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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1396**

Scott Parks,
Appellant,

vs.

Covidien Holding, Inc., et al.,
Respondents.

**Filed June 13, 2022
Reversed and remanded
Bjorkman, Judge**

Anoka County District Court
File No. 02-CV-20-3685

Gale D. Pearson, Michael Gorwitz, Fears Nachawati, PLLC, Dallas, Texas (for appellant)

Nicole E. Narotzky, Thomas R. Pack, Greenberg Traurig LLP, Minneapolis, Minnesota;
and

Anupama D. Sreekanth, Fredrikson & Byron, P.A., Minneapolis, Minnesota; and

Bryan T. Pratt (pro hac vice), Shook, Hardy & Bacon L.L.P., Kansas City, Missouri (for
respondents)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Bratvold, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges summary judgment dismissing his product-liability claims against respondents medical-device manufacturers based on judicial estoppel. He argues that (1) judicial estoppel is not available under Minnesota law, and (2) the requirements for judicial estoppel are not met in this case. Because the district court misapplied the law regarding judicial estoppel, we reverse and remand.

FACTS

In September 2016, appellant Scott Parks underwent a surgery that involved use of a surgical stapler. After complications with the staples, he received corrective surgery. He was discharged from the hospital the following month.

In August 2017, Parks filed for Chapter 13 bankruptcy. When completing the property schedule for his bankruptcy petition, Parks was asked to indicate “yes” or “no” to the following prompt: “Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment. *Examples:* Accidents, employment disputes, insurance claims, or rights to sue.” Parks selected “No.” Parks amended his bankruptcy petition in May 2018 but did not change his information about claims against third parties. The following month, the bankruptcy court confirmed Parks’s bankruptcy plan. It reconfirmed his plan in early 2020, again without any indication from Parks of a potential legal claim.

In September 2020, Parks initiated this action against respondents Covidien Holding Inc., Covidien LP, Covidien LLC, Covidien Sales LLC, and Medtronic Inc. (collectively, Covidien), asserting product-liability claims related to the surgical staples used in his

surgery. Covidien moved for summary judgment on February 10, 2021, arguing that Parks's representation in the bankruptcy proceeding that he possessed no claims should judicially estop his claims against Covidien. Two weeks later, Parks added his Covidien claims to the property schedule in his open bankruptcy case. In opposing summary judgment, Parks argued that Minnesota does not recognize judicial estoppel and the requirements for judicial estoppel are not met since he corrected his bankruptcy filing. During the motion hearing, Parks offered to submit an affidavit indicating that he failed to list the claims earlier because he was unaware he needed to do so until Covidien moved for summary judgment; the district court told him it was unnecessary.

The district court granted summary judgment, reasoning that Parks failed to provide “any reason why he waited until after this summary judgment motion was filed . . . to disclose his claims” and could not “escape textbook judicial estoppel merely by amending his initial inconsistent position.” Parks appeals.

DECISION

Summary judgment is appropriate if “there is no genuine issue as to any material fact” and the moving party “is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. It is a “blunt instrument” and “should not be granted when reasonable persons could draw different conclusions from the evidence presented.” *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021) (quotation omitted). When considering a motion for summary judgment, a court views the evidence in the light most favorable to the non-moving party and resolves all factual inferences and doubts against the moving party. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We

review de novo whether there are genuine issues of material fact and whether the district court properly applied the law. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020).

Judicial estoppel is an equitable doctrine that protects the integrity of the judicial system by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quotation omitted). The doctrine is not applied for the benefit of defendants, *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 547 (7th Cir. 2014), and is “not intended to eliminate all inconsistencies,” *Park v. Atty. Gen. of U.S.*, 472 F.3d 66, 73 (3d Cir. 2006) (quotation omitted). Rather, it aims to protect courts from deception and manipulation. *Spaine*, 756 F.3d at 547. In this sense, the doctrine “embodies the notions of common sense and fair play.” *Kirk v. Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 384 (8th Cir. 2018) (quotation omitted). Whether to apply the doctrine is a question of law, which we review de novo. *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005); *see also Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 821-22 (Minn. 2016) (explaining that a district court’s determination whether the requirements of an equitable doctrine are met is a legal issue that appellate courts review de novo).

I. Judicial estoppel is an available doctrine.

Parks contends the district court erred by applying judicial estoppel because the Minnesota Supreme Court has not adopted the doctrine. This argument is unavailing. Our supreme court has thus far declined to adopt judicial estoppel, but it has also expressly declined to reject the doctrine. *E.g., Ryan Contracting Co. v. O’Neill & Murphy, LLP*, 883

N.W.2d 236, 248-49 (Minn. 2016); *see also Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 331-32 & n.10 (Minn. 2013) (explaining that the court’s refusal to adopt a doctrine in a particular case is not controlling on whether the court has rejected the doctrine). Indeed, the supreme court has consistently declined to formally adopt judicial estoppel because it has concluded that the doctrine does not apply under the circumstances of the cases before it. *Ryan Contracting*, 883 N.W.2d at 249; *Pendleton*, 706 N.W.2d at 507; *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 801 (Minn. 2004); *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999). The caselaw persuades us that the supreme court has left the door open for Minnesota courts to apply judicial estoppel.

Moreover, judicial estoppel is a well-established common-law doctrine. *See New Hampshire*, 532 U.S. at 749-50. We have applied it. *E.g., Bauer v. Blackduck Ambulance Ass’n, Inc.*, 614 N.W.2d 747, 750 (Minn. App. 2000). So have state and federal courts across the country. *See Whitacre P’ship v. Biosignia, Inc.*, 591 S.E.2d 870, 878-86 (N.C. 2004) (stating that “at least thirty-five other states and the United States Supreme Court” recognize judicial estoppel and examining the doctrine’s history).¹ Accordingly, we discern no error in the district court’s determination that judicial estoppel is a doctrine available to Minnesota courts.

¹ *See also, e.g., New Hampshire*, 532 U.S. at 756; *Van Horn v. Martin*, 812 F.3d 1180, 1182 (8th Cir. 2016); *Dzakula v. McHugh*, 746 F.3d 399, 400 (9th Cir. 2014); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476 (6th Cir. 2010); *Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003); *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003); *Jackson v. Harris*, 303 So.3d 454, 457 (Miss. Ct. App. 2020); *Skinner v. Holgate*, 173 P.3d 300, 303 (Wash. Ct. App. 2007).

II. The district court misapplied the law regarding judicial estoppel.

Parks contends the district court erred in concluding the requirements of judicial estoppel are satisfied because he corrected his bankruptcy petition to disclose his claims against Covidien. He also maintains that his initial nondisclosure was inadvertent. We are persuaded that the district court's analysis was incomplete and misapplied the law of judicial estoppel because it (1) relied on *Bauer* to establish the parameters of judicial estoppel and (2) did not properly consider whether Parks's prior position was based on inadvertence or mistake.

A. The district court erred by relying on *Bauer* to establish the parameters of judicial estoppel.

Bauer involved a plaintiff who obtained workers' compensation benefits as an injured employee, then sought to recover in tort (as a non-employee) from the entity she had asserted to be her employer. 614 N.W.2d at 750. In applying judicial estoppel to bar *Bauer*'s tort claim, we identified three factors that govern the application of the doctrine: (1) "the later position" of the party to be estopped "must clearly be inconsistent with [its] earlier position," (2) "the facts at issue should be the same in both cases," and (3) "the party to be estopped must have convinced the first court to adopt its position." *Id.* (quotation omitted). Neither party urged a different formulation of the doctrine, and the district court recited these three factors from *Bauer*. But while *Bauer* supports the conclusion that judicial estoppel is an available doctrine, it does not articulate the parameters of judicial estoppel applicable in this case.

First, it is doubtful that *Bauer* represents current law on judicial estoppel. The year after *Bauer*, the United States Supreme Court addressed judicial estoppel and articulated a similar but distinct set of factors that “typically” frame the analysis: (1) the “later position” of the party to be estopped “must be clearly inconsistent with its earlier position,” (2) the party to be estopped must have “succeeded in persuading a court to accept [its] earlier position,” and (3) the party to be estopped “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire*, 532 U.S. at 750-51. Within the *New Hampshire* framework, the circumstances of the prior position matter. *See id.* at 753 (“We do not question that it may be appropriate to resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake.” (quotation omitted)). And while our supreme court has not adopted judicial estoppel, it has looked to *New Hampshire* to describe the doctrine. *Ryan Contracting*, 883 N.W.2d at 248 (citing *New Hampshire*, 532 U.S. at 749); *Ill. Farmers Ins.*, 683 N.W.2d at 800 (citing *New Hampshire*, 532 U.S. at 748-49).²

Second, *Bauer* is inapposite. The considerations that govern the application of judicial estoppel are informed by the “specific factual context[.]” *New Hampshire*, 532

² We observe that the *New Hampshire* framework has the benefit of avoiding a flaw in the *Bauer* framework—the second factor (same operative facts) essentially duplicates the first (clear inconsistency), since a clear inconsistency could not exist between the two positions absent a shared set of operative facts. *See Profit*, 591 N.W.2d at 462 (noting connection between these factors). But we recognize that our supreme court’s references to the elements of judicial estoppel—including in cases that do not follow *New Hampshire*—are dicta until such point as the supreme court formally adopts the doctrine. *See Thoreson v. State*, 965 N.W.2d 295, 308 (Minn. 2021) (reciting the same factors as *Bauer* but declining to adopt the doctrine); *Pendleton*, 706 N.W.2d at 507 (same).

U.S. at 751. In *Bauer*, the context was workers' compensation. 614 N.W.2d at 750. Here, the context is bankruptcy. A debtor filing for bankruptcy has an affirmative and ongoing duty to disclose his assets, including any potential causes of action against third parties. *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999). A debtor who fails to include a cause of action in bankruptcy filings may be judicially estopped from asserting it against a third party. *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (citing *Coastal Plains*, 179 F.3d at 208). There are many cases addressing how judicial estoppel applies in this context; *Bauer* is not one of them. Indeed, the district court essentially recognized as much by looking to numerous federal cases as guidance in applying the *Bauer* formulation of judicial estoppel to the bankruptcy context.

B. The district court erred by failing to consider whether Parks's prior inconsistent position was based on inadvertence or mistake.

As noted above, when a party's earlier position was based on inadvertence or mistake, "it may be appropriate to resist application of judicial estoppel." *New Hampshire*, 532 U.S. at 753 (quotation omitted). Courts across the country consistently hew to this principle in the bankruptcy context, overwhelmingly agreeing that an inadvertent or mistaken failure to disclose a claim does not justify application of judicial estoppel. *See, e.g., Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1181-82 (11th Cir. 2017); *Love*, 677 F.3d at 261; *White*, 617 F.3d at 476; *Eastman*, 493 F.3d at 1156-57; *Stallings*, 447 F.3d at 1048-

49; *Krystal*, 337 F.3d at 319-20.³ *But see Guay v. Burack*, 677 F.3d 10, 20 (1st Cir. 2012) (leaving the question “open”).

There are two general approaches to the issue of inadvertence. One requires a fact-based inquiry. *See Martineau v. Wier*, 934 F.3d 385, 394 (4th Cir. 2019); *Slater*, 871 F.3d at 1185; *Spaine*, 756 F.3d at 548; *White*, 617 F.3d at 478-79; *Fulton County*, 849 S.E.2d at 476; *see also Ah Quin v. Cnty. of Kawai Dep’t of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013) (requiring fact-based inquiry if debtor corrected bankruptcy filing). Under this approach, to determine whether a plaintiff-debtor’s inconsistent statements were intentional or inadvertent, a court looks “to all the facts and circumstances of the particular case.” *Slater*, 871 F.3d at 1185 (listing factors); *see also Ah Quin*, 733 F.3d at 276-77 (requiring inquiry into plaintiff-debtor’s “subjective intent when filling out and signing the bankruptcy schedules”).⁴

The other approach views the question of inadvertence narrowly, effectively presuming that the plaintiff-debtor intentionally failed to disclose his claims unless he (1) lacked knowledge of the undisclosed claims or (2) had no motive for concealing them. *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1034 (8th Cir. 2016); *Love*, 677 F.3d at 262; *Eastman*, 493 F.3d at 1157-58; *Krystal*, 337 F.3d at 321; *Jackson*, 303 So. 3d at 458;

³ *See also Fulton County v. Ward-Poag*, 849 S.E.2d 465, 473 (Ga. 2020); *Jackson*, 303 So.3d at 457; *McCallister v. Dixon*, 303 P.3d 578, 585 (Idaho 2013); *Morgan Cnty. Hosp. v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008); *Skinner*, 173 P.3d at 303.

⁴ Courts endorsing this approach also often note that strict application of judicial estoppel may run counter to equity because it operates to the detriment of the plaintiff’s creditors and the benefit of alleged bad actors. *Slater*, 871 F.3d at 1187; *Ah Quin*, 733 F.3d at 275.

McCallister, 303 P.3d at 585; *Morgan Cnty. Hosp.*, 884 N.E.2d at 280; *Skinner*, 173 P.3d at 306. This approach has been popular, but recent years have seen some courts abandoning or limiting its application. See *Slater*, 871 F.3d at 1185 (overruling prior Eleventh Circuit cases applying negative presumption)⁵; *Ah Quin*, 733 F.3d at 272, 276 (clarifying that presumption is proper when plaintiff-debtor does not correct bankruptcy filing but improper after a correction); *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 F. App'x 38, 43 n.3 (5th Cir. 2019) (rejecting assertion that the Fifth Circuit presumes intentional nondisclosure and clarifying it “has always required courts to consider the facts before them in determining whether a debtor acted inadvertently”).⁶ And even courts applying a negative presumption recognize that the issue of intent or inadvertence should be determined as a matter of law only if the plaintiff-debtor, when confronted with the nondisclosure, presents no explanation. See *Dzakula*, 746 F.3d at 401; *Love*, 677 F.3d at 262-63; *Morgan Cnty. Hosp.*, 884 N.E.2d at 283.

In sum, we discern a strong and growing consensus among courts that granting summary judgment based on judicial estoppel is improper when the plaintiff-debtor raises

⁵ Among the cases *Slater* overruled was *Burnes v. Pemco Aeroplex Inc.*, 291 F.3d 1282, 1286-87 (11th Cir. 2002), which many courts have looked to as authority for applying a negative presumption. E.g., *Eastman*, 493 F.3d at 1157; *McCallister*, 303 P.3d at 585; *Robson v. Tex. E. Corp.*, 833 N.E.2d 461, 467 (Ind. Ct. App. 2005). As such, *Slater* may signal a trend away from the presumption.

⁶ Recent federal cases in Minnesota also may signal a trend away from the Eighth Circuit’s narrow approach by carefully considering various circumstances in concluding that bankruptcy debtors should not be judicially estopped from pursuing claims they initially failed to disclose. *United States v. Cameron-Ehlen Group, Inc.*, No. 13-CV-3003, 2020 WL 4476427, *7-8 (D. Minn. Aug. 4, 2020); *Nowling v. SN Servicing Corp.*, No. 19-CV-1605, 2020 WL 1244809, *5-8 (D. Minn. Mar. 16, 2020).

a fact question regarding inadvertence or mistake. And mindful that our supreme court disfavors harsh application of other preclusive doctrines, we conclude that Minnesota courts should adhere to this principle when applying judicial estoppel. *See Mach v. Wells Concrete Prod. Co.*, 866 N.W.2d 921, 926-27 (Minn. 2015) (stating that res judicata and collateral estoppel require consideration of whether the doctrine’s application would “work an injustice on the party against whom estoppel is urged” (quotation omitted)); *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (stating that “neither res judicata nor collateral estoppel is to be rigidly applied”).

The district court failed to do so here.⁷ It directed Parks not to submit an affidavit explaining his reason for not disclosing his Covidien claims earlier. It also disregarded Parks’s amendment of his bankruptcy filing solely because the amendment occurred after Covidien moved for summary judgment. In doing so, the district court correctly noted that many courts view a bankruptcy correction skeptically when it comes only after the specter of judicial estoppel has been raised. *E.g.*, *Jones*, 811 F.3d at 1034; *Love*, 677 F.3d at 266; *White*, 617 F.3d at 480; *Krystal*, 337 F.3d at 320-21. But even then, the timing of the correction is relevant to, not determinative of, a claim of inadvertence or mistake. *See Love*, 677 F.3d at 266 (criticizing “automatically” deeming nondisclosure “innocent” because of correction); *White*, 617 F.3d at 480 (observing that efforts to correct

⁷ Covidien contends Parks has forfeited any challenge to this failure because he did not argue to the district court that inadvertence should excuse his nondisclosure. We are not persuaded. Parks raised the issue by correcting his bankruptcy filing, asserting inadvertence, and directing the district court to caselaw unanimously endorsing the view that judicial estoppel is inappropriate when a failure to disclose a claim in bankruptcy filings was inadvertent.

nondisclosure before a motion to dismiss “are more important” than subsequent efforts); *see also Slater*, 871 F.3d at 1185 (suggesting consideration of “whether and under what circumstances the plaintiff corrected the disclosures”). We conclude that the district court erred by granting summary judgment. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion. We express no opinion as to whether Parks would be judicially estopped from pursuing his claims against Covidien under the proper legal analysis.

Reversed and remanded.