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IN THE

Supreme Court of Virginia

RECORD NO. 160311

SHERYL DENISE RICKETTS,

Appellant,

v.

CHARLIE EDWARD STRANGE, *et al.*,

Appellees.

BRIEF OF APPELLEE
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STATEMENT OF FACTS

This case arises out of a motor vehicle accident that occurred in the City of Danville on February 3, 2012 ("the accident"). (J.A. 1.) Appellant Sheryl Denise Ricketts ("Ricketts") alleges the accident to have occurred as the result of negligence on the part of appellee Charlie Edward Strange ("Strange") in the operation of his motor vehicle. (J.A. 1, 4.)

From February 3, 2012, forward, Ricketts considered Strange to be at fault for the accident. (J.A. 273, 275, 302-06.) By February 14, 2012, she had submitted a claim for personal injury and property damage as a result of the accident to Strange's automobile liability insurer. (J.A. 385-402.)

On September 21, 2012, Ricketts, with the assistance of counsel, filed a petition under Chapter 7 of the United States Bankruptcy Code. (J.A. 20.) She received a discharge in bankruptcy on December 18, 2012. (J.A. 22.) Of the $37,653.39 in medical expenses that she has claimed as a result of the accident, Ricketts had incurred $12,336.15 as of September 21, 2012. (J.A. 269-272, 277-79, 312, 315, 317-18, 358-361, 380-84.) She incurred another $3,709.00 of these expenses by the date of her discharge. (J.A. 269-272, 277-79, 312, 315, 317-18, 358-361, 380-84.)

Ricketts was asked in "Schedule B" of her bankruptcy petition to identify:

> 21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.

(J.A. 31.) In response, she answered, "None." (J.A. 31.) Ricketts similarly was asked to identify:

> 18. Other liquidated debts owed to debtor including tax refunds. Give particulars.

(J.A. 31.) In response, she answered:

> Potential funds due to Debtor unknown at this time, including State & Federal tax refunds, 9/12 interest in joint 2012 tax refund of approximately $9700 = $7274, debtor ½ interes [*sic*] = $3638, possible garnishment funds, insurance proceeds, proceeds related to claims or causes of action that may be asserted by the debtor, any claim for earned but unpaid wages, and/or inheritance.

(J.A. 31.) Ricketts assigned a value to this listing of $3,639.00. (J.A. 31.)

Elsewhere in Schedule B, Ricketts listed, in some detail, various items of personal property. (J.A. 29, 32-33.) Among these items were "5 Wedding Rings," a washer and dryer, a boat, various motor vehicles, "1 Pair of Eyeglasses," "4 Watches," a camera, "7 Lamps," and a treadmill. (J.A. 29, 32-33.) Nowhere in Schedule B did Ricketts mention Strange, the accident, or the claim she had pending with Strange's insurer. (J.A. 29-33.)

In "Schedule C" of her petition, Ricketts claimed an exemption for the very same assets she identified in Line Item 18 of Schedule B. (J.A. 35.) In

support of this exemption, she cited Virginia Code § 34-4, the standard Virginia "homestead" exemption. (J.A. 35.) Ricketts assigned the same value to this exemption that she did in Schedule B. (J.A. 35.) Nowhere in Schedule C did Ricketts mention Strange, the accident, or the claim she had pending with Strange's insurer. (J.A. 34-35.) Although she cited to numerous other statutes, more specific than Virginia Code § 34-4,[1] to support certain other exemptions she was claiming, nowhere in Schedule C did she make any reference to Virginia Code § 34-28.1, which exempts from creditor process claims for personal injury or wrongful death. (J.A. 34-35.)

Ricketts filed suit in this matter on January 16, 2014. (J.A. 1.) The statute of limitations applicable to her personal injury claim expired on February 3, 2014. (J.A. 1.) At no point prior to Ricketts' discharge in bankruptcy did the bankruptcy court enter an Order exempting her personal injury claim against Strange from her bankruptcy estate. (J.A. 20-22.) At no point prior to discharge was there any hearing or other effort to abandon Ricketts' personal injury claim. (J.A. 20-22.)

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[1] For example, Ricketts cited to Virginia Code § 34-26(8) in support of her claimed exemption for a 2000 Jeep Wrangler, Virginia Code § 34-26(6) in support of her claimed exemption for a pair of eyeglasses, and Virginia Code § 34-26(4) in support of her claimed exemption for women's clothing. (J.A. 34-35.) She likewise cited to Virginia Code § 34-34 in support of her claimed exemption relative to her 401(k) plan. (J.A. 34.)

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW

The resolution of the issues before this Court, both as to the trial court's ruling on Strange's Motion for Summary Judgment and its denial of Ricketts' Motion to Amend Pleadings, present pure questions of law subject to *de novo* review. *Thorsen v. Richmond SPCA*, ___ Va. ___, ___, 786 S.E.2d 453, 459 (2016); *Kocher v. Campbell*, 282 Va. 113, 712 S.E.2d 477 (2011), *cert. denied*, 132 S.Ct. 847 (2011); *James v. Peyton*, 277 Va. 443, 674 S.E.2d 864 (2009).

II. THE TRIAL COURT CORRECTLY HELD RICKETTS TO LACK STANDING TO SUE BASED ON HER FAILURE TO SCHEDULE WITH REASONABLE PARTICULARITY HER PERSONAL INJURY CLAIM AGAINST STRANGE, THEREBY RENDERING HER LAWSUIT AGAINST STRANGE A LEGAL NULLITY AND ENTITLING STRANGE TO SUMMARY JUDGMENT. [A.O.E. I]

As the trial court correctly held, at the time Ricketts filed suit on January 16, 2014, her personal injury claim against Strange was part of Ricketts' bankruptcy estate, assertable only by the trustee in bankruptcy. Ricketts, therefore, lacked standing to bring that action, rendering her lawsuit against Strange a legal nullity. Because Ricketts lacked standing, and did not

acquire standing prior to February 3, 2014, the trial court correctly granted Strange's Motion for Summary Judgment and dismissed Ricketts' lawsuit with prejudice.

A debtor's filing of a petition in bankruptcy creates, by operation of law, a bankruptcy estate administered by an appointed trustee. *Kocher*, 282 Va. at 117, 712 S.E.2d at 479 (citing 11 U.S.C. § 541 (2011)). "All the legal and equitable interests in property that the debtor had before the petition was filed pass to and become a part of the bankruptcy estate," under the trustee's control. *Id.* (citing *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1343-44 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988)). This includes "not only those causes of action which are pending in court, but also those which are only inchoate claims at the time of filing." *Id.*

A debtor's claim that passes to the bankruptcy estate remains enforceable only by the trustee unless and until the bankruptcy court restores the claim to the debtor. *Id.* There are two methods by which assets of a bankruptcy estate may be restored to the debtor. *Id.* at 117, 712 S.E.2d at 480. The first allows the trustee to abandon the assets after notice and hearing pursuant to 11 U.S.C. § 554. *Id.* Alternatively, abandonment may occur when listed assets remain unadministered upon closure of the bankruptcy case. *Id.* (citing 11 U.S.C. § 554(c)). The second method allows

the bankruptcy court to enter an order exempting the assets pursuant to 11 U.S.C. § 522. *Id.* "In the absence of abandonment or exemption, the assets remain a part of the bankruptcy estate." *Id.*

In accordance with 11 U.S.C. § 522, Virginia provides an exemption from creditor process for causes of action for personal injury. Va. Code Ann. § 34-28.1 (Michie 2016). "In order to claim the exemption, the debtor must list the cause of action as an asset in his [or her] schedule B and then claim it as exempt property on his schedule C using forms prescribed by the bankruptcy rules." *Kocher*, 282 Va. at 118, 712 S.E.2d at 480. "The bankruptcy court may thereafter enter an order exempting the listed property." *Id.* "If the debtor fails to follow this procedure, the cause of action, having become a part of the bankruptcy estate ... , remains so, and is enforceable solely by the trustee." *Id.* (citing *Koch Refining*, 831 F.2d at 1342). *See also Vanderheyden v. Peninsula Airport Commission*, 2013 U.S. Dist. LEXIS 399 (E.D. Va. Jan. 2, 2013) (applying *Kocher*). *See also Canterbury v. J.P. Morgan Acquisition Corp.*, 958 F. Supp.2d 637, 649-650 (W.D. Va. 2013), *affirmed*, 561 Fed. Appx. 293 (4th Cir. 2014) (citing "settled law" that "unless and until a cause of action, contingent or matured, is properly scheduled, and subsequently abandoned, the claim remains

property of the bankruptcy estate, even if the case has been closed, and the debtor lacks standing to pursue the claim.").

A debtor's duty of disclosure in scheduling assets and exemptions is one of "reasonable particularization under the circumstances." *In re Mohring*, 142 B.R. 389, 395 (Bankr. E.D. Cal. 1992), *affirmed*, 153 B.R. 601 (B.R.P. 9th Cir. 1993), *affirmed*, 24 F.3d 247 (9th Cir. 1994). Although not required "to itemize every dish and fork," *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986), a debtor "must furnish enough information" in her schedules "to put the trustee on notice of the wisdom of further inquiry." *Id.* at 206. *See generally Mohring*, 142 B.R. at 395 (debtor "must do enough itemizing to enable the trustee to determine whether to investigate further"). In keeping with the debtor's duty of disclosure, any ambiguity in a debtor's schedules is construed against the debtor. *Mohring*, 142 B.R. at 395.

Illustrative of the foregoing, *Mohring* involved a motion to avoid a lien on putatively exempt property under 11 U.S.C. § 522(f). *Id.* at 391. Under the category for household goods and furnishings in the debtor's Schedule B was the following entry: "At Debtor's Residence $1,000." *Id.* On Schedule C, the debtor claimed an exemption for "household goods and furnishings" valued at $1,000. *Id.* The court held the debtor's "generic" listing of

"household goods" to be "incomplete" and "unquestionably ambiguous." *Id.* at 395-96. The court construed this ambiguity against the debtor and denied avoidance of the lien. *Id.*

In *Payne*, plaintiff debtors submitted to the bankruptcy court a schedule of assets containing some entries that were specific (a nine year old refrigerator) and others that were general ("furniture" having a value of $615 and "household dishes and small appliances" having a value of $100). *Payne*, 775 F.2d at 203. Four months later, as part of the adjustment of a fire loss to the plaintiffs' residence, the plaintiffs submitted to their insurer a proof of loss that contained items that never were disclosed in the plaintiffs' bankruptcy schedules. *Id.* Following adjustment of the plaintiffs' claim, the trustee sought recovery of the insurance proceeds. *Id.* In finding, for the most part,[2] in favor of the trustee, the court reiterated the importance of honest reporting to the integrity of the bankruptcy system. *Id.* at 205. As submitted, the plaintiffs' schedules were incomplete and failed to put the trustee on notice of the need for further inquiry. *Id.* at 206. As to any of the plaintiffs' omitted assets that conceivably could be categorized as "furniture"

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[2] The Court ruled the debtors were entitled to the full value of what they lost in "clothing," on grounds that a specific statutory exemption allowed them this recovery. *Payne*, 775 F.2d at 205.

or "household dishes and small appliances," the court held the plaintiffs limited to recovering only the $615 and $100 value, respectively, that they identified for these categories in their bankruptcy petition. *Id.* "Rough justice, no doubt," the court concluded. *Id.* "But any other principle would encourage the making of excessively general claims in the hope that if omissions should be discovered, the debtors could argue that the omitted property was 'really' in some broadly worded category." *Id.* *Accord In re Soto*, 2013 Bankr. LEXIS 2926, *17 (Bankr. D. P.R. July 18, 2013) ("Generic categorizations of claimed exemptions do not provide adequate notice of the property claimed exempt."); *In re Stone*, 504 B.R. 908, 913 (Bankr. C.D. Ill. 2014) (noting potential for bad faith arising from debtor's description of "relatively valuable assets ... in vague or misleading terms" or "lump[ing]" those assets "together in general categories so as not to attract attention.")

In *Tilley v. Anixter, Inc.*, 332 B.R. 501 (D. Conn. 2005), the plaintiff debtor filed suit against the defendants for intentional infliction of emotional distress. *Tilley*, 332 B.R. at 503. The defendants moved to dismiss for lack of standing, on grounds that the plaintiff, in her prior bankruptcy, had failed to schedule her claim as an asset or claim it as exempt. *Id.* at 507. In Schedule B, the plaintiff had listed a "[c]laim against ex-husband and ex-husband's employer for back child support." *Id.* She included this same

language in Schedule C for property she claimed as exempt. *Id.* In support of her exemption, the plaintiff cited 11 U.S.C. § 522(d)(10)(D), which authorized an exemption for "the debtor's right to receive ... alimony, support, or separate maintenance ... ." *Id.* at 507, 510. Granting the defendants' motion, the court found the language the plaintiff used to describe her claim, read in light of the authority she cited in support of her exemption, showed that she scheduled "a state court claim for unpaid child support, not for intentional infliction of emotional distress." *Id.* at 510. Because the plaintiff's emotional distress claim existed while she was in bankruptcy, she should have scheduled that claim in her petition. *Id.* at 510-11. Because she did not do so, she lacked standing to sue the defendants for intentional infliction of emotional distress. *Id.* at 511.

Lastly, in *In re Wilmoth*, 412 B.R. 791 (Bankr. E.D. Va. 2009), upon which Ricketts relies, the plaintiff debtor was involved in a motor vehicle accident in 2005. *Wilmoth*, 412 B.R. at 794. Fourteen months later, he filed a voluntary petition under Chapter 7. *Id.* Three months after the filing of his petition, while his bankruptcy remained pending, the plaintiff filed suit for personal injuries he alleged to have sustained as a result of the accident. *Id.* The plaintiff never scheduled his personal injury claim as an asset. *Id.* He likewise never scheduled that claim as an exemption. *Id.* After receiving his

discharge, the plaintiff obtained leave to reopen his bankruptcy proceeding to schedule his personal injury claim as an asset and to claim that claim as exempt. *Id.* The trustee objected to the claimed exemption. *Id.* at 794-95. In denying the plaintiff's exemption, the court noted that the plaintiff, upon the filing of his Chapter 7 petition, was required to schedule his personal injury claim together with all of his other assets. *Id.* Although the trustee likely would have abandoned the claim had it been scheduled and the exemption claimed, the claim, by virtue of the plaintiff's failure to schedule it, remained an asset of the plaintiff's bankruptcy estate, enforceable only by the trustee. *Id.* It mattered not to the court that the plaintiff had scheduled as liabilities $80,992.00 in medical expenses that he had incurred as a result of the accident. *Id.* at 794. The plaintiff's personal injury claim was not disclosed and, thus, remained property of the bankruptcy estate. *Id.* at 795.

By contrast, in *In re Bonner*, 2005 Bankr. LEXIS 1683 (B.R.P. 6th Cir. Sept. 6, 2005), husband and wife debtors filed a Chapter 7 petition. *Bonner*, 2005 Bankr. LEXIS 1683, at *4. On Schedule B, they identified as property of the debtor wife an "Auto Accident Claim" with unknown value. *Id.* On Schedule C, the debtors again listed "Auto Accident Claim" with two different exemptions: one in the amount of $5,000 pursuant to Ohio Rev. Code Ann. § 2329.66(A)(12)(c) (which provides an exemption for a payment of

$5,000.00 or less "on account of personal bodily injury") and the second in the amount of $400 under Ohio Rev. Code Ann. § 2329.66(A)(18) (which permits an exemption of a "person's interest, not to exceed $400, in any property"). *Id.* Following discharge, the trustee moved to reopen the debtors' bankruptcy in order to administer the wife's personal injury claim as part of the bankruptcy estate. *Id.* at *5. In support of his motion, the trustee argued that the wife's claim had not been scheduled or administered during the course of the bankruptcy. *Id.* Acknowledging a debtors' duty to prepare and submit accurate and complete schedules with his or her bankruptcy petition, the court noted that a debtor must do enough itemizing to put the trustee and creditors on notice of the debtors' assets, including any potential claims. *Id.* at *8-10. Applying this standard,

> it is clear that the debtors' scheduling of "Auto Accident Claim" plainly and unambiguously included any claim that the debtors may have had for any personal injury arising out of the automobile accident. ... [I]t is common knowledge that an automobile accident may, and often does, result in personal injury. By listing "Auto Accident Claim," the debtors gave the Trustee sufficient information alerting him to the possible existence of a personal injury claim and the need for further investigation. In the event there was any doubt that the auto accident claim listed by the debtors involved a personal injury, that doubt would and should have been removed by the debtors' claimed $5,000 exemption for "personal bodily injury" resulting from the automobile accident.

Id. at *10-11. Accordingly, the court denied the trustee's motion. *Id.* at *15.

Similarly, in *Sandres v. Corrections Corp. of Am.*, 2010 U.S. Dist. LEXIS 113959 (E.D. Cal. 2010), the plaintiff filed suit against his former employer, alleging wrongful discrimination and retaliation. *Sandres*, 2010 U.S. Dist. LEXIS 113959, at *1. At the time he filed for bankruptcy, the plaintiff had consulted with an attorney, but had not yet filed suit. *Id.* at *7. In his bankruptcy petition, he identified the following in his amended Schedule B:

> Terry Roberts v. CA City Correctional Center (nothing has been filed yet the debtor has only consulted with this attorney)
> 213.487.4727 Robert Dexter Neman [sic] Attorney at Law
> Attorney: Robert Newman, Los Angeles
> Wstrn Ctr on Law & Poverty
> 3701 Wilshire Blvd #208
> Los Angeles, CA 90010-2809

Id. The employer moved to dismiss the plaintiff's lawsuit for lack of standing, on grounds that the plaintiff failed to identify his lawsuit in his bankruptcy schedules. *Id.* at *4-5. In denying the employer's motion, the court held the plaintiff's identification of his potential lawsuit against his employer, which was based on the information he had available to him, "sufficient to provide the trustee with all information necessary to conduct a proper investigation

of the asset, particularly in light of the fact that Plaintiff provided an estimated value of the lawsuit and contact information for the attorney with whom Plaintiff had discussed his case." *Id.* at *13-14. Because the plaintiff had scheduled his lawsuit with reasonable particularity, based on the information then existing, his interest in that lawsuit was automatically abandoned upon closure of the plaintiff's bankruptcy proceeding. *Id.* at *14. The plaintiff, thus, had standing to sue. *Id.* *See also Wahlman v. Datasphere Technologies, Inc.*, 2014 U.S. Dist. LEXIS 26319 (W.D. Wash. Feb. 27, 2014) (plaintiff debtor's scheduling of "EEOC claims" as asset sufficient to put creditors and trustee on notice of employment discrimination claim); *Vasquez v. Adair*, 253 B.R. 85 (B.R.P. 9th Cir. 2000) (debtor's listing of "slip and fall personal injury accident at work" for which recovery was "uncertain" was sufficient to put trustee on notice and allow for further investigation); *In re Furlong*, 437 B.R. 712, 714, 719 (Bankr. D. Mass. 2010), *affirmed*, 450 B.R. 263 (D. Mass. 2011), *affirmed*, 660 F.3d 81 (1st Cir. 2011) (debtor's listing of contingent and unliquidated "Claims for Breach of Contract (Andrew Donarumo et al.)" with "indeterminate" value sufficient to put trustee on notice that claims against Donarumo existed and that they had potential value for debtor's bankruptcy estate); *In re Johnson*, 361 B.R. 903 (Bankr. D. Mont. 2007) (debtors'

scheduling of interest in "CLASS ACTION SUIT AGAINST ASSOCIATES" with "unknown" value sufficient to allow trustee to properly investigate asset).

"The Bankruptcy Code imposes an express, affirmative duty" on a debtor "to disclose all assets including contingent and unliquidated claims." *McCorvy v. A&B Escrow Services, Inc.*, 2008 Wash. App. LEXIS 2698, *13 (Wash. App. Nov. 17 2008). "A debtor must disclose all possible causes of action, even if the likelihood of success is unknown." *Id.* "The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed." *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996).

A debtor's compliance with her disclosure obligation is "at the heart of the bankruptcy system." *In re Mazzola*, 4 B.R. 179, 183 (Bankr. D. Mass. 1980*), remanded*, 23 B.R. 263 (D. Mass. 1981). *Accord White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 480 (6th Cir. 2010) (bankruptcy system "depends on accurate and timely disclosures"; "extent of these efforts, together with their effectiveness, is important."); *Vanderheyden*, 2013 U.S. Dist. LEXIS 399, at *27 (debtor's compliance with disclosure obligation "preserve[s] the integrity" of judicial function of bankruptcy courts); *Wilmoth*,

412 B.R. at 799 ("While the Trustee must inspect the financial affairs of the Debtor, the integrity of the Trustee's inspection is dependent upon the honesty of the Debtor and the transparency of the information the Debtor presents to the Trustee, the Court, and creditors."); *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003) (debtor's disclosure obligations "at the very core of the bankruptcy process"); *Tilley*, 332 B.R. at 509. "[B]ankruptcy confers substantial benefits on the honest but unfortunate debtor." *Mohring*, 142 B.R. at 396. Such benefits, however, come with a price, in the form of the debtor's providing the necessary full and complete disclosure of assets and exemptions in her bankruptcy schedules. *Id.*; *Colvin*, 288 B.R. at 481.

In the case at bar, Ricketts filed her petition for bankruptcy on September 21, 2012. Upon the filing of her petition, her inchoate claim for personal injury as a result of the accident passed to her bankruptcy estate. Unless and until either abandoned or exempted, that claim remained part of Ricketts' bankruptcy estate, enforceable only by the bankruptcy trustee.

A review of Ricketts' bankruptcy petition discloses no listing of her personal injury claim as an asset in Schedule B. It likewise discloses no claim for an exemption as to this claim in Schedule C, nor any reference to or mention of Virginia Code § 34-28.1, which specifically exempts claims for personal injury. Despite her having been involved in the accident, for which

she held Strange responsible that very same day; her having submitted a claim for both personal injuries and property damage as a result of the accident to Strange's insurer; and her having incurred $12,336.15 in medical expenses by the date of her filing for bankruptcy that she attributed to the accident, Ricketts made no mention of the accident, Strange, or her claims against him in her bankruptcy petition.

To the extent Ricketts attempts to claim that her reference to "insurance proceeds" or "proceeds related to claims or causes of action that may be asserted by the debtor" in line item 18 of Schedule B somehow includes her personal injury claim against Strange, such attempt must fail. Not only is this language, like that disapproved of in both *Payne* and *Soto*, too broad and generic to be of any consequence, it, by its own terms, does not fit Ricketts' personal injury claim. Rather than a claim that "may be asserted," Ricketts' claim against Strange was already in progress by the time she filed her bankruptcy petition. In addition, Ricketts included this language in response to a question asking for information relative to "liquidated debts owed to [the] debtor," rather than inchoate claims such as her claim against Strange. Ricketts also referenced the general homestead exemption set forth in Virginia Code § 34-4 as support for her exemption of "insurance proceeds" or "proceeds related to claims or causes of action that

may be asserted by the debtor" in Schedule C, rather than Virginia Code § 34-28.1.

In addition, Ricketts buried the language upon which she relies among a number of very specific references to assets such as a washer and dryer, "5 wedding rings," a camera, and "1 Pair of Eyeglasses." She exempted many of these assets by citing to specific sections of the Code of Virginia that address those particular items. Ricketts easily could have employed the same level of specificity in disclosing her personal injury claim as a result of the accident with Strange and claiming an exemption with respect to that claim. Had she done so, the trustee would have been on notice of the claim and could have investigated further.

Ricketts was required to schedule her assets and exemptions with reasonable particularity under the existing circumstances, sufficient to place the bankruptcy court, trustee, and creditors on notice of the asset and/or exemption. This she did not do. At a minimum, Ricketts could have scheduled a "personal injury claim against Charlie Edward Strange" a "personal injury claim as a result of February 3, 2012, motor vehicle accident," a "claim for insurance proceeds as a result of 2012 motor vehicle accident," or even simply "motor vehicle accident." She also could have scheduled this information in the appropriate section of her petition and cited

to Virginia Code § 34-28.1, rather than the general homestead exemption. Because Ricketts did not schedule her personal injury claim against Strange with the requisite particularity, or with any particularity at all for that matter, that claim remains part of Ricketts' bankruptcy estate, enforceable only by the bankruptcy trustee. Accordingly, the trial court, in a straightforward application of *Kocher* and the other authority cited herein, properly held Ricketts to be without standing to sue.

"[A]n action filed by a party who lacks standing is a legal nullity" and "has no tolling effect on the statute of limitations." *Kocher*, 282 Va. at 119, 712 S.E.2d at 480 (citing *Johnston Mem. Hosp. v. Bazemore*, 277 Va. 308, 312, 672 S.E.2d 858, 860 (2009)). The statute of limitations applicable to Ricketts' personal injury claim expired on February 3, 2014. Va. Code Ann. § 8.01-243 (Michie 2016); Va. Code Ann. § 8.01-230 (Michie 2016). At no point prior to that date was a cause of action against Strange filed by anyone with legal standing to do so. Because Ricketts did not have standing to sue when she filed her lawsuit on January 16, 2014, and did not acquire standing prior to the expiration of the statute of limitations on February 3, 2014, her claim herein, as the trial court correctly held, is barred.

Ricketts states a preference for adjudicating claims on the merits rather than disposing of them for what she describes as "technical" reasons. Such

preference, however, ignores not only the result in *Kocher*, but also longstanding law in this Commonwealth regarding standing, the application of which does not depend on the merits of the claim being pursued. *Andrews v. American Health & Life Ins. Co.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988); *Biddison v. Virginia Marine Res. Comm'n*, 54 Va. App. 521, 527, 680 S.E.2d 343, 346 (2009). Indeed, in *Kocher*, the Court did not address the merits of the plaintiff's underlying personal injury claim in its ruling dismissing the plaintiff's lawsuit. Dismissal was appropriate based on the plaintiff's lack of standing to pursue it. *Kocher*, 282 Va. at 119, 712 S.E.2d at 480. Similarly, in *Bazemore*, the Court reversed the trial court's judgment granting the plaintiff a nonsuit and denying the defendant's motions to abate in a wrongful death action the plaintiff filed before she qualified as administrator of her decedent's estate. *Bazemore*, 277 Va. 308 at 315, 672 S.E.2d at 861-62. Because the plaintiff lacked standing to file the action, the Court, without addressing the merits of the action, dismissed the plaintiff's lawsuit with prejudice. *Id.*

Second, Ricketts' contention that her failure to schedule her personal injury claim is, in effect, much ado about nothing, given that the claim, had it been scheduled, would be exempt, fails to recognize the purpose and importance of the scheduling requirement in the first instance. A debtor is

required to schedule all assets in her bankruptcy petition, regardless of whether those claims are subject to a valid exemption. By failing to schedule her personal injury claim, Ricketts deprived the trustee of an opportunity to investigate the claim. She further deprived the trustee, the bankruptcy court, and Ricketts' creditors of the full and complete disclosure of her assets and liabilities that the bankruptcy statutes require. In *Kocher*, it mattered not that the plaintiff's personal injury claim may have been exempt had he disclosed it. *Kocher*, 282 Va. at 117-18, 712 S.E.2d at 480. Similarly, in *Wilmoth*, the bankruptcy court held the plaintiff's personal injury claim remained property of the bankruptcy estate, thereby providing the trustee alone with standing to pursue it, even though the claim, had it been properly scheduled and claimed timely as exempt, would, in all likelihood, have been abandoned by the trustee. *Wilmoth*, 412 B.R. at 795.

Another focus of Ricketts' argument is an alleged lack of prejudice to Strange or "anybody" else if she were to be allowed to prosecute her personal injury claim. The primary case upon Ricketts relies in support of her prejudice argument, *In re Poulette*, 493 B.R. 729 (Bankr. D. Md. 2013), addresses the concept of prejudice in a setting totally different from the one presented here. *Poulette* dealt with a bankruptcy trustee's objection to a debtor's claimed exemption for two causes of action in which she had an

interest at the time she filed for bankruptcy, but which she failed to schedule in her bankruptcy petition. *Poulette*, 493 B.R. at 730-31. Upon the reopening of the plaintiff's bankruptcy, the debtor amended her schedules to include her interest in the two causes of action and to claim those interests as exempt. *Id.* at 732. In rejecting the trustee's objection to the exemption, the bankruptcy court analyzed whether the debtor, who was unrepresented by counsel during the course of her bankruptcy, could prove "excusable neglect" under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure as the reason for her failure to schedule the causes of action in her bankruptcy petition. *Id.* at 733. Among the factors the court considered in analyzing the issue of "excusable neglect" was prejudice to the bankruptcy estate. *Id.* at 733-35 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)). At no point in *Poulette* was there any discussion or question of whether the debtor had standing to pursue her interest in the two causes of action based on her failure to schedule them in her bankruptcy petition. *See also Wilmoth*, 412 B.R. at 796-800 (analyzing under "excusable neglect" standard of Rule 9006 whether plaintiff could amend his schedules after closure of his bankruptcy case to include claim he failed to schedule while his bankruptcy was pending).

The trial court's grant of judgment in favor of Strange further was appropriate under the doctrine of judicial estoppel. "Judicial estoppel is a principle developed to prevent a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in court." *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007) (citing *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28 (4th Cir. 1995)). In bankruptcy, "[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend [her] schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001). *See also Vanderheyden*, 2013 U.S. Dist. LEXIS 399, at *33-34 (discussing application of judicial estoppel).

By failing to disclose her personal injury claim, Ricketts took the position with the bankruptcy court, the trustee, and her creditors that no such claim existed. She clearly had knowledge of her claim at the time she filed for bankruptcy and at the time she received her discharge. Her failure to schedule that claim as an asset in her bankruptcy petition judicially estops her from pursuing any claim against Strange as a result of the accident. For this reason, too, this Court should affirm the judgment of the trial court.

III. THE TRIAL COURT CORRECTLY DENIED RICKETTS' MOTION TO AMEND PLEADINGS, AS THERE WAS NO "MISNOMER" TO CORRECT AND RICKETTS COULD NOT SUBSTITUTE A NEW PARTY FOR ONE WHO LACKED STANDING TO SUE. [A.O.E. II & III]

In an effort to avoid the finality of her failure to comply with her disclosure obligations under the Bankruptcy Code, Ricketts, under the guise of correcting a "misnomer" pursuant to Virginia Code § 8.01-6, sought to amend her Complaint to identify the bankruptcy trustee, instead of herself, as the named plaintiff. (J.A. 421-22.) In the alternative, she sought leave to substitute the trustee as plaintiff pursuant to Rule 3:17 of the Supreme Court of Virginia, based on Ricketts' allegedly becoming "incapable of pursuing" her personal injury action in light of the trial court holding she lacked standing and the trustee's allegedly being "the proper successor in interest." (J.A. 421-22.)

"A misnomer is a mistake in name, but not person." *Rockwell v. Allman*, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971); *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 172 (1996). Where "the wrong person [is] named ... it cannot be corrected under" § 8.01-6. *Rockwell*, 211 Va. at 561, 179 S.E.2d at 472. Rather, "[t]he only resolution in such a case, in the absence of a statute of limitations bar, is to commence a new action against the proper party." *James*, 277 Va. at 456, 674 S.E.2d at 870.

Illustrative of the appropriate application of these principles, and the result the trial court reached on Ricketts' Motion, is *Cook v. Radford Community Hosp.*, 260 Va. 443, 536 S.E.2d 906 (2000). In *Cook*, the plaintiff, who had been declared incapacitated pursuant to former Virginia Code § 37.1-132, filed suit for medical malpractice. *Cook*, 260 Va. at 446, 536 S.E.2d at 907. The defendants moved to dismiss, on the grounds that, because a guardian had been appointed for the plaintiff, Code § 37.1-141 required that the guardian, not the plaintiff, be the one to file suit. *Id.* Agreeing that the plaintiff did not have standing to sue in her own right, the trial court denied the plaintiff's motion to amend her pleadings under either § 8.01-6, or the misjoinder statute, Code § 8.01-5, and dismissed the plaintiff's lawsuit. *Id.* Affirming, this Court noted, as to the misnomer statute, that "[a] misnomer 'arises when the right person is incorrectly named, not where the wrong person is named.'" *Id.* at 451, 536 S.E.2d at 910 (quoting *Swann*, 252 Va. at 184, 476 S.E.2d at 172). "In this case the 'right person' was [the plaintiff's] guardian." *Id.* Rather than incorrectly naming the right person, the plaintiff named the "wrong person," herself. *Id.* Accordingly, there was no misnomer that an amendment could correct.

Ricketts and the trustee are separate entities. What Ricketts sought to do by her Motion was substitute the trustee for herself as the party plaintiff.

By virtue of her lacking standing, Ricketts was the wrong person to file this action. As in *Cook*, she cannot cure that defect by seeking leave to substitute someone else in her place to prosecute her claim.

As to Ricketts' attempt under Rule 3:17 of the Supreme Court of Virginia to substitute the trustee in her place as her alleged successor in interest, such attempt is as flawed as her attempt under § 8.01-6. Under Rule 3:17(a), "[i]f a person becomes incapable of prosecuting or defending because of death, disability, conviction of felony, removal from office, or other cause, a successor in interest may be substituted as a party in such person's place." Va. S. Ct. Rule 3:17(a). By its terms, this provision applies to a party who "becomes incapable" of prosecuting or defending an action, not one who was incapable of such prosecution or defense in the first instance.

Rather than becoming incapable of prosecuting this action once it was pending, Ricketts lacked the capacity to prosecute this matter the day she filed suit. Accordingly, Rule 3:17 does not apply.

In *The Chesapeake House on the Bay, Inc. v. Virginia Nat. Bank*, 231 Va. 440, 344 S.E.2d 913 (1986), the plaintiff, an incorporated condominium unit owners association, brought suit for damages arising from defects in the construction of a condominium project. *Chesapeake*, 231 Va. at 441, 344 S.E.2d at 914. The defendants demurred on the grounds that the plaintiff

lacked standing and that a claim by anyone with standing was barred by the statute of limitations. *Id.* The trial court sustained the demurrer. The plaintiff then moved for leave to add the individual condominium owners as parties. *Id.* at 441, 344 S.E.2d at 914-15. The trial court denied the plaintiff's motion, ruling that "[a] new party plaintiff cannot be added or substituted for a party plaintiff who had no standing to institute" the original suit. *Id.* at 441-42, 344 S.E.2d at 914-15. Affirming, this Court held Virginia's liberal policy of allowing amendments to pleadings "has always been subject to the limitation that a new plaintiff may not be substituted for an original plaintiff who lacked standing to bring the suit." *Id.* at 442-43, 344 S.E.2d at 915. Rejecting the plaintiff's reliance on *Jacobson v. Southern Biscuit Co., Inc.*, 198 Va. 813, 97 S.E.2d 1 (1957), cited by Ricketts, the Court ruled that, subject to the statute of limitations, "the sole remedy" in such a situation "is a nonsuit followed by a new action brought in the name of a proper plaintiff."[3] *Id.* at 443, 344 S.E.2d at 915.

> Regardless of its form, the substance of [the plaintiff's] motion in this case was for the substitution of new parties plaintiff, who would have standing to maintain the action, in lieu of [the plaintiff], which lacked such standing. In *Norfolk So. R. Co. v.*

[3] In *Bazemore*, the Court clarified its ruling in *Chesapeake* to make clear that a lawsuit filed by someone without standing cannot be nonsuited, since that lawsuit has no legal effect. *Bazemore*, 277 Va. at 315, 672 S.E.2d at 861 (citing *Nerri v. Adu-Gyamfi*, 270 Va. 28, 31, 613 S.E.2d 429, 430 (2005)).

> *Greenwich Corp.*, 122 Va. 631, 95 S.E. 389 (1918), we equated such a substitution with the assertion of a new cause of action and held an order permitting such a substitution to be reversible error."

Id. Accord Wells v. Lorcom House Condominiums' Council of Co-Owners, 237 Va. 247, 254, 377 S.E.2d 381, 385 (1989) (citing *Greenwich Corp.*).

As found by the trial court, Ricketts lacks standing to prosecute a personal injury claim against Strange as a result of the accident. Because Ricketts' filing of this action did nothing to toll the statute of limitations applicable to such claim, any effort at this point on the part of someone with standing to prosecute that claim is time barred. Ricketts may not circumvent the finality of this result by characterizing her filing of this lawsuit as a misnomer or by seeking to substitute someone with standing in place of herself. Accordingly, the trial court correctly denied Ricketts' Motion to Amend Pleadings and further was correct in granting summary judgment in favor of Strange. This Court should affirm the trial court's judgment.

CONCLUSION

As the trial court held, Ricketts lacked standing to file this action against Strange. Because of her lack of standing, Ricketts' filing of this action was a legal nullity and did not nothing to toll the statute of limitations applicable to her personal injury claim. The statute of limitations having

expired, Ricketts' claim against Strange in this action is barred. There was no misnomer to correct and no basis for substitution of the trustee as plaintiff in Ricketts' place.

For these reasons, Strange respectfully requests that this Court affirm the judgment of the trial court in Strange's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies compliance with Rule 5:26 of the Supreme Court of Virginia and that on this 19th day of August, 2016, a true and correct copy of the foregoing was mailed via electronic and first class United States mail to the following:

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