee told them to report to their bankruptcy lawyer lump sum payments in excess of $2000, and they had not received such payments. The trustee also said Workers' Compensation benefits were exempt. *Id.* at ¶ 12.

After setting out the prerequisites for estoppel, the court cautioned that even if those factors were present, intent to deceive or mislead is not necessarily present because inadvertence or mistake might account for the facts asserted. The trial court next determines whether to apply judicial estoppel, exercising discretion. The court said multiple factors inform that decision, among them the significance or impact of the party's action in the first proceeding and whether there was an intent to deceive or mislead in the first proceeding as opposed to the prior position having been the result of inadvertence.

The decision included citation to a federal case the court said suggested "in what may, perhaps, be a minority view in federal bankruptcy jurisprudence—that judicial estoppel should apply only where there is "deliberate," "cold manipulation," or a "scheme to mislead the court," not where there is "inadvertent oversight," a "confused blunder," or a "good-faith mistake". *Id.* at ¶ 47, quoting phrases from *Jaeger v. Clear Wing Productions, Inc.*, 465 F.Supp.2d 879, 882 (S.D.Ill.2006). In other words, the court took the view of a minority of federal courts that estoppel applies only where there was cold, deliberate manipulation, a much stricter view of intent.

The court assumed there was a duty to disclose personal injury claims in a bankruptcy proceeding, although there was evidence that no such duty exists in the law. *Id.* at ¶ 52. It found there was no evidence of intent to deceive. The trial court had pointed to the disclosure of the Workers' Compensation claim as evidence of the need to disclose the personal injury claim, but this court discounted that because it had not been disclosed as an asset but only to show why the claimant had reduced income.

The court also noted that the plaintiffs' lawyer attempted to settle the personal injury case during the pendency of the bankruptcy case. The court. emphasized that if the plaintiff was trying to avoid creditors, he and his lawyer would have waited until after discharge to attempt to settle. *Id.* at ¶ 59. In other words, similar to Duniver's argument, if the parties were attempting to deceive, they would have gone about it much differently. Although the

plaintiffs there may have been procedurally clumsy, the sequence of events implied they did not intend to deceive.

This court further noted it was difficult to discern how the personal injury claim might have been valued to benefit the creditors within the applicable period of the Chapter 13 bankruptcy. *Id.* at ¶ 60. Here, the bankruptcy attorney valued the personal injury claim at zero in the amended schedule, meaning listing it earlier would have changed nothing.

This court further noted the plaintiffs there had been told to report lump sums in excess of $2,000 received during bankruptcy. From that, it was "understandable that laymen might infer, in the absence of advice to the contrary from their bankruptcy attorney—which appears not to have been forthcoming in this case—that smaller sums—and certainly unliquidated claims for money—did not have to be disclosed." *Id.* at ¶¶ 61-62. That is similar to Duniver's argument that the form's instructions, along with the failure of those with knowledge of at least one claim (the Workers' Compensation claim) to correct him when he said he had not sued anyone and the fact the lawyer valued this claim at zero, explained why he did not list it.

The *Seymour* decision concluded its analysis with the proclamation that it was not willing, as appeared to be the case in federal cases, to presume a debtor's failure to disclose represented deliberate manipulation. The court did not find that inference or presumption controlling in Illinois, much less in light of the facts before it. *Id.* at ¶¶ 61-62. Where there is affirmative

uncontroverted evidence that debtors did not deliberately change positions or employ "intentional self-contradiction * * * as a means of obtaining unfair advantage," the purpose of judicial estoppel would not be furthered by applying the doctrine. The court was "not so ready, as the federal courts appear to be, to penalize, via presumption, the truly inadvertent omissions of good-faith debtors in order to protect the dubious, practical interests of bankruptcy creditors." *Id.* at ¶ 63.

That the plaintiffs had a legal duty to disclose but failed to do so did not, under those facts, establish intent to deceive or manipulate. The court said applying estoppel whenever there was a failure to disclose would diminish the application of judicial estoppel to a rigid formula and fail to consider the specific circumstances of each case. *Id.* at ¶ 64.

Thus, it is not just a matter of what information Duniver provided to the person generating the computerized form, or what he said or did not say. Rather, the analysis critically requires consideration of the context of those exchanges. Duniver said his omission was inadvertent. App. at A19. The trial court disagreed. But as noted above, the question of intent is particularly ill-suited for resolution by summary judgment, which is why estoppel requires proof by clear and convincing evidence, something missing here.

Defendants relied on *Smith v. Integrated Mgmt. Services, LLC*, 2019 IL App (3d) 180576, ¶ 21, 144 N.E.3d 1254, 1259, but its facts are much different. Def. br. at 44. That plaintiff's cause of action had accrued, and the plaintiff

pursued it, before he declared bankruptcy. At a deposition five days after his deposition in the bankruptcy case, plaintiff explicitly denied declaring bankruptcy. And he offered to settle the personal injury action for $1.2 million without disclosing it. That is different than what occurred here, and comparison of the two cases actually shows Defendants' proofs here fell short of the clear and convincing evidence required to prove estoppel.

Policy also favors affirming the appellate court decision.

Defendants paint estoppel only as preventing someone from concealing a civil claim to get a bankruptcy discharge and then obtaining a judgment in the undisclosed civil action. They hold themselves out as guardians of the public morals. But the reality is that their interests are financial—they hope to avoid liability for the injury they allegedly caused. However, in assessing equities, should courts not keep in mind that a "victory" for such defendants actually gives them a windfall and prevents the system from putting responsibility for the injury on those who were culpable?

Before Defendants are allowed to wrap themselves in the mantle of self-righteousness, the court should consider that their position has at its core not equity, but their desire to avoid liability for the injury they caused. If we look at the context here, we see that equity involves more than the immediate players. Defendants would avoid liability, putting the burden for paying for the consequences of their negligence on the injured person, his or her family,

and the employer or workers' compensation carrier who would otherwise get repaid. In the same vein, there will be no funds to pay other creditors.

That was one of the *Rainey* court's points in holding that such "admissions" should be viewed strictly. *Rainey v. United Parcel Serv., Inc.*, 466 Fed. Appx. 542, 544–45 (7th Cir. 2012) (preventing debtor from bringing his claims would undermine creditors' interests). The potential "punishment" for not answering accurately thus extends well beyond Darrius Duniver. Defendants had no answer to that point in the appellate court.

II. Plaintiff had standing to bring this claim.

The appellate court also found that dismissal of Duniver's bankruptcy action did not deny him standing to prosecute this action. Opinion at ¶¶ 1, 26. Defendants contend that both the appellate court and the trial court were wrong on this question. Def. br. at 49.

The trial court acknowledged that Duniver's technical error, filing the civil claim personally rather than filing it on behalf of the bankruptcy estate, could be readily corrected. The error was thus of no consequence. The court rejected a corrective amendment only because it concluded that allowing Duniver to correct the error would be futile, due to the fact that it had already granted summary judgment based on equitable estoppel. It noted, correctly in light of the summary judgment, that amending the complaint to correct the identity of the plaintiff at that point would not change the outcome. That was the only reason it did not grant that relief. C1033; App. to main br. at A6. If

amending would have changed the outcome, it is clear the court would have allowed that.

Plaintiff addressed that issue at length in the trial court, and that presumably led to that court's recognition that any error in the identity of the plaintiff was readily correctable. C644. Because Duniver filed under Chapter 13, he possessed all the rights and powers of a trustee in bankruptcy, exclusive of the trustee. 11 U.S.C.A. § 1303 (West). Section 1306(b) of the Bankruptcy Code provides that the debtor remains in possession of the property, except as provided in a confirmed plan. 11 U.S.C.A § 1306(b). 472. The debtor can pursue legal claims for the benefit of the estate and its creditors. *Rainey v. United Parcel Serv., Inc.*, 466 Fed. Appx. 542, 544–45 (7th Cir. 2012).

The *Bowker* court summarized the question of who controls litigation in a Chapter 13 proceeding. *In re Bowker*, 245 B.R. 192, 200 (Bankr. D.N.J. 2000). It looked at decisions providing for trustee control, debtor control, and joint control. It concluded that debtors are the true representatives of their estates and should be given latitude to control their case. The court explained why it made sense from the perspective of either the debtor or the trustee to have debtors responsible for litigating causes of action.

Defendants do not challenge the trial court's acknowledgement of the efficacy of amending the complaint's caption to correct the plaintiff's status. They instead argue that a debtor in bankruptcy can pursue a claim only on behalf of the bankruptcy estate and not personally. Def. br. at 49. Even if that

were a correct statement of the law, that would be irrelevant because the circuit court said any such deficiency in the plaintiff's status could be corrected by simply amending the complaint.

Defendants contend the standing error could not be corrected after the court granted summary judgment because the bankruptcy court had dismissed Duniver's bankruptcy proceeding. They argue that once that dismissal occurred, Duniver could not change his status in this action because there was nothing pending in the bankruptcy court where he could present such a motion. As part of that argument in the appellate court (Def. br. at 16), Defendants claimed Duniver had no standing to file this action unless he first got the trustee's permission to do that. The circuit court did not say that (C1033), and Defendants did not cite authority for that proposition. None of the above cases say that. Trustee permission is not required.

Defendants reason here that if Duniver can no longer correct the standing issue, this claim is barred. Def. br. at 50. In support of that claim, they abandoned the "no permission" argument they made in the appellate court and replaced it with a new argument. They contend that because Duniver did not make payments pursuant to his plan, he denied the trustee the ability "to assess the value of his personal injury lawsuit before a decision was made to dismiss the bankruptcy case." Def. br. at 52. Without that, Defendants argue the trustee could not have knowingly abandoned this action. However, they cite no authority for that proposition.

All that is premised on their assumption that a claim reverts to the debtor only if the trustee abandons the claim. But the appellate court did not rest its analysis on abandonment. It simply noted that courts have found standing can revest if the trustee abandons a personal injury claim. But it also noted that the trustee here did not abandon the personal injury claim, but rather that Duniver's bankruptcy was dismissed. Once the proceeding was dismissed, no matter the reason, the claim had to revest in Duniver; it did not move to some kind of legal purgatory.

This is not a case like *Cannon-Stokes v. Potter*, 453 F.3d 446, 447–48 (7th Cir. 2006), relied on by Defendants. The plaintiff there completed her bankruptcy, and her debts were discharged. That abandonment discussion occurred in an entirely different context. The same was true in *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 525 (8th Cir. 1991) (trustee auctioned off the goods, debtor was discharged, and the bankruptcy proceeding was closed), cited at 52. The courts referred to closing a case after the bankruptcy plan was satisfied, or the chapter 7 was completed and the debtor discharged. Dismissal, especially dismissal before anything was completed, is not the same thing.

Those cases are more like *Rainey*, brought to the appellate court's attention by way of comparison and distinguished in Plaintiff's appellate court reply brief. *Rainey v. United Parcel Serv., Inc.*, 466 Fed. Appx. 542, 544–45 (7th Cir. 2012); Pl. reply br. at 5. Like Defendants' other authorities, the

Rainey court commented on a situation where the bankruptcy estate was closed, concluding the debtor could no longer pursue claims on behalf of the estate and, applying the strict federal rule, noted the debtor would typically be estopped from pursuing claims for his own behalf. *Rainey, supra*. That was not this case.

The bankruptcy here was not closed, as in *Rainey*, but rather was dismissed. That left Duniver with the option, after the summary judgment and the court's agreement that he could amend if that would save the case, of reopening the bankruptcy proceeding and amending the civil suit or simply proceeding with the civil suit on his own behalf. The only bar to the latter would be an adverse estoppel ruling, and whether that will occur depends on the court's decision on Point I.

Defendants close their point with the argument that equity should not allow the claim to revest to Duniver because that would reward someone "who deliberately withholds information from his creditors". Def. br. at 53. However, the appellate court found that he did not benefit and that he did not intend to deceive. The premise for Defendants' argument is thus invalid.

CONCLUSION

For the reasons stated, Plaintiff-Appellee Darrius Duniver requests that the decision of the appellate court be affirmed

.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, I certify that this document conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9601 words.

/s/ ***Michael W. Rathsack***

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SUPPLEMENTAL APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DARRIUS DUNIVER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	19 L 546
	)	
CLARK MATERIAL HANDLING COMPANY, BATTERY HANDLING SYSTEMS, INC., EQUIPMENT DEPOT OF ILLINOIS, INC., and NEOVIA LOGISTICS SERVICES, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER ON DEFENDANT NEOVIA LOGISTICS SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT

I. FACTUAL BACKGROUND

The Plaintiff filed a six-count complaint against the Defendants seeking damages for injuries he sustained while working as a forklift operator for Neovia Logistics, on July 30, 2017. On February 8, 2019, the Plaintiff filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois.

In the motion, Defendant Neovia points out that the Plaintiff never listed the instant lawsuit on his bankruptcy petition although it was filed and pending prior to his bankruptcy. It maintains that the Plaintiff should be judicially estopped from maintaining this cause of action, noting that he took two inconsistent positions in two proceedings intending the trier of fact to accept the truth of the facts alleged, and he succeeded in the first receiving some benefit. The Defendant contends that the Plaintiff benefitted by having his Amended Chapter 13 Plan confirmed by the bankruptcy court. Further, it contends that the automatic

bankruptcy stay is also a significant benefit to the debtor. The Defendant further points out that the Plaintiff's non-disclosure was not inadvertent, noting that he retained an attorney and filed the lawsuit prior to filing for bankruptcy and he did disclose a collection action in which he was a defendant. In addition, the Defendant maintains that the Plaintiff has no standing to pursue this claim because he is not doing so on behalf of the bankruptcy estate.

In response, the Plaintiff contends that he relied on his bankruptcy attorney to file an accurate petition and schedules and to inquire as to any unknown items. He maintains that any non-disclosure was inadvertent and he has asked his bankruptcy counsel to correct any inaccuracies. The Plaintiff contends that judicial estoppel is inapplicable and the non-disclosure should be reconciled and the instant case should not be dismissed. He maintains that he had no intent to deceive or mislead the Court. With regard to standing, the Plaintiff maintains that he does have standing to pursue this claim under a Chapter 13 bankruptcy, as a debtor under Chapter 13 retains possession and control of his property, including lawsuits. He contend that cases have allowed a Chapter 13 debtor to pursue a claim alone or concurrently with a trustee.

In the reply, the Defendant points out that the Plaintiff does not dispute that elements of judicial estoppel have been met, rather he only argues that his failure to disclose the lawsuit was inadvertent. It contends that ignorance of the legal duty to disclose and reliance on legal advice are insufficient bases to avoid judicial estoppel. Further, the Defendant contends that evidence does not support inadvertence. It points out that the Plaintiff attended a meeting of his creditors on March 14, 2019, and testified under oath that he was not suing anyone when directly asked. With regard to standing, the Defendant

contends that while a debtor may pursue a claim, it must be done on behalf of the bankruptcy estate rather than on his own. Here, the Plaintiff is not suing on behalf of the estate. The Defendant also maintains that the Plaintiff should not be allowed to avoid summary judgment by amending the schedules after he was caught concealing the suit.

The Court has read the motion, response, and reply, as well as, all of the supporting materials tendered therewith.

II. COURT'S DISCUSSION AND RULING

A bankruptcy estate encompasses all property, including legal claims, and debtors have a duty to disclose their assets, including a continuing duty to do so while the bankruptcy case remains open. Fricke v. Healthcare Revenue Recovery Group, 2015 U.S. Dist. Lexis 106469, at 5 (N.D. Ill); Seymour v. Collins, 2015 IL 118432, P52. Thus, if a debtor fails to disclose the asset of a legal claim, the debtor can be judicially estopped from pursuing that claim. Judicial estoppel is an equitable doctrine invoked by the court at its discretion, and its purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Seymour, at P36. It applies in a judicial proceeding when litigants take a position, benefit from it, and seek to take a contrary position in a later proceeding. Id.

There are five prerequisites that generally must be met for the court to invoke judicial estoppel. Id., at P37. The doctrine requires that the party to be estopped: (1) took two positions; (2) that were factually inconsistent; (3) in separate judicial proceedings; (4) intending for the trier of fact to accept the truth of the facts alleged; and (5) succeeded in the first proceeding and received some benefit from the factual position taken therein. Id., at

P47.

If all of the prerequisites for the application of judicial estoppel have been met, the second part of the process requires the court to then determine whether to apply judicial estoppel, an action requiring the exercise of discretion. Id. Multiple factors may affect the court's decision, including the significance or impact of the party's action in the first proceeding, and whether there was an intent to deceive, as opposed to the prior position being the result of inadvertence or mistake. Id. The intent to deceive or mislead is a critical factor in the application of judicial estoppel. Johnson v. Fuller Family Holdings, 2017 IL App (1st) 162130, P35.

In this case, the Plaintiff essentially concedes that all of the elements of judicial estoppel are met, and instead argues that the doctrine should not be applied here because his failure to disclose the lawsuit as an asset was inadvertent. The Plaintiff's purported inadvertence is based on his reliance on his counsel, arguing that he relied on his bankruptcy counsel to inform him of all requirements and to ensure that the petition was accurate, noting that the bankruptcy attorney never asked him about pending lawsuits nor advised him that lawsuits had to be disclosed. However, while the Plaintiff has not submitted any evidence from his bankruptcy attorney to support his position, reliance on advice of counsel does not avoid the application of judicial estoppel. Cannon-Stokes v. Potter, 453 F.3d 446, 449 (7th Cir., 2006). Thus, to the extent that his attorney made any errors, the Plaintiff would still be bound by his counsel's actions.

Furthermore, the Plaintiff admits that he signed his bankruptcy schedules under oath and penalty of perjury, and read the question asking whether he had filed a lawsuit with the

answer "no." He also admits that he filed a Statement of Financial Affairs which asked if he was a party in any lawsuit, and failed to list the instant suit. It is of note that while the Plaintiff failed to list this lawsuit that he was *prosecuting* as an asset on the bankruptcy schedules, he did list a collection action filed *against* him. Additionally, it appears that the Plaintiff attended a meeting of his creditors with the Bankruptcy Trustee on March 14, 2019, at which the Trustee asked him directly if he was suing anyone, to which he replied, "no."

Where a possible money judgment could be kept from creditors, there is a motive for concealment, and these facts are suggestive of the Plaintiff's intent to deceive or mislead the court and do not support a claim of inadvertence. Even if the Plaintiff's bankruptcy attorney failed to ask him about any lawsuits or failed to inform him of the requirement to disclose any lawsuits, he was asked directly by the Bankruptcy Trustee whether he was suing anyone and he answered the question untruthfully. If, at that point, he had told the Trustee that he was a party to the lawsuit, his position that he was not aware that he had to disclose such a fact would seem more reasonable. Instead, he blatantly deceived the Trustee.

The instant case is distinguishable from Seymour v. Collins, 2015 IL 118432, relied on by the Plaintiff, because here, there is evidence of an intent to deceive rather than merely a misunderstanding of the scope of duty or an inadvertent omission. While the Seymour plaintiff failed to disclose the personal injury action with no other evidence of improper motive, there is evidence in the instant case which goes beyond a mere omission. Seymour, at P63. Most damning here is the fact that the Plaintiff directly lied to the Trustee when asked if he was suing anyone. Accordingly, the Court finds that in this case, the omission was not inadvertent, judicial estoppel should apply, and summary judgment in favor of the Defendant

is appropriate.

With regard to the issue of standing, a Chapter 13 debtor is permitted to pursue claims in his own name for the estate. Holland v. Schwan's Home Serv., 2013 ILL App (5th) 110560 at P118, P127. Thus, while technically the Plaintiff does have standing to pursue the claim, it must be done *on behalf of the estate.* The instant case, however, is brought on behalf of the Plaintiff and not on behalf of the estate. While this could be corrected if the Plaintiff obtained an order from the Bankruptcy Court allowing him to pursue the claim on behalf of the estate, or even if the claims here had to be prosecuted by the trustee, the trustee could be substituted in as plaintiff to allow the case to go forward, the correction would be futile in light of the ruling with regard to judicial estoppel and the lack of inadvertence.

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Based on the foregoing, Defendant's Motion for Summary Judgment is granted. As this ruling applies to all Defendants, the order shall be final and appealable pursuant to SCR 301.

ENTER:

Judge Kathy M. Flanagan

ENTER

FEB 24 2020

KATHY M. FLANAGAN #2677

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DARRIUS DUNIVER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	19 L 546
	)	
CLARK MATERIAL HANDLING COMPANY, BATTERY HANDLING SYSTEMS, INC., EQUIPMENT DEPOT OF ILLINOIS, INC., and NEOVIA LOGISTICS SERVICES, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION TO RECONSIDER

I. FACTUAL BACKGROUND

The Plaintiff filed a six-count complaint against the Defendants seeking damages for injuries he sustained while working as a forklift operator for Neovia Logistics, on July 30, 2017. On February 8, 2019, the Plaintiff filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois.

Defendant Neovia filed a Motion for Summary Judgment pointing out that the Plaintiff never listed the instant lawsuit on his bankruptcy petition although it was filed and pending prior to his bankruptcy, and seeking to apply the doctrine of judicial estoppel. In response, the Plaintiff had argued that he relied on his bankruptcy attorney, that any non-disclosure was inadvertent, that judicial estoppel did not apply, and that his non-disclosure should be amended and the case allowed to proceed.

On February 24, 2020, this Court entered its Memorandum Opinion and Order

granting the Defendant's motion based on the application of judicial estoppel, finding that the Plaintiff had an intent to deceive, and that judicial estoppel applied.

The Plaintiff now moves for reconsideration of that order, arguing that judicial estoppel does not apply based on new information that was not available at the time of the prior ruling. He contends that on January 22, 2020, he amended his bankruptcy schedules, disclosing the instant action, and that on February 19, 2020, his bankruptcy was dismissed due to his failure to make scheduled payments pursuant to the plan, which was unrelated to any failure to disclose. In light of this, the Plaintiff maintains that he did not benefit from taking two contrary positions.

All of the Defendants filed a response, essentially arguing that the Plaintiff's new information presented as a basis for reconsideration is neither new nor relevant. They contend that the Plaintiff clearly deceived the Bankruptcy Court in order to gain a benefit, and that the Plaintiff's information does not change this, noting that the amendment was done only after being caught and to avoid an adverse judgment.

The Court has read the motion and responses, the filing of a reply having been deemed unnecessary, as well as, all of the supporting materials tendered therewith.

II. COURT'S DISCUSSION AND RULING

A motion to reconsider brings to the court's attention newly discovered evidence, changes in the law, or errors in the court's application of existing law. Papadikis v. Fitness, 2018 IL App (1st) 170388, P13. Newly discovered evidence is defined as evidence that was not available at the time of the prior order or hearing. Horlacher v.Cohen, 2017 IL App (1st) 162712, P82. Information readily available or discoverable at the time of the prior hearing

does not qualify as newly discovered evidence and can be disregarded on a motion to reconsider. Gardner v. Navistar, 213 Ill. App.3d 242, 248 (1st Dist., 1991).

Here, the Plaintiff claims that the "new" evidence upon which he bases his motion is the fact that he amended his bankruptcy schedules, and that his bankruptcy petition was dismissed on February 19, 2020 for failure to make scheduled payments pursuant to the bankruptcy plan. The Plaintiff also maintains that this information was not available at the time of the prior ruling by this Court on February 24, 2020.

This information is not newly discovered evidence that was unavailable at the time of the prior hearing. The Plaintiff filed an amended bankruptcy schedule on January 22, 2020, well before this Court's ruling on the underlying Motion for Summary Judgment on February 24, 2020. Similarly, the bankruptcy action was dismissed on February 19, 2020, also prior to the hearing on the motion. The Plaintiff did not bring this information to the Court's attention either by way of a motion, to either file a sur-reply or supplement his response or other motion, or at the time of that the ruling was provided to the parties in court. As the Plaintiff has not demonstrated that there is *newly discovered* evidence which was *unavailable* at the time of the prior hearing, the Court may, and will, disregard it. On this basis alone, the motion to reconsider must be denied.

The Plaintiff also argues, as he did in response to the underlying motion, that his omission was inadvertent and that any errors were due to his bankruptcy counsel. However, the evidence remains clear that the Plaintiff's failure to initially report the instant lawsuit as an asset on his bankruptcy schedule was not inadvertent, and that he intentionally deceived the bankruptcy court and received a benefit as a result. Further, as the Court previously

pointed out, to the extent that the Plaintiff's attorney made any errors, the Plaintiff would still be bound by his counsel's actions.

The Plaintiff also offers nothing which alters the facts that were noted in the underlying ruling. The Plaintiff signed his bankruptcy schedules under oath and penalty of perjury, and answered "no" to the question asking whether he had filed a lawsuit. The Plaintiff also admittedly failed to list the instant lawsuit in his Statement of Financial Affairs where it asked if he was a party in any lawsuit, while at the same time listing a collection action that was filed *against* him. Further, the Plaintiff attended a meeting of his creditors with the Bankruptcy Trustee on March 14, 2019, at which the Trustee asked him directly if he was suing anyone, to which he replied unequivocally and untruthfully, "no." Unlike the situation in Seymour v. Collins, 2015 IL 118432, there is evidence here of an intent to deceive rather than merely a misunderstanding of the scope of duty or an inadvertent omission. Seymour, at P63.

While the Court need not consider the "new" evidence, it notes that the Plaintiff's eleventh hour disclosure does not vitiate against the applicability of judicial estoppel. The Plaintiff did take inconsistent positions in two legal proceedings intending for the truth of the facts to be accepted in each, and he received a benefit therefrom. Despite the Plaintiff's amendment and subsequent dismissal, his bankruptcy plan was approved based on his untruthful, factual averments and it remained in effect, unaltered by the amendment, until he failed to make payments pursuant to it. The Plaintiff benefitted from this, as well as from the year-long automatic stay. However, as noted form the outset of this ruling, regardless of the Plaintiff's recent actions with regard to his bankruptcy action, he has failed to demonstrate

the existence of newly discovered evidence that was unavailable at the time of the prior hearing as a basis of reconsideration. Accordingly, the February 22, 2020 ruling stands and the motion to reconsider must be denied. 4373

Based on the foregoing, Plaintiff's Motion to Reconsider is denied. 5285

ENTER:

Judge Kathy M. Flanagan

ENTER

JUN 19 2020

KATHY M. FLANAGAN #267

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

DARRIUS DUNIVER, Plaintiff-Appellant, v. CLARK MATERIAL HANDLING CO., BATTERY HANDLING SYSTEMS, INC., EQUIPMENT DEPOT OF ILLINOIS, INC., and NEOVIA LOGISTICS SERVICES, LLC, Defendants-Appellees, COWORX STAFFING SERVICES, LLC, Third-Party Defendant, and ACE AMERICAN INSURANCE CO., a/s/o CoWorx Staffing Services, LLC, Intervenor.	) Circuit Court No.: 2019 L 000546) Hon. Kathy Flanagan, Judge Presiding.) Notice of appeal: 7/14/2020) Judgment: 2/24/2020) Recons. Denied: 6/19/2020

NOTICE OF APPEAL

Plaintiff/Appellant Darrius Duniver, by his attorneys, Romanucci & Blandin, LLC, hereby appeals to the Appellate Court of Illinois for the First Judicial District from the order granting summary judgment to defendants on February 24, 2020, a copy of which is attached as Exhibit A and incorporated herein, and the order denying plaintiff's motion for reconsideration entered on June 19, 2020, a copy of which is attached as Exhibit B and incorporated herein.

An appeal is taken from the order described below:

Date of the judgment/order being appealed: 2/24/20 (reconsideration denied on 6/19/20).

Name of judge who entered the judgment/order being appealed: Hon. Kathy Flanagan

Relief sought from Reviewing Court:

Plaintiff/Appellant requests that said orders be reversed and that the matter be remanded for further appropriate proceedings. In the alternative, plaintiffs-appellants request such other and further relief as may be deemed appropriate.

I understand that a "*Request for Preparation of Record on Appeal*" form (CCA 0025) must be completed and the initial payment of $70 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e. at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A "*Request for Preparation of Supplemental Record on Appeal*" form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

Respectfully Submitted,
ROMANUCCI & BLANDIN, LLC

By: _____
Attorney for Plaintiff/Appellant

Michael E. Holden
Romanucci & Blandin, LLC
321 N. Clark St.; Ste. 900
Chicago, IL 60654
Tel: 312-458-1000
Fax: 312-458-1004
Email: mholden@rblaw.net
Attorney No: 35875

Debtor 1 **Darrius R. Duniver** Case number *(if known)*

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

☐ No. Go to line 16b.

■ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

☐ No. Go to line 16c.

☐ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts

17. Are you filing under Chapter 7?

■ No. I am not filing under Chapter 7. Go to line 18.

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

☐ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

☐ No

☐ Yes

18. How many Creditors do you estimate that you owe?

■ 1-49
☐ 50-99
☐ 100-199
☐ 200-999
☐ 1,000-5,000
☐ 5001-10,000
☐ 10,001-25,000
☐ 25,001-50,000
☐ 50,001-100,000
☐ More than100,000

19. How much do you estimate your assets to be worth?

■ $0 - $50,000
☐ $50,001 - $100,000
☐ $100,001 - $500,000
☐ $500,001 - $1 million
☐ $1,000,001 - $10 million
☐ $10,000,001 - $50 million
☐ $50,000,001 - $100 million
☐ $100,000,001 - $500 million
☐ $500,000,001 - $1 billion
☐ $1,000,000,001 - $10 billion
☐ $10,000,000,001 - $50 billion
☐ More than $50 billion

20. How much do you estimate your liabilities to be?

■ $0 - $50,000
☐ $50,001 - $100,000
☐ $100,001 - $500,000
☐ $500,001 - $1 million
☐ $1,000,001 - $10 million
☐ $10,000,001 - $50 million
☐ $50,000,001 - $100 million
☐ $100,000,001 - $500 million
☐ $500,000,001 - $1 billion
☐ $1,000,000,001 - $10 billion
☐ $10,000,000,001 - $50 billion
☐ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

/s/ Darrius R. Duniver
Darrius R. Duniver
Signature of Debtor 1

Executed on **February 8, 2019**
MM / DD / YYYY

Signature of Debtor 2

Executed on
MM / DD / YYYY

Debtor 1 **Darrius R. Duniver** Case number *(if known)*

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses
■ No
☐ Yes. Give specific information about them...

Money or property owed to you?	**Current value of the portion you own?** Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**
■ No
☐ Yes. Give specific information about them, including whether you already filed the returns and the tax years.....

29. **Family support**
Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement
■ No
☐ Yes. Give specific information.....

30. **Other amounts someone owes you**
Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else
■ No
☐ Yes. Give specific information..

31. **Interests in insurance policies**
Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance
■ No
☐ Yes. Name the insurance company of each policy and list its value.

Company name:	Beneficiary:	Surrender or refund value:

32. **Any interest in property that is due you from someone who has died**
If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, or are currently entitled to receive property because someone has died.
■ No
☐ Yes. Give specific information..

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**
Examples: Accidents, employment disputes, insurance claims, or rights to sue
■ No
☐ Yes. Describe each claim.....

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**
☐ No
■ Yes. Describe each claim.....

Darrius Duniver **Workman's Comp** **Desparti Law Goup** **Rommiumicci & Blanch** **v**	**$0.00**

35. **Any financial assets you did not already list**
■ No
☐ Yes. Give specific information..

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here.....** **$800.00**

C 467

Fill in this information to identify your case:

Debtor 1: **Darrius R. Duniver** (First Name / Middle Name / Last Name)

Debtor 2 (Spouse if, filing): (First Name / Middle Name / Last Name)

United States Bankruptcy Court for the: NORTHERN DISTRICT OF ILLINOIS

Case number (if known): _____

☐ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

4/16

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*

   ■ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)

   ☐ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption.*	Specific laws that allow exemption
2015 Chrysler 200S Line from *Schedule A/B*: **3.1**	**$8,325.00**	■ **$2,400.00** ☐ 100% of fair market value, up to any applicable statutory limit	**735 ILCS 5/12-1001(c)**
Household Goods & Furniture Line from *Schedule A/B*: **6.1**	**$300.00**	■ **$300.00** ☐ 100% of fair market value, up to any applicable statutory limit	**735 ILCS 5/12-1001(b)**
TV & Electronics Line from *Schedule A/B*: **7.1**	**$375.00**	■ **$375.00** ☐ 100% of fair market value, up to any applicable statutory limit	**735 ILCS 5/12-1001(b)**
Normal Clothes Line from *Schedule A/B*: **11.1**	**$200.00**	■ **$200.00** ☐ 100% of fair market value, up to any applicable statutory limit	**735 ILCS 5/12-1001(a)**
Checking/Savings Account: Capital One Bank Line from *Schedule A/B*: **17.1**	**$800.00**	■ **$800.00** ☐ 100% of fair market value, up to any applicable statutory limit	**735 ILCS 5/12-1001(b)**

Debtor 1 **Darrius R. Duniver** Case number (if known)

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption.*	Specific laws that allow exemption
Darrius Duniver **Workman's Comp** **Desparti Law Goup** **Rommiumicci & Blanch** **v** Line from *Schedule A/B*: **34.1**	**$0.00**	■ **$0.00** ☐ 100% of fair market value, up to any applicable statutory limit	**820 ILCS 305/21**

3. **Are you claiming a homestead exemption of more than $160,375?**
(Subject to adjustment on 4/01/19 and every 3 years after that for cases filed on or after the date of adjustment.)

■ No

☐ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?

☐ No

☐ Yes

C 470

SA-17

7. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20% or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

■ No
☐ Yes. List all payments to an insider.

Insider's Name and Address	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment

8. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?**
Include payments on debts guaranteed or cosigned by an insider.

■ No
☐ Yes. List all payments to an insider

Insider's Name and Address	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name

Part 4: Identify Legal Actions, Repossessions, and Foreclosures

9. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

☐ No
■ Yes. Fill in the details.

Case title Case number	Nature of the case	Court or agency	Status of the case
City of Chicago **v** **Darrius Duniver** **AC91043**	**Collection**	**Cook County, IL**	■ Pending ☐ On appeal ☐ Concluded

10. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

■ No. Go to line 11.
☐ Yes. Fill in the information below.

Creditor Name and Address	Describe the Property Explain what happened	Date	Value of the property

11. **Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off any amounts from your accounts or refuse to make a payment because you owed a debt?**

■ No
☐ Yes. Fill in the details.

Creditor Name and Address	Describe the action the creditor took	Date action was taken	Amount

12. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, a custodian, or another official?**

■ No
☐ Yes

C 493

SA-18

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DARRIUS DUNIVER,

Plaintiff,

v.

CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC; and EQUIPMENT DEPOT OF ILLINOIS, INC.,

Defendants.

No.: 19 L 00546

AFFIDAVIT OF DARRIUS DUNIVER

I, Darrius Duniver, being first duly sworn under oath and subject to the penalty of perjury, state that, if called to testify in this matter, I would testify as follows:

1. I am over the age of 18 and am otherwise competent to testify.

2. On July 30, 2017, I was injured as the result of a workplace incident resulting in the amputation of the lower portion of my left leg.

3. On September 6, 2017, I retained Romanucci & Blandin, LLC to investigate and pursue claims for injuries arising out of that workplace incident.

4. At that time, I did not inform Romanucci & Blandin, LLC that I was contemplating filing a bankruptcy petition.

5. Between September, 2017 and September, 2019, I did not inform Romanucci & Blandin that I was contemplating filing a bankruptcy petition, and there were no discussions about any obligations or requirements I may have in any bankruptcy petition as it relates to any claim for injuries.

6. On January 16, 2019, this lawsuit was filed.

C 650

7. In early February of 2019, I met with and retained the law offices of David M. Siegel to file a bankruptcy petition. Said petition was filed on my behalf on February 8, 2019.

8. I relied on my bankruptcy attorneys to be aware of all requirements associated with the filing of that petition and to inform me of what assets or potential assets needed to be disclosed.

9. I relied on the law office of David Siegel to ensure that the petition contained accurate information and to request information from me if it was needed for the petition.

10. During the course of the initial meeting with Mr. Siegel's office, I was asked about any debts or outstanding bills I had, and was asked about what income I had. I disclosed to Mr. Siegel the weekly income I was receiving along with all known debts and collections action I had.

11. At no time prior to the filing of the petition was I asked by Mr. Siegel's office about whether I had pending lawsuits or claims for injuries I sustained.

12. At no time prior to the filing of the petition was I advised that lawsuit or claims for injuries were required to be disclosed as part of the bankruptcy.

13. On July 16, 2019, an Amended Chapter 13 Plan was filed on my behalf by the law offices of David Siegel.

14. I relied on my bankruptcy attorneys to be aware of all requirements associated with the filing of that Amended Chapter 13 Plan and to inform me of what assets or potential assets needed to be disclosed.

15. I relied on the law office of David Siegel to ensure that the petition contained accurate information and to request information from me if it was needed for the Amended Chapter 13 Plan.

16. At no time prior to the filing of the Amended Chapter 13 Plan was I asked by Mr. Siegel's office about whether I had pending lawsuits or claims for injuries I sustained.

17. At no time prior to the filing of the Amended Chapter 13 Plan was I advised that lawsuit or claims for injuries were required to be disclosed as part of the bankruptcy.

18. If I had been asked about pending lawsuits prior to filing of the petition and the Amended Chapter 13 Plan, I would have informed him of my lawsuit/claim for injuries arising out of the July 30, 2017 workplace incident.

19. If I had been informed by Mr. Siegel's office that pending lawsuits and/or claims were considered part of the bankruptcy, I would have informed Mr. Siegel's office of the lawsuit/claim for injuries arising out of the July 30, 2017 workplace incident.

20. The non-disclosure of this lawsuit was inadvertent on my part as I was not informed of the requirement by my attorneys. I had no intention to deceive the bankruptcy court as part of my bankruptcy petition or the Amended Chapter 13 Plan.

21. Prior to being contacted by Romanucci & Blandin in September of 2019 about this issue, I was not advised or aware that any lawsuit or claim for injuries needed to be included in any bankruptcy action.

22. I have directed my bankruptcy attorney to take the necessary steps to correct the petition and plan to reflect the existence of this lawsuit.

FUIRTHER AFFIANT SAYETH NAUGHT

Darrius Duniver

Subscribed and sworn to before me
on this 18th day of January, 2020

Notary Public

MICHAEL E HOLDEN
Official Seal
Notary Public – State of Illinois
My Commission Expires Mar 7, 2021

C 652

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

DARRIUS DUNIVER,	)	
	)	
Plaintiff–Appellee,	)	
	)	
v.	)	No. 128141
	)	
CLARK MATERIAL HANDLING CO., et al.,	)	
	)	
Defendants–Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on August 3, 2022, the Brief of Plaintiff-Appellee was electronically filed and served upon the Clerk of the above court. On August 3, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Michael W. Rathsack
Michael W. Rathsack

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Michael W. Rathsack
Michael W. Rathsack

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