

**NOT FOR PUBLICATION****FILED**

UNITED STATES COURT OF APPEALS

FEB 14 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

MARK MONJE and BETH MONJE,  
individually and on behalf of their minor  
son R.M.,

Plaintiffs-Appellants,

v.

SPIN MASTER INCORPORATED, a  
Delaware corporation; et al.,

Defendants-Appellees.

No. 15-16480

D.C. No. 2:09-cv-01713-JJT

MEMORANDUM\*

MARK MONJE and BETH MONJE,  
individually and on behalf of their minor  
son R.M.,

Plaintiffs-Appellees,

v.

SPIN MASTER INCORPORATED, a  
Delaware corporation; et al.,

Defendants,

and

No. 15-16567

D.C. No. 2:09-cv-01713-JJT

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

MOOSE ENTERPRISES PROPRIETARY  
LIMITED, an Australian company,

Defendant-Appellant.

Appeal from the United States District Court  
for the District of Arizona  
John Joseph Tuchi, District Judge, Presiding

Argued and Submitted February 1, 2017  
University of Arizona – Tucson, Arizona

Before: LEAVY, MURGUIA, and FRIEDLAND, Circuit Judges.

This appeal follows an eight-day jury trial that resulted in a verdict for Plaintiffs-Appellants Mark and Beth Monje. The Monjes sought and were awarded compensatory damages on behalf of their minor son, R.M., for injuries he sustained after ingesting “Aqua Dots,” toy beads designed, distributed, and sold by Defendants-Appellees Spin Master Inc., Spin Master Ltd., Moose Enterprises Proprietary, Ltd., and Toys “R” Us, Inc. (collectively, “Defendants”). The Monjes appeal several pretrial rulings that prohibited them from seeking additional damages at trial. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.<sup>1</sup>

1. The district court did not err in granting partial summary judgment for

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<sup>1</sup> Because we affirm all of the rulings challenged by the Monjes, we need not address the issues raised in the contingent cross-appeal filed by Moose Enterprises.

Defendants on punitive damages. To recover punitive damages in Arizona, a plaintiff must show that the defendant acted with an “evil mind.” *Thompson v. Better-Bilt Aluminum Prods. Co.*, 832 P.2d 203, 209 (Ariz. 1992) (in banc). An “evil mind” requires either intentional conduct or conscious disregard of an unjustifiably substantial risk of harm to others. *Id.*

There is no evidence from which a reasonable juror could conclude that Defendants acted with an “evil mind.” Defendants were not aware that Aqua Dots posed a toxicological risk before R.M.’s ingestion. Defendants submitted the product for testing, and independent laboratories repeatedly certified the toy as compliant with global and U.S. safety standards. The Monjes contend Defendants could have discovered that Aqua Dots were toxic if they had performed more or different testing, but “negligence, or even gross negligence” cannot establish the requisite “evil mind.” *Volz v. Coleman Co.*, 748 P.2d 1191, 1195 (Ariz. 1987) (in banc). Accordingly, Defendants were entitled to judgment as a matter of law on the issue of punitive damages.

2. The district court did not abuse its discretion in holding that Mr. Monje was judicially estopped from asserting claims for loss of consortium, emotional distress, and R.M.’s past and future medical expenses. *See Hamilton v. State Farm*

*Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (stating that the district court's application of the doctrine of judicial estoppel to the facts of a case is reviewed for abuse of discretion). Mr. Monje omitted his claims in this action from the asset disclosure schedule in his Chapter 7 bankruptcy proceeding. A party is judicially estopped from asserting a cause of action that was not disclosed in a previous bankruptcy proceeding. *Id.*

Mr. Monje seeks to escape that well-established rule by claiming that his omission was inadvertent. The district court found Mr. Monje's claim of inadvertence to be conclusory and not credible; that determination was not illogical or unreasonable.<sup>2</sup> Mr. Monje also argues that barring his claims will deprive his innocent creditors of a potential source of recovery. Given that the integrity of the entire bankruptcy system is undermined when debtors fail to fully and honestly disclose their assets, *Hamilton*, 270 F.3d at 785, the district court did not abuse its

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<sup>2</sup> Inadvertence also fails to explain Mr. Monje's failure to reopen the bankruptcy case as soon as Defendants raised judicial estoppel. In fact, Mr. Monje did not move to reopen the bankruptcy case until nearly five months after the district court's adverse judicial estoppel ruling. In light of those circumstances, the district court did not abuse its discretion by refusing relief from its judicial estoppel ruling after Mr. Monje reopened the bankruptcy case. *See Harvest v. Castro*, 531 F.3d 737, 741 (9th Cir. 2008) (stating that Rule 60(b) motions for relief from judgment are reviewed for abuse of discretion).

discretion by concluding that competing policy interests weighed in favor of applying the doctrine of judicial estoppel.

To the extent the Monjes are attempting to challenge the district court's denial of the bankruptcy trustee's motion to intervene or to assert claims on behalf of the bankruptcy creditors, they lack standing to do so. *See Estate of Spirtos v. One San Bernardino Cty. Super. Ct. Case Numbered SPR 02211*, 443 F.3d 1172, 1175-76 (9th Cir. 2006) (holding that the trustee alone has standing to assert claims on behalf of a bankruptcy estate).

3. The district court did not abuse its discretion by excluding the Monjes' expert witness from opining that Aqua Dots caused R.M. to suffer permanent brain injuries. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191 (9th Cir. 2007) (stating that a district court's decision to exclude expert testimony is reviewed for abuse of discretion). The Monjes' expert witness advanced two causation theories. One theory was not disclosed until the expert's deposition and was excluded as a discovery sanction for untimely disclosure.<sup>3</sup> The other theory was excluded as

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<sup>3</sup> The Monjes later tried to revive this theory under a different name; however characterized, the theory was not disclosed in the expert's report, and it was not an abuse of discretion to impose the attendant automatic discovery sanction. *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011); *accord* Fed. R. Civ. P. 37(c)(1).

unreliable after the expert witness unambiguously disavowed the theory at his deposition, stating repeatedly and explicitly that there was no supporting evidence. It was well within the district court's broad discretion to exclude both theories. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999).

**AFFIRMED.**

## **United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

### **Information Regarding Judgment and Post-Judgment Proceedings**

#### **Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### **Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### **Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

#### **Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

##### **(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

##### **B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.



- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

# United States Court of Appeals for the Ninth Circuit

## BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By:

, Deputy Clerk