No. _____

In the Supreme Court of the United States

SANDRA MARSHALL,
Petitioner,
v.

HONEYWELL TECHNOLOGY SYSTEMS INC.;
L-3 COMMUNICATIONS GOVERNMENT SERVICES INC.,
also known as EER SYSTEMS INC.; SGT, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debtor's oral disclosure to the bankruptcy trustee of a pending administrative matter is material evidence of mistake or inadvertence sufficient to defeat a motion for summary judgment on the ground of judicial estoppel in civil litigation arising out of the administrative matter?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is Sandra Marshall, who is not a corporation.

Respondents are:

Honeywell Technology Solutions, Inc. ("HTSI"). HTSI's parent corporation is Honeywell International, Inc., a publicly-traded corporation with no parent corporation. State Street Corporation, including its direct or indirect subsidiaries in their various fiduciary and other capacities, owns more than 10% of Honeywell International's stock.

L-3 Communications Government Services, Inc., also known as EER Systems, Inc., and L-3 Services, Inc., Global and Security Engineering Services, and presently known as Engility Corporation. On July 17, 2012, L-3 Communications Government Services, Inc. divested Engility Holdings, Inc. ("Holdings"), in a spin transformation, establishing Engility Holdings, Inc. L-3 Services, Inc., contributed to Holdings, which was renamed Engility Corporation.

SGT, Inc. SGT has no parent company or publicly-traded entity that holds 10% or more of its stock.

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The July 12, 2016 panel opinion of the Court of Appeals for the District of Columbia Circuit, with dissenting opinion by Circuit Judge Griffith (App. 22-27), is reported at 828 F.3d 923 (D.C. Cir. 2016) and reprinted in the Appendix at App. 1-27. The judgment of the appellate court is reprinted in the Appendix at App. 28-29. The opinion of the U.S. District Court for the District of Columbia granting the motion for summary judgment on judicial estoppel grounds of each of the Respondents is reported at 73 F. Supp. 3d 5 and reprinted in the Appendix at App. 30-42. The final order of the district court is reprinted in the Appendix at App. 43.

JURISDICTION

The District of Columbia Circuit Court of Appeals filed its decision affirming the final order of the U.S. District Court for the District of the District of Columbia on July 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the court of appeals' decision on a writ of certiorari.

STATEMENT

Petitioner Sandra Marshall worked at the National Aeronautics and Space Administration ("NASA") as a voice control manager, where her employers were Respondent Honeywell Technology Solutions, Inc. ("HTSI"), a government contractor, and Respondent L-3 Communications Government Services, Inc., now known as Engility Corporation, a subcontractor. (App. 2.) In 2003, Respondent SGT, Inc., took over the subcontract under HTSI. Although Mrs. Marshall had worked at NASA for 25 years at the time, SGT

interviewed her but did not hire her (App. 2). In response to her termination from employment, on December 29, 2003, Mrs. Marshall dual-filed charges of discrimination based on race and sex, as well retaliation, with a local Maryland human relations commission and the Equal Employment Opportunity Commission ("EEOC"). In February 2004, she filed similar charges against HTSI and Engility. (App. 2-3.) She retained attorney Jo Ann P. Myles as counsel for her employment discrimination claims in August 2005. (App. 3, 72.)

In September 2005, Mrs. Marshall filed a Chapter 7 bankruptcy petition in the U.S. District Court for the District of the District of Columbia. (App. 3, 49, 83.) She proceeded pro se and did not seek the assistance of Ms. Myles, whom she knew was not a bankruptcy attorney and did not practice bankruptcy law. (App. 3, 83-85 and 97-99.) Mrs. Marshall did not list her three employment discrimination administrative claims on her "Statement of Financial Affairs" or on any of the schedules submitted in connection with the bankruptcy petition. (App. 5.) She explained that she was not aware that she was required to list those administrative claims on her bankruptcy filings but she orally disclosed the information to the Bankruptcy Trustee at her creditors meeting. (App. 68-69, 83-85 and 98.)

On November 10, 2005, two months after she filed her bankruptcy petition pro se, Mrs. Marshall attended the section 341 (11 U.S.C. § 341) creditors' meeting with Bankruptcy Trustee William White. No creditors attended the meeting. In response to the trustee's written interrogatories and questioning by the trustee,

Ms. Marshall disclosed that she had a pending EEOC claim against HTSI. (App. 68-70.) She gave him contact information for her discrimination attorney, Ms. Myles. (App. 69.) The trustee contacted Ms. Myles, who reported that Mrs. Marshall had filed administrative discrimination charges against HTSI, Engility and SGT and gave him an estimate as to the value of the claims. (App. 5-6, 74-75, 83-85.) In response to the trustee's question as to what she was seeking in her administrative proceeding, Mrs. Marshall stated that she was seeking her job back. The trustee suggested that there might be some liability for money compensation, but Mrs. Marshall was unable to give him that information. (App. 70-71.) Mrs. Marshall submitted an affidavit stating that she was unaware that she should have amended her bankruptcy schedules to list her pending administrative claims after disclosing the information to the trustee. (App. 85, 99.)

On December 30, 2005, Mrs. Marshall filed a lawsuit against HTSI, Engility, and SGT alleging a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (App. 6.) On January 4, 2006, Ms. Myles advised the trustee's secretary that she had filed Mrs. Marshall's age discrimination complaint, but that the administrative discrimination claims were still pending. (App. 74-75.) In apparent response to knowledge of Mrs. Marshall's employment discrimination claims, both administrative and civil, the trustee sent out a notice of possible dividends to creditors on January 20, 2006. (App. 86-92.) The bankruptcy court discharged Mrs. Marshall from bankruptcy on February 13, 2006, and the trustee was

discharged and the case was closed because there were no assets in the estate. (App. 7, 54-55.)

In 2007, Mrs. Marshall amended her complaint in the age discrimination suit to add claims for race and sex discrimination and retaliation, based on the administrative charges for which she had received right-to-sue letters. (App. 7-8.) After the district court dismissed some of Mrs. Marshall's claims, the parties proceeded to discovery. On December 18, 2009, the district court dismissed the complaint without prejudice on the ground that Mrs. Marshall lacked standing. The district court reasoned that because the administrative discrimination claims were pending when Mrs. Marshall filed her bankruptcy petition, those causes of action belonged to the bankruptcy estate, not Mrs. Marshall, and only the trustee as the real party in interest had standing to pursue the discrimination claims. Since Mrs. Marshall did not list those administrative claims on her bankruptcy schedules, the district court concluded that the trustee did not abandon that estate property when he failed to intervene. (App. 8-9.)

In January 2010 the bankruptcy promptly granted Mrs. Marshall's motion to reopen her bankruptcy case. In March 2010 she amended her bankruptcy schedules to include the lawsuit as an asset valued at $1,000,000 and naming her attorney, Ms. Myles, as a secured creditor with a claim of at least $150,000. (App. 9.) Mrs. Marshall did not file an amended Schedule C claiming an exemption for the proceeds of the action. (App. 47, 57.) In June 2010, the district court granted the trustee's motion to reinstate Mrs. Marshall's employment discrimination case. The trustee

abandoned the case in early 2011, and the claim reverted to Mrs. Marshall. (App. 9.)

The district court granted Respondents' motions for summary judgment on the ground of judicial estoppel. (App. 42.) Applying an abuse-of-discretion standard of review (App. 10-11), the D.C. Circuit Court of Appeals affirmed the lower court and rejected Mrs. Marshall's argument that judicial estoppel did not apply, because she and her attorney disclosed the three administrative proceedings pending at the time she filed for bankruptcy and that any omission was due to mistake or inadvertence. (App. 15-21.) Judge Griffith filed a dissent, pointing out that in his view summary judgment was inappropriate since all evidence should have been evaluated in a light most favorable to Mrs. Marshall as the nonmoving party, and evidence that she and her attorney had orally disclosed the administrative claims to the bankruptcy trustee had raised a genuine issue of material fact on the issue of whether her failure to include the administrative claims on the bankruptcy papers was due to deception or due to mistake or inadvertence. (App. 22.)

REASONS FOR GRANTING THE PETITION

The Petition Should Be Granted in Order to Resolve a Split in the Circuits as to What Constitutes Material Evidence of Mistake or Inadvertence Sufficient to Defeat a Motion for Summary Judgment on the Ground of Judicial Estoppel in a Bankruptcy Context

The doctrine of "judicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)) (brackets added). The purpose of this doctrine "is 'to protect the integrity of the judicial process,' *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment,' *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993))." *Id.* at 749-50.

This Court has identified three factors that courts consider in deciding whether to apply this equitable doctrine:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled

> . . . . [T]hird[,] . . . whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted). Even if a court finds that each of these factors supports judicial estoppel, however, this Court has instructed that courts should "resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *Id.* at 753 (citation omitted).

Although this Court has cautioned that the foregoing "factors . . . do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," *id.* at 751, when a defendant in civil litigation raises judicial estoppel in order to bar a plaintiff from going forward with a claim that was not disclosed in the plaintiff's bankruptcy, several circuits, including the D.C. Circuit in this case, have treated the factors as just that, inflexible prerequisites. On the issue of whether the failure to disclose a pending civil or administrative claim in the bankruptcy was due to mistake or inadvertence, these courts hold that "in considering judicial estoppel for *bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999) (emphasis in original) (footnote omitted), *cert. denied*, 528 U.S. 1117 (2000); *see also Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1034 (8th Cir. 2016) (following *In re Coastal Plains*); *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1157-58

(10th Cir. 2007) (same); *Barger v. City of Cartersville,* 348 F.3d 1289, 1295-97 (11th Cir. 2003) (same). Under the circular reasoning of this inflexible approach, a motive for concealment can be inferred from the simple failure to disclose valuable assets in bankruptcy schedules, even the contingent assets of a pending administrative or civil cause of action. *See, e.g.*, *In re Flugence*, 738 F.3d 126, 130-31 (5th Cir. 2013)*; Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287-88 (11th Cir. 2002). In short, the failure to disclose results in a presumption of deceit.

Other courts, eschewing the inflexible "presumption of deceit" approach, which always leads to judicial estoppel, have opted for an examination of all evidence relevant to the plaintiff's subjective intent in filling out the bankruptcy schedules, not just whether the disclosure was made in writing on approved bankruptcy forms. These courts rely on the ordinary understanding of "mistake" and "inadvertence," not the constrained definition adopted by courts employing the inflexible approach. *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 276-77 (9th Cir. 2013). In *Ah Quin*, for example, the Ninth Circuit Court of Appeals reversed a grant of summary judgment on judicial estoppel grounds because it found that the conflicting evidence in the record created a genuine issue of material fact as to whether the failure of an employment discrimination plaintiff to list that claim in her bankruptcy filing was due to mistake or inadvertence. The plaintiff submitted an affidavit swearing that when she reviewed what she found to be vague bankruptcy schedules she did not think that she

had to disclose her pending lawsuit. Her affidavit also stated that she had listed her employment discrimination attorney as a creditor on the schedules and would not have done so had she intended to conceal the lawsuit. The defendant sought to overcome that affidavit by submitting evidence of what the court characterized a muddled colloquy with the bankruptcy court that arguably, but not conclusively, supported a conclusion that the plaintiff was put on notice that she was obligated to disclose the suit. In addition, the defendant pointed out that the plaintiff did not reopen the bankruptcy in order to amend the schedules to list the discrimination claim until after the defendant raised judicial estoppel in the discrimination litigation, which suggested deceit. However, because the evidence in the record suggested both mistake and deceit, and because all evidence had to be resolved in favor of the plaintiff on summary judgment, the Ninth Circuit vacated the grant of summary judgment to the employer. *Id.* at 277-78.

Of particular relevance to this matter, in which Mrs. Marshall and her attorney each submitted an affidavit attesting that they orally notified the trustee of the three related administrative discrimination charges, courts employing a more flexible approach to judicial estoppel have found that a plaintiff's affidavit stating that she disclosed a claim to the bankruptcy trustee orally is material evidence defeating an inference on summary judgment that she concealed her claim from the bankruptcy trustee or the creditors. *See, e.g.*, *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 547 (7th Cir. 2014); *Matthews v. Potter*, 316 F. App'x 518, 522 (7th Cir. 2009); *Eubanks v. CBSK Fin. Group*, 385 F.3d 894, 898 (6th Cir. 2004). Likewise, evidence

that plaintiff's bankruptcy counsel freely communicated with the bankruptcy trustee about a pending matter that was excluded from the bankruptcy schedules is evidence that the omission was inadvertent. *Stephenson v. Malloy*, 700 F.3d 265, 275 (6th Cir. 2012). While evidence of specific intent may not be relevant to the narrow definition of mistake and inadvertence set forth by the Fifth Circuit in *In re Coastal Plains*, it is plainly relevant to the ordinary meaning of those words and the approach promoted by the Ninth Circuit in *Ah Quin*.

While the D.C. Circuit professed not to have chosen sides in the debate between the inflexible and the flexible approaches to judicial estoppel in the bankruptcy context (App. 20), in refusing to evaluate Mrs. Marshall's oral disclosure to the trustee as part of claim of mistake or inadvertence, the court below clearly chose the inflexible approach. This approach is inconsistent with the approach to judicial estoppel established by this Court in *New Hampshire v. Maine* and runs counter to the equitable nature of the remedy.

Moreover, there is nothing unique to bankruptcy that justifies such harsh treatment of debtors who wish to pursue a claim for damages. As the dissenting judge below stated with regard to the flexible approach:

> This straightforward approach to mistake is particularly appropriate in the bankruptcy context, where "[h]onest mistakes and oversights are not unheard of." *Spaine*, 756 F.3d at 548. Indeed, a major reason that trustees meet with debtors in the first place is to prevent inadvertent errors on bankruptcy forms, which are often filled out by people like Marshall who

> have little knowledge of the legal system. *See id.* The bankruptcy code clearly anticipates that mistakes might happen; it requires trustees to investigate debtors' financial affairs and meet with them to talk about their assets and liabilities, 11 U.S.C. §§ 341, 704(a)(4), and the Federal Rules of Bankruptcy Procedure allow amendments to initial filings, Fed. R. Bankr. P. 1009(a).

(App. 25-26.)

The D.C. Circuit's approach to judicial estoppel demands perfection in the filing of bankruptcy schedules, even though the bankruptcy rules and bankruptcy code allow for honest mistakes. The inflexible approach serves to punish debtors who may have been confused by the applicable rules when the bankruptcy law would not punish those debtors. In this case, for example, if the bankruptcy court had reason to believe that Mrs. Marshall had defrauded the bankruptcy court or otherwise deceived the trustee or the creditors by failing to disclose her three administrative proceedings in written filings, the court undoubtedly would not have readily reopened her bankruptcy case at her request in January 2010, and the court would not have allowed her to amend her schedules to list the administrative claims. Similarly, if the trustee had been deceived by Mrs. Marshall's failure to disclose the administrative proceedings in writing, he would not have moved to reinstate her employment discrimination case following reopening of the bankruptcy case and amendment of the schedules.

The fact that the trustee sent out a notice of possible dividends to creditors on January 20, 2006 and

took other action, after oral disclosure of Mrs. Marshall's pending employment discrimination claims (App. 86-96.), and before discharging her from bankruptcy on February 13, 2006 (App. 7, 54-55.), supports Mrs. Marshall's assertion of oral disclosure and is evidence that the trustee and creditors were not deceived about the existence of Mrs. Marshall's claims. In addition, the fact that Mrs. Marshall did not file an amended Schedule C claiming an exemption for the proceeds of the employment discrimination action when her bankrupcty case was reopened in 2010 (App. 47, 57.) is further evidence that she had no intent to reap the benefits of any recovery to the detriment of her creditors. Had she intended to deprive her creditors of a recovery from any proceeds of her employment discrimination claim, she would have claimed an exemption. The decisions of the district court and the circuit court finding that Mrs. Marshall engaged in deceptive behavior, therefore, run counter to her treatment by the bankruptcy court.

The purpose of judicial estoppel is to protect the integrity of the court, but the integrity of the bankruptcy court was not besmirched by Mrs. Marshall's failure to disclose her administrative claims in writing, where she and her employment discrimination attorney disclosed all of the claims to the bankruptcy trustee, who acted on that knowledge by notifying the creditors about the possibility of assets. Likewise, the district court was not tarnished by Mrs. Marshall's failure to disclose her administrative claims in writing where the bankruptcy case progressed with full knowledge of those claims, and Respondents were not tricked into defending Mrs. Marshall's claims. As the dissenting judge pointed out:

> Furthermore, I see little to be gained by jumping to the conclusion that Marshall lied. When we apply judicial estoppel based on bankruptcy omissions, the costs primarily fall not on the plaintiff, but on her creditors, who might otherwise recover assets from successful lawsuits. *See Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006); *Ah Quin,* 733 F.3d at 276 ("If Plaintiff's bankruptcy omission was mistaken, the application of judicial estoppel in this case would do nothing to protect the integrity of the courts, would enure to the benefit only of an alleged bad actor, and would eliminate any prospect that Plaintiff's unsecured creditors might have of recovering."). Here, the defendant corporations, who are accused of unlawful conduct, will get a windfall at the expense of Marshall's creditors, who are accused of nothing at all.

(App. 26.)

It may be appropriate in limited circumstances where there is absolutely no evidence of mistake in the ordinary sense of the word to draw an inference of deceit based on the lack of evidence that the debtor lacked knowledge of the undisclosed claims or had no motive to conceal those claims. *See, e.g.*, *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 800 (D.C. Cir. 2010) (court properly granted summary judgment in favor of employer on judicial estoppel grounds where employment discrimination plaintiff selectively disclosed his liabilities in bankruptcy proceeding, concealed his assets, and offered no evidence that he made a mistake in failing to disclose his lawsuit in the

bankruptcy schedules). However, where, as here, a plaintiff offers admissible evidence that she orally disclosed an administrative claim to the bankruptcy trustee, there is no policy reason for a court to ignore this evidence of a lack of subjective intent to deceive the trustee or the creditors. As the dissenting judge correctly noted, the result of excluding this evidence is a windfall to Respondents at the expense of Mrs. Marshall's creditors.

This Court should instruct the courts that in entertaining a motion for judicial estoppel in a bankruptcy context, they should consider all evidence of the subjective intent of the plaintiff not to deceive the bankruptcy court by failing to disclose assets, including pending administrative and civil actions, on bankruptcy schedules or other financial filings. Moreover, the court should make it clear that a debtor's oral disclosure to the bankruptcy trustee of a pending administrative matter is material evidence of mistake or inadvertence sufficient to defeat a motion for summary judgment on the ground of judicial estoppel in civil litigation arising out of the administrative matter.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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