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

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ARGUMENT

I. DUNIVER FORFEITED THE ARGUMENT HE RECEIVED NO BENEFIT FROM HIS BANKRUPTCY PROCEEDINGS.

Duniver's forfeiture of the "no benefit received" argument deserves close attention - this is not a pro forma forfeiture argument. Duniver listed the five prerequisites for application of judicial estoppel in response to defendants' motions for summary judgment but elected not to challenge the "benefit received" prong of the judicial estoppel analysis. Duniver asks this Court to overlook his decision to concede this essential element of the judicial estoppel analysis in his response to the defendants' motions for summary judgment but offers *no reason* why Duniver failed to timely raise the argument. Duniver's failure to raise the issue in circuit court until his motion for reconsideration forfeited the argument and since Duniver has "offer[ed] no persuasive reason why [this court] should overlook forfeiture in this case," this Court should decline to do so. *Zander v. Carlson*, 2020 IL 125691 at ¶ 34

Duniver argues that forfeiture is a limitation on the parties, but not the court. (See Plft's Brf., p. 12) But when Duniver specifically identifies a prerequisite to the application of judicial estoppel, and elects not to challenge that element *at all*, that omission amounts to a waiver and Duniver should have to live with that decision. *People v. Sophanavong*, 2020 IL 124337, ¶ 20 ("Waiver … is an intentional relinquishment or abandonment of a known right or privilege") (internal citations omitted).

Duniver argues that "fairness" dictates consideration of his new argument. (Pltf's Brf., p. 12) But fairness to whom? Certainly not to the circuit court who had no opportunity to address a challenge to the benefit received argument before ruling on the motions for summary judgment. Duniver demands an "equitable" approach, which is a bold ask from the party who elected not to address a fundamental prerequisite to application of judicial estoppel in response to the summary judgment motions and provably mislead the bankruptcy court in his bankruptcy filings and testimony.

Duniver argues his forfeiture should be overlooked because "the point" was raised in circuit court in his motion to reconsider. (Pltf's Brf., 12) But when Duniver first raised the "no benefit received" argument in his motion to reconsider, he did so superficially, in two sentences, without reference to legal authority. (C683, C685) So, the "no benefit received" argument was doubly forfeited, "both by the failure to raise it earlier and by *the lack of any legal support provided by the [party*]." *Velasquez v. Downer Place Holdings, LLC*, 2018 IL App (2d) 170418, ¶ 48, (emphasis added), citing P*eople ex. Rel. Ill. Dep't of Labor v. E.R.H. Enters.,* 2013 IL 115106, ¶ 56. Now, Duniver seeks to place exclusive reliance on this forfeited argument to overturn the circuit court's decision when Duniver thought so little of the argument that he ignored it in response to motions that would defeat his claim.

Forfeiture is a rule of practice designed to ensure fairness to the parties and to the courts. The forfeiture rule "serves the salutary effect of

prompting parties to timely articulate arguments" and "[a]n argument that could and should have been raised before a lower court, but was not, is waived." *People v. Wells*, 182 Ill. 2d 471, 490 (1998). Fairness to the defendants, the circuit court, and the adversarial system dictates that this Court refuse to consider Duniver's forfeited argument.

II. IF THE COURT LOOKS BEYOND DUNIVER'S FORFEITURE, DUNIVER SUCCEEDED IN RECEIVING BENEFITS FROM BANKRUPTCY PROCEEDINGS.

To begin, Duniver has provided this Court with no legal authority establishing that discharge of debt is necessary before the Court can find a benefit was conferred during bankruptcy proceedings. No case says that discharge of debt is *required* for the debtor to receive a benefit. Duniver argues he "did not receive any actual benefit" from his bankruptcy proceedings because he "was not discharged" and cites to a single case to support this contention: *Johnson v. Fuller Family Holdings, LLC*. (Pltf's Brf., p. 13) But *Johnson* simply found the plaintiffs in that case succeeded in their bankruptcy case when they received a discharge of their debts. 2017 IL App (1st) 162130 ¶ 42. *Johnson* did not hold a plaintiff *must* receive a discharge to receive "some benefit." (*Id*.)

On the issue of whether Duniver received any benefit during his bankruptcy proceedings, this Court should look to decisions of the federal courts, the courts tasked with interpreting and enforcing bankruptcy statutes and rules. Unlike the issue of intent, state reviewing courts look to federal

decisions when interpreting bankruptcy laws. See e.g. *Dailey v. Smith*, 292 Ill. App. 3d 22, 24 (1st Dist. 1997); *Smith v. Integrated Mgmt. Servs.*, 2019 IL App (3d) 180576, ¶¶ 20-23. Overwhelming federal authority says that both the automatic stay triggered by the filing of a voluntary petition for bankruptcy, and the confirmation of a debtor's bankruptcy plan, are benefits conferred on the debtor during bankruptcy proceedings.

In their opening Joint Brief, Defendants identified numerous decisions wherein federal courts unequivocally identified the automatic stay and the confirmation of a debtor's bankruptcy plan as benefits a debtor receives by filing for voluntary bankruptcy. (Def's Jt. Brf., pp. 26-28) Duniver has nothing to say about those decisions, other than an attempt to distinguish them factually by stating the benefits of Duniver's stay were "purely hypothetical." (Pltf's Brf., p. 16) But that is provably false.

A. Duniver's Bankruptcy petition immediately and automatically stayed the commencement or continuation of judicial or other proceedings against him and stayed any act to obtain possession of his property or create or enforce a lien against his property.

First, Duniver concedes that a collection action by the City of Chicago was pending against him when Duniver filed his bankruptcy petition. (Pltf's Brf., p. 17) (C 493 at ¶ 9) That pending collection action was stopped dead in its tracks the moment Duniver filed his bankruptcy petition on February 8, 2019. That event alone constituted a benefit to Duniver. A bankruptcy petition "operates as a stay, applicable to all entities, of the commencement

or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of [bankruptcy] case ..." 11 U.S.C. § 362(a)(1).

Duniver argues the automatic stay "provided no tangible benefit to Duniver" because he was "missing a leg [and] unable to work" and because "no creditor was likely to pursue collection of a debt, and even if they had, they would not have received anything." (Pltf's Brf., p. 13) These arguments are factually unsupported and inaccurate. The Court cannot rely on Duniver's "bald allegations" about what his creditors may have done when he provided no evidentiary support for the allegations. *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 692 (1st Dist. 2007) Duniver provided no evidence via affidavit or otherwise: (1) that he has not worked or that his physical condition renders him unable to ever work again; (2) that creditors cease all collection efforts when a debtor has a physical impairment; or (3) that Duniver would not have paid his bills even without the automatic stay. Duniver was receiving nearly $2,000.00 per month in Worker's Compensation benefits (C 487) and had funds with which to pay bills.

Regardless, whether Duniver was going to pay his bills is irrelevant. Most people who file for bankruptcy cannot pay their bills, which is why they file for bankruptcy. The pertinent question is whether the creditors were stayed from attempting to collect the money Duniver owed them and the answer to that is yes.

Moreover, the automatic stay also prevented the *commencement* of any judicial, administrative, or other action against the debtor. 11 U.S.C. § 362(a)(1). By filing his bankruptcy petition, Duniver prevented all the entities to whom he owed a debt from *commencing* any type of collection proceeding against him. Duniver identified 10-pages-worth of creditors with claims against him in his bankruptcy paperwork, some of which had already been submitted for collection purposes. (C 472-C 482) None of those creditors could commence or continue any type of judicial, administrative, or other action against Duniver once he filed his petition for bankruptcy. That was indeed a benefit to Duniver.

Duniver identified $10,000 worth of personal assets, including an automobile he valued at $8,325. (C 462; C464) Duniver also identified $800 in a checking/savings account. (C 466) Duniver was receiving Worker's Compensation benefits. (C487) By filing for bankruptcy, Duniver received the benefit of an automatic stay which prevented "any act to obtain possession of property of the estate" or "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(3)(4) Those were concrete benefits bestowed on Duniver when he filed for bankruptcy. Duniver owed money to the Internal Revenue Service, a notoriously relentless creditor, (C 473) and by filing his petition for bankruptcy, he immediately suspended the IRS' efforts to collect. Medical corporations had pending collection actions

against him (C 478) and those collection efforts were immediately stalled. These benefits were not "purely hypothetical." They were real.

Duniver's argument that the stay really had no value for him and that he received nothing tangible from bankruptcy is inconsistent with the law and the facts. The stay immediately halted the City of Chicago's action against him. It prevented his other creditors from pursuing litigation against him and placing a lien on his bank account. It stalled all the other pending collection efforts against him. Duniver did not suffer the consequences of non-payment, such as debt collector letters, lawsuits, or further interest charges or penalties. Those are the precise benefits that debtors seek when filing for bankruptcy, and the reason why Duniver filed three consecutive bankruptcy petitions without ever receiving a discharge of his debt. (See U.S. Bankruptcy Court, NDIL (Eastern Division) Case No. 16-8408, Docs. 18, 31); (See also C526, C532; C841)

Rather than acknowledging the automatic stay as the benefit it was, the appellate court alternatively concluded Duniver received "no benefit" or no "significant" benefit. (A22-A23) The court's declaration that Duniver received "no benefit" is just wrong factually for the reasons articulated above. And the court's belief that Duniver must have received a "significant" benefit before estoppel may be invoked is a standard in conflict with *Seymour v. Collins*, 2015 IL 118432 ¶ 37. ("The party to be estopped must have …

received *some* benefit" from taking factually inconsistent positions in separate judicial proceedings) (emphasis added).

The "significant benefit" test presents a new, dangerously ambiguous standard subject to inconsistent interpretations. Must this Court review every judicial estoppel dismissal to evaluate the significance of the benefit received by a particular debtor? Is the significance of a benefit the same across all debtors? The appellate court's "significant benefit" standard would require an individualized assessment of each debtor's assets, their value, the debtor's income-earning ability, and the status of collection efforts, among other variables - an unworkable and needlessly complicated standard when the federal courts have stated the automatic stay and confirmation of a bankruptcy plan are themselves benefits.

Nonetheless, Duniver attempts to buttress the appellate court's new standard by citing decisions where courts similarly utilized loose language about the significance of a benefit, but a close examination of those cases reveals no support for Duniver's argument.

In *Terry v. Ethicon, Inc.*, 1:19-cv-00175-GNS, 2020 WL 3003051, *14-15 (W.D. Ky June 4, 2020), the court only used the term "significant financial benefit" when quoting other cases, but in its own analysis, stated: "Patricia benefitted from her Chapter 13 bankruptcy even without a discharge: She received the benefit of the automatic stay, held the collection of most of her unsecured debt at bay for almost four years, and paid no interest to

creditors." *Id.* at *15. This holding supports Defendants' contention that Duniver benefited from the automatic stay even though he did not receive a discharge of his debts.

Mathews v. Denver Newspaper Agency LLP did not involve deceit during bankruptcy proceedings or an evaluation of whether a stay on debt collection benefitted a debtor. 649 F.3d 1199, 1209-1210 (10th Cir. 2011). Instead, the court there noted plaintiff's receipt of disability payments from the Social Security Administration based on a representation that he was completely disabled from working was a significant benefit, but the court did not say a "significant" benefit was required to invoke estoppel. *Id.*

In *Assasepa*, although the court referred to "significant financial benefits" when quoting *Williams v. Hainje*, in its own analysis of the facts it held "significant financial benefits" *included* "being free of debt-collectors and entering a payment plan designed to relieve debts." *Assasepa v. JP Morgan Chase Bank*, Case No. 1:11-cv-156, 2012 U.S. Dist. LEXIS 3491, *47 (S.D. Ohio Jan. 11, 2012). The court specifically rejected the debtor's contention that she must receive a discharge of her debt to have benefitted from concealing her lawsuit: "Although Ms. Assasepa's 'debts may not have been permanently wiped away, a debtor who receives even preliminary benefits from concealing a [lawsuit] from [her] creditors can still be estopped from pursuing the suit…'" *Id.*, quoting *Williams v.Hainje*, 375 F. App'x 625, 627 (7th Cir. 2010).

In *Robinson v. Globe Newspaper Co.*, although the plaintiff admitted he obtained a substantial benefit in the form of a significant reduction in his prison sentence, the court stated only the following was required for judicial estoppel: "a litigant must have made a bargain with the tribunal of the first proceeding by making representations to the tribunal *to obtain a benefit*." 26 F. Supp.2d 195, 200 (D.Maine 1998) (emphasis added). Finally, in *Burruss v. Cook County Sheriff's Office*, the defendants (not the court) utilized the term "significant financial benefits," again when citing *Williams v. Hainje*. *Burruss*, Case No. 08 C 6621, 2013 U.S. Dist. LEXIS 98860, *54 (N.D.IL. July 15, 2013).

Even in *Williams* (relied on by the appellate court), when the Seventh Circuit stated Williams received "significant financial benefits during his short stint in bankruptcy," the court was referring to the automatic stay and the confirmation of the debtor's bankruptcy reorganization plan, finding those benefits sufficiently "significant" to warrant application of judicial estoppel even though Williams' bankruptcy case was dismissed without discharge of his debt. *Williams v. Hainje*, 375 Fed. Appx. 625, 627 2010). And *Williams* did not hold "significant" benefits were required. Instead, it held: "a debtor who receives even preliminary benefits from concealing a chose in action from his creditors can still be estopped from pursuing the suit in the future." (*Id.*)

The appellate court's conclusion that Duniver received no benefit from providing the bankruptcy court with false information is wrong factually and legally and this Court should reverse.

B. The confirmation of Duniver's bankruptcy plan also benefitted Duniver.

Duniver has little to say about the benefit he received from confirmation of his bankruptcy plan. (Pltf's Brf., p. 17) And in the single paragraph Duniver devoted to this issue, he provides no legal authority which says confirmation of a bankruptcy plan is not of benefit to the debtor. Instead, Duniver argues the defendants failed to show how his repayment plan would have differed had the bankruptcy court been told about his injury lawsuit. But that puts the proverbial cart before the horse and is precisely the point – Duniver denied the bankruptcy court the opportunity to accurately assess Duniver's potential assets and create a plan that was fair to his creditors. A debtor's bankruptcy estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case," and specifically encompasses "every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative." 11 U.S.C. § 541(a)(1); *Dailey v. Smith,* 292 Ill. App. 3d 22 at 24, 25.

Thus, even though Duniver's injury action was a contingent, future interest of Duniver's, bankruptcy law required him to disclose the asset so the trustee and bankruptcy judge could accurately assess his bankruptcy

estate. It is not the defendants' burden to demonstrate how the repayment plan would have differed – the bankruptcy statutes themselves require disclosure of a speculative personal injury action before a bankruptcy plan is confirmed for a reason – it provides the trustee the opportunity to accurately assess the potential value of the bankruptcy estate. By withholding that information, Duniver denied his creditors the opportunity to object to his proposed repayment plan.

Duniver then states that if the trustee had asked the defendants about the value of Duniver's personal injury claim, the defendants would have said it had no merit. (Pltf's Brf., p.17) But that's the wrong question. If the trustee had asked *Mr. Duniver* about the value of his pending personal injury lawsuit, Mr. Duniver would have suggested the lawsuit was worth millions of dollars. His creditors were entitled to that knowledge before they agreed to Duniver's proposed repayment plan.

And when Mr. Duniver's bankruptcy plan was confirmed, Duniver was then free of all creditors' claims. See 11 U.S.C. § 1141(c) ("after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors ...") Confirmation of the plan also allowed Duniver to keep possession of the property he did own, including his car and bank account. "The confirmation of a plan vests all of the property of the estate in the debtor." 11 US.C. § 1327(b).

Duniver has no answer for the *Smith* court's unequivocal statement that "Courts nationwide recognize that when a bankruptcy court confirms a Chapter 13 plan, the court accepts the debtor's position and confers a benefit." *Smith v. Integrated Management Services*, 2019 IL App (3d) 180576, ¶21. *Smith* stated the obvious: "a debtor succeeds when the bankruptcy court confirms a Chapter 13 plan." *Id*. at ¶ 23.

Based on the false information Duniver provided to the trustee, a bankruptcy plan was confirmed which permitted Duniver to repay his debts over 3 years at a rate of 10 percent. (C542) The existence of a potentially lucrative personal injury action that may have been resolved within the repayment plan period was information to which the trustee was entitled and may have altered the outcome of Duniver's bankruptcy proceedings. At bottom, Duniver denied his creditors information he was required to disclose which would have impacted their decision to approve Duniver's proposed bankruptcy plan. That is a benefit.

C. No personal injury plaintiff wants to turn control of his injury lawsuit over to a bankruptcy trustee.

Duniver then argues that retaining control of his personal injury lawsuit was not a benefit to him. That would come as a surprise to most personal injury plaintiffs and their counsel. Duniver admits the case would be under the control of the trustee if disclosed as a bankruptcy asset. (Pltf's Brf., p. 17) The trustee's settlement ambitions would be far different than those of Mr. Duniver. The trustee's concern would have been satisfaction of

the $50,000.00 debt owed to Duniver's creditors, a far cry from Duniver's ambitions. Maintaining exclusive authority to dictate the terms of his personal injury lawsuit was of benefit to Duniver.

Duniver argues that retaining control of his injury lawsuit was actually a disadvantage because he would be required to pay for investigation and counsel, however these are typically not out-of-pocket expenses for plaintiffs and pale in comparison to the benefit of maintaining control over resolution of his case. Maintaining exclusive authority to dictate the terms and resolution of his personal injury lawsuit was of benefit to Duniver.

III. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN FINDING DUNIVER INTENDED TO DECEIVE THE BANKRUPTCY COURT.

A. Duniver's attempt to explain away the appellate court's improper exercise of its own discretion is unsuccessful.

The appellate court said this: "[i]f all elements of judicial estoppel had been proven, *we would exercise our discretion* in determining whether to apply the doctrine." (A22) Duniver attempts to explain away the appellate court's error in this regard by speculating that "in all likelihood, [the court] used that word to mean its power to review the trial court's decision that Duniver intended to deceive." (Pltf's Brf., p. 20) But there are several problems with that argument. First, it is unadulterated speculation. Second, that would mean the appellate court did not understand a term of art routinely employed by it to set the standard for its review. Third, that assumption is entirely undercut by the appellate court itself when it stepped

into the circuit court's shoes and said: "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." (A23)

But that was not the appellate court's job and was inconsistent with an abuse of discretion standard. The abuse of discretion standard is extremely deferential, permitting the reviewing court to review the trial court's decision only to determine if it was "arbitrary, fanciful, or unreasonable." *People v. McDonald,* 2016 IL 118882 at ¶ 32. 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." *Id.* But that is precisely what the appellate court did – it behaved as if it was the lower tribunal, viewed the evidence itself, and somehow concluded "the evidence presented fails to show an intent to deceive or mislead." (A23)

In declaring it would exercise its own discretion, the appellate court cited *Seymour*, 2015 IL 118432 at ¶ 47. (A22) However, *Seymour* says just the opposite in that very paragraph. "Second, if all prerequisites have been established, the *trial court* must determine whether to apply judicial estoppel – an action requiring the exercise of discretion." *Id.* at ¶ 47, emphasis added. This Court then explained it would review a trial court's exercise of discretion for an abuse of discretion. *Id.* at ¶ 48.

The errant standard of review utilized by the appellate court was a mistake with significant consequences since the appellate court never made a

finding that the circuit court abused its discretion, and for good reason. The circuit court employed the *Seymour* analytical framework, observed the elements of judicial estoppel were conceded by Duniver, and found evidence of an intent to deceive. The appellate court not once utilized the phrase "abuse of discretion." That mistake determined the outcome in the appellate court. Rather than evaluating whether the circuit court's determination that Duniver intended to deceive the bankruptcy court was "fanciful, arbitrary, or unreasonable," the appellate court conducted its own independent analysis of intent. That was error, and an error that drove the appellate court to reach the wrong decision.

B. The circuit court's determination that Duniver intended to deceive or mislead the bankruptcy court was not arbitrary or unreasonable.

The proper question for the appellate court was whether the circuit court's determination that evidence existed of Duniver's intent to deceive the bankruptcy court was arbitrary or unreasonable such that no reasonable person would have reached the same conclusion. The circuit court's finding of an intent to deceive was anything but arbitrary – it was based upon multiple points of undisputed evidence allowing the circuit court, as trier of fact on this issue, to find Duniver intended to deceive the bankruptcy court.

The undisputed evidence revealed Duniver made the following false statements under oath in bankruptcy court:

1. Duniver denied having claims against third parties even though he had filed a personal injury lawsuit 23 days earlier. (C 467 at ¶ 33)

2. Duniver failed to list his personal injury action in his bankruptcy paperwork even though instructed to list any personal injury case filed within one year before Duniver filed for bankruptcy. (C 493 at ¶ 9)

3. When asked under oath at the Rule 341 creditors meeting whether he was suing anyone, Duniver answered "No." (C 667)

Accordingly, the circuit court's determination that Duniver intended to mislead the bankruptcy court was not arbitrary. It was based on multiple false answers in bankruptcy court after Duniver was advised he had an obligation to notify his bankruptcy attorney if he had filed a lawsuit (C 503) and had agreed to provide his bankruptcy attorney with accurate financial information. (C 509)

Unlike the plaintiff in *Seymour*, Duniver offered the circuit court no innocent explanation for his failure to disclose his pending injury lawsuit. The only "explanation" for his failure to disclose his lawsuit is contained in his affidavit. (C650-C652) Therein, Duniver stated he relied on his bankruptcy attorneys to be aware of the requirements associated with the filing of his bankruptcy petition. (C 651-C 652) However, reliance on his counsel was insufficient to protect him from his false answers.

> [B]ad legal advice does not relieve the client of the consequences of her own acts… a debtor in bankruptcy is bound by her own representations, no matter why they were made ... the remedy for bad legal advice lies in malpractice litigation against the offending lawyer ... whether the bankruptcy fraud was [the lawyer's] suggestion ... or [the bankruptcy petitioner's] own bright idea does not matter in the end. The signature on the

> bankruptcy schedule is hers. The representation she made is false ... *Cannon-Stokes v. Potter,* 453 F.3d 446, 449 (7th Cir. 2006).

Beyond that, Duniver signed his bankruptcy paperwork in three separate areas, each time indicating he had reviewed his bankruptcy paperwork and was declaring under penalty of perjury the information provided was true and correct. (C521-C523) Duniver stated under penalty of perjury that he had examined his petition and that the information provided was true and correct. (C521) Duniver indicated under penalty of perjury that he had reviewed the summary and schedules filed with his petition and that they were also true and correct. (C 522) Duniver also declared under penalty of perjury that he had read his answers on the Statement of Financial Affairs and that those answers were true and correct. (C 523)

"Generally, absent fraud, the act of signing legally signifies that the individual had an opportunity to become familiar with and comprehend the terms of the document he or she signed." *Hawkins v. Capital Fitness, Inc.,* 2015 IL App (1st) 133716 at ¶ 14. An individual who has an opportunity to read a document before signing and signs the document cannot later plead a lack of understanding. *Id.*; see also *Schweihs v. Chase Home Fin., LLC,* 2016 IL 120041 at ¶ 57; (a man who signs a contract cannot relieve himself from the obligations of a contract by saying he did not know or understand what it contained.)

Duniver not only signed the bankruptcy petition in three separate areas, in each of those instances he swore under oath that he had reviewed the documents and they were true and accurate when they were not.

To avoid the consequences of Duniver's false statements, Duniver's counsel claims Duniver was "confused" by the bankruptcy paperwork. (Pltf's Brf., p. 23) But Duniver never said that. (C650-C6652) Duniver never said he did not understand the paperwork. Duniver had a bankruptcy attorney to whom he could have directed any questions. Duniver had been through the bankruptcy process twice before. Duniver never said he was told he need not disclose his injury action. Instead, he was told he had to be honest with his bankruptcy attorney, he was specifically asked if he had filed any lawsuits, he answered falsely, and then he falsely stated his answers were true and accurate.

Duniver then states "[p]resumably some paralegal at the bankruptcy lawyer's office filled it out, after either speaking with Duniver or having him fill out a questionnaire." (Pltf's Brf., p. 23) First, Duniver has provided no evidence of that "fact." And even if he had, it would be irrelevant. Duniver was obligated to review the paperwork, no matter by whom it was prepared, and verify its accuracy.

The circuit court acted as the trier of fact on this issue as it was supposed to do and, weighing all the available evidence, found evidence of an intent to mislead. That determination may not be disturbed absent an abuse of discretion. Reasonable people could agree with the circuit court's determination and in fact did in *Smith v. Integrated Mgmt. Servs.,* 2019 IL App (3d) 180576 at ¶¶ 26-27. There, the court stated the following:

> 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 ... plaintiff testified under oath in a 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, despite it accruing two years before he declared bankruptcy. ... plaintiff amended his bankruptcy schedules only after defendant moved for summary judgment here and after the bankruptcy court confirmed his repayment plan ... no reasonable person would find these misrepresentations innocent. *Id.* at ¶ 26.

Likewise, no reasonable person would find Duniver's false statements in bankruptcy court innocent. Duniver had an obligation to disclose his personal injury lawsuit, was asked that specific question, and gave a false answer. He reviewed his bankruptcy paperwork before he signed it and promised that his answers were true and accurate. He filed a significant personal injury lawsuit 23 days before filing his bankruptcy petition and never indicated he forgot about the lawsuit or had no knowledge of the lawsuit. The appellate

court's statement that "the evidence presented fails to show an intent to deceive or mislead" is inappropriate and baffling.

It was not the appellate court's job to independently review the evidence of intent. Instead, the appellate court was tasked only with evaluating whether the circuit court exercised its discretion in finding evidence of intent. And even if the appellate court could independently evaluate the evidence of intent, its conclusion that Duniver "did not deliberately fail to disclose his personal injury claim to the bankruptcy court" cannot be squared with Duniver's "No" answer under oath to the question whether he had filed any personal injury action. How can that answer be interpreted in any way other than an intent to mislead the bankruptcy court? If this record falls short of evidence of an intent to deceive, then judicial estoppel becomes a worthless method of enforcing honesty in judicial proceedings unless the debtor admits his intent to deceive. The intentional assertion of a position inconsistent with his pending injury lawsuit perverted the judicial system. The decision of the appellate court must be reversed.

IV. STANDING WAS NOT REVESTED IN DUNIVER WHEN HIS BANKRUPTCY CASE WAS DISMISSED.

To begin, Duniver lost standing to pursue his personal injury action the moment he filed his bankruptcy petition. And Duniver never sought leave of court to amend his personal injury action to pursue it on behalf of the bankruptcy estate, rather than personally.

Nor did dismissal of Duniver's bankruptcy case automatically revest standing in Duniver. Dismissal of a bankruptcy case only revests to the debtor property that was scheduled as part of the bankruptcy estate. See 11 U.S.C. § 554(d). Property of the estate that is not administered in the bankruptcy case and that is not abandoned by the trustee remains property of the bankruptcy estate. *Id.* This remains true unless the trustee abandons the personal injury claim. The issue, therefore, is what is necessary to establish abandonment by the trustee.

The bankruptcy code answers that question. The trustee may abandon any property of the estate "after notice and a hearing." 11 U.S.C. § 554(a). No hearing was conducted by the trustee for the purpose of abandonment of the estate property. Duniver should not be permitted to manipulate the bankruptcy system to "revest" standing for his personal injury lawsuit. Revesting standing in a debtor who deliberately withholds information from his creditors regarding a pending personal injury lawsuit just because his bankruptcy case was dismissed for failure to make plan payments would reward the debtor's deceitful manipulation of bankruptcy proceedings at the expense of his deserving creditors and would incentivize debtors to withhold plan payments to secure dismissal of a bankruptcy case to reassume control of his injury lawsuit. That cannot be this Court's desired outcome.

Duniver boldly states, without legal support, that "once the proceeding was dismissed, no matter the reason, the claim had to revest in Duniver." (Pltf's Brf., p. 38) But that just highlights how a debtor can manipulate the system to prompt dismissal of a bankruptcy case to resume control of the lawsuit he failed to disclose in bankruptcy proceedings.

Finally, Duniver offered no response to the defendant's argument the circuit court lacked jurisdiction to entertain Mr. Duniver's lawsuit since a plaintiff's case must present a justiciable matter involving real parties in interest. (Def'ts' Joint Brf. at p. 53) Likewise, Duniver also failed to address the defendant's argument that these entire proceedings are moot since the case lacks an actual controversy between parties. (*Id.)*

Duniver lacked standing to pursue his personal injury action once he filed for bankruptcy. Duniver should have asked for leave of court to pursue his personal injury claim for the benefit of his bankruptcy estate but failed to do so. Once he filed for bankruptcy, Duniver was no longer the real party in interest nor was there an actual controversy between parties. For any of those reasons, the circuit court's order dismissing Duniver's claim should be affirmed.

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, or enter such other relief as this Court deems fit.

Respectfully submitted,

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RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this Reply 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 (c) certificate of compliance, and the certificate of service is 5,582 words.

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045214AP/01270/JAT

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.

HON. KATHY M. FLANAGAN

JUDGE PRESIDING

NOTICE OF FILING AND PROOF OF SERVICE

To: See Attached Service List

PLEASE TAKE NOTICE THAT ON **August 31, 2022**, the undersigned attorney caused to be electronically filed the **Joint Reply Brief of Defendants-Appellants, Battery Handling Systems, Inc., Neovia Logistics Services, LLC, Clark Material Handling Co., and Equipment Depot of Illinois,** with the Clerk of the Illinois Supreme Court. The undersigned further certifies that on August 31, 2022, the parties listed above were served with a copy of this notice and the Joint Reply Brief 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,

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