IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAYMOND E. COLBERT and RHONDA L. COLBERT, husband and wife,	)	**No. 28508-1-III**
Respondents,	)	**Division Three**
v.	)	
U.S. BANK OF WASHINGTON, NATIONAL ASSOCIATION, a National Bank,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Sweeney, J. — This is a dispute over the existence and payment of two Washington college savings bonds. The owners of the bonds claimed the bank lost the bonds and sued for the proceeds. The bank has no record of the bonds, suggests that it may have paid out on them already, and says the bond holders should not be allowed to assert a claim for the proceeds, regardless, because they failed to list the bonds in their bankruptcy schedules. At the invitation of the lawyers, the trial court resolved the dispute on cross motions for summary judgment. We conclude that there are genuine issues of

material fact that preclude summary resolution of this dispute and reverse and remand for trial.

FACTS

Raymond and Rhonda Colbert bought two $25,000 State of Washington general obligation college savings bonds for their sons from U.S. Bank of Washington in 1989. The Colberts' bonds could not be redeemed before their maturity dates. One matured in 2003; the other in 2007.

The Colberts tried to redeem both bonds in 2007. U.S. Bank responded that it did not have a record of the bonds. The Colberts then asked U.S. Bank of Investments (U.S. Bank's affiliate) and the Bank of New York (a bond paying agent) for records of the bonds. U.S. Bank of Investments said it had no record of the bonds. And the Bank of New York said it was "the paying agent for the issues, but [did] not have any holdings for [the bonds]." Clerk's Papers (CP) at 610. The Bank of New York found no book entry for the 2003 bond and found a book entry in someone else's name for the 2007 bond.

The Colberts sent U.S. Bank and U.S. Bank of Investments an affidavit of lost instrument and demanded that they pay on the bonds. Neither bank responded. So the Colberts sued U.S. Bank for enforcement and payment of the bonds.

Both parties moved for summary judgment. U.S. Bank argued that the Colberts should be judicially estopped from enforcing the bonds because they failed to disclose the

bonds in their 2002 and 2005 bankruptcy proceedings. The Colberts filed for chapter 11 bankruptcy in 2002 and chapter 12 bankruptcy in 2005. They named U.S. Bank as a creditor in the first bankruptcy. But the Colberts did not list either the bonds or any claim to the bond proceeds as an asset in either bankruptcy proceeding. The first bankruptcy ended with an approved repayment plan and decree. The court dismissed the second bankruptcy after it approved a settlement agreement between the Colberts and RFC Property I, Inc. U.S. Bank's creditor's claims were assigned to RFC.

U.S. Bank also argued that the Colberts failed to show the terms of the bonds or that they were lost. The bank argued that the bonds could not be lost because they are electronic and that their terms were not set forth in the "Confirmation Safe-Keeping Receipts" produced by the Colberts. Instead, the bank claimed a document entitled, "Official Statement," set forth the bonds' terms.

The trial court denied U.S. Bank's motion for summary judgment and granted summary judgment to the Colberts. U.S. Bank appeals.

DISCUSSION

Standard of Review

The issues here were resolved on cross motions for summary judgment and so our review is de novo. *Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007). That is, we place ourselves in the trial court's position and consider the facts before that

court in the light most favorable to the nonmoving party. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005).

Summary judgment is appropriate "if the pleadings, . . . answers to interrogatories, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party has the initial burden of showing that no genuine issue of material fact exists. CR 56(e); *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). If the moving party satisfies its burden, the nonmoving party must produce specific facts that show the presence of a genuine issue of material fact for trial. CR 56(e); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The Colberts' Summary Judgment Motion

U.S. Bank first contends that the Colberts were not entitled to summary judgment on the question of whether they satisfied the requirements for a lost instrument under RCW 62A.3-309. That statute requires that they show (1) the bonds' terms, (2) their right to enforce the bonds, (3) their possession of the bonds at a time when they had a right to enforce them, (4) the absence of a transfer or lawful seizure of the bonds, and (5) the inability to gain possession of the bonds because their whereabouts are unknown. RCW 62A.3-309.

U.S. Bank maintains that genuine issues of fact remain over the bonds' terms and the Colberts' right to enforce the bonds.

The Bonds' Terms

The Colberts produced documents that did not show the bonds' terms—a confirmation/safekeeping receipt, a securities contract, and an untitled document adding terms to the securities contract for each bond. The receipt contains no terms. And the securities contracts contain only general terms between the Colberts and U.S. Bank, not terms specific to the bonds at issue. U.S. Bank produced a document entitled, "Official Statement $130,000,000 State of Washington General Obligation College Savings Bonds, Series 1989." CP at 388-96. This document contains specific terms for the bonds. It is undisputed and evidence of the bonds' terms.

The Colberts' Right to Enforce the Bonds

The right to require payment of the bonds follows if the Colberts (1) possessed the bonds, (2) could enforce them when they lost possession of them, (3) did not personally transfer the bonds, (4) did not lose them to a lawful seizure, and (5) cannot reasonably repossess them because they were lost, destroyed, or stolen. RCW 62A.3-309.

First, there is a question of fact as to whether the Colberts possessed the two bonds. The Colberts possessed the bonds if they owned them. *See* Webster's Third New International Dictionary 1770 (1993) (defining "possess"). And receipts show the

Colberts purchased two bonds in 1989. The receipts are proof of possession. But there is also evidence that the Colberts did not possess the bonds. Bankruptcy schedules from 2002 and 2005 do not show that the Colberts owned any bonds. And each bank the Colberts contacted said it did not have a record of the bonds. The Colberts maintain that they owned the bonds in 2002 and 2005 but did not list them in their bankruptcy schedules because they held the bonds in trust for their sons and their lawyer told them they did not have to list them. But the record contains no evidence of such a trust. There is, then, an issue of fact as to whether the Colberts possessed the bonds when they reached maturity.

The receipts, bankruptcy schedules, and the banks' responses also raise issues of fact about when the Colberts lost possession of the bonds and whether they were enforceable at the time. There are, then, genuine issues of fact as to whether the Colberts have a right to enforce the bonds. The Colberts were not entitled to summary judgment. CR 56(c).

U.S. Bank's Summary Judgment Motion

The Colberts rely on *Miller v. Campbell*[1] for the proposition that, because judicial estoppel is an equitable remedy, its application is vested in the sound discretion of the trial court. Resp't's Br. at 17. And, while equitable remedies like judicial estoppel may

[1] *Miller v. Campbell*, 137 Wn. App. 762, 771, 155 P.3d 154 (2007).

have been the province of the trial court at one time, it is clear that the modern rule is that they are like any other legal cause of action:

> The Court of Appeals, in affirming the equitable relief, agreed with [Vaughn Community Church], holding that trial courts have broad discretionary power in fashioning equitable remedies and such action is typically reviewed for abuse of discretion. This standard is incorrect.
>
> While the fashioning of the remedy may be reviewed for abuse of discretion, the *question of whether equitable relief is appropriate is a question of law.*

Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (emphasis added) (citations omitted).

Judicial estoppel, like other equitable doctrines, requires proof of specific elements. *Baldwin v. Silver*, 147 Wn. App. 531, 535-36, 196 P.3d 170 (2008). Whether or not the court's factual findings support those elements is a question of law that we will review de novo, giving no deference to the trial court. *Id.* And, of course, we will review the court's findings for substantial evidence. *Id.*

The Bank contends that it was entitled to summary judgment on its claim of judicial estoppel. Judicial estoppel requires a showing of three elements: (1) a party's current position is inconsistent with an earlier position; (2) an earlier court accepted the earlier position, creating the perception that the earlier court or the later court was misled; and (3) the party gets an unfair advantage or imposes an unfair disadvantage on the opposing party if not estopped. *Skinner*, 141 Wn. App. at 848.

Inconsistent Positions

Bankruptcy petitioners must disclose all of their assets to the court, including all of their claims and potential causes of action. *Id.* at 848-49. The Colberts represented in their chapter 11 and chapter 12 bankruptcy filings that they neither owned bonds nor held bonds for others. They also represented that they had no contingent claims to redeem bonds. But the Colberts now claim that they have owned two bonds since 1989 and have had a right to redeem one since 2003 and the other since 2007. The Colberts' current position, then, is inconsistent with their earlier position in their chapter 11 and chapter 12 bankruptcy cases. But, again, there is an issue of fact as to whether and when the Colberts' possessed these bonds. They may have held them and lost them before their first bankruptcy.

Moreover, it is not clear that a court can judicially estop the Colberts' action. Courts generally estop debtors from benefitting from undisclosed assets after their bankruptcy proceedings close. *Id.* at 848. The status of the bank's debt and whether or not failure to list the claim disadvantaged the bank, given the debts owed to the bank, are questions of fact not properly the object of summary judgment.

Attorney Fees

U.S. Bank requests statutory attorney fees. It appears to base its request on RAP 14.2 and RAP 14.3. Those rules authorize an award of costs, including statutory attorney

fees, to the substantially prevailing party on appeal. RAP 14.2, 14.3. Neither U.S. Bank nor the Colberts is the substantially prevailing party here. Both parties prevailed in part. Each party should, therefore, bear its own costs. *In re Marriage of Goodell*, 130 Wn. App. 381, 394, 122 P.3d 929 (2005).

We reverse the order granting the Colberts' motion for summary judgment, affirm the order denying U.S. Bank's motion for summary judgment, and remand for trial on both claims—lost instrument and judicial estoppel.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.