

In the Motion, Plaintiff claimed RRF was his “sole source of income” and he was RRF’s sole operator. (Exhibit 1, p. 11).

Subsequently, on March 17, 2022, Plaintiff was involved in a vehicular accident (“Accident”) which ultimately led to this lawsuit. On December 21, 2023, within Plaintiff’s bankruptcy, the Trustee filed a Final Report and Accounting. (Exhibit 1, pp. 15-17). The Trustee indicated there had been \$108,385.36 in unsecured claims; Calob had made payments of \$26,368.75; \$12,790.46 had been disbursed to the creditors; and \$13,578.29 had been used for expenses of administration. (Exhibit 1, pp. 15-17). Thereafter, Plaintiff’s bankruptcy was closed and the docket reflects the following entry (Exhibit 1, pp. 19-20).

01/24/2024	137	Final Decree. The estate of the debtor has been fully administered. The trustee is discharged from any further duties as trustee on this case, the bond is canceled, and the case is closed. (cew) (Entered: 01/24/2024)
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Less than two (2) months later, on March 12, 2024, Plaintiff filed his lawsuit arising out of the Accident. In responding to Interrogatories, Plaintiff later stated:

INTERROGATORY NO. 5

In your bankruptcy filed under case number 18-01444, did you identify your interest in this accident, or claim, as an asset, to the trustee, before the bankruptcy was closed, and if so, state the date you made such identification and the method you used.

ANSWER: Objection. Plaintiff objects to the foregoing Interrogatory to the extent the same requests information which is irrelevant. Subject to, and without waiving, said objection,

Plaintiff states as follows:

No. (Exhibit 2).

II. Standard

Summary judgment is appropriate and shall be rendered when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Ind. Trial Rule 56(c)*. The party moving for summary judgment bears the initial burden of proving the propriety of summary judgment and all rational assertions of fact and reasonable inferences to be resolved therefrom are deemed to be true and viewed in the nonmovant's favor. *Ramon v. Glenroy Constr. Co.*, 609 N.E.2d 1123, 1127 (Ind. Ct. App. 1993).

The movant must establish the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law before the burden will shift to the nonmovant to file affidavits or other materials showing the existence of a genuine issue for resolution by the factfinder. *Callis v. State Auto. Insurance Co.*, 579 N.E.2d 129, 131 (Ind. Ct. App. 1991). A defendant is entitled to judgment as a matter of law when it shows that the undisputed material facts negate at least one element of the plaintiff's claim for relief. *Moore v. Sitzmark Corp.*, 555 N.E.2d 1305, 1307 (Ind. Ct. App. 1990).

III. Argument

A. Summary Judgment is Proper Because Plaintiff is Judicially Estopped From Pursuing This Lawsuit

Although there is no "exhaustive formula" for assessing judicial estoppel, courts focus on: 1) whether a litigant's argument is clearly inconsistent with an earlier argument; 2) whether the litigant successfully persuaded a court to accept an earlier argument; and 3) whether the litigant's actions would result in an unfair advantage. *Red Lobster Restaurants LLC v. Fricke*, 234 N.E.3d 159, 169-170.

Here, Plaintiff's position, in this lawsuit, that he is entitled to compensation for his injuries is inconsistent with his representations to the Bankruptcy Court that he did not have a right to receive payment on account of personal bodily injury. Likewise, Plaintiff successfully persuaded the Bankruptcy Court to discharge his debts, in part, by not providing a full picture of his assets. Finally, Plaintiff's actions resulted in an unfair advantage because he disposed of \$108,385.36 in debt by paying \$26,368.75, over time, but now seeks to retain any compensation associated with this lawsuit exclusively for himself. Further, Plaintiff testified at his deposition that RRF was "more of a hobby" and that while he was performing activities through RRF, he was also driving a dump truck for Wesley Enterprises, Huber, and 77 (Dep. pp. 6-8) which appears to run contrary to April 24, 2018, representation that RRF was his sole source of income. In light of these undisputed facts, Plaintiff is judicially estopped from pursuing this lawsuit and summary judgment is appropriate.

B. Summary Judgment is Proper Because Plaintiff is Not the Real Party In Interest

Because Plaintiff's accident happened after his Bankruptcy Petition was filed, but before his Bankruptcy case was closed, his cause of action, should have been disclosed to the Bankruptcy Court. Indeed, a debtor's personal injury claim that is post-petition, post-confirmation, is property of the estate under § Section 1207 of the Bankruptcy Code.

(a) Property of the estate includes, in addition to the property specified in section 541 of this title--

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.¹

Pursuant to *Red Lobster*, although Plaintiff may have standing to pursue this lawsuit, he is not the real party in interest. Indeed, in *Red Lobster* the Supreme Court concluded a Chapter 13 debtor who failed to disclose a post-petition accident giving rise to injury should have been afforded an opportunity to substitute the trustee as the real party in interest before dismissing the debtor's lawsuit. *Id.* at 169. Here, Plaintiff has made no effort to substitute the trustee as the real party in interest and therefore the case should be dismissed.

IV. Conclusion

There is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

GOODIN ABERNATHY, LLP

/s/ Karl G. Popowics

Karl G. Popowics

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by the Court's electronic filing system to:

Thomas S. Bowman tsb@awhkc.com Corwin S. Marcum csm@awhkc.com
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¹ *see In Re Padula*, 542 B.R. 753 (Bankr. E.D. Va. 2015) [holding that a debtor's personal injury claim that was post-petition was property of the kind specified in § 541] *see also Red Lobster Restaurants LLC v. Fricke*, 234 N.E.3d 159, 167 (Ind. 2024) [observing estate includes assets the debtor acquires after commencement of the case but before the case is closed].

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