E-FILED
6/8/2022 12:04 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

No. 128141

In The Supreme Court of Illinois

DARRIUS DUNIVER,

Plaintiff-Appellee,

vs.

CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC. and NEOVIA LOGISTICS SERVICES, LLC.

Defendants-Appellants.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT CASE NO. 1-20-0818

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CASE NO. 2019 l 000546

HONORABLE KATHY M. FLANAGAN, JUDGE PRESIDING

JOINT BRIEF & APPENDIX OF DEFENDANTS-APPELLANTS, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC, CLARK MATERIAL HANDLING CO. & EQUIPMENT DEPOT OF ILLINOIS

Julie A. Teuscher
Henry Ortiz
CASSIDAY SCHADE LLP
222 West Adams Street, Suite 2900
Chicago, IL 60606
(312) 641-3100
jteuscher@cassiday.com
hortiz@cassiday.com
Attorneys for Battery Handling Systems, Inc.

Kurt E. Olsen
KRAKAR & OLSEN
300 S. Riverside, Ste. 2050
Chicago, IL 60606
(312) 775-9750
kurt.olsen@zurichna.com
Attorneys for Neovia Logistics, LLC

ORAL ARGUMENT REQUESTED

Brian W. Bell
Michael A. McCaskey
Catherine B. Weiler
Jack A. Gould
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100
bbell@smtrials.com
mmccaskey@smbtrials.com
cweiler@smbtrials.com
jgould@smbtrials.com
Attorneys for Clark Material Handling Co.

Michael E. Kujawa
Deborah A. Ostvig
SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.
70 W. Madison St. Suite 5300
Chicago, IL 60602
(312) 345-5700
mkujawa@schainbanks.com
dostivig@schainbanks.com
Attorneys for Equipment Depot of Illinois, Inc.

No. 128141

In The Supreme Court of Illinois

DARRIUS DUNIVER,

Plaintiff-Appellee,

vs.

CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC.; and NEOVIA LOGISTICS SERVICES, LLC.,

Defendants-Appellants.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT CASE NO. 1-20-0818

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CASE NO. 2019 L 000546

HONORABLE KATHY M. FLANAGAN

JUDGE PRESIDING.

JOINT BRIEF & APPENDIX OF DEFENDANTS-APPELLANTS, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC, CLARK MATERIAL HANDLING CO. & EQUIPMENT DEPOT OF ILLINOIS

TABLE OF CONTENTS

POINTS & AUTHORITIES

NATURE OF THE CASE

Darrius Duniver filed a personal injury lawsuit on January 16, 2019 seeking recovery for a leg-severing work accident. (C20) Twenty-three days later, Duniver filed for bankruptcy in federal court and, in proceedings before that court, Duniver denied having any legal actions against third parties and denied suing anyone. (C467, C667) The circuit court granted summary judgment to defendants by applying judicial estoppel after finding Duniver intentionally deceived the bankruptcy court by falsely stating he had filed no claims against third parties. (C673-C678; A1 – A6)

The appellate court reversed, finding Duniver received no benefit from falsely testifying in bankruptcy court even though: Duniver received an automatic stay on all debt collection; Duniver's bankruptcy plan was confirmed allowing Duniver to pay his debts at a significantly reduced rate, over time, interest free; and Duniver retained control over his injury lawsuit. *Duniver v. Clark Material Handling Co. et al*, 2021 IL App (1st) 200818; A15-25. The appellate court also believed the record lacked evidence of Duniver's intent to deceive the bankruptcy court even though Duniver provided false answers to questions in his bankruptcy paperwork and testified falsely under oath at the bankruptcy court's creditors' meeting. (*Id.*)

The Defendants-Appellants petitioned this Court for leave to appeal (A26-A55) and this Court allowed the petition. (A56) The Defendants-Appellants now submit this Joint Brief.

ISSUES PRESENTED FOR REVIEW

1. Did the appellate court err in exercising its own discretion to reverse the circuit court's grant of summary judgment where the circuit court conducted the appropriate *Seymour* analysis and exercised its discretion in applying judicial estoppel?
2. Did Duniver forfeit the right to argue he received no benefit from successfully persuading the bankruptcy court he had filed no personal injury lawsuit by failing to raise such an argument in response to Defendants' summary judgment motions?
3. Did the appellate court err in finding Duniver received no benefit by falsely swearing under oath in bankruptcy court that he had filed no claims against third parties where Duniver received an automatic stay on all debt collection efforts against him, received confirmation of his bankruptcy repayment plan, and retained control of his injury lawsuit?
4. Did the circuit court act within its discretion in applying judicial estoppel after finding evidence of Duniver's intent to deceive the bankruptcy court?

STATEMENT OF JURISDICTION

On February 24, 2020, the circuit court granted the defendants' motions for summary judgment by invoking the doctrine of judicial estoppel. (C673-C678; A1 – A6) On March 24, 2020, Duniver filed a Motion to Reconsider (C680-C685) which the circuit court denied on June 19, 2020. (C1018-C1022; A7 – A11) Duniver timely appealed on July 14, 2020. (C1037-C1039; A12-A14)

On December 27, 2021, the appellate court reversed the circuit court's decision. *Duniver v. Clark Material Handling Co. et al*, 2021 IL App (1st) 200818; A15-25. No party sought rehearing. On January 31, 2022, the Defendants-Appellants timely filed a Joint Petition for Leave to Appeal in this Court pursuant to Illinois Supreme Court Rule 315(b). (A26-A55) On March 30, 2022, this Court allowed the Joint Petition for Leave to Appeal. (A56) Accordingly, this Court has jurisdiction to consider this appeal.

STATEMENT OF FACTS

Duniver's Accident and Personal Injury Lawsuit

On July 30, 2017, Darrius Duniver suffered a leg-severing injury while working. (C24 at ¶ 25) On January 16, 2019, Duniver filed this personal injury lawsuit in the Circuit Court of Cook County to recover for his work-related injuries (C20) and sought damages in excess of $50,000.00 (Fifty-Thousand dollars) for pain and suffering, medical expenses, disability, and disfigurement. (C30 at ¶ 55)

Duniver's Bankruptcy Proceedings

A. Duniver's 2016 Chapter 13 Bankruptcy Cases

1. Case No. 16-8408

On March 11, 2016, Duniver filed for Chapter 13 bankruptcy in the U.S. Bankruptcy Court for the Northern District of Illinois (Eastern Division) as Bankruptcy Case No. 16-8408. (See Docket, U.S. Bankruptcy Court, NDIL (Eastern Division), Case No. 16-8408, Doc. 1)[1] A creditors' meeting took place during these bankruptcy proceedings before the bankruptcy case was dismissed on June 29, 2016 because Duniver failed to make plan payments. (Id. at Docs. 18, 31)

2. Case No. 16-29185

On September 13, 2016, approximately 10 months prior to his accident, Duniver filed a second Chapter 13 bankruptcy petition in the U.S.

[1] This court may take judicial notice of public documents contained in the records of other courts. *May Dep't Stores Co. v. Teamsters Union*, 64 Ill. 2d 153, 159 (1976.)

Bankruptcy Court for the Northern District of Illinois (Eastern Division) as Bankruptcy Case No. 16-29185. (C526-C533). Duniver was dismissed from this bankruptcy case on December 20, 2017, again for failing to make his scheduled plan payments. (C526, C532) Duniver provided no notice to the bankruptcy court in Case No. 16-29185 of his July 30, 2017 accident, or any potential claim arising out of the accident, at any time before this bankruptcy case was closed on January 23, 2018. (C532)

B. Duniver's 2019 Chapter 13 Bankruptcy Case

1. Duniver's Bankruptcy Paperwork

On February 8, 2019, just twenty-three days after filing his personal injury lawsuit, Duniver filed for Chapter 13 bankruptcy for the third time in the U.S. Bankruptcy Court for the Northern District of Illinois (Eastern Division) in Case No. 19-03330. (C 455-C525) The bankruptcy court advised Duniver in writing that a Chapter 13 bankruptcy proceeding "puts burdens on debtors, such as the burden of making complete and truthful disclosures of their financial situation." (C502) Duniver was required to "provide the [bankruptcy] attorney with full, accurate and timely information, financial and otherwise ..." (*Id.*) Duniver also agreed to "[n]otify the attorney if the debtor is sued or wishes to file a lawsuit ..." (C503)

Duniver's Bankruptcy Petition required Duniver to list all his assets on "Official Form 106A/B Schedule A/B: Property". (C464) However, in response to the question whether Duniver had any "[c]laims against third

parties, whether or not [he] [had] filed a lawsuit," Duniver answered "No" even though his injury lawsuit was filed twenty-three days earlier. (C467 at ¶ 33) The form specifically advised Duniver this category of assets included things such as an accident or right to sue. (Id.) When asked in the very next paragraph of the form whether Duniver had any other contingent or unliquidated claims of any nature, Duniver identified only his workman's compensation case arising from the same incident (C467 at ¶ 34) which Duniver claimed was exempt from bankruptcy proceedings. (C470) Duniver did not list his pending personal injury claim. (C467 at ¶ 34)

Moreover, on Official Form 107, the "Statement of Financial Affairs," Duniver was asked to identify any legal actions in which he was involved. (C491, C493) Specifically, Duniver was asked "[w]ithin 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?" (C493 at ¶ 9) Duniver was directed to "[l]ist all such matters, *including personal injury cases.*" (Id.) (emphasis added) Duniver failed to list his pending personal injury action, but he did list a collection action pending against him. (Id.)

Duniver, in his own hand, signed the bankruptcy petition in three separate areas. First, he signed beneath the language: "I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct." (C521) Second, Duniver swore his Property Schedule was accurate, signing his name beneath the language: "under penalty of

perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct." (C522) Duniver also declared under penalty of perjury that his Statement of Financial Affairs was true and correct by handwriting his signature under the language: "I have read the answers on this *Statement of Financial Affairs* ..., and I declare under penalty of perjury that the answers are true and correct." (C523) (emphasis in original)

Duniver's initial Bankruptcy Plan called for a repayment plan of $225.00 per month to the bankruptcy trustee for 36 months. (Case No. 19-03330, U.S. Bankruptcy Court, IL Northern, Doc. 2) On July 16, 2019, Duniver filed an Amended Chapter 13 Bankruptcy Plan in case No. 19-03330. (C540-C544) Duniver included nothing in the Amended Plan about his injury lawsuit. (Id.) Duniver proposed to repay his creditors at a rate of only ten percent of the claims owed at $225.00 per month for 36 months. (C540, C542 at ¶ 5.1) Duniver's Bankruptcy Plan was confirmed by an order of the bankruptcy court on July 24, 2019. (C545)

2. The Rule 341 Creditors' Meeting

On March 14, 2019, approximately 8 weeks after Duniver filed his injury lawsuit, Duniver appeared at the Rule 341 creditors' meeting for his bankruptcy case and was sworn under oath. (C666-C667) Duniver answered "sure" when asked if he would tell the "whole truth." (C667) The following exchange then took place:

Trustee: Are you suing anyone?

Duniver: No.

(C667)

On February 19, 2020, Duniver's Bankruptcy case No. 19-03330 was dismissed for Duniver's failure to make plan payments. (C841)

Defendants Move for Summary Judgment

On September 10, 2019, Neovia Logistics Services, LLC ("Neovia") moved for summary judgment in Duniver's personal injury lawsuit on two bases. (C440-C454) First, Neovia asserted the doctrine of judicial estoppel barred Duniver from prosecuting his injury suit because Duniver had failed to disclose the existence of the injury suit in his sworn bankruptcy schedules and Statement of Financial Affairs. (C440-C441, C444-C453). Neovia established that all elements of judicial estoppel had been satisfied, including the fact that Duniver received the benefit of an automatic stay on collection efforts during bankruptcy proceedings. (C448-C449) Neovia also demonstrated Duniver's non-disclosure was not inadvertent. (C449-C451)

Second, Neovia argued Duniver lacked standing to prosecute his injury suit because, under both Illinois and federal law, the injury claims belonged to Duniver's bankruptcy estate, and not to Duniver personally. (C443-C444). Equipment Depot of Illinois, Inc. filed a motion to join Neovia's summary judgment motion. (C571-C574). Clark Material Handling Company and Battery Handling Systems, Inc. followed suit, each filing motions to join

Neovia's summary judgment motion. (C579-C582, C575-C578, respectively).

On January 21, 2020, Duniver responded to the motions and attached Duniver's affidavit in support of his response. (C635-C649; C650-C652) In his affidavit, Duniver stated: "[a]t no time prior to the filing of the petition was I asked by [my bankruptcy attorney] about whether I had pending lawsuits or claims for injuries I sustained." (C651 at ¶ 11) Duniver further stated "[i]f I had been asked about pending lawsuits prior to filing of the petition and the amended Chapter 13 plan, I would have informed [my bankruptcy attorney] of my lawsuit/claim for injuries arising out of the July 30, 2017 workplace incident." (C652 at ¶ 18) Duniver offered no other explanation for his failure to disclose his pending personal injury lawsuit in his bankruptcy paperwork or at the creditors' meeting. (C650-C652)

In response to the summary judgment motion, Duniver argued his failure to disclose his pending personal injury action during bankruptcy proceedings was inadvertent. (C639-C644) Duniver challenged none of the elements of the judicial estoppel analysis, and specifically, offered no response to defendants' argument that Duniver benefitted from failing to disclose his injury lawsuit in his bankruptcy proceedings. (C635-C649) Instead, Duniver argued his "non-discourse was inadvertent." (640) Duniver also argued he still maintained standing to pursue his injury lawsuit even though the lawsuit itself was property of the bankruptcy estate. (C644-C649)

Defendants replied, arguing all the elements of judicial estoppel had

been satisfied, and that Duniver lacked standing to pursue his injury lawsuit. (C657-C665)

On January 22, 2020, after the defendants moved for summary judgment, but before the circuit court's ruling on the motion for summary judgment, Duniver filed an Amended "Schedule A/B: Property" (C829-C833) and an Amended "Official Form 106C" (C834-C835) in bankruptcy court. (C840, Entry 35) This time, in answer to whether he had any claims against third parties, Duniver answered "yes" and listed his injury lawsuit. (C832) Duniver claimed his injury lawsuit was exempt from bankruptcy proceedings up to the applicable statutory limit. (C835). The bankruptcy court dismissed Duniver's Chapter 13 bankruptcy case on February 19, 2020 because Duniver failed to make payments in accordance with his Amended Chapter 13 plan. (C841-C842)

On February 24, 2020, the circuit court granted the defendants' motions for summary judgment. (C673-C678; A1 – A6) The circuit court noted Duniver had conceded the elements of judicial estoppel in response to the motions for summary judgment but argued the doctrine should not be applied because his failure to disclose his injury lawsuit was inadvertent. (C676; A4) The circuit court found Duniver's failure to disclose his injury lawsuit in both the bankruptcy schedules and Statement of Financial Affairs evidence of an intent to deceive. (C676-C677; A4 – A5) The circuit court also relied on Duniver's false statement under oath at the creditors' meeting where he

denied suing anyone as evidence of an intent to deceive. (C677; A5) The court determined Duniver "blatantly deceived the Trustee" and "directly lied to the Trustee" and rejected Duniver's argument that his non-disclosure was inadvertent. (C677; A5)

Second, the court determined that a Chapter 13 debtor may only pursue a personal injury lawsuit on behalf of the bankruptcy estate, and not on his own behalf. (C678; A6) While the court thought this might be corrected if Duniver obtained an order from the bankruptcy court allowing him to pursue the claim on behalf of the estate, or by substituting the bankruptcy trustee as plaintiff, the court observed that the correction would be futile in light of its judicial estoppel ruling (Id.)

Duniver failed to inform the circuit court prior to its February 24, 2020 order granting summary judgment that he had filed amended schedules in his Chapter 13 bankruptcy case. (C1020; A9) Duniver also failed to inform the circuit court prior to its summary judgment ruling that his Chapter 13 bankruptcy case was dismissed on February 19, 2020, meaning Duniver could no longer obtain an order from the bankruptcy court allowing him to pursue his injury claim on behalf of the estate. (C1020; A9).

Duniver asks the Circuit Court to Reconsider its Order

Duniver moved to reconsider the court's order, asking the court to reconsider its judicial estoppel ruling. (C680-C685) For the first time, in two sentences unsupported by legal authority, Duniver claimed he received no

benefit from the false answers he provided in bankruptcy court. (C683; C685) The circuit court denied Duniver's motion to reconsider. (C1018-C1022)

First, the circuit court observed that Duniver presented no new information in his motion which was unavailable when the court issued its summary judgment ruling. (C1020) The court noted Duniver knew of his January 22, 2020 amendment to his bankruptcy plan and the February 19, 2020 dismissal of his bankruptcy case before the circuit court ruled on defendants' motions for summary judgment on February 24, 2020, yet failed to bring that information to the circuit court's attention by way of a motion or otherwise at any time before or at the time of the circuit court's ruling. (C1020; A9)

Next, the court rejected Duniver's re-argument that his failure to disclose his pending injury lawsuit during bankruptcy proceedings was inadvertent. (C1020-C1021; A9-A10) The court reiterated the undisputed facts on which it relied to find evidence of Duniver's intent to deceive:

> 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." (C1021; A10) (emphasis in original)

Duniver appealed. (C1037-C1039)

Appellate Court Proceedings

On December 27, 2021, the appellate court reversed the circuit court's judgment. *Duniver v. Clark Material, et al.*, 2021 IL App (1st) 200818. (A15-A25) The court held the dismissal of Duniver's Chapter 13 bankruptcy "in effect" revested Duniver with standing to pursue his lawsuit. (*Id.* at ¶ 15; A19) The court acknowledged that Duniver had forfeited the argument that he received no benefit from falsely testifying in bankruptcy proceedings by failing to raise such an argument in response to the defendants' summary judgment motions, but "[chose] to overlook forfeiture" because the court felt it was "necessary to obtain a just result ..." (*Id.* at ¶ 18; A20-A21) The court believed Duniver "received no benefit" from failing to advise the bankruptcy court of his personal injury lawsuit. (*Id.* at ¶ 20; A22) The court also found "the evidence presented fails to show an intent to deceive or mislead." (*Id.* at ¶ 24; A23)

On January 31, 2022, the Defendants-Appellants filed a Joint Petition for Leave to Appeal in this Court. (A26-A55) On March 30, 2022, this Court allowed the Joint Petition for Leave to Appeal. (A56) The Defendants submit this Joint Brief in support of their request for reversal of the appellate court's decision.

ARGUMENT

I. INTRODUCTION

As this Court observed in *Seymour v. Collins*, "the uniformly recognized purpose of the doctrine [of judicial estoppel] is to protect the integrity of the judicial process" by prohibiting parties from taking one position in one courtroom, then taking the opposite position in another to serve the litigant's interests of the moment. *Seymour v. Collins*, 2015 IL 118432 at ¶ 36. There is no matter more critical to the integrity of the judicial system than ensuring that parties who participate in the process tell the truth under oath. Without truthfulness, the process collapses. And one of the few mechanisms available to the courts to protect the integrity of the judicial process is the doctrine of judicial estoppel. So, where there is evidence, as here, of a litigant's intentional failure to truthfully answer questions under oath to serve his interests of the moment, judicial estoppel must be invoked.

Darrius Duniver filed his personal injury lawsuit on January 16, 2019 seeking recovery for a leg-severing injury. Twenty-three days later, Duniver swore under oath in federal bankruptcy court that he had filed no personal injury claims. The circuit court conducted the precise judicial estoppel analysis called for by this Court in *Seymour*, found all the prerequisites of judicial estoppel satisfied, and exercised its discretion in concluding, based on undisputed evidence, that Duniver's false statements in federal bankruptcy court were intended to deceive the bankruptcy court.

The appellate court reversed, finding the elements of judicial estoppel had not been satisfied though Duniver timely challenged none of them in circuit court. The appellate court also concluded Duniver's failure to disclose his personal injury lawsuit to the trustee in bankruptcy court was not deliberate, even though Duniver, under oath, denied filing any injury claims in his bankruptcy paperwork and denied suing anyone at the required creditors' meeting.

The appellate court's decision entirely undermines the critical doctrine of judicial estoppel and encourages debtors to deceive the bankruptcy court because even if caught, there are no repercussions for the debtor unless the debtor admits his deception. But that cannot be the standard unless the Court is willing to abandon one of the few enforcement mechanisms at its disposal to ensure truth-telling during judicial proceedings. The appellate court's decision condones intentional deceit – even when the debtor is caught red-handed. The appellate court's decision must be reversed.

II. THE CIRCUIT COURT CORRECTLY APPLIED JUDICIAL ESTOPPEL TO GRANT SUMMARY JUDGMENT SINCE DUNIVER SWORE UNDER OATH IN BANKRUPTCY COURT HE HAD FILED NO LAWSUIT JUST WEEKS AFTER DUNIVER FILED HIS PERSONAL INJURY LAWSUIT.

A. The Standard of Review

The Court conducts a *de novo* review of an order granting summary judgment. *Seymour v. Collins,* 2015 IL 118432 at ¶ 42. Summary judgment is appropriate where there are no genuine issues of material fact and the

moving party is entitled to judgment as a matter of law. *Id.* Accordingly, in reviewing the circuit court's order granting summary judgment, this Court will examine whether questions of fact existed, and in the judicial estoppel setting, this means the Court will independently examine whether the prerequisites for application of the doctrine have been satisfied. *Id.* at ¶ 47.

No dispute of material fact existed in this case. Duniver did not dispute the contents of his bankruptcy paperwork, did not dispute the testimony he gave at the creditors' meeting, did not dispute knowledge of his personal injury lawsuit when he falsely denied it in bankruptcy court, did not deny receiving an automatic stay on collection efforts when his bankruptcy petition was filed, did not deny receiving confirmation of his bankruptcy plan, and did not deny retaining control of his injury lawsuit. (C635-C652)

The circuit court observed these undisputed facts, determined Duniver had conceded all the prerequisites for judicial estoppel, and analyzed whether evidence existed of an intent to deceive the bankruptcy court. (C675-C678; A3-A6) When those factors went unchallenged, the circuit court followed the *Seymour* analytical framework by evaluating the evidence of Duniver's intent to deceive the bankruptcy court. *Seymour* at ¶¶ 53-54. The circuit court stated:

> 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. 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 ... (C676, A-4) (internal citation omitted)

The circuit court was correct. "[I]f all prerequisites have been established, the *trial court* must determine whether to apply judicial estoppel – an action requiring the exercise of discretion." *Seymour*, at ¶ 47 (emphasis added). This Court then "review[s] a trial court's exercise of discretion for abuse of discretion." *Id.* at ¶ 48. "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Id.* at ¶ 41.

Rather than reviewing the circuit court's decision to apply judicial estoppel for an abuse of discretion, the appellate court erroneously exercised its own discretion in determining whether the doctrine of judicial estoppel should have been applied after assuming the prerequisites had been satisfied, stating: "If all elements of judicial estoppel had been proven, we would exercise our discretion in determining whether to apply the doctrine." *Duniver*, 2021 IL App (1st) 200818 at ¶ 21; A22. But that makes no sense.

Because the circuit court followed the *Seymour* analytical framework, and exercised its discretion to invoke judicial estoppel, the only issue for the appellate court was whether the circuit court abused its discretion. Otherwise, why trouble the circuit court at all? Under the abuse of discretion standard, "the question is not whether the reviewing court would have made the same decision if it were acting as the lower tribunal." *People v.*

McDonald, 2016 IL 118882 at ¶ 32. Instead, the reviewing court must determine if the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.*

In *Seymour*, this Court noted its review of the judicial estoppel ruling was "necessarily truncated" by the "circumstances" of that case. *Seymour*, 2015 IL 118432 at ¶ 50. Because the circuit court there exercised no discretion in applying judicial estoppel, believing dismissal was mandated by the debtor's failure to disclose his personal injury action in bankruptcy, deferential review was precluded. *Id.*

But no such circumstances were present here. Nothing justified the appellate court's decision to step into the shoes of the circuit court and exercise its own discretion in evaluating the evidence of intent. The appellate court did not find the circuit court violated the *Seymour* analytical framework. *Duniver v. Clark Material Handling Co., et al*, 2021 IL App (1st) 200818. (A15-A25) The appellate court did not find the circuit court failed to exercise its discretion. (*Id.*) The appellate court did not find the circuit court abused its discretion in applying the doctrine. (*Id.*)

Where the prerequisites for judicial estoppel have been satisfied under undisputed facts, and the circuit court utilizes its discretion in deciding whether to invoke the doctrine based on evidence of an intent to deceive, then the reviewing court's analysis should be limited to determining whether the circuit court abused its discretion in applying judicial estoppel. In other

words, was the circuit court's determination that Duniver intended to mislead the bankruptcy court "fanciful, arbitrary or unreasonable?" Would no reasonable person agree with the circuit court's conclusion that Duniver intended to mislead the bankruptcy court when he testified under oath that he was not suing anyone? The circuit court acted well within its discretion in applying judicial estoppel based on the undisputed evidence of Duniver's false statements in federal bankruptcy court. The appellate court erred in exercising its own discretion under these circumstances, rendering the circuit court proceedings a complete waste of time.

In the end, even under a *de novo* standard of review, the circuit court's summary judgment order should have been affirmed since Duniver raised no dispute as to any material fact and since ample evidence of an intent to deceive existed.

B. The Purpose of the Doctrine of Judicial Estoppel

The doctrine of judicial estoppel prevents a party from taking contradictory positions in separate judicial proceedings. *Seymour* at ¶ 36. The "uniformly recognized purpose of the doctrine" is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions to serve their interests of the moment. *Id.* The focus of judicial estoppel is "to protect the integrity of the courts; it does not focus on the fairness of the relationship between the litigants." *Dailey v. Smith*, 292 Ill. App. 3d 22, 27 (1st Dist. 1997). So, no matter the relative culpability of the

parties to a lawsuit, or the severity of an injury, the focus of the judicial estoppel analysis is ensuring the integrity of the judicial process.

The goal of the doctrine is to "prevent a party from manipulating and making a mockery of our system of dispensing justice in all its forms." *Shoup v. Gore*, 2014 IL App (4th) 130911 at ¶ 9. The doctrine is designed to prevent litigants from engaging in "gamesmanship" or "hoodwinking a court." *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 850 (1st Dist. 1994). In sum, the doctrine is designed to promote truthfulness.

The appellate court's decision undercuts that noble purpose. Instead of promoting honesty, the appellate court's decision entirely undermines the doctrine of judicial estoppel. If the doctrine is unenforced in a situation like this where undisputed evidence shows that Duniver falsely told the federal bankruptcy court multiple times under oath that he was pursuing no third-party claims while simultaneously pursuing a potentially lucrative personal injury lawsuit in circuit court, then the doctrine is useless, litigants have carte blanche to act deceitfully, and the integrity of judicial proceedings is lost. The appellate court's application of judicial estoppel would eviscerate its application to the rare instance where the party to be estopped affirmatively admitted an intent to deceive.

C. No Factual Dispute Existed as to the Prerequisites for Application of the Doctrine of Judicial Estoppel

1. Duniver challenged none of the prerequisites of judicial estoppel in circuit court in response to defendants'

> *summary judgment motions and forfeited the right to do so.*

This Court has identified five prerequisites that must be present before a court may invoke the doctrine of judicial estoppel. The party to be estopped must have: (1) taken two positions; (2) that are factually inconsistent; (3) in separate judicial proceedings; (4) intending for the trier of fact to accept the truth of the facts alleged; and (5) have succeeded from doing so and received some benefit from it. *Seymour,* 2015 IL 118432 at ¶ 37.

Critically, Duniver challenged none of the prerequisites for judicial estoppel in response to defendants' summary judgment motions. (C635-C649) Duniver listed the five prerequisites for application of the doctrine in response to defendants' motions for summary judgment but took issue with none of them. (C640; C640-C644) Duniver argued only that his failure to disclose his personal injury lawsuit in his bankruptcy case was "inadvertent." (C641-C 644)

The circuit court noted this omission, observing that Duniver "essentially concede[d] 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." (C676; A4) Duniver waited until his motion to reconsider the circuit court's order granting summary judgment to challenge a single prerequisite. (C680-C685) There, for the first time, Duniver argued he received no benefit from falsely representing his assets in bankruptcy court. (C683, C685) And even then,

Duniver devoted two sentences to the argument, neither of which was supported by legal authority. (*Id.*)

This Court has plainly stated "[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal." *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271 at ¶ 36. Indeed, "[a] reconsideration motion is not the place to raise a new legal theory or factual argument." *Liceaga v. Baez*, 2019 IL App (1st) 181170 at ¶ 25. But that is precisely what Duniver attempted in his motion to reconsider – he raised a new theory that he did not benefit from falsely telling the bankruptcy court he had filed no injury lawsuits. (C683, C685)

The circuit court noted Duniver had contested none of the prerequisites for application of judicial estoppel. (C676; A4) Thus, at the summary judgment stage, Duniver denied the circuit court the opportunity to consider or address the primary basis on which the appellate court reversed the circuit court's decision. "A trial judge should have an opportunity to appraise the errors which are asserted to have taken place. It is unfair to charge him with errors in a reviewing court without having brought them to his attention ..." *People v. Georgina L.*, 2017 IL App (1st) 161944 at ¶ 16.

The appellate court acknowledged Duniver's forfeiture of this argument, but "[chose] to overlook forfeiture because it [was] necessary to obtain a just result ..." *Duniver v. Clark Material Handling Company, et al*, 2021 IL App (1st) 200818 at ¶ 18; A20-A21. But a just result for whom? For

the party who falsely testified in bankruptcy court? Certainly not a just result for the circuit court, or for the bankruptcy court, Duniver's creditors, or the judicial system as a whole.

The appellate court reversed the circuit court on a basis Duniver never timely asked the circuit court to consider and in doing so, benefited the party who falsely testified under oath in bankruptcy court. The circuit court deserved better. Duniver elected not to challenge any of the prerequisites to judicial estoppel in circuit court. The circuit court noted that election, relied on it, and examined the evidence of Duniver's intent to mislead the bankruptcy court - methodically following the procedure this Court demanded in *Seymour*. The appellate court erred in relying on a forfeited argument to reverse the circuit court's decision.

2. *Even if Duniver had preserved a challenge to the prerequisites of judicial estoppel, all prerequisites were established by clear and convincing evidence.*

If this Court looks beyond Duniver's forfeiture, the defendants still prevail since all five prerequisites for judicial estoppel were present here. Duniver has never disputed that his actions satisfied the first four prerequisites for application of judicial estoppel, nor could he. Duniver filed this personal injury lawsuit in circuit court on January 16, 2019 (C20) and in bankruptcy court on February 8, 2019, he denied filing any claims against third parties. (C467 at ¶¶ 33-34) On March 14, 2019, Duniver testified under oath in bankruptcy court that he was not suing anyone. (C667) Accordingly,

Duniver satisfied the first and second prerequisites of judicial estoppel by taking two positions that were factually inconsistent.

Moreover, Duniver's factually inconsistent positions were taken in separate judicial proceedings, satisfying the third prerequisite for judicial estoppel. Duniver filed his personal injury suit in the Circuit Court of Cook County (C20), then denied having done so in U.S. Bankruptcy Court. (C467, C667) Duniver swore under oath in bankruptcy court that he had filed no lawsuits, evidence Duniver intended the bankruptcy court to accept as true his statements that he had filed no claims against third parties and was not suing anyone, thereby satisfying the fourth prerequisite for judicial estoppel.

As to the fifth prerequisite, the appellate court held Duniver received no "significant" benefit from misrepresenting his assets during bankruptcy proceedings because his debts were not discharged. *Duniver* at ¶¶ 1, 26 (A16, A23). But that determination was a mischaracterization of the legal standard established by this Court in *Seymour*, was inconsistent with overwhelming federal and state legal authority, and ignored the record facts.

D. The Appellate Court Erred in Finding Duniver Received no Benefit from Deceiving the Bankruptcy Court about his Potentially Lucrative Injury Lawsuit.

1. The appellate court used the wrong standard.

To start, the appellate court utilized the wrong standard when it concluded Duniver "did not receive a *significant* benefit" from providing false information to Duniver's creditors in bankruptcy court. *Duniver* at ¶¶ 1, 26;

A16, A23. (emphasis added) This Court has not required that a debtor receive a "significant" benefit before judicial estoppel may be invoked. Instead, this Court looks to whether the party to be estopped received "some" benefit from taking factually inconsistent positions in two different courtrooms. *Seymour* at ¶ 37.

The appellate court cited no legal authority supporting its conclusion that Duniver must have received a "significant" benefit before estoppel could be invoked, because none exists. Prior to the appellate court's decision, all five appellate districts of this state utilized the same standard: the party to be estopped must have received "a benefit" or "some benefit" for the doctrine to apply. See *Brummel v. Grossman*, 2018 IL App (1st) 170516, ¶ 70; *Giannini v. Kumho Tire US.A., Inc.*, 385 Ill. App. 3d 1013, 1019 (2nd Dist. 2008); *Barnes v. Lolling*, 2017 IL App (3rd) 150157, ¶ 20; *Shoup v. Gore*, 2014 IL App (4th) 130911, ¶ 10; and *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 113.

This is no small distinction. A stay on collection of debt, for example, and the ability to pay one's debts over time without incurring interest or penalties, are unquestionably "a benefit" or of "some benefit" to a debtor in bankruptcy. "Some" benefit means any tangible benefit, such as a stay on collection of debt or the ability to retain control over one's personal injury lawsuit, warrants estoppel. A standard requiring receipt of a "significant" benefit is dangerously ambiguous, likely to prompt inconsistent

interpretations, and contrary to this Court's precedent. So, the pertinent question is whether Duniver received some benefit from misrepresenting his assets during his bankruptcy case. Overwhelming federal authority, the *Smith* decision, and common sense establish that he did.

2. The federal courts charged with overseeing bankruptcy cases and interpreting bankruptcy laws recognize the many benefits bestowed on a debtor in bankruptcy short of a discharge of debt.

Federal courts have original and exclusive jurisdiction of all bankruptcy cases under Title 11. *28 U.S.C. § 1334(a)*. Federal courts recognize the many benefits conferred during bankruptcy proceedings even where the bankruptcy case is dismissed with no discharge of debt. *Williams v. Hainje,* 375 Fed. App'x 625, 627 (7th Cir. 2010). *Williams* held a debtor received "significant financial benefits during his short stint in bankruptcy," including an automatic stay on debt collection, avoidance of interest charges, and confirmation of his bankruptcy plan even though he never received a discharge of his debt. *Id.* The *Williams'* court reasoned:

> To hold otherwise would give debtors an incentive to game the bankruptcy system. Debtors could take a wait–and–see approach to disclosure by prosecuting an undisclosed claim while waiting to see how favorably the bankruptcy proceeding unfolds before discharge. That approach would undermine both the primary aim of judicial estoppel which is to protect the integrity of the judicial process and the bankruptcy laws' goal of unearthing all assets for the benefit of creditors. *Id.* at 628 (internal citations omitted).

Other courts concur. See *In re Residential Capitol, LLC,* 519 B.R. 606, 611-12 (SDNY 2014) ("Nonetheless, [the debtor] received a financial benefit even though her debts were not discharged. The automatic stay prevented [a creditor] from immediately foreclosing on [the debtor's] house, and the Chapter 13 plan temporarily relieved [the debtor] of most of her debts without further interest or penalty"); *Jethroe v. Omnova Solutions, Inc.,* 412 F. 3d 598, 600 (5th Cir. 2005) (judicial estoppel barred debtor who failed to disclose claim where bankruptcy court "certainly confirmed Jethroe's plan at least in part based on its assessment of her assets and liabilities"); *Terry v. Ethicon, Inc.,* No. 1:19-CV-00175-GNS, 2020 U.S. Dist. LEXIS 98278 at *12 (W.D. Ky. June 4, 2020)(noting that "securing a discharge is not the only way to evidence the bankruptcy court's adoption of a misleading position proffered by Plaintiffs" and finding "[w]hen a bankruptcy court – which must protect the interests of all creditors – approves a payment from the bankruptcy estate on the basis of a party's assertion of a given position, that ... is sufficient judicial acceptance to estop the party from later advancing an inconsistent position").

Duniver succeeded in persuading the bankruptcy court he had no claims against third parties and received a benefit when the bankruptcy court confirmed his Chapter 13 plan. Had Duniver's creditors known of his lawsuit, they could have objected to the bankruptcy court plan and required a higher payout. They could have extended the life of the plan to maximize

recovery upon resolution of Duniver's injury lawsuit. Instead, believing Duniver had no other assets, the bankruptcy court approved a plan in which Duniver proposed to repay his unsecured creditors at ten percent of the total amount of their claims over the course of three years without the fear of interest or default penalties. (C542 at ¶ 5.1)

The appellate court's conclusion that a debtor receives no benefit from making false statements in bankruptcy court unless his debts are discharged is factually inaccurate and contrary to decisions of the federal courts - the courts charged with enforcing bankruptcy laws.

3. No Illinois decision holds a discharge of debt is the only way a debtor benefits from providing false testimony in bankruptcy court.

While Illinois courts have recognized that a debtor derives a benefit when his debt is discharged in bankruptcy, no Illinois court has said a discharge of debt is *required* to find a benefit was received by the debtor. See *Barnes v. Lolling*, 2017 IL App (3rd) 150157; *Shoup v. Gore*, 2014 IL App (4th) 130911; and *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560. In both *Barnes* and *Shoup*, the plaintiffs received a discharge of debt, so there was no need for the court to consider whether other benefits were conferred. In *Holland*, the plaintiff filed a bankruptcy petition and the bankruptcy court confirmed his repayment plan before his cause of action even arose. *Holland* at ¶ 117. The *Holland* court could not have found Holland succeeded in gaining confirmation of his bankruptcy plan by

withholding a cause of action that did not exist when his plan was confirmed. Here, Duniver's personal injury lawsuit existed before Duniver petitioned for bankruptcy and before his bankruptcy plan was confirmed.

The appellate court seemed to find the length of time Duniver's automatic stay was in place insufficient to label the stay a "benefit." *Duniver*, at ¶ 19; A21 ("Unlike the plaintiff in *Williams*, Duniver's bankruptcy was dismissed after only 11 months.") The court also entirely ignored plan confirmation as a benefit. The court erred on both counts.

a. An automatic stay on debt collection efforts is a benefit to a debtor.

The voluntary filing of a Chapter 13 bankruptcy petition operates as an automatic stay on any judicial or other proceeding against the debtor that was or could have been commenced. See *11 U.S.C.S. § 362(a).* "The automatic stay set forth in § 362(a) takes affect the moment the petition in bankruptcy is filed." *Townsend v. Magic Graphics, Inc.*, 169 Ill. App. 3d 73, 76 (2d Dist. 1988). Any attempted action taken in violation of the automatic stay is void. *Cohen v. Salata,* 303 Ill. App. 3d 1060, 1064 (1999). Accordingly, the moment a debtor files a voluntary Chapter 13 petition in bankruptcy court, an automatic stay is in place applicable to the commencement or continuation of any proceeding against the debtor.

An automatic stay on debt collection efforts for nearly one year is unquestionably of benefit to a debtor, a concept recognized by courts around

the country. See *In re Amir*, 436 B.R. 1, 19 (B.A.P. 6th Cir. 2010) ("Throughout the entire pendency of his case, [the debtor who alleged the signature on his bankruptcy petition was forged] has enjoyed the benefits of the automatic stay"); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F. 3d 778, 784-85 (9th Cir. 2001) ("[t]he debtor, once he institutes the bankruptcy process, disrupts the clow of commerce and obtains a stay and the benefits derived by listing all his assets"); *Eastman v. Union Pac. R. Co.*, 493 F. 3d 1151, 1159 (10th Cir. 2007) (once a debtor files for bankruptcy, he "disrupts the flow of commerce and promptly benefits from an automatic stay.")

Most debtors would breathe a sigh of relief with just a few months' stay on debt collection, let alone nearly one year's worth. Duniver benefited from a stay on debt collection efforts from February 8, 2019 when he filed for bankruptcy until February 19, 2020 when his bankruptcy case was dismissed. (C455; C841) The protection of the automatic stay immediately stalled creditors' efforts to pursue repayment of debts owed by Duniver. Any debtor would view that occurrence as a benefit.

b. Confirmation of a bankruptcy plan benefits a debtor by permitting repayment of debt at a reduced amount, over time, interest free, and without penalties.

Second, confirmation of a bankruptcy plan confers a benefit on a debtor. When a Chapter 13 bankruptcy plan is confirmed by the bankruptcy court, confirmation of the plan "vests all of the property of the estate in the debtor" and "is free and clear of any claim or interest of any creditor provided

for by the plan." See *11 U.S.C.S. § 1327(b)(c)*. Thus, when the bankruptcy plan is confirmed, no creditor may place any claim or interest on property of the bankruptcy estate. The debtor is permitted to re-pay his debts over time without interest or penalties.

Moreover, failing to disclose a potentially lucrative personal injury action valued by Mr. Duniver as being worth over $50,000.00 denied his creditors and the trustee important knowledge utilized to determine a repayment plan. A debtor's deliberate concealment of a personal injury claim has a significant impact on the bankruptcy proceedings, particularly in circumstances like this, where Duniver identified debts less than $50,000.00 (C462) while pursuing a personal injury lawsuit he valued at greater than $50,000.00. Creditors must be able to rely on the financial disclosures of the debtor to inform their decision whether to object to, or seek modification of, a bankruptcy plan. By withholding information about his injury lawsuit, Duniver received the benefit of having his repayment plan approved without the creditors' knowledge of his potential asset and without objection from his creditors.

The confirmation of a bankruptcy plan (and the automatic stay) were recognized as benefits conferred on a debtor in bankruptcy in *Smith v. Integrated Mgmt. Servs.*, but the appellate court here entirely ignored *Smith* in its opinion despite its striking factual similarities and its prominence in the defendants' Joint Response Brief. The appellate court concluded Duniver

"received no benefit" from making false statements under oath in bankruptcy court. *Duniver* at ¶ 20; A 22. But the *Smith* court found otherwise under nearly identical circumstances.

In *Smith*, the plaintiff filed a personal injury lawsuit in December of 2015 after sustaining a back injury while working. *Id.* at ¶¶ 3-4. While his injury lawsuit was pending, Smith filed for Chapter 13 bankruptcy and failed to disclose his personal injury action in his petition for bankruptcy or in any of the related statements or schedules he made under oath and on penalty of perjury. *Id.* at ¶ 5. The bankruptcy paperwork completed by Smith appears identical to the paperwork completed by Duniver – asking whether the plaintiff had any claims against third parties and asking whether the plaintiff was a party to any lawsuit. *Id.* at ¶ 5. Smith also testified under oath in bankruptcy proceedings that his petition and schedules were true. *Id.* at ¶ 6.

In September of 2017, the bankruptcy court confirmed Smith's repayment plan. *Id.* at ¶ 9. Smith's plan allowed him to pay his claims over the course of five years interest-free and without the possibility of default penalties. *Id.* at ¶ 9.

When the defendant discovered Smith's failure to disclose his personal injury action in his bankruptcy proceedings, the defendant moved for summary judgment arguing Smith lacked standing to pursue his injury action and that he was judicially estopped from pursuing his injury action.

Id. at ¶ 10. The circuit court granted the defendant's motion for summary judgment and the appellate court affirmed. *Id.* at ¶¶ 12, 30. On appeal, Smith- like Duniver - argued he received no benefit from falsely testifying in bankruptcy court since his debts were not discharged. *Id.* at ¶ 20. The *Smith* court disagreed, stating:

> Although a discharge is one way to incur a benefit from non-disclosure, the bankruptcy court's confirmation of a Chapter 13 plan is another. Courts nationwide recognize that when a bankruptcy court confirms a Chapter 13 plan, the court accepts the debtor's position and confers a benefit. See *e.g.*, *Williams v. Hainje*, 375 F. App'x 625, 627 (7th Cir. 2010); *Casanova v. Pre Solutions, Inc.*, 228 F. App'x 837, 840-41 (11th Cir. 2007; *Jethroe v. Omnova Solutions, Inc.*, 412 F. 3d 598,599-600 (5th Cir. 2005); *White v. Wyndham Vacation Ownership, Inc.*, 617 F. 3d 472, 474-75, 479-82 (6th Cir. 2010). *Id.* at ¶ 20.

The *Smith* court detailed the benefits received by a debtor in bankruptcy court short of discharge of debt, stating:

> Plaintiff's insistence that he did not receive a benefit is unavailing. Creditors of a Chapter 13 debtor can object to the bankruptcy court's plan and require a higher payout based on a debtor's disclosed finances. *11 U.S.C. § 1322(a)(1), (a)(4) (2012).* Plaintiff received a benefit from the bankruptcy proceeding by repaying his unsecured creditors interest free over the course of five years without the possibility of default penalties. The bankruptcy court confirmed plaintiff's Chapter 13 plan. The court and his debtors accepted plaintiff's financial affairs as he presented them. By failing to disclose this cause of action, plaintiff never placed the potential $1.2 million payout from this action at risk. Plaintiff kept his creditors in the dark; they did not object to the plan because, based on the available information, plaintiff was paying what he could. *Id.*at ¶ 21.

The *Smith* court observed that "[f]ederal courts agree that debtors succeed when the bankruptcy court confirms the Chapter 13 plan based on

the purported accuracy of the debtors' schedules." *Id.* at ¶ 23. The *Smith* court adhered to overwhelming federal authority and recognized reality. The appellate court erred in finding Duniver received "no benefit" by withholding information about his personal injury lawsuit from the bankruptcy court.

> c. By failing to disclose his personal injury lawsuit in bankruptcy court, Duniver succeeded in retaining exclusive control over his lawsuit.

Next, upon commencement of the bankruptcy case, the debtor's interest in property vests in the bankruptcy estate and the debtor surrenders the right to control the estate property. See *28 U.S.C. § 1334(e).* Once the debtor's interests become property of the bankruptcy estate, the property of the estate is administered exclusively by the trustee. See e.g., *11 U.S.C. §§ 323(a), 363, and 704.* The bankruptcy estate includes causes of action that belong to the debtor on the date the petition was filed. *Cannon-Stokes v. Potter,* 453 F.3d 446, 448 (7th Cir. 2006).

"The filing of a bankruptcy petition is an assertion of the jurisdiction of the bankruptcy court over all the assets and property of the alleged bankrupt." *Dailey v. Smith*, 292 Ill. App. 3d 22, 24 (1st Dist. 1997). Section 541 of the Bankruptcy Code states that the property belonging to a bankruptcy estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case." *11 U.S.C. § 541(a)(1).* Section 541 encompasses "every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative," including any

unliquidated lawsuits of the debtor. *Id.* at 24, 25, *quoting In re Yonikus,* 996 F.2d 866, 869 (7th Cir. 1993). Once a bankruptcy action is initiated, "only the bankruptcy trustee then has standing to pursue [an unliquidated lawsuit.]" *Bd. of Managers of the 1120 Club Condo Ass'n v. 1120 Club, LLC,* 2016 IL App (1st) 143849 at ¶ 41.

Therefore, when a debtor files for bankruptcy, a *disclosed* personal injury lawsuit becomes part of the bankruptcy estate over which the trustee wields exclusive power for the benefit of the debtor's creditors. So, a debtor who files for bankruptcy *without* disclosing a pending personal injury lawsuit receives the benefit of an automatic stay preventing creditors from pursuing him, receives confirmation of his bankruptcy plan which allows him to make debt payments at a reduced rate over time without interest or penalties, and retains control over his injury lawsuit, rather than turning control of his lawsuit over to the trustee for the benefit of his creditors– all benefits to the debtor.

Duniver enjoyed several benefits by falsely testifying in bankruptcy court that he was not pursuing a personal injury lawsuit, including:

1. An automatic stay on any judicial or other debt collection proceedings against him;

2. Confirmation of a repayment plan that allowed Duniver to repay his debts at a fraction of their value over time, interest free, and without penalties;

3. Forestalling creditors' objections to Duniver's repayment plan and avoiding requests to modify the plan;

4. Retaining control of his injury lawsuit rather than having the

> bankruptcy trustee assume control for the benefit of Duniver's creditors.

Despite these benefits, the appellate court somehow concluded Duniver "received no benefit" from failing to advise the bankruptcy court of his injury lawsuit. *Duniver* at ¶ 20; (A22). The appellate court bought Duniver's argument that "no creditor was likely to pursue collection of a debt." *Duniver* at ¶19; A21. But Duniver's own bankruptcy filings disprove that assumption. On Duniver's own Statement of Financial Affairs, Duniver listed a pending collection action against him for a debt he owed the City of Chicago. (C493 at ¶ 9) He also listed the City of Chicago as a creditor in his Schedule of Creditors, listing the City's various claims against him. (C474-C475) So the idea that Duniver would benefit from an automatic stay on debt collection efforts was not an abstract or speculative notion – Duniver received an actual, particular benefit when the automatic stay halted the City's ongoing effort to collect debts owed by Duniver.

A debtor who files for bankruptcy receives many benefits short of a discharge of his debt. To hold otherwise ignores reality and encourages gamesmanship during bankruptcy proceedings. If a debtor believes he can file for bankruptcy and hold off his creditors by taking advantage of an automatic stay while simultaneously pursuing an undisclosed personal injury lawsuit and avoid the consequences of deceiving the bankruptcy court simply by dismissing his bankruptcy case before his debts are discharged, then where does that leave the bankruptcy court and the debtor's creditors? Mr.

Duniver had two bankruptcy cases dismissed for failure to make plan payments before he filed his third bankruptcy case. When Duniver filed his third bankruptcy case, he succeeded in preventing his creditors from pursuing recovery of his debts for one year, from February 8, 2019 when he filed his petition (C455) until his bankruptcy case was dismissed on February 19, 2020 (C841). If the Court accepts Duniver's new argument that he received no benefit from deceiving the bankruptcy court because his debts were not discharged, then a debtor such as Duniver is incentivized to cheat the bankruptcy court and his creditors a second time by failing to make plan payments so that his bankruptcy case is dismissed before his debts are discharged, thus enabling him to pursue a third-party lawsuit that should rightfully belong to his creditors. That cannot be the result the Court desires.

d. The *Holland* decision on which the appellate court relied is factually distinct.

The appellate court relied on *Holland v. Schwan's Home Service, Inc.* in reaching its conclusion that Duniver received no benefit from providing the bankruptcy court with false information. *Duniver* at ¶ 20; A22. But *Holland* was significantly factually and procedurally distinct.

In *Holland*, the Fifth District Appellate Court observed that Holland filed a retaliatory discharge complaint in November of 2009, long after his bankruptcy plan had been confirmed. *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560 at ¶ 88. Further, there was no evidence Holland filed any bankruptcy pleadings after Holland's employment was

terminated, meaning, unlike Duniver, Holland never filed a bankruptcy pleading in which he affirmatively denied the existence of a pending lawsuit and never testified falsely about the asset during a creditors' committee meeting.

The circuit court refused to apply judicial estoppel based on Holland's failure to disclose his subsequent retaliatory discharge claim in his pending bankruptcy case, and the appellate court affirmed, finding the circuit court did not abuse its discretion in *refusing* to apply the doctrine. *Id.* at ¶ 122. Holland did not benefit from failing to disclose his *post-plan confirmation* injury lawsuit. Accordingly, the debtor in *Holland* did not receive the benefit of confirmation of his bankruptcy plan based on false information – his retaliatory discharge action had not even accrued when his bankruptcy plan was confirmed.

Holland also came to the appellate court in a different procedural posture – the circuit court refused to apply judicial estoppel based on the evidence and the appellate court analyzed whether the *refusal* was an abuse of discretion. As the *Smith* court observed, *Holland* is inapplicable to cases like *Smith* and this case, where confirmation of the bankruptcy plan occurred after the debtor made inconsistent statements to bankruptcy court. The *Smith* court stated:

> It is unclear what benefit [the *Holland* decision] provides plaintiff. In *Holland*, the plaintiff filed a bankruptcy petition; the bankruptcy court confirmed his plan. *Id.*, ¶ 117. His personal injury action was

> nonexistent at that time. *Id.* Accordingly, the court could not say that plaintiff succeeded by withholding a cause of action that did not exist. *Id.*

Smith, 2019 IL App (3d) 180576 at ¶ 22.

Not so here. Duniver successfully withheld information about an existing cause of action. Duniver filed his personal injury action first, then denied doing so just 3 weeks later in bankruptcy court. Duniver's bankruptcy plan was confirmed when his personal injury lawsuit existed but was not disclosed in bankruptcy court. Duniver benefitted by obtaining confirmation of a bankruptcy plan based on false information.

The conclusion reached in *Smith* on the benefits received issue is consistent with federal authority and reflects the world as it actually exists. What debtor would view a stay on collection of all outstanding debt as not beneficial? What debtor would reject the opportunity to repay debts over time without interest or penalties? Failing to disclose the injury lawsuit in bankruptcy court also allowed Duniver to control his lawsuit and avoid having the trustee wield the authority to negotiate a settlement of the lawsuit and repay Duniver's creditors. The appellate court's declaration that Duniver "received no benefit" from giving false testimony in bankruptcy court was wrong legally and factually.

Accordingly, all five prerequisites for application of the doctrine of judicial estoppel were satisfied. Once that occurred, the circuit court properly moved on to determine whether evidence of Duniver's intent to deceive the bankruptcy court warranted application of the doctrine.

E. The Circuit Court Acted Well Within Its Discretion in Applying Judicial Estoppel Since There was Evidence of Duniver's Intent to Mislead the Bankruptcy Court

Once all the prerequisites for judicial estoppel have been established, "the trial court must determine whether to apply judicial estoppel – an action requiring the exercise of discretion." *Seymour*, 2015 IL 118432 at ¶ 47. "Multiple factors may inform the court's decision, among them the significance or impact of the party's action ... and ... whether there was an intent to deceive or mislead ..." *Id.* Here, Duniver admittedly failed to disclose in bankruptcy proceedings a personal injury action he had filed after suffering a leg-severing injury at work. Duniver had several opportunities to be honest with the bankruptcy court and the trustee, yet, at every turn, Duniver provided false information.

1. A debtor has an obligation to provide truthful and complete information to the bankruptcy court.

Duniver was told that, before filing his bankruptcy case, he was to provide his bankruptcy attorney with "full, accurate and timely information, financial and otherwise ..." (C 509) Duniver was also instructed to notify his bankruptcy attorney "if the debtor is sued or wishes to file a lawsuit ..." (C

510) Duniver signed the bankruptcy form in his own hand, agreeing to the conditions of the bankruptcy court on February 7, 2019. (C 514)

The commencement of a bankruptcy proceeding creates a bankruptcy estate consisting of all the property of the debtor, with certain exclusions not pertinent to this appeal, as of the commencement of the bankruptcy case and any interest in property the estate acquires after commencement of the bankruptcy case. See *11 U.S.C. § 541(a)(b).* "The reach of this section is extensive; § 541 has been found to encompass 'every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative.'" *Dailey v. Smith*, 292 Ill. App. 3d 22, 24 (1st Dist. 1997) (*quoting In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993). Specifically, "[o]nce a debtor files for bankruptcy, any unliquidated lawsuits become part of the bankruptcy estate ..." *Dailey*, at 25.

Courts look to the bankruptcy court's records and the affidavits before the circuit court to determine whether a debtor has intended to mislead the bankruptcy court. *Seymour* at ¶ 55. Where a debtor's knowledge of his personal injury claim is combined with a motive for concealment, and where concealment takes place in the face of an affirmative obligation to disclose, the evidence is sufficient to infer the debtor "has played fast and loose with the courts." *Dailey*, 292 Ill. App. 3d 22 at 29, *quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 363 (3d Cir. 1996). Here, Duniver's multiple false statements during his bankruptcy proceedings,

combined with Duniver's affirmative duty to disclose his personal injury lawsuit, provided the circuit court with ample evidence of an intent to mislead the bankruptcy court sufficient to invoke the doctrine of judicial estoppel.

2. Ample evidence existed of Duniver's intent to deceive the bankruptcy court.

Throughout his bankruptcy paperwork, Duniver was instructed to be as complete and accurate as possible. (C 455, C 462, C 464, C 486, C 491, C 523) And this was not Duniver's first journey through bankruptcy – Duniver had filed for bankruptcy on two prior occasions. (C 457) Duniver's first bankruptcy case in March of 2016 was dismissed approximately three months later for Duniver's failure to make plan payments. (See Case No. 16-08408, U.S. Bankruptcy Court, N.D.I.L., Eastern Division, Docs. 1, 31)

Duniver's second bankruptcy case, filed in September of 2016, (C 526-C 533), was dismissed after fifteen months for failure to make plan payments. (C 532, Entry 45) And even though Chapter 13 bankruptcy paperwork requires a debtor to identify all claims against third parties, *including accidents or rights to sue* (C 467), there is no indication Duniver amended his bankruptcy paperwork in Case No. 16-29185 to disclose his accident even though the 16-29185 bankruptcy case remained open until January 23, 2018, nearly six months after Duniver's injury on July 30, 2017. (C532, entry 48; C24) By the time Darrius Duniver filed his third bankruptcy case in February of 2019, he had been through the process twice and was familiar

with the paperwork, obligations, and proceedings, including the creditors' meeting.

Yet despite that experience, Duniver made several false statements to the bankruptcy court in Case No. 19-03330. First, Duniver estimated his assets to be less than $50,000.00 (C 460) even though just weeks before he had filed a personal injury lawsuit seeking damages in excess of $50,000.00. (C 30 at ¶ 55) Official Bankruptcy Form 106A/B required Duniver to list all personal property of the debtor of whatever kind, including contingent and unliquidated claims of every nature. (C464-C467) Duniver flatly denied having any claims against third parties. (C 467 at ¶ 33) Duniver did not list his personal injury lawsuit. (C 467 at ¶ 34)

Official Bankruptcy Form 107 required Duniver to be as complete and accurate as possible and identify any personal injury lawsuits to which he was a party. (C493 at ¶ 9) Despite being asked "[w]ithin one year before you filed for bankruptcy, were you a party in any lawsuit" and being asked to list any such matter "*including personal injury cases*," Duniver made no mention of his personal injury claim. (C 493 at ¶ 9) (emphasis added) But he did list a collection action pending against him. (Id.)

Duniver then signed his bankruptcy paperwork in his own hand in three separate areas, declaring under penalty of perjury that the information contained in his petition, in his debtors' schedules, and in his Statement of Financial Affairs was true and correct even though it was decidedly not. (C

521-C 523) And when he was given one final opportunity to be truthful under oath at the required Rule 341 creditors' meeting in bankruptcy court on March 14, 2019, Duniver again flatly denied suing anyone. (C 667) See *11 U.S.C. § 343.*

Duniver did not mislead the bankruptcy court just once or twice – Duniver repeatedly failed to disclose his pending personal injury lawsuit despite questions directed to discover just that. The number and materiality of Duniver's false statements evidence an intent to deceive. There was not one misstep. Duniver repeatedly, under oath, denied the existence of his brand-new lawsuit seeking recovery for a significant injury. The circuit court had ample evidence of Duniver's intent to mislead the bankruptcy court and acted well within its discretion in invoking the doctrine of judicial estoppel to bar Duniver's personal injury lawsuit. "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour*, 2015 IL 118432 at ¶ 41. The circuit court's decision here was not arbitrary or fanciful but was based on multiple points of evidence. Reasonable people could take the same view adopted by the circuit court.

Indeed, the *Smith* court did so. *Smith v. Integrated Mgmt. Servs.*, 2019 IL App (3d) 180576. The bankruptcy paperwork in *Smith* was identical to the bankruptcy paperwork Duniver completed. Smith's bankruptcy schedule asked whether he had any claims against third parties, regardless of whether

he had pursued legal action. *Id.* at ¶ 5. Smith's Statement of Financial Affairs also required him to list all lawsuits and court actions to which he was a party. *Id.* Just like Duniver, Smith disclosed a collection action against him, but failed to disclose his personal injury case. *Id.* Smith also testified under oath in his bankruptcy proceedings that his petition and schedules were true and complete. *Id.* at ¶ 6.

The *Smith* court reached the same conclusion reached by the circuit court here, finding:

> The record here contains ample evidence that plaintiff's failure to disclose his personal injury claim was a deliberate attempt to mislead or deceive the bankruptcy court and his creditors, as well as the court and defendant in this case. Plaintiff testified under oath in his bankruptcy proceeding that his schedules and SOFA were an accurate and complete representation of his financial standing. He disclosed two collection actions but failed to mention this action ... *Id.* at ¶ 26.

The *Smith* Court concluded with this: "No reasonable person would find these misrepresentations innocent." *Id.* The *Smith* court considered the facts there readily distinguishable from the facts in *Seymour*. (*Id.*) And the *Smith* Court was correct.

In *Seymour*, the debtor plaintiff provided affirmative and uncontroverted evidence of an innocent explanation for his failure to disclose his personal injury lawsuit during bankruptcy proceedings. First, Seymour's bankruptcy petition was filed on April 24, 2008, more than 3 years *before* Seymour filed his personal injury action. *Seymour v. Collins*, 2015 IL 118432 at ¶¶ 3, 4. Seymour's personal injury action, therefore, was not pending

when he filed his bankruptcy petition. Moreover, this Court found no basis in Seymour's bankruptcy records to prove Seymour knew he had to disclose his injury or his lawsuit. *Id.* at ¶ 55.

In contrast, the bankruptcy forms submitted by Duniver asked Duniver specifically whether he had claims against third parties and whether he was a party in any lawsuit, including personal injury cases. (C467; C493) At the required Rule 341 creditors' meeting, Duniver was specifically asked whether he was suing anyone and he answered falsely. (C667) Accordingly, sufficient evidence existed to establish Duniver knew he had to disclose his injury lawsuit, yet failed to do so.

Beyond that, the debtor in *Seymour* supplied affidavits of his bankruptcy attorney and the bankruptcy trustee, both of whom attested that they advised Seymour he was only required to report to his bankruptcy attorney and the trustee "any lump sum funds received in excess of $2,000.00 during the pendency of the Chapter 13 bankruptcy proceeding." *Id.* at ¶¶ 10, 11. This Court concluded those affidavits provided "affirmative, uncontroverted evidence" that Seymour's failure to disclose his personal injury action may have resulted from inadvertence or a good faith belief he need not do so. *Id.* at ¶¶ 61, 63.

Here, Duniver provided no such uncontroverted, affirmative evidence. Duniver provided an affidavit in response to defendants' motions for summary judgment that established Duniver retained his personal injury

attorney in September of 2017 following his July 2017 accident. (C 650 at ¶¶ 2-3) Mr. Duniver stated his bankruptcy attorney never asked him whether Duniver had any pending lawsuits prior to filing his bankruptcy petition. (C 651 at ¶ 11) Duniver then stated: "if I had been asked about pending lawsuits prior to filing a petition and the amended Chapter 13 plan, I would have informed [my bankruptcy attorney] of my lawsuit/claim for injuries arising out of the July 30, 2017 workplace incident." (C 652 at ¶ 18)

But the trustee asked him that very question during the creditors' meeting in March of 2019. (C666-C667) Duniver offered no explanation, innocent or otherwise, as to why he answered the trustee's question deceitfully. (C650-C652) And even though Duniver was asked at the creditor's meeting in March of 2019 about his involvement in any lawsuits, Duniver again failed to disclose his injury lawsuit when he filed his amended Chapter 13 bankruptcy plan four months later on July 16, 2019. (C 540-C 544)

In his only affidavit, Duniver never claimed he was unaware of his personal injury lawsuit when he filed for bankruptcy. (C 650-C 652) Duniver never stated his bankruptcy attorney told him he need not disclose his personal injury lawsuit. (*Id.*) Duniver never stated the trustee told him he need not disclose his personal injury lawsuit. (*Id.*) Duniver never stated he misunderstood his bankruptcy paperwork or was confused at the creditors' meeting. (*Id.*) Duniver's only excuse was that he would have told his

bankruptcy attorney if his bankruptcy attorney had asked him about a personal injury lawsuit. But the trustee asked him that very question and Duniver answered falsely.

The circuit court had more than enough evidence of Duniver's intent to mislead the bankruptcy court to exercise its discretion and apply judicial estoppel. The appellate court's conclusory statement that "the evidence presented fails to show any intent to deceive or mislead" is factually inaccurate. *Duniver*, 2021 IL App (1st) 200818 at ¶ 24; A23. If Duniver's false answers in his bankruptcy paperwork and his false testimony under oath at the creditors' meeting are insufficient to establish an intent to deceive, then intent will never be found short of a debtor's admission of deceit.

The doctrine of judicial estoppel is designed to promote truthfulness during judicial proceedings. The doctrine should raise the cost of lying to the court, not eliminate it. The appellate court's decision results in just the opposite. Under the appellate court's standard, debtors will be incentivized to misrepresent their assets to the bankruptcy court because, even if caught, they will suffer no consequences unless they admit a deceitful intent. The decision of the appellate court must be reversed because it entirely undermines the doctrine of judicial estoppel and rewards a litigant who provided false information to a federal court on several occasions. The decision should also be reversed because the appellate court usurped the

circuit court's responsibility to analyze the undisputed facts for evidence of an intent to mislead and to exercise its discretion in deciding whether to apply the doctrine of judicial estoppel.

III. DUNIVER LACKED STANDING TO PURSUE HIS INJURY LAWSUIT AFTER HE FILED HIS PETITION FOR BANKRUPTCY

If this Court affirms the circuit court's order granting summary judgment to defendants based on the application of judicial estoppel, then the Court need not reach the issue of whether Duniver lacked standing to pursue his personal injury action after he filed for bankruptcy. But even if Duniver should not have been estopped from pursuing his injury action based on the false information he provided to the bankruptcy court, Duniver's case should still be dismissed because Duniver lacked standing to pursue his personal injury lawsuit after filing for bankruptcy.

A. When a Debtor Files a Bankruptcy Petition, the Bankruptcy Estate Includes the Debtor's Lawsuits and the Bankruptcy Trustee Alone Has Standing to Pursue Them.

The bankruptcy court has jurisdiction over all the assets and property of an alleged bankrupt. *Dailey v. Smith,* 292 Ill. App. 3d 22, 24 (1st Dist. 1997). "Once a debtor files for bankruptcy, any unliquidated lawsuits become part of the bankruptcy estate, and, ... a debtor is divested of standing to pursue them upon filing his petition." *Id.* at 25. This remains true even if the debtor fails to disclose his lawsuit during bankruptcy proceedings. "[T]he

failure to schedule a claim in bankruptcy (as well as the reasons for such failure) can have no relevance to the bankrupt's standing to bring a subsequent claim. Once a bankruptcy petition is filed, all claims belong to the estate, and the bankruptcy trustee alone has standing to pursue them." *Id.* at 26.

Accordingly, when the bankruptcy estate acquires a cause of action from the debtor, whether disclosed or not, the cause of action no longer belongs to the debtor. *Id.* at 26. Thus, when Duniver filed his bankruptcy petition on February 8, 2019, all Duniver's claims, whether disclosed in bankruptcy or not, belonged to the bankruptcy estate and the bankruptcy trustee alone had standing to pursue the claims. Duniver lost standing to pursue his personal injury lawsuit, filed January 16, 2019, when he filed his Chapter 13 bankruptcy petition on February 8, 2019. This Court may reverse the decision of the appellate court and affirm the circuit court's decision since Duniver lacked standing to pursue his personal injury lawsuit.

B. The Dismissal of Duniver's Bankruptcy Case Did Not Revest Standing in Duniver.

The appellate court concluded the dismissal of Duniver's bankruptcy case "in effect" revested standing in Duniver to pursue his injury claim. *Duniver,* 2021 IL App (1st) 200818 at ¶ 15; A19. But in support, the appellate court relied on decisions where a trustee in bankruptcy knowingly and intentionally abandoned a personal injury claim after evaluating the merits and value of the claim. *Johnson v. Fuller Family Holdings, LLC,* 2017 IL

App (1st) 162130; *Bd. of Managers of the 1120 Club Condo Ass'n v. 1120 Club, LLC*, 2016 IL App (1st) 143849.

However, the claim reverts to the debtor only if the trustee abandons the claim. *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006). A trustee is said to have abandoned property of the estate only "after notice and a hearing" where the trustee finds the property of the estate is either burdensome or of inconsequential value. See *11 U.S.C. § 554(a).* While generally dismissal of a bankruptcy case revests the property of the estate in the debtor (See *11 U.S.C. § 349(3)),* that rule does not apply to property of the bankruptcy estate that is not abandoned and that is not administered in the case. See *11 U.S.C. § 554(d).*

According to bankruptcy law, property of the estate "that is not abandoned ... and that is not administered in the [bankruptcy] case remains property of the estate." (See *11 U.S.C. § 554(d)*). While scheduled property is automatically abandoned at the close of a bankruptcy case, "[p]roperty of the estate that is not abandoned remains property of the estate unless otherwise ordered by the court." *Aspling v. Ferral*, 232 Ill. App. 3d 758, 767 (2nd Dist. 1992). A debtor in bankruptcy is required to file a schedule of the debtor's assets and liabilities. See *11 U.S.C. § 521(a)(1)(B)(i).* When a claim is not scheduled property under § 521(1) of the Bankruptcy Code, it is not automatically abandoned when a bankruptcy case is dismissed. *Aspling* at 767. According to federal reviewing courts, resolving abandonment questions

by speculating as to a trustee's intention when a bankruptcy case is dismissed is inconsistent with § 554 and untenable. As the Eighth Circuit stated:

> In order for property to be abandoned by operation of law pursuant to § 554(c), the debtor must formally schedule the property before the close of the case. It is not enough that the trustee learns of the property through other means; the property must be scheduled pursuant to § 521(1). *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991).

Federal authority, therefore, establishes that an unscheduled asset cannot be abandoned by a trustee just because a bankruptcy case is dismissed. Simply stated, a trustee cannot intentionally abandon a claim about which he or she has no knowledge. Duniver affirmatively told the bankruptcy court and the trustee that he had filed no lawsuits. He filed an amended Chapter 13 plan on July 16, 2019, again failing to disclose his personal injury lawsuit. The bankruptcy court confirmed his Chapter 13 plan based on this information on July 24, 2019. By December of 2019, the trustee moved to dismiss Duniver's bankruptcy case for failure to make plan payments. Duniver denied the trustee and the creditors the ability to assess the value of his personal injury lawsuit before a decision was made to dismiss the bankruptcy case. Without information concerning the injury lawsuit and its potential value, Duniver presented no evidence the trustee knowingly and intentionally abandoned the lawsuit.

Since the lawsuit remained property of the bankruptcy estate even though, and because, Duniver failed to disclose the lawsuit in bankruptcy

proceedings, and since the trustee never abandoned the personal injury lawsuit, standing never revested in Duniver. As such, Duniver had no right to pursue his injury claim against the defendants. This result may be reached because Duniver lacked standing or because of a lack of jurisdiction. See *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002) (to invoke the jurisdiction of the circuit court, a plaintiff's case must present a justiciable matter involving real parties and interest with adverse legal interests). Likewise, Duniver's lack of standing also renders this proceeding moot since it lacks an actual controversy between parties. *In re Torry G.*, 2014 IL App (1st) 130709 at ¶ 26.

Duniver enjoyed all the protections bankruptcy court offers a debtor while stiffing his creditors, only to be rewarded by the appellate court revesting Duniver with standing to pursue his undisclosed injury lawsuit when his bankruptcy case was dismissed. Revesting standing in a debtor who deliberately withholds information from his creditors regarding a potentially lucrative personal injury action just because his bankruptcy case was dismissed for failure to make plan payments is an untenable outcome which rewards the debtor's deceitful manipulation of bankruptcy proceedings at the expense of his deserving creditors.

Since Duniver lacked standing to pursue his lawsuit after he filed his petition for bankruptcy, and since dismissal of his bankruptcy case did not

revest standing in Duniver, Duniver's personal injury lawsuit should also have been dismissed for lack of standing.

CONCLUSION

Wherefore, for the foregoing reasons, the Defendants-Appellants, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS, SERVICES, LLC, CLARK MATERIAL HANDLING CO., and EQUIPMENT DEPOT OF ILLINOIS, INC. respectfully request that this Court reverse the decision of the Appellate Court, affirm the decision of the Circuit Court, and enter such other relief as this Court deems fit.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: */s/ Julie A. Teuscher*
One of the Attorneys for BATTERY HANDLING SYSTEMS, INC.

Julie A. Teuscher
CASSIDAY SCHADE LLP
222 West Adams Street, Suite 2900
Chicago, IL 60606
(312) 641-3100
(312) 444-1669 – Fax
jteuscher@cassiday.com

Respectfully submitted,

WHITSON-OWEN & OLSEN

By: */s/Kurt E. Olsen*
One of the Attorneys for NEOVIA LOGISTICS SERVICES

Kurt E. Olsen
Whitson-Owen & Olsen
300 S. Riverside, Ste. 2050
Chicago, IL 60606
(312) 775-9750
kurt.olsen@zurichna.com

Respectfully submitted,

SWANSON, MARTIN & BELL, LLP

By: */s/Catherine B. Weiler*
One of the Attorneys for CLARK MATERIAL HANDLING CO.

Brian W. Bell
Michael A. McCaskey
Catherine B. Weiler
Jack A. Gould
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100
bbell@smbtrials.com
mmccaskey@smbtrials.com
cweiler@smbtrials.com
jgould@smbtrials.com

Respectfully submitted,

SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.

By: */s/Deborah A. Ostvig*
One of the Attorneys for EQUIPMENT DEPOT OF ILLINOIS, INC.

Michael E. Kujawa
Deborah A. Ostvig

SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.
70 W. Madison St. Suite 5300
Chicago, IL 60602
(312) 345-5700
mkujawa@schainbanks.com
dostivig@schainbanks.com

RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages 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 13,155 words.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: */s/ Julie A. Teuscher*
One of the Attorneys for BATTERY HANDLING SYSTEMS, INC.

Julie A. Teuscher
CASSIDAY SCHADE LLP
222 West Adams Street, Suite 2900
Chicago, IL 60606
(312) 641-3100
(312) 444-1669 – Fax
jteuscher@cassiday.com

No. 128141

In The Supreme Court of Illinois

DARRIUS DUNIVER,

Plaintiff-Appellee,

vs.

CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC.; and NEOVIA LOGISTICS SERVICES, LLC.,

Defendants-Appellants.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT CASE NO. 1-20-0818

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CASE NO. 2019 L 000546

HONORABLE KATHY M. FLANAGAN

JUDGE PRESIDING.

APPENDIX

JOINT BRIEF OF DEFENDANTS-APPELLANTS, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC, CLARK MATERIAL HANDLING CO. & EQUIPMENT DEPOT OF ILLINOIS

TABLE OF CONTENTS TO APPENDIX

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.

4022
9208

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 2022

KATHY M. FLANAGAN #267

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.

Parties:

Plaintiff/Appellant, Darius Duniver
Michael E. Holden
Romanucci & Blandin, LLC
321 N. Clark St.; Ste. 900
Chicago, IL 60654
Tel: 312-458-1000
Cook County Attorney No.: 35875

Defendant/Appellee 1:
Neovia Logistic Services
Kurt E. Olsen
300 S. Riverside Plaza; Ste. 2050
Chicago, IL 60606
Tel: 312-775-9750
Email: kurt.olsen@zuricna.com

Defendant/Appellee 2:
Clark Material Handling Co.
Brian W. Bell
Jack A. Gould
Swanson, Martin, & Bell, LLP
330 N. Wabash; Ste. 3300
Chicago, IL 60611
Tel: 312-321-9100
Email: bbell@smbtrials.com /
jgould@smbtrials.com

Defendant/Appellee 3:
Equipment Depot
Michael E. Kujawa
Pam Walker
Schain, Banks, Kenny & Schuartz, Ltd.
70 W. Madison St.; Ste. 5300
Chicago, IL 60602
Tel: 312-345-5700
Email: mkujawa@schainbanks.com /
pwalker@schainbanks.com

Defendant/Appellee 4:
Battery Handling Systems
Thomas Boylan
Henry Ortiz
Cassiday Schade, LLP
222 W. Adams St. Ste. 2900
Chicago, IL 60606
Tel: 312-641-3100
Email: tboylan@cassiday.com /
hortiz@cassiday.com

Additional Parties:
Third-Party Defendant, CoWorx Staffing Services, LLC
Robert J. Winston
Brady, Connolly, & Masuda, P.C.
10 South LaSalle Street, Suite 900,
Chicago, IL 60603
Email: rwinston@bcm-law.com

Intervenor, Ace American Insurance Co. a/s/o CoWorx Staffing Services, LLC
Jeffrey F. Clement
Brady, Connolly & Masuda, P.C.
10 S. LaSalle St.; Ste. 900
Chicago, IL 60603
Tel: 312-334-9503
Email: jclement@bcm-law.com

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

2021 IL App (1st) 200818
No. 1-20-0818
Opinion filed December 27, 2021

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DARRIUS DUNIVER, Plaintiff-Appellant, v. CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC.; and NEOVIA LOGISTICS SERVICES, LLC, Defendants-Appellees.	Appeal from the Circuit Court Of Cook County, Illinois. No. 2019 L 000546 The Honorable Kathy M. Flanagan Judge Presiding.

JUSTICE WALKER delivered the judgment of the court, with opinion.
Justice Pucinski and Justice Coghlan concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Darius Duniver filed a personal injury action against Clark Material Handling Company (Clark), Battery Handling Systems, Inc. (Battery Handling Systems), Equipment Depot of Illinois, Inc. (EDI), and Neovia Logistics Services, LLC (Neovia) (collectively, "Defendants"). The circuit court entered summary judgment in favor of defendants, finding

Duniver was judicially estopped and lacked standing to bring his claim because he failed to disclose his personal injury action to the bankruptcy court. Duniver appeals, arguing the circuit court erred in granting summary judgment. We find that Duniver received no significant benefit in the bankruptcy proceedings, he did not deliberately fail to disclose his personal injury claim to the bankruptcy court, and judicial estoppel is not warranted. Therefore, we reverse the circuit court's judgment and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On July 30, 2017, Duniver was injured during his employment, resulting in the loss of his leg. While working on a forklift recently modified with changed batteries by Battery Handling Systems, Duniver alleged that his forklift suddenly reversed directions. He attempted to stop the forklift but claimed the forklift did not have a functioning emergency stop button. On January 16, 2019, Duniver filed a personal injury lawsuit against defendants in the circuit court of Cook County.

¶ 4 On February 8, 2019, Duniver filed for voluntary Chapter 13 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois. One of the forms he was required to complete asked if he had any claims against third parties, regardless of whether he pursued legal action. Duniver responded, "No." Another schedule asked if there were any "Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims." Duniver marked "Yes" and described the claim as "Darrius Duniver Workman's Comp Desparti Law Group Rommiumicci & Blanch v." Duniver's statement of financial affairs required him to list all lawsuits and court actions to which he was a party. He disclosed a collection action but did not include this personal injury action.

¶ 5 On March 14, 2019, Duniver testified under oath in the bankruptcy proceeding, and confirmed that the petition and schedules were accurate and complete. When asked whether he was suing anyone, Duniver said "no." On July 24, 2019, the bankruptcy court entered an order that confirmed Duniver's Chapter 13 plan.

¶ 6 On September 10, 2019, Neovia moved for summary judgment in the personal injury suit. Neovia claimed Duniver's personal injury suit was barred by judicial estoppel, and he lacked standing under Illinois law because his personal injury claim was required to be brought by the bankruptcy estate. Clark, Battery Handling Systems, and EDI joined in the motion. In response, Duniver argued that he relied on his bankruptcy counsel to inform him of any inaccuracies and judicial estoppel was inapplicable because his failure to disclose the personal injury action was inadvertent.

¶ 7 On January 22, 2020, Duniver amended his Chapter 13 bankruptcy forms to include his personal injury lawsuit. On February 19, 2020, the bankruptcy court dismissed Duniver's bankruptcy case for failure to make confirmed plan payments.

¶ 8 The circuit court granted the defendants' motion for summary judgment on February 24, 2020. The circuit court found the elements of judicial estoppel were satisfied, and Duniver intentionally deceived the trustee in the bankruptcy proceeding.

¶ 9 Duniver filed a motion to reconsider the summary judgment ruling on March 24, 2020, and the motion was denied. Duniver filed a timely notice of appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, Duniver argues judicial estoppel was inappropriate because defendants did not prove by clear and convincing evidence that his failure to list the personal injury claim resulted from an intention to deceive the bankruptcy court and the court erred in granting summary

judgment. Duniver asks this court to reverse the circuit court's grant of summary judgment and remand for further proceedings.

¶ 12 We traditionally review the circuit court's discretionary rulings for an abuse of discretion, but where the circuit court's ruling on judicial estoppel terminates the litigation, our review is *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶¶ 48-49. This matter was resolved in the circuit court pursuant to summary judgment, and we review a circuit court's entry of summary judgment *de novo*. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14. *De novo* review is without deference to the trial court's judgment or reasoning." *People v. Randall*, 2016 IL App (1st) 143371, ¶ 44. Summary judgment is appropriate if no material fact is in dispute, if reasonable persons could not draw differing "inferences from the undisputed material facts," and if reasonable persons could not "differ on the weight to be given the relevant factors of a legal standard." (Internal quotation marks omitted.) *Seymour*, 2015 IL 118432, ¶ 42. In reviewing an order granting summary judgment, we strictly construe the record against the movant and view it in favor of the nonmoving party. *Id.* ¶ 49. Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Id.*

¶ 13 The doctrine of judicial estoppel prevents a party from taking contradictory positions in separate judicial proceedings. *Moy v. Ng*, 371 Ill. App. 3d 957, 962 (2007). Judicial estoppel aims "to protect the integrity of the judicial process, [citation], by prohibiting parties from deliberately changing positions according to the exigencies of the moment." (Internal quotation marks omitted.) *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). Our supreme court has identified the prerequisites to determine whether judicial estoppel applies. *Seymour*, 2015 IL 118432, ¶ 37. 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." *Id.* We review these factors *de novo*. *Id.* ¶ 49.

¶ 14 If all prerequisites have been established, the court must then determine whether judicial estoppel should be applied. *Id.* Multiple factors may affect that decision, including the significance or impact of the party's action in the first proceeding and "whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.*

¶ 15 As a preliminary matter, defendants argue in the alternative that Duniver lacked standing to pursue his personal injury lawsuit in his own name. Defendants contend that because Duniver's bankruptcy case was dismissed, he can no longer request permission from the bankruptcy court to pursue his personal injury lawsuit on behalf of his estate. In response, Duniver claims the circuit court already established he has standing. The circuit court entered a memorandum opinion on February 24, 2020, acknowledging that Duniver could still obtain permission from the bankruptcy court but found that it would be "futile in light of the ruling with regard to judicial estoppel." In similar cases, we have found that standing can revest in the debtor when the bankruptcy trustee abandons the personal injury claim. See *Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 29; *Board of Managers of the 1120 Club Condominium Ass'n v. 1120 Club, LLC*, 2016 IL App (1st) 143849, ¶ 42. Here, the bankruptcy trustee did not abandon the personal injury claim; Duniver's bankruptcy was dismissed. The dismissal of Duniver's Chapter 13 bankruptcy, in effect, revested his standing. Therefore, we find that Duniver had standing to pursue his personal injury claim.

¶ 16 We must next determine whether judicial estoppel supported the grant of summary judgment. The dispositive issue in this case is whether the plaintiff intentionally failed to disclose his personal injury claim to the bankruptcy court, but we first examine the five elements of judicial estoppel to determine whether there is clear and convincing evidence to support its application. *Davis v. Pace Suburban Bus Division of the Regional Transportation Authority*, 2021 IL App (1st) 200519, ¶ 39. Duniver does not dispute that his actions satisfy four of the five elements. Duniver satisfied the first and second elements by taking two factually inconsistent positions when he made the attestation that he had no claims against third parties during his bankruptcy proceeding. Duniver satisfied the third element by taking opposing positions in the bankruptcy proceeding and the personal injury proceeding. He satisfied the fourth element because he intended for the courts in both proceedings to accept the truths of the facts alleged.

¶ 17 Duniver maintains that the circuit court erred applying judicial estoppel because: (1) the final element was not satisfied and he did not receive any benefit, (2) defendants did not prove an intent to deceive by clear and convincing evidence, and (3) the circuit court applied the wrong burden of proof in finding the fifth prerequisite was satisfied. Defendants argue that Duniver failed to preserve the argument that he received no benefit from nondisclosure because he did not raise the argument in his brief in opposition to the motion for summary judgment and that, even if the argument is preserved, the circuit court did not err in finding Duniver benefitted from nondisclosure.

¶ 18 Duniver did not raise the benefit argument until he filed his motion to reconsider. Arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 130 (2008). Accordingly, Duniver

has forfeited this issue. However, forfeiture of issues on appeal is a limitation on the parties and not on the appellate court; as such, the court can overlook forfeiture and address an issue when it is necessary to obtain a just result or to maintain a sound body of precedent. *Village of New Athens v. Smith*, 2021 IL App (5th) 200257, ¶ 22 (citing *Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App (2d) 160811, ¶ 22). We choose to overlook forfeiture because it is necessary to obtain a just result in this case.

¶ 19 Duniver argues that he did not benefit from the factually inconsistent positions because he never received a discharge of debt. Defendants argue that Duniver benefited from an automatic stay. In support of their argument, defendants cite the Seventh Circuit's decision in *Williams v. Hainje*, 375 F. App'x 625, 627 (7th Cir. 2010). In *Williams*, the plaintiff filed for bankruptcy without disclosing his pending civil rights suit. Defendants filed a motion for summary judgment arguing that the plaintiff was judicially estopped for failing to disclose his claim to creditors. The Seventh Circuit found that while the plaintiff's Chapter 13 bankruptcy was dismissed without a discharge, he benefited from an automatic stay. Duniver insists that the facts here are distinguishable from *Williams* because "there were or would have been collection proceedings absent the stay" in those cases. Duniver maintains he was unable to work due to his missing leg, that no creditor was likely to pursue collection of a debt, and that, even if one had, it would not have received payment. In reaching its decision in *Williams*, the Seventh Circuit emphasized that the assets were shielded from creditors for 20 months before being dismissed. *Id.* Unlike the plaintiff in *Williams*, Duniver's bankruptcy was dismissed after only 11 months.

¶ 20 This court has previously held that a party derives some benefit when debt is discharged. See *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 22 (finding the plaintiff "received a benefit"

from failing to disclose a personal injury claim "by having more than $92,000 of her unsecured debt discharged in bankruptcy without having to increase her payments to her creditors in light of the claim"); *Shoup v. Gore*, 2014 IL App (4th) 130911, ¶ 13 (finding "the plaintiff received a benefit by having her debts discharged without the creditors knowing of her potential recovery in state court"). Here, Duniver had none of his debt discharged, and his Chapter 13 plan was dismissed for failure to make payments. Therefore, he received no benefit. See *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 122 (finding plaintiff "did not benefit from the nondisclosure because the bankruptcy court dismissed his chapter 13 plan for failure to make the plan's required payments"). Hence, judicial estoppel does not apply.

¶ 21 Although we find judicial estoppel inapplicable, we will address Duniver's claim that defendants did not prove his intent to deceive. If all elements of judicial estoppel had been proven, we would exercise our discretion in determining whether to apply the doctrine. *Seymour*, 2015 IL 118432, ¶ 47. We may consider the significance of plaintiff's benefit in the first proceeding. *Id.* Our supreme court has found that the dispositive issue is whether the plaintiff deliberately failed to disclose his personal injury claim to the bankruptcy court, and in *Seymour*, the supreme court found no evidence that plaintiffs intended to mislead the court by failing to disclose a personal injury claim. *Id.* ¶ 54. The court was unwilling to "presume that the debtors' failure to disclose was deliberate manipulation." (Emphasis omitted.) *Id.* ¶ 62. If the debtor "deliberately change[d] positions according to the exigencies of the moment," summary judgment would have been appropriate. *Id.* ¶ 63.

¶ 22 Here, Duniver contends that his failure to disclose was inadvertent. To support his claim, Duniver argues the extensive bankruptcy forms he completed were the source of his mistake.

He also argues that the trustee should have recognized he was suing someone because the worker's compensation claim was disclosed that he had "other contingent and unliquidated claims of every nature." Relying on the trustee's failure to acknowledge this inconsistency, Duniver insists his answers in the petition "did not represent an intent to deceive but rather reflect that no one put emphasis on this suit's importance."

¶ 23 In response, defendants contend that Duniver's amended schedule does not show inadvertence because a "pattern of being asked to disclose but failing to disclose" does not amount to inadvertence. Defendants argue Duniver's signing of the bankruptcy petition supports their claim of deception, and by signing the bankruptcy petition, Duniver's argument that he was confused by the length of the petition holds no merit. Duniver counters by contending he relied on his bankruptcy counsel to file accurate schedules.

¶ 24 Viewing the evidence in a light most favorable to Duniver, we find that the evidence presented fails to show an intent to deceive or mislead. Following our supreme court's decision in *Seymour*, we find that Duniver did not deliberately fail to disclose his personal injury claim to the bankruptcy court. The application of judicial estoppel "should not be used where to do so would result in an injustice." *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 851 (1994). Therefore, as our supreme court did in *Seymour*, we find that judicial estoppel is not warranted.

¶ 25 III. CONCLUSION

¶ 26 For the forgoing reasons, we reverse the grant of summary judgment entered in favor of defendants because Duniver did not receive a significant benefit in the bankruptcy proceedings, he did not deliberately fail to disclose his personal injury claim to the bankruptcy court, and judicial estoppel is not warranted. We remand the cause for further proceedings.

¶ 27 Reversed and remanded.

No. 1-20-0818

Cite as:	*Duniver v. Clark Material Handling Co.*, 2021 IL App (1st) 200818
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 2019-L-000546; the Hon. Kathy M. Flanagan, Judge, presiding.
Attorneys for Appellant:	Michael Rathsack, Michael R. Grieco, and Michael E. Holden, all of Chicago, for appellant.
Attorneys for Appellee:	Julie A. Teuscher and Christopher Cassidy, of Cassiday Schade LLP, Kurt E. Olsen, of Krakar & Olsen, Brian W. Bell, Michael A. McCaskey, and Catherine B. Weiler, of Swanson, Martin & Bell, LLP, and Michael E. Kujawa and Deborah A. Ostvig, of Schain, Banks, Kenny & Schwartz, Ltd., all of Chicago, for appellees.

128141

No. _____

In The Supreme Court of Illinois

DARRIUS DUNIVER,

Plaintiff-Respondent,

vs.

CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC.; and NEOVIA LOGISTICS SERVICES, LLC.,

Defendants-Petitioners.

ON PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT CASE NO. 1-20-0818

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CASE NO. 2019 L 000546

HONORABLE KATHY M. FLANAGAN

JUDGE PRESIDING.

JOINT PETITION FOR LEAVE TO APPEAL AND APPENDIX OF DEFENDANTS-PETITIONERS, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC, CLARK MATERIAL HANDLING CO., and EQUIPMENT DEPOT OF ILLINOIS, INC.

Julie A. Teuscher
Henry Ortiz
CASSIDAY SCHADE LLP
222 West Adams St., Suite 2900
Chicago, IL 60606
(312) 641-3100
jteuscher@cassiday.com
hortiz@cassiday.com
Attorneys for Battery Handling Systems, Inc.

Kurt E. Olsen
KRAKAR & OLSEN
300 S. Riverside, Ste. 2050
Chicago, IL 60606
(312) 775-9750
kurt.olsen@zurichna.com
Attorneys for Neovia Logistics, LLC

ORAL ARGUMENT REQUESTED

E-FILED
1/31/2022 12:03 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

SUBMITTED - 16507343 - Julie Teuscher - 1/31/2022 12:03 PM

SUBMITTED - 18209164 - Julie Teuscher - 6/8/2022 12:04 PM

128141

Brian W. Bell
Michael A. McCaskey
Catherine B. Weiler
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100
bbell@smbtrials.com
mmccaskey@smbtrials.com
cweiler@smbtrials.com
Attorneys for Clark Material Handling Co.

Michael E. Kujawa
Deborah A. Ostvig
SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.
70 W. Madison St. Suite 5300
Chicago, IL 60602
(312) 345-5700
mkujawa@schainbanks.com
dostivig@schainbanks.com
Attorneys for Equipment Depot of Illinois, Inc

128141

No. _____

In The Supreme Court of Illinois

DARRIUS DUNIVER, *Plaintiff-Respondent,* vs. CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; EQUIPMENT DEPOT OF ILLINOIS, INC.; and NEOVIA LOGISTICS SERVICES, LLC., Defendants-Petitioners.	ON PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT CASE NO. 1-20-0818 THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CASE NO. 2019 L 000546 HONORABLE KATHY M. FLANAGAN JUDGE PRESIDING.

JOINT PETITION FOR LEAVE TO APPEAL AND APPENDIX OF DEFENDANTS-PETITIONERS, BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC, CLARK MATERIAL HANDLING CO., and EQUIPMENT DEPOT OF ILLINOIS, INC.

128141

PRAYER FOR LEAVE TO APPEAL

The defendants-petitioners Battery Handling Systems, Inc., Neovia Logistics, LLC, Clark Material Handling Co., and Equipment Depot of Illinois, Inc. ("the defendants") respectfully petition this Court for leave to appeal the December 27, 2021 decision of the appellate court, reversing the circuit court's order granting summary judgment to defendants.

JUDGMENTS BELOW

The circuit court granted the defendants' motions for summary judgment based on the doctrine of judicial estoppel and denied Duniver's motion for reconsideration. The appellate court reversed the circuit court's order in a published opinion on December 27, 2021. *Duniver v. Clark Material Handling Co., et al.*, 2021 IL App (1st) 200818. (A1-A11) No party petitioned for rehearing.

POINTS RELIED UPON FOR REVIEW

Darius Duniver filed an injury lawsuit on January 16, 2019, seeking recovery for a leg-severing work accident. (C20) Twenty-three days later, Duniver filed for bankruptcy and, in proceedings before that court, denied having any legal actions against third parties and denied suing anyone. (C467, C667) The circuit court granted summary judgment to defendants by applying judicial estoppel after finding Duniver intentionally deceived the bankruptcy court by falsely stating he had filed no claims against third parties. (C673-C678; A12 – A17) The appellate court reversed, and in doing so, created several conflicts regarding application of judicial estoppel and fundamentally

128141

undermined the doctrine itself.

A word about the eight points listed below warranting this Court's review - defendants understand eight points for review is an unusually high number, particularly from a ten-page opinion, but each warrants this Court's review and in combination, even more so. Review is warranted to address significant issues with ramifications far beyond this lawsuit.

1. **The appellate court's decision is in direct conflict with *Smith v. Integrated Mgmt. Servs.*, 2019 IL App (3d) 180576 and federal authority on the issue of whether a debtor receives a benefit from deceiving the bankruptcy court when a bankruptcy case is dismissed without a discharge of debt.**

There are five prerequisites to application of judicial estoppel. The party to be estopped must have: taken two positions; that are factually inconsistent; in separate judicial proceedings; intending for the trier of fact to accept the truth of the facts; and received some benefit from doing so. *Seymour v. Collins*, 2015 IL 118432, ¶ 37. The appellate court held Duniver received no "significant" benefit from giving false testimony during his bankruptcy proceedings because his debts were not discharged, even though Duniver received an automatic stay of all collection proceedings against him when his bankruptcy petition was filed, had his bankruptcy plan confirmed, was permitted to re-pay his debts over time without penalty, and retained control over his personal injury action. *Duniver* at ¶ 26 (A9).

In *Smith*, the court resolved the same legal issue differently, holding the debtor received a benefit from falsely testifying in bankruptcy court even

128141

though the bankruptcy court discharged none of the debtor's debt. *Smith*, 2019 IL App (3d) 180576 at ¶ 20. *Smith* held a debtor received several benefits from filing for bankruptcy short of discharge of debt, including confirmation of the debtor's Chapter 13 plan, protection from collection efforts, and permission to repay his debts interest free over time. *Id.* at ¶¶ 20-21, 23.

Likewise, federal precedent establishes a debtor receives many benefits during bankruptcy even when the bankruptcy case is dismissed without a discharge of debt, including an automatic stay on debt collection and confirmation of the bankruptcy plan. See e.g., *Williams v. Hainje*, 375 Fed. App'x 625, 627 (7th Cir. 2010). See also *In Re Residential Capital, LLC*, 519 B.R. 606, 611-12 (S.D.N.Y 2014) (collecting cases). The appellate court's decision is contrary to federal authority on this basic element of judicial estoppel, requiring this Court's review.

2. The appellate court's requirement that a "significant" benefit must be bestowed on a debtor who misrepresents his assets in bankruptcy before judicial estoppel may be invoked is also inconsistent with *Seymour v. Collins*.

The appellate court utilized an improper standard when it held Duniver received no "significant benefit" from falsely testifying in bankruptcy court. (A 9) This Court stated a party need only receive "some" benefit from taking factually inconsistent positions in two different courtrooms to invoke the doctrine. *Seymour v. Collins*, 2015 IL 118432, ¶ 37. This is no small distinction. A stay on collection of debt, for example, is unquestionably of "some" benefit to a debtor in bankruptcy. Review by this Court is warranted to address the

128141

unequivocal conflict the appellate court's decision has created on the issue of whether a debtor receives a benefit short of discharge of his debts by falsely testifying in bankruptcy court.

3. The appellate court brushed aside Duniver's failure to timely argue he received no benefit from his false declarations in bankruptcy court.

The appellate court acknowledged Duniver forfeited the argument he received no benefit from his false statements in bankruptcy court, but "[chose] to overlook forfeiture because it [was] necessary to obtain a just result ..." (*Duniver* at ¶ 18; A7). But a just result for whom? For the party who falsely testified in bankruptcy court? Certainly not a just result for the bankruptcy or circuit courts, or for the sanctity of truth in the judicial process. The appellate court reversed the circuit court on a basis the circuit court was never asked to consider and, in doing so, benefited the party who falsely testified under oath in bankruptcy court. The circuit court deserves better.

4. The appellate court's decision is in direct conflict with *Smith* on the evidence sufficient to establish a debtor's intent to deceive the bankruptcy court.

Like Duniver, Smith filed his personal injury lawsuit first, then filed for Chapter 13 bankruptcy. *Smith* at ¶¶ 4-5. The bankruptcy paperwork in *Smith* was identical to the bankruptcy paperwork required of Duniver. *Id.* at ¶ 5. Like Duniver, Smith falsely denied having any claims against third parties and falsely testified under oath in his bankruptcy proceedings. *Id.* at ¶¶ 5-6. The *Smith* court reached a different resolution from extraordinarily similar

128141

evidence, holding the debtor's false statements in bankruptcy court evidenced an intent to deceive the bankruptcy court sufficient to invoke the doctrine of judicial estoppel, stating: "No reasonable person would find these misrepresentations innocent." *Smith* at ¶ 26. But the appellate court here did.

The appellate court somehow concluded "the evidence ... fails to show an intent to deceive or mislead," even though Duniver falsely denied having filed claims against third parties in his bankruptcy paperwork and later falsely testified under oath at the creditor's meeting that he was not suing anyone. (*Duniver* at¶ 24; A9)

Two such disparate results from the same essential facts calls for this Court's review.

5. The appellate court's decision is also inconsistent with *Seymour* on intent to deceive.

In *Seymour*, this Court relied on "affirmative, uncontroverted evidence" supplied by the debtor's bankruptcy attorney and the bankruptcy trustee to conclude the debtor did not intentionally provide false information to the bankruptcy court. *Seymour v. Collins*, 2015 IL 118432, ¶¶ 11-14, 63. Both the bankruptcy attorney and the trustee told Seymour he was required only to disclose lump sum funds greater than $2,000.00 *received during the pendency of bankruptcy proceedings*. *Id.* (emphasis added)

Duniver never said his bankruptcy attorney or the trustee told him he only had to disclose to the bankruptcy court cash received during the pendency of bankruptcy proceedings. Duniver never said his bankruptcy attorney or the

128141

trustee told him he need not disclose his personal injury action. Duniver supplied none of the affirmative evidence on which this Court relied in *Seymour* to find an inadvertent omission by the debtor. Review is warranted to correct the appellate court's mistaken belief that it was "following" *Seymour* when it found "Duniver did not deliberately fail to disclose his personal injury claim to the bankruptcy court." (*Duniver* at ¶ 24; A 9)

6. The appellate court's decision also fundamentally undermines, if not entirely eviscerates, judicial estoppel, a doctrine designed to protect the integrity of the judicial process.

Twenty-three days after Duniver filed a personal injury action, Duniver filed a bankruptcy petition in which he falsely denied filing claims against third parties. (C467) Duniver signed the petition in his own hand, three times, declaring under penalty of perjury: that he had examined his petition and the information provided therein was true and correct; that the schedules he filed with his petition were true and correct; and that his Statement of Financial Affairs was true and correct. (C521-C523)

Less than two months after he filed his personal injury lawsuit, Duniver falsely testified under oath at the creditor's meeting required under 11 U.S.C. § 341 in bankruptcy court that he was not suing anyone. (C667) If these undisputed facts are not evidence of an intent to deceive the bankruptcy court, then the doctrine of judicial estoppel is meaningless. Worse yet, debtors are incentivized to provide false testimony in bankruptcy court. The decision tells prospective debtors they will suffer no consequences from making false

128141

statements in bankruptcy court unless the debtor admits his deceitful intent. The decision has a profound impact on the sanctity of judicial proceedings, the sanctity of the oath, and the continued vitality of the doctrine of judicial estoppel.

7. This Court's review is necessary to demystify the standard of review when a circuit court exercises its discretion in applying judicial estoppel.

This Court has stated it reviews a circuit court's decision to apply judicial estoppel for an abuse of discretion. *Seymour*, 2015 IL 118432 at ¶ 48. The Court has also stated that when the exercise of discretion results in termination of the litigation on summary judgment, it reviews "that ruling" *de novo*. *Id.* at ¶ 49. But where the prerequisites for judicial estoppel were conceded, and the circuit court exercised its discretion in applying judicial estoppel after finding evidence of an intent to deceive, the appellate court's review should be limited to determining whether the circuit court abused its discretion in invoking the doctrine of judicial estoppel.

Instead, the appellate court exercised its own discretion in finding no evidence of an intent to deceive. But when the circuit court follows the *Seymour* analytical framework as it did here, and exercises its discretion to invoke judicial estoppel, it makes no sense for the appellate court to independently exercise its discretion in refusing to invoke the doctrine. Why trouble the circuit court at all? Litigants and the lower courts would benefit

128141

from this Court's clarification on precisely what is subject to *de novo* review.

8. **Review is warranted for this Court to address whether standing for a personal injury claim is revested in the debtor when a bankruptcy case is dismissed without the trustee's knowledge of the injury lawsuit or its potential value.**

Can a bankruptcy trustee knowingly abandon rights to pursue a debtor's personal injury claim by dismissing a bankruptcy case even though the trustee is unaware of the injury lawsuit or its potential value? The appellate court said dismissal of Duniver's bankruptcy case "in effect" revested Duniver with standing to pursue his lawsuit, but relied on precedent where the trustee intentionally abandoned rights to the debtor's lawsuit after gauging the value of the lawsuit. Review is necessary to clarify whether dismissal of a bankruptcy case revests the debtor with standing to pursue his injury claim if the trustee is unaware of the injury claim or its potential value.

STATEMENT OF FACTS

On July 30, 2017, Darrius Duniver suffered a leg-severing injury while working. (C24 at ¶ 25) On January 16, 2019, Duniver filed this personal injury lawsuit to recover for his work-related injuries. (C20)

Twenty-three days later, on February 8, 2019, Duniver filed for Chapter 13 bankruptcy. (C 455-C525) The bankruptcy court advised Duniver in writing that Duniver must make "complete and truthful disclosures of [his] financial situation." (C502) Duniver was required to "provide the [bankruptcy] attorney with full, accurate and timely information, financial and otherwise ..." (*Id.*) Duniver also agreed to "[n]otify the attorney if the debtor is sued or wishes to

128141

file a lawsuit ..." (C503)

In his bankruptcy petition, Duniver was required to list all his assets on "Official Form 106A/B Schedule A/B: Property". (C464) However, in response to the question whether Duniver had any "[c]laims against third parties, whether or not [he] [had] filed a lawsuit," Duniver answered "No." (C467 at ¶ 33) When asked whether Duniver had any other contingent or unliquidated claims of any nature, Duniver identified only his workman's compensation case (C467 at ¶ 34) which Duniver claimed was exempt from bankruptcy proceedings. (C470) Duniver did not list his pending personal injury claim. (C467 at ¶ 34)

Moreover, in the "Statement of Financial Affairs," Duniver was asked to identify any legal actions in which he was involved. (C491, C493) Specifically, Duniver was asked "[w]ithin 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?" (C493 at ¶ 9) Despite being directed to "[l]ist all such matters, including personal injury cases," Duniver failed to list his pending personal injury action, but did list a collection action pending against him. (C493 at ¶ 9)

Duniver, in his own hand, signed the bankruptcy petition in three separate areas. First, he signed beneath the language: "I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct." (C521) Duniver also swore that his Property Schedule was accurate, signing his name beneath the language: "under penalty of perjury, I

128141

declare that I have read the summary and schedules filed with this declaration and that they are true and correct." (C522) Duniver also declared under penalty of perjury that his Statement of Financial Affairs was true and correct by handwriting his signature under the language: "I have read the answers on this *Statement of Financial Affairs* ..., and I declare under penalty of perjury that the answers are true and correct." (C523) (emphasis in original)

On March 14, 2019, approximately 8 weeks after Duniver filed his injury lawsuit, Duniver appeared at the Rule 341 creditors meeting for his bankruptcy case and was sworn under oath. (C666-C667) When the trustee asked Duniver if he was suing anyone, Duniver answered "No." (C667)

On July 16, 2019, Duniver filed an amended Chapter 13 plan. (C540-C544) Duniver included nothing in the amended plan about his injury lawsuit. (*Id.*) The amended plan called for Duniver to make regular payments to the trustee at $225.00 per month for 36 months. (C540) Duniver's bankruptcy plan was confirmed on July 24, 2019. (C545)

On September 10, 2019, Neovia Logistics, LLC moved for summary judgment, arguing Duniver lacked standing to pursue his injury action since his lawsuit was property of his bankruptcy estate. (C440-C454) Neovia also argued Duniver was judicially estopped from pursuing his personal injury action by denying its existence in bankruptcy court. (Id.) Equipment Depot (C571-C572), Battery Handling Systems (C575-C576) and Clark Material Handling (C579-C580) joined the motion.

128141

On January 21, 2020, Duniver responded to the motions (C635-C649) and attached Duniver's affidavit, in which Duniver stated: "[a]t no time prior to the filing of the petition was I asked by [my bankruptcy attorney] about whether I had pending lawsuits or claims for injuries I sustained." (C651 at ¶ 11) Duniver further stated "[i]f I had been asked about pending lawsuits prior to filing of the petition and the amended Chapter 13 plan, I would have informed [my bankruptcy attorney] of my lawsuit/claim for injuries arising out of the July 30, 2017 workplace incident." (C652 at ¶ 18) Duniver did not argue in response to the motion for summary judgment that he received no benefit from failing to disclose his pending personal injury lawsuit during his bankruptcy proceedings. (C635-C649)

On February 19, 2020, Duniver's bankruptcy case was dismissed for Duniver's failure to make plan payments. (C841) On February 24, 2020, the circuit court granted the defendants' motions for summary judgment. (C673-C678; A12 – A17) The circuit court noted Duniver had conceded the elements of judicial estoppel but argued the doctrine should not be applied because his failure to disclose his injury lawsuit was inadvertent. (C676; A15) The circuit court found Duniver's failure to disclose his injury lawsuit in his bankruptcy schedules and Statement of Financial Affairs was evidence of an intent to deceive. (C676-C677; A15 - A16) The circuit court also relied on Duniver's false statement under oath at the creditors' meeting where he denied suing anyone.

128141

(C677; A 16) The court concluded Duniver "blatantly deceived the Trustee" and that Duniver's "omission was not inadvertent." (Id.)

Duniver moved to reconsider the court's order (C680-C685) but the court denied Duniver's motion. (C1018-C1022) Duniver appealed. (C1037-C1039)

On December 27, 2021, the appellate court reversed the circuit court's judgment. *Duniver*, 2021 IL App (1st) 200818. (A1-A11) The court held the dismissal of Duniver's Chapter 13 bankruptcy "in effect" revested Duniver with standing to pursue his lawsuit. (*Id.* at ¶ 15; A5) The court acknowledged Duniver had forfeited the argument that he received no benefit from falsely testifying in bankruptcy proceedings but "[chose] to overlook forfeiture" because the court felt it was "necessary to obtain a just result ..." (*Id.* at ¶ 18; A6 -A7) The court then concluded Duniver "received no benefit." (*Id.* at ¶ 20; A8) The court further concluded "the evidence presented fails to show an intent to deceive or mislead." (*Id.* at ¶ 24; A9)

Defendants now petition this Court for review of the appellate court's decision.

ARGUMENT FOR REVERSAL

I. The Appellate Court's decision conflicts with *Smith*, federal authority, and *Seymour* on the issue of whether a benefit is received when a bankruptcy case is dismissed without a discharge of debt. (Points 1-3 above)

A. Duniver forfeited this argument.

To begin, Duniver never argued in circuit court that he received no benefit from falsely representing his assets in bankruptcy court until his

128141

motion to reconsider. (C635-C649; C680-C685) But "[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal." *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271 at ¶ 36.

The circuit court noted Duniver contested none of the elements of judicial estoppel, (including whether a benefit was received), in response to the summary judgment motions. (C676; A15) Thus, Duniver denied the circuit court the opportunity to consider or address the primary basis on which the appellate court reversed the circuit court's decision. Forfeiture is designed to prevent just such an occurrence. "A trial judge should have an opportunity to appraise the errors which are asserted to have taken place. It is unfair to charge him with errors in a reviewing court without having brought them to his attention ..." *People v. Georgina L.*, 2017 IL App (1st) 161944 at ¶ 16.

The appellate court acknowledged Duniver's forfeiture but decided the issue in his favor nonetheless to reach what the appellate court described as a "just result." But forfeiture should not be overlooked to benefit the party who gave false testimony in bankruptcy court at the expense of the circuit court which was denied the opportunity to consider the issue. And in sliding past Duniver's forfeiture of this issue, the appellate court relied on two decisions where forfeiture was overlooked because the circuit court committed significant errors during the underlying proceedings. *See Village of New Athens v. Smith*, 2021 IL App (5th) 200257 (damage award reversed even though defendant challenged only the grant of summary judgment because of

128141

several problems with the damage calculation by the circuit court); *Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App (2d) 160811 (forfeiture overlooked to address a circuit court's error in admitting into evidence exhibits that were never marked as exhibits or admitted at trial). No such fundamental error was committed by the circuit court here and the circuit court deserved better than to suffer reversal on a point Duniver failed to timely raise.

B. The decision is in direct conflict with Smith and federal authority on "benefit received."

Even if the issue had been preserved, the appellate court's resolution of the "benefit received" issue is in direct conflict with *Smith v. Integrated Mgmt. Servs.*, 2019 IL App (3d) 180576 and overwhelming federal authority. The appellate court entirely ignored *Smith* in its opinion (despite its prominence in the defendants' Joint Response Brief) and concluded Duniver "received no benefit" from making false statements under oath in bankruptcy court since none of Duniver's debts were discharged. *Duniver* at ¶ 20; A8. The *Smith* court found otherwise under nearly identical circumstances, stating:

> Although a discharge is one way to incur a benefit from non-disclosure, the bankruptcy court's confirmation of a Chapter 13 plan is another. Courts nationwide recognize that when a bankruptcy court confirms a Chapter 13 plan, the court accepts the debtor's position and confers a benefit. ... creditors of a Chapter 13 debtor can object to the bankruptcy court's plan and require a higher payout based on a debtor's disclosed finances. ... Plaintiff received a benefit from the bankruptcy proceeding by repaying his unsecured creditors interest free over the course of 5 years without the possibility of default penalties. ... Plaintiff never placed the potential $1.2 million dollar payout from this action at risk. Plaintiff kept his creditors in the dark; they did not object to the plan because, based on the available information,

128141

> plaintiff was paying what he could. *Smith,* 2019 IL App (3d) 180576 at ¶¶ 20-21.

Federal courts agree with *Smith* on the "benefit received" issue. Federal courts have original and exclusive jurisdiction of all bankruptcy cases under Title 11. 28 U.S.C. § 1334(a). Federal courts recognize the many benefits conferred during bankruptcy proceedings even where the bankruptcy case is dismissed with no discharge of debt. *Williams v. Hainje,* 375 Fed. App'x 625, 627 (7th Cir. 2010). *Williams* held a debtor received "significant financial benefits during his short stint in bankruptcy," including an automatic stay on debt collection, avoidance of interest charges, and confirmation of his bankruptcy plan even though he never received a discharge of his debt. *Id.* The *Williams* court reasoned:

> To hold otherwise would give debtors an incentive to game the bankruptcy system. Debtors could take a wait-and-see approach to disclosure by prosecuting an undisclosed claim while waiting to see how favorably the bankruptcy proceeding unfolds before discharge. That approach would undermine both the primary aim of judicial estoppel which is to protect the integrity of the judicial process and the bankruptcy law's goal of unearthing all assets for the benefit of creditors. *Id.* at 628 (internal citations omitted).

See also *In Re Residential Capital, LLC,* 519 B.R. 606, 611-12 (S.D.N.Y. 2014) (collecting cases). The appellate court's conclusion that a debtor receives no benefit from making false statements in bankruptcy court unless his debts are discharged is factually inaccurate and contrary to precedents of federal courts - the courts charged with enforcing

128141

bankruptcy laws.

C. The appellate court used the wrong standard in assessing whether a benefit was received.

The appellate court utilized the wrong standard when determining whether Duniver received a benefit. The appellate court reversed the circuit court's decision because it determined Duniver did not receive a "significant" benefit in bankruptcy proceedings. *Duniver* at ¶ 26; (A9). But this Court set a different standard in *Seymour*, holding a party may be estopped if the party received "some" benefit from testifying falsely in bankruptcy proceedings. *Seymour*, 2015 IL 118432 at ¶ 47. "Some" benefit is appreciably different than a "significant" benefit. "Some" benefit suggests that any benefit, such as a stay on collection of debt, warrants estoppel. A standard requiring receipt of a "significant" benefit is dangerously ambiguous, likely to prompt inconsistent interpretations, and contrary to this Court's precedent.

II. The appellate court's conclusion that the evidence failed to demonstrate an intent to deceive is in direct conflict with *Smith*, inconsistent with *Seymour*, based on facts unsupported in the record, and fundamentally undermines the doctrine of judicial estoppel. (Points 4-6 above)

The *Smith* court found "ample evidence" of the debtor's intent to deceive the bankruptcy court under strikingly similar facts to those presented here. *Smith*, 2019 IL App (3d) 180576 at ¶ 26. Smith gave

128141

sworn testimony in his bankruptcy proceedings that his schedules and Statement of Financial Affairs were accurate even though he failed to identify his pending personal injury action. *Id.* The bankruptcy forms submitted by Smith were identical to those submitted by Duniver. *Id.* at ¶ 5. Just like Duniver, Smith disclosed collection actions against him but failed to disclose his personal injury action. *Id.* The *Smith* court held "no reasonable person would find these misrepresentations innocent." *Id.* at ¶ 26.

The appellate court here reached precisely the opposite conclusion. Even though Duniver swore he would tell the truth in his bankruptcy paperwork, swore he had disclosed all his assets, swore he had no pending claims, and swore he was not suing anyone, the appellate court concluded the evidence failed to show an intent to mislead. *Duniver* at ¶ 24; (A9). If these facts fail to show an intent to mislead, then no facts exist short of an admission that would satisfy the appellate court's standard.

Beyond that, the appellate court relied on facts found nowhere in the record to reach its conclusion that Duniver did not intend to deceive the bankruptcy court. The appellate court stated "Duniver argues the extensive bankruptcy forms ... were the source of his mistake." *Duniver* at ¶ 22; (A8). But Duniver never said that. (C650-C652) The court also credited Duniver's argument that Duniver "rel[ied] on the trustee's

128141

failure to acknowledge [the inconsistency between Duniver's disclosure of his worker's compensation claim and the absence of a personal injury claim]." *Duniver* at ¶ 22. (A 9) But Duniver never stated he relied on the trustee's failure to acknowledge this inconsistency. (C650-C652)

Instead, Duniver supplied an affidavit establishing only that he never advised his bankruptcy attorney of his personal injury lawsuit. Duniver stated: "*If I had been asked* about pending lawsuits prior to filing of the petition ... I would have informed [my bankruptcy attorney] of my lawsuit/claim for injuries ..." (C652 at ¶ 18) (emphasis added). But how is that different than being asked by the trustee at the required creditors' meeting? (C667) Duniver says his failure to disclose his personal injury lawsuit was inadvertent because his attorney never asked him about pending lawsuits. But the trustee sure did. (Id.) So Duniver's claim that his failure to disclose his injury lawsuit was inadvertent because he was never asked if he was suing anyone is completely undermined by the fact the trustee asked him that very question. And Duniver answered falsely. (Id.)

Duniver never said his bankruptcy or personal injury attorney told him he did not have to disclose a personal injury lawsuit in bankruptcy. (C650-C652) Duniver never said the trustee told him he need not do so. (Id.) Duniver never said he was confused by the bankruptcy paperwork. (Id.) Duniver never said his attorney or the

128141

trustee told him he was only required to disclose cash received during the pendency of his bankruptcy proceedings. (Id.) Unlike *Seymour*, Duniver offered no affirmative, uncontradicted evidence of inadvertence. The circuit court did not abuse its discretion in finding evidence of an intent to mislead the bankruptcy court sufficient to apply judicial estoppel to bar Duniver's injury claim.

The appellate court's decision undermines the doctrine of judicial estoppel in a fundamental way. The doctrine is designed to enforce the sanctity of the oath and to prevent litigants from taking contrary positions in different courtrooms to serve the exigencies of the moment. *Seymour* at ¶ 36. Application of the doctrine must raise the cost of lying in court, not eliminate it. Review is warranted by this Court as the ultimate guardian of the sanctity of judicial proceedings.

III. Review is warranted to provide clarification on the standard of review when application of judicial estoppel results in a summary judgment order. (Point 7 above)

No disputes of material fact existed in this case. Duniver did not dispute the contents of his bankruptcy paperwork, did not dispute the testimony he gave at the creditors' meeting, did not dispute knowing he had filed a personal injury action when he falsely denied it in bankruptcy court, and did not dispute he received an automatic stay on collection efforts when his bankruptcy petition was filed. The circuit

128141

court assessed those undisputed facts, conducted the appropriate judicial estoppel analysis, determined all the elements of judicial estoppel had been conceded by Duniver, found evidence of an intent to deceive, and exercised its discretion in invoking the doctrine of judicial estoppel. (C673-C678; A12 – A17)

A trial court's decision to apply judicial estoppel is an exercise of discretion which is reviewed for an abuse of discretion. *Seymour*, 2015 IL 118432 at ¶¶ 47-48. In *Seymour*, this Court found the circuit court failed to exercise its discretion because the circuit court believed dismissal was mandated once the five elements of judicial estoppel were fulfilled without considering the debtor's intent. *Id.* at ¶ 50. "Because no discretion was exercised ... no deferential review would be warranted..." *Id.* at ¶ 50.

Here, however, the circuit court carefully followed *Seymour*'s analytical framework, noted Duniver had conceded the prerequisites for judicial estoppel, and exercised its discretion in applying judicial estoppel based on evidence of Duniver's intent to deceive. (C676; A15) So, the circuit court did not abuse its discretion by failing to follow *Seymour's* analytical approach.

This Court also stated that when the application of judicial estoppel results in summary judgment, this Court reviewed "that ruling" *de novo*. *Id.* at ¶ 49. The *de novo* review, however, called upon

128141

the appellate court only to review whether genuine issues of material fact precluded summary judgment. *Id.* But the appellate court did not so limit its *de novo* review. The appellate court stated: "If all elements of judicial estoppel had been proven, *we would exercise our discretion* in determining whether to apply the doctrine." *Duniver* at ¶ 21; (A 8) (emphasis added).

But that is contrary to *Seymour's* analytical framework and makes no sense. This Court stated: "if all prerequisites have been established, the *trial court* must determine whether to apply judicial estoppel – an action requiring the exercise of discretion." *Seymour* at ¶ 47 (emphasis added). Here, even though the appellate court concluded Duniver received no benefit from falsely denying he had filed an injury lawsuit, the court proceeded to independently exercise its own discretion to decide whether judicial estoppel should be applied had Duniver received a benefit. *Duniver*, ¶ 21. (A 8)

In other words, the appellate court believed it could independently exercise its own discretion in determining whether to apply the doctrine of judicial estoppel if the court assumed the prerequisites for judicial estoppel had been satisfied, rather than reviewing the circuit court's exercise of its discretion for an abuse of discretion. If the circuit court is tasked with utilizing its discretion to invoke the doctrine based upon undisputed facts, then how can the

128141

appellate court exercise its own independent discretion when the facts are conceded? Why bother with the circuit court at all?

The appellate court could not have found the circuit court erred on the "benefits received" prong of the judicial estoppel analysis since Duniver conceded that element in circuit court. The appellate court did not find the circuit court violated the *Seymour* analytical framework. The appellate court did not find the circuit court abused its discretion in applying the doctrine. Instead, the appellate court exercised its own discretion in determining whether the doctrine should be applied. But under an abuse of discretion standard, "the question is not whether the reviewing court would have made the same decision if it were acting as the lower tribunal." *People v. McDonald*, 2016 IL 118882 at ¶ 32. Instead, the reviewing court must determine if the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.*

Review is warranted for this Court to clarify whether reviewing courts may exercise their own discretion in deciding whether judicial estoppel should be applied when the circuit court exercised its discretion in applying judicial estoppel to enter summary judgment for the defendants.

IV. If the Court concludes the circuit court abused its discretion in applying judicial estoppel to bar Duniver's injury lawsuit, this Court's review is warranted to determine whether standing is revested

128141

in a debtor when the trustee lacks information concerning the debtor's pending injury claim when the bankruptcy case is dismissed. (Point 8 above)

The appellate court concluded the dismissal of Duniver's bankruptcy case "in effect" revested standing in Duniver to pursue his injury claim. *Duniver* at ¶ 15. (A 5) But in support, the appellate court relied on decisions where a trustee knowingly and intentionally abandoned a personal injury claim after evaluating the merits and value of the claim. *Johnson v. Fuller Family Holdings, LLC,* 2017 IL App (1st) 162130. *Duniver* at ¶ 15. (A 5) Here, however, there is no indication the trustee knew of the existence, or potential value, of Duniver's injury lawsuit. Without such knowledge, the trustee cannot have intentionally elected to revest Duniver with standing to pursue his injury claim by dismissing his bankruptcy case for failure to make scheduled payments. There is no evidence the trustee intended to assign the personal injury action back to Duniver.

Duniver's personal injury claim belonged to the trustee once Duniver filed for bankruptcy. *Dailey v. Smith*,292 Ill. App. 3d 22, 25 (1st Dist. 1997) ("Once a debtor files for bankruptcy, any unliquidated lawsuits become part of the bankruptcy estate, and, even if such claims are scheduled, a debtor is divested of standing to pursue them upon filing his petition.") The only way the claim reverts to the debtor is if the trustee abandons the claim. *Canon-Stokes v. Potter*, 453 F. 3d 446,

128141

448 (7th Cir. 2006).

Duniver supplied no evidence the trustee intended to abandon a claim about which he was unaware. Duniver provided no legal authority establishing he was revested with standing to pursue his undisclosed personal injury claim just because his bankruptcy case was dismissed for failure to make plan payments. And revesting standing in a debtor who deliberately withheld information from his creditors regarding the existence of his potentially lucrative personal injury action just because his bankruptcy case was dismissed for failure to make payments is an untenable outcome, rewarding the debtor's deceitful manipulation of bankruptcy proceedings at the expense of his deserving creditors.

128141

CONCLUSION

The decision of the appellate court has created a direct conflict with *Smith* and is inconsistent with federal authority and with *Seymour* in several significant ways. The decision also fundamentally undermines one of the few mechanisms protecting the sanctity of judicial proceedings. Review by this Court is warranted to address the conflicts and the important issues presented.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: */s/Julie A. Teuscher*
One of the Attorneys for Battery Handling Systems, Inc.,

Julie A. Teuscher
Henry Ortiz
CASSIDAY SCHADE LLP
222 W. Adams St., Suite 2900
Chicago, IL 60606
(312) 641-3100
(312) 444-1669 (Fax)
jteuscher@cassiday.com
hortiz@cassiday.com

Respectfully submitted,

KRAKAR & OLSEN

By: */s/Kurt E. Olsen*
One of the Attorneys for Neovia Logistics, LLC

Kurt E. Olsen
KRAKAR & OLSEN
300 S. Riverside, Ste. 2050
Chicago, IL 60606
(312) 775-9750

128141

kurt.olsen@zurichna.com
Attorneys for Neovia Logistics, LLC

Respectfully submitted,

SWANSON, MARTIN & BELL, LLP

By: */s/ Catherine B. Weiler*
One of the Attorneys for Clark Material Handling Co.

Brian W. Bell
Michael A. McCaskey
Catherine B. Weiler
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100
bbell@smbtrials.com
mmccaskey@smbtrials.com
cweiler@smbtrials.com
Attorneys for Clark Material Handling Co.

Respectfully submitted,

SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.

By: */s/ Deborah A. Ostvig*
One of the Attorneys for Equipment Depot of Illinois, Inc.

Michael E. Kujawa
Deborah A. Ostvig
SCHAIN, BANKS, KENNY & SCHWARTZ, LTD.
70 W. Madison St. Suite 5300
Chicago, IL 60602
(312) 345-5700
mkujawa@schainbanks.com
dostivig@schainbanks.com
Attorneys for Equipment Depot of Illinois, Inc.

128141

RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this Petition for Leave to Appeal conforms to the requirements of Supreme Court Rules 315, 341(a) and (b). The length of this Petition, excluding the pages containing the Rule 341(d) cover, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the Brief under Rule 315(c)(6) is 5,784 words.

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

Respectfully submitted,

CASSIDAY SCHADE LLP

By: /s/ Julie A. Teuscher
One of the Attorneys for Battery Handling Systems, Inc.

Julie A. Teuscher
Henry Ortiz
Cassiday Schade LLP
222 W. Adams St.
Suite 2900
Chicago, IL 60606
(312) 641-3100
(312) 444-1669 (Fax)
jteuscher@cassiday.com
hortiz@cassiday.com

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

March 30, 2022

In re: Darrius Duniver, Appellee, v. Clark Material Handling Company et al., Appellants. Appeal, Appellate Court, First District.
128141

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

DARRIUS DUNIVER
Plaintiff/Petitioner

Reviewing Court No: 1-20-0818
Circuit Court No: 2019L000546
Trial Judge: KATHY M. FLANAGAN

v.

CLARK MATERIAL HANDLING, CO. ET AL.
Defendant/Respondent

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 6

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 6

COMMON LAW RECORD - TABLE OF CONTENTS

COMMON LAW RECORD - TABLE OF CONTENTS

COMMON LAW RECORD - TABLE OF CONTENTS

045214AP/01270/JAT

No. 128141

IN THE SUPREME COURT OF ILLINOIS

DARRIUS DUNIVER,

Plaintiff-Appellee,

vs.

BATTERY HANDLING SYSTEMS, INC., NEOVIA LOGISTICS SERVICES, LLC., CLARK MATERIAL HANDLING CO., AND EQUIPMENT DEPOT OF ILLINOIS, INC.,

Defendants/Appellants.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT
CASE NO. 1-20-0818

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CASE NO. 2019 L 000546

HONORABLE KATHY M. FLANAGAN,

JUDGE PRESIDING

NOTICE OF FILING AND PROOF OF SERVICE

To: See Attached Service List

PLEASE TAKE NOTICE THAT ON **June 8, 2022**, the undersigned attorney caused to be electronically filed the **Joint Brief and Appendix** of the **Defendants-Appellants Battery Handling Systems, Inc., Neovia Logistics Services, LLC., Clark Material Handling Co., and Equipment Depot of Illinois, Inc.'s** with the Clerk of the Illinois Supreme Court. The undersigned further certifies that on June 8, 2022 the parties listed above were served with a copy of this notice the Joint Appellants' Brief and Appendix at their respective email addresses by emailing the same. Under Penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

Respectfully submitted,

CASSIDAY SCHADE LLP

By: */s/Julie A. Teuscher*
One of the Attorneys for BATTERY HANDLING SYSTEMS, INC.

Julie A. Teuscher
CASSIDAY SCHADE LLP
222 West Adams Street, Suite 2900
Chicago, Illinois 60606
(312) 641-3100
(312) 444-1669 – Fax
jteuscher@cassiday.com

045214AP/01270/JAT
DARRIUS DUNIVER v. CLARK MATERIAL HANDLING COMPANY; BATTERY HANDLING SYSTEMS, INC.; and EQUIPMENT DEPOT OF ILLINOIS, INC. and NEOVIA, et al

SERVICE LIST

Michael R. Grieco, Esq.
Romanucci & Blandin, LLC
321 N. Clark Street
Suite 900
Chicago IL 60654
(312) 458-1000
mgrieco@rblaw.net

Additional Counsel Plaintiff-Appellant
Michael W. Rathsack, Esq.
10 South LaSalle Street, 1420
Chicago IL 60603
(312) 726-5433
mrathsack@rathsack.net

ATTORNEYS FOR CLARK MATERIAL HANDLING COMPANY
Brian W. Bell, Esq.
Michael A. McCaskey, Esq.
Catherine B. Weiler, Esq.
Jack A. Gould, Esq.
Swanson Martin & Bell
330 N. Wabash Street
Suite 3300
Chicago IL 60611
(312) 321-9100
bbell@smbtrials.com
mmccaskey@smbtrials.com
cweiler@smbtrials.com
jgould@smbtrials.com

ATTORNEYS FOR EQUIPMENT DEPOT OF ILLINOIS
Pam Walker, Esq.
Deborah A. Ostvig, Esq.
Schain Banks & Kenny
70 West Madison Street
Suite 5300
Chicago IL 60602

(312) 345-5703
pwalker@schainbanks.com
dostivig@schainbanks.com

ATTORNEY FOR APPELLEE, NEOVIA LOGISTICS, LLC
Kurt Olsen, Esq.
Ann Goldstein, Esq.
Whitson-Owen & Olsen
300 South Riverside Plaza
Suite 2050
Chicago IL 60606
(312) 775-9750
kurt.olsen@zurichna.com
ann.goldstein@zurichna.com - Legal Asst.

11090998