

JUN 10 2009

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	WW-08-1292-HMoJu
)		WW-08-1303-HMoJu
CHRISTINA ROTH,)		
)	Bk. No.	01-45594
Debtor.)	Adv. No.	08-04050
_____)		
WILLIAM J. HAGLER,)		
Appellant and Cross-Appellee,)		
v.)	M E M O R A N D U M ¹	
BRIAN L. BUDSBERG, Trustee,)		
Appellee and Cross-Appellant.))		
_____)		

Argued and Submitted on May 19, 2009
at Seattle, Washington

Filed - June 10, 2009

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: HOLLOWELL, MONTALI and JURY, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Creditor William Hagler ("Hagler") filed a complaint against
2 the chapter 7² bankruptcy trustee for negligently failing to
3 preserve an asset for the benefit of the estate. The bankruptcy
4 court determined, on a motion for reconsideration of a summary
5 judgment motion, that the trustee was not responsible for the
6 loss of the asset and that Hagler's cause of action was time-
7 barred. Hagler appeals that ruling. The trustee cross-appeals
8 the bankruptcy court's denial of the trustee's request for
9 sanctions against Hagler. We **AFFIRM** the bankruptcy court's grant
10 of summary judgment in favor of the trustee including its refusal
11 to award sanctions against Hagler.

12 I. FACTS

13 A. The Bankruptcy Case

14 Christina Roth ("Roth") filed a joint chapter 7 bankruptcy
15 case with her husband on June 6, 2001. The chapter 7 trustee was
16 Scott Kilpatrick ("Kilpatrick").

17 Roth's Schedule B list of personal property included a 50%
18 interest in the estate of Derenda Crumpler ("Crumpler"), her aunt
19 who died thirteen months before Roth filed bankruptcy.
20 Crumpler's estate was in probate at the time Roth filed
21 bankruptcy. Roth listed the value of her interest in Crumpler's
22 estate ("Inheritance") as "unknown" and located "in debtor's
23 possession." Roth scheduled the Inheritance as exempt under
24

25 ² Unless otherwise indicated, all chapter, section, and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
28 enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

1 § 522(d) with an "unknown" value ("Exemption").³

2 Kilpatrick met with Roth for the § 341 meeting of creditors
3 on July 18, 2001. According to Roth's attorney, James Dart
4 ("Dart"), Kilpatrick asked Roth questions regarding the
5 Inheritance. Dart subsequently sent Kilpatrick additional
6 information regarding Crumpler's probate estate and a copy of
7 Crumpler's will describing the disposition of her residuary
8 estate in trust for its named beneficiaries. Roth maintained
9 that the Inheritance was in the nature of a spendthrift trust and
10 not property of the estate. According to Dart, Kilpatrick did
11 not agree. However, Kilpatrick did not object to Roth's
12 exemption of the Inheritance.

13 On September 5, 2001, Roth amended her schedules to list a
14 service contract with Hagler, D/B/A Hagler Investigative, and her
15 intention to reject the contract. Hagler was added to the
16 creditor mailing matrix ("Matrix") with a street address on
17 Granger. Dart certified he sent Hagler the § 341 Meeting of
18 Creditors Notice on September 5, 2001. The § 341 meeting notice
19 states the case is considered to have no assets with which to pay
20 creditors and directs creditors not to file proofs of claim
21 unless notified by the court.⁴

22
23 ³ Section 522 governs the allowance of exemptions in
24 bankruptcy. Under § 522(b)(1) and (2), a debtor has the option
25 to choose between those exemptions provided by the Code under
26 § 522(d), or to choose those made available under state law.
27 Washington is not a state that has prohibited the election of
28 federal exemptions; therefore, Roth was entitled to claim the
Exemption under § 522(d).

⁴ We have taken judicial notice of the § 341 notice to
creditors. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
(continued...)

1 On September 17, 2001, notwithstanding the § 341 meeting
2 notice's directive not to file claims, Hagler filed a secured
3 proof of claim for \$105,000, plus interest, asserting that his
4 claim was secured by the real property of Crumpler's probate
5 estate. Hagler alleged he had enhanced the value of the
6 Inheritance through the provision of private investigative
7 services to Crumpler. He attached to his proof of claim an
8 Agreement with Roth (nee Cox) memorializing Roth's agreement to
9 pay Hagler for those services. Hagler's proof of claim form was
10 handwritten. The street address was given as Granger; however,
11 from the handwriting it read as Orange. Hagler was, therefore,
12 added to the Matrix by the bankruptcy clerk's office a second
13 time with the street address of Orange. Thus, Hagler appears on
14 the Matrix twice, with one correct address and one incorrect
15 address.

16 Roth and her husband received their discharge on September
17 19, 2001. Notice of the discharge was sent to the Matrix on
18 September 21, 2001.

19 On August 14, 2002, Kilpatrick resigned as the chapter 7
20 trustee; Appellee, Brian Budsberg, was substituted as the trustee
21 on August 22, 2002 ("Trustee"). In October 2002, Trustee and
22 Dart exchanged correspondence regarding the Inheritance. Roth
23 again asserted her position that the Inheritance was held in a
24 testamentary spendthrift trust and not property of the estate.

27 ⁴(...continued)
28 Fegert), 887 F.2d 955; 957-58 (9th Cir. 1988) (authorizing
appellate court to take judicial notice of underlying bankruptcy
records).

1 The Trustee filed a report of no distribution ("No-Asset
2 Report") on January 17, 2003, and the case was closed on January
3 21, 2003.

4 On Roth's motion, the case was reopened on January 15, 2004,
5 for an amendment of the bankruptcy schedules, rescinding the
6 discharge of Roth's husband, bifurcating the case, and converting
7 Debtor's husband's case to chapter 13. Notice of this motion was
8 sent to the Matrix. The case was then re-closed on January 30,
9 2004.

10 In January 2004, Hagler contacted an attorney regarding his
11 claim. Hagler's attorney reviewed the bankruptcy case docket and
12 sent the Trustee a letter advising of his client's interest in
13 the Inheritance and his understanding that Crumpler's estate
14 would be settling with Roth receiving approximately \$150,000.

15 Apparently, as a result of receiving that letter, the
16 Trustee filed a Motion to Reopen Case for the Purpose of
17 Administering Asset on February 5, 2004, in order to administer
18 the Inheritance ("Motion to Reopen"). The Motion to Reopen and
19 notice of hearing on the Motion to Reopen was sent to the Matrix
20 the same day.

21 The following day, the Trustee faxed a letter to Crumpler's
22 probate attorney advising him a Motion to Reopen had been filed
23 due to Roth's impending receipt of the Inheritance and advised
24 him to disburse the funds to the bankruptcy estate pending
25 further order from the bankruptcy court. On the same day, the
26 letter was copied by FAX to Hagler's attorney. Hagler's attorney
27 subsequently sent a notice of appearance addressed to the
28 bankruptcy court on February 24, 2004, with service on the

1 Trustee, Dart, and Roth. However, for reasons not explained in
2 the record, the notice of appearance was not docketed and
3 Hagler's attorney was not added to the Matrix.

4 Roth objected to the Trustee's Motion to Reopen contending
5 that because the case was closed, the Inheritance had been
6 irrevocably abandoned under § 554(c). On March 10, 2004, the
7 bankruptcy court denied the Motion to Reopen with prejudice and
8 noticed the order to Dart and the Trustee. There are no written
9 or oral findings in the record that set out the reasons for the
10 denial of the Motion to Reopen.

11 **B. The Adversary Proceeding.**

12 On December 31, 2007, Hagler filed, pro se, a complaint
13 against the Trustee in Washington state court for negligence and
14 breach of fiduciary duty.⁵ Through counsel, Hagler amended his
15 complaint in January 2008, alleging the Trustee failed to
16 identify, disclose, or inventory the Inheritance for the benefit
17 of Roth's estate ("Complaint").⁶

18 On March 27, 2008, Hagler filed a Motion to Reopen Case and
19 Authorize Creditor to Pursue Trustee. The Trustee objected to
20 reopening the case on the basis that the issues raised in the
21 Complaint were litigated and resolved by the denial of the Motion
22 to Reopen. In his objection, the Trustee requested sanctions
23 against Hagler under Rule 9011. On May 19, 2008, the bankruptcy
24 court ordered the case reopened. Hagler removed the Complaint to
25

26 ⁵ The record on appeal does not contain a copy of the
27 original complaint.

28 ⁶ The exact date is illegible on the copy in the record and
not provided by the parties otherwise.

1 bankruptcy court on April 16, 2008 and commenced an adversary
2 proceeding.

3 The Trustee filed an Answer to the Complaint on May 15,
4 2008, asserting affirmative defenses and counterclaiming for
5 sanctions and attorney's fees. On May 16, 2008, Trustee filed a
6 motion for summary judgment ("Summary Judgment Motion"). The
7 Trustee argued: (1) he had immunity; (2) it was Kilpatrick who
8 lost the Inheritance by failing to timely object to the
9 Exemption; (3) claim and issue preclusion barred the action
10 against the Trustee; and, (4) the statute of limitations barred
11 Hagler's Complaint. As part of the Summary Judgment Motion, the
12 Trustee again sought sanctions under Rule 9011.

13 Hagler filed a pro se response to the Summary Judgment
14 Motion on August 14, 2008, and he amended the response on August
15 21, 2008. The hearing on the Summary Judgment Motion was held
16 August 28, 2008. The bankruptcy court denied the Summary
17 Judgment Motion, concluding that the Inheritance was not
18 abandoned from the estate through the failure of Kilpatrick to
19 object to the Exemption and that the Trustee did not enjoy
20 immunity from suit; but, it found a material issue of fact
21 existed as to when the statute of limitations began to run.

22 At the close of oral argument, the bankruptcy court stated
23 it would give the parties the opportunity "to note up another
24 motion. If I am wrong on this law, because this is the first
25 time you are hearing it, then I want to know. . . . This ruling
26 on summary judgment is without prejudice to anybody re-noting
27 these issues." Hr'g Tr. 10:8-15 (August 28, 2008). It then
28 entered the Order Denying Defendant's Motion for Summary Judgment

1 Without Prejudice on September 18, 2008. The following day,
2 Judge Snyder recused himself from the case and the case was
3 transferred to Judge Glover.

4 On September 26, 2008, the Trustee filed a Motion for
5 Reconsideration ("Reconsideration Motion"). The Trustee alleged
6 Judge Snyder "overlooked fundamental issues that go to the lack
7 of substance in Hagler's claim." Hagler responded, contending
8 his claim was not meritless and objected to Judge Glover hearing
9 the Reconsideration Motion. The Trustee filed a Reply on
10 November 4, 2008, and the matter was heard on November 7, 2008.

11 Judge Glover granted the Trustee's Reconsideration Motion
12 and granted summary judgment in favor of the Trustee. He ruled
13 the Inheritance was lost by Kilpatrick's failure to object to the
14 Exemption and that Hagler's Complaint was time barred by the
15 statute of limitations. Judge Glover made no findings regarding
16 the Trustee's request for sanctions.

17 The bankruptcy court entered the Order on Reconsideration
18 Granting Summary Judgment to Defendant ("Reconsideration Order")
19 on November 7, 2008, and dismissed Hagler's Complaint with
20 prejudice. The Reconsideration Order was drafted and submitted
21 by the Trustee's counsel. The court struck from the proposed
22 order the language imposing sanctions on Hagler and awarding the
23 Trustee attorney's fees. The Trustee timely appealed the portion
24 of the Reconsideration Order denying attorney's fees.

25 **II. JURISDICTION**

26 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
27 § 157(b)(1). We have jurisdiction under 28 U.S.C. § 158.

1 **III. ISSUES**

- 2 1. Did the bankruptcy court err in entering the Reconsideration
3 Order dismissing Hagler's Complaint?
4 2. Did the bankruptcy court abuse its discretion in declining
5 to impose sanctions against Hagler and award the Trustee
6 attorney's fees?

7 **IV. STANDARDS OF REVIEW**

8 Whether the bankruptcy court properly considered and granted
9 a motion for reconsideration is reviewed for an abuse of
10 discretion. Arrow Elecs., Inc. v. Justus (In re Kaypro), 218
11 F.3d 1070, 1073 (9th Cir. 2000). We also review for abuse of
12 discretion a court's decision to reconsider a previously assigned
13 judge's interlocutory order. Castner v. First Nat'l Bank, 278
14 F.2d 376, 380-81 (9th Cir. 1960); Abada v. Charles Schwab & Co.,
15 Inc., 300 F.3d 1112, 1117 (9th Cir. 2002). A bankruptcy court
16 abuses its discretion if it bases its decision on an erroneous
17 view of the law or clearly erroneous factual findings. Cooter &
18 Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990). We review a
19 bankruptcy court's conclusions of law de novo. Educ. Credit
20 Mgmt. Corp. v. McBurney (In re McBurney), 357 B.R. 536, 538 (9th
21 Cir. BAP 2006).

22 The bankruptcy court's decision to grant the Reconsideration
23 Motion resulted in a grant of summary judgment in favor of the
24 Trustee. We review de novo the bankruptcy court's ruling on a
25 motion for summary judgment. Woodworking Enters., Inc. v. Baird
26 (In re Baird), 114 B.R. 198, 201 (9th Cir. BAP 1990). Viewing
27 the evidence in the light most favorable to the non-moving party,
28 we determine whether the bankruptcy court correctly found there

1 were no genuine issues of material fact and that the moving party
2 is entitled to summary judgment as a matter of law. Id. We may
3 affirm the bankruptcy court on any basis supported by the record.
4 Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (9th Cir. BAP
5 1995).

6 A decision whether to award sanctions under Rule 9011 is
7 reviewed for an abuse of discretion. Smyth v. City of Oakland (In
8 re Brooks-Hamilton), 329 B.R. 270, 277 (9th Cir. BAP 2005).

9 V. DISCUSSION

10 A. Hagler's Appeal.

11 Judge Snyder found there was a material issue of fact as to
12 when the statute of limitations began to run on Hagler's claims.
13 However, Judge Glover, as the successor judge, determined there
14 were no material facts in dispute and that Hagler's Complaint
15 was, as a matter of law, time barred. We agree the Complaint is
16 time barred. However, before discussing that conclusion, we
17 address Appellant's contention that the Reconsideration Order was
18 entered in error due to procedural defect.

19 The Appellant asks the Panel to vacate the Reconsideration
20 Order because Judge Glover did not certify he had familiarized
21 himself with the earlier proceedings as required by Fed. R. Civ.
22 P. 63. ("If a trial or hearing has been commenced and the judge
23 is unable to proceed, any other judge may proceed with it upon
24 certifying familiarity with the record and determining that the
25 proceedings in the case may be completed without prejudice to the
26 parties.") However, Fed. R. Civ. P. 63 is not violated where
27 there are no material facts in dispute and the successor judge
28 rules as a matter of law. Patelco Credit Union v. Sahni, 262

1 F.3d 897, 906 (9th Cir. 2001). The Reconsideration Motion
2 presented no new facts or change in the law. Judge Glover did
3 not make any factual findings, but ruled as a matter of law that
4 Hagler's Complaint was time barred. Under these circumstances,
5 we decline to vacate the Reconsideration Order for not filing a
6 certification under Fed. R. Civ. P. 63.

7 Appellant also contends Judge Glover impermissibly exceeded
8 the scope of Fed. R. Civ. P. 59 by conducting a de novo review of
9 Judge Snyder's previous ruling. The denial of the Summary
10 Judgment Motion was an interlocutory order; therefore, it is
11 subject to reconsideration by the court at any time. Freeman v.
12 Jamond, 1999 WL 58595, *2 (N.D. Cal. 1999); Preaseau v.
13 Prudential Ins. Co. of Am., 591 F.2d 74, 79-80 (9th Cir. 1979).
14 Where a federal judge has denied a motion for summary judgment
15 and the case has been transferred to another federal judge, the
16 second judge has discretion to revisit the prior judge's ruling.
17 Castner, 278 F.2d at 380.

18 Furthermore, Judge Snyder specifically stated he was denying
19 the Summary Judgment Motion without prejudice so that the parties
20 could re-note any of the issues ruled on by the court if they
21 believed the court was wrong on the law.

22 Appellant argues the Trustee failed to articulate a basis
23 for reconsideration; however, the Reconsideration Motion states
24 the motion is brought because the Trustee believed Judge Snyder
25 committed a manifest error of law in denying the Summary Judgment
26 Motion. This is an appropriate basis for seeking reconsideration
27 under Fed. R. Civ. P. 59, made applicable to bankruptcy
28 proceedings under Rule 9023. Hale v. United States Trustee (In

1 re Basham), 208 B.R. 926, 934 (9th Cir. 1997), aff'd, 152 F.3d
2 924 (9th Cir. 1998) (reconsideration is appropriate if the moving
3 party demonstrates (1) manifest error of fact; (2) manifest error
4 of law; or (3) newly discovered evidence). We find nothing in
5 the record to demonstrate the bankruptcy court abused its
6 discretion in granting the Reconsideration Motion.

7 Finding it was not an abuse of discretion for the bankruptcy
8 court to grant the Reconsideration Motion, we review de novo the
9 substantive issues presented and the bankruptcy court's
10 conclusions of law. Judge Glover ruled: (1) the Trustee was not
11 liable to Hagler because the Inheritance was lost from the
12 bankruptcy estate when Kilpatrick failed to timely object to the
13 Exemption; and, (2) the statute of limitations had run on the
14 two-year statute of limitations under the trustee's bond, under
15 § 322(d), and, on the three-year limitations period provided by
16 state law under Washington Revised Code ("RCW") 4.16.080.

17 The bankruptcy court's ruling was based upon the precedent
18 set in Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), which
19 strictly construes Rule 4003⁷ and holds when a debtor makes an
20 unambiguous manifestation of intent to seek an unlimited
21 exemption in property, absent a timely objection, the property is
22 exempt in its entirety, even if its actual value exceeds the
23
24
25

26 ⁷ Rule 4003(b)(1) provides that "a party in interest may
27 file an objection to the list of property claimed as exempt
28 within 30 days after the meeting of creditors held under § 341(a)
is concluded or within 30 days after any amendment to the list or
supplemental schedules is filed, whichever is later.

1 statutory exemption amount. Id. at 642; Rule 4003(b); 11 U.S.C.
2 § 522(1).⁸

3 There is no dispute Kilpatrick did not timely object to
4 Roth's claimed exemption in the Inheritance. However, Hagler
5 argues the failure of Kilpatrick to object to the Exemption
6 resulted, at most, in the partial exemption of the Inheritance
7 (to the amount allowed under the exemption statute) but did not
8 exempt the full value of the Inheritance. Hagler relies on cases
9 holding that if a debtor does not signal an intent to exempt the
10 entirety of an asset, the trustee can later object to the value
11 of the property subject to the exemption, even if the trustee did
12 not timely object to the validity of the claimed exemption.
13 Hyman v. Plotkin (In re Hyman), 967 F.2d 1316, 1319 (9th Cir.
14 1992); Stoebner v. Wick (In re Wick), 276 F.3d 412, 416 (8th
15 Cir. 2002); Klein v. Chappell (In re Chappell), 373 B.R. 73, 78
16 (9th Cir. BAP 2007).⁹

17 Relying on the holding of those cases, Hagler alleges the
18 Trustee breached his fiduciary duty to creditors by negligently
19 filing the No-Asset Report allowing the case to be closed

21 ⁸ Section 522(1): "The debtor shall file a list of property
22 that the debtor claims as exempt under subsection (b) of this
23 section. If the debtor does not file such a list, a dependent of
24 the debtor may file such a list, or may claim property as exempt
25 from property of the estate on behalf of the debtor. Unless a
party in interest objects, the property claimed as exempt on such
list is exempt."

26 ⁹ Judge Snyder, in his ruling on the Summary Judgment
27 Motion, relied on this line of cases, in particular, In re Wick,
276 F.3d 412 (8th Cir. 2002), in determining the Trustee was not
28 entitled to summary judgment on Hagler's allegation that the
Trustee was responsible for the removal of the entire Inheritance
from the bankruptcy estate when he allowed the case to be closed.

1 resulting in the abandonment of the entire Inheritance from the
2 estate under § 554(c).

3 A bankruptcy trustee's determination that the case is a no
4 asset case does not, by itself, constitute a de facto abandonment
5 of property of the estate. Schwaber v. Reed (In re Reed), 940
6 F.2d 1317, 1321 (9th Cir. 1991). However, once the case is
7 closed, any scheduled property of the estate that is not
8 administered is abandoned to the debtor. 11 U.S.C. § 544(c).
9 The property becomes "technically abandoned." Schwaber, at 1321.
10 Abandonment under § 554(c) is generally irrevocable. DeVore v.
11 Marshack (In re DeVore), 223 B.R. 193, 197-98 (9th Cir. BAP
12 1998).¹⁰

13 Even if we accept Hagler's argument and assume, without
14 deciding, that the Inheritance was only partially exempted and
15 remained in the estate until the bankruptcy case was closed and
16 the Inheritance was technically abandoned, Hagler's claim against
17 the Trustee is still time-barred.

18 Hagler brought his Complaint in state court under a
19 negligence theory. He seeks damages against the Trustee
20 individually, not against the Trustee's surety. Therefore,
21 Hagler's Complaint is governed by § 322(b), which allows actions
22 against the trustee personally for negligent conduct during the
23

24
25 ¹⁰ The revocation of an abandonment is only appropriate when
26 the trustee is misled by false or incomplete information. In re
27 DeVore, 223 B.R. at 197-98; Vasquez v. Adair (In re Adair), 253
28 B.R. 85, 89 (9th Cir. BAP 2000). Neither party contends the
abandonment of the Inheritance should be revoked due to
misinformation; the facts demonstrate Roth scheduled the
Inheritance and that both Kilpatrick and the Trustee sought and
received detailed information about the Inheritance from Roth.

1 administration of the estate. 11 U.S.C. § 322(b); Searles v. Dye
2 (In re Noakes), 104 B.R. 323, 327 (Bankr. D. Mont. 1989).
3 Section 322(b) does not contain a statute of limitations. The
4 rule for federal causes of action with no federal limitations
5 period is to "look at the state statute of limitations applicable
6 to the most similar state cause of action." Briley v.
7 California, 564 F.2d 849, 854 (9th Cir. 1977). Therefore, the
8 applicable statute of limitations is three years under Washington
9 state tort law. RCW 4.16.080.

10 A statute of limitations period begins to run when the cause
11 of action accrues; in a negligence action it accrues when the
12 plaintiff suffers injury or damage. RCW 4.16.005; Crisman v.
13 Crisman, 931 P.2d 163, 165 (Wash. App. 1997). The limitations
14 period may be equitably tolled by the "discovery doctrine," which
15 is used by the courts to "balance the policies underlying
16 statutes of limitations against the unfairness of cutting off a
17 valid claim where the plaintiff, through no fault of her own,
18 could not have reasonably discovered the claim's factual elements
19 until some time after the date of injury." Id. at 166.

20 Thus, if there is a delay between the injury and the
21 plaintiff's discovery of it, and the delay was not caused by the
22 plaintiff sleeping on his or her rights, the court may toll the
23 limitation period until such time as the plaintiff knew, or,
24 through the exercise of due diligence, should have known of the
25 facts supporting his or her cause of action. Janicki Logging &
26 Constr. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 37 P.3d
27 309, 312 (Wash. App. 2001).

1 Hagler asserts he "first learned that Roth had been
2 disbursing funds received from Crumpler's probate estate" on
3 January 15, 2005. He contends he did not receive notice of the
4 outcome of the Motion to Reopen, and therefore, had not become
5 aware of the facts supporting his claim against the Trustee until
6 January 15, 2005.

7 Generally, it is an issue of fact whether the limitations
8 period should be tolled. However, "when [the] application of
9 equitable tolling turns on the plaintiff's diligence in
10 discovering a cause of action, courts may hold, as a matter of
11 law, that the doctrine does not apply." Ernst & Young v.
12 Matsumoto (In re United Ins. Mgmt., Inc.), 14 F.3d 1380, 1385
13 (9th Cir. 1994). The court may, therefore, grant a summary
14 judgment motion if the uncontroverted evidence irrefutably
15 demonstrates that a plaintiff discovered or should have
16 discovered the facts supporting his cause of action but failed to
17 file a timely complaint. Id. This is such a case. There is
18 ample undisputed evidence in the record demonstrating Hagler had
19 actual notice of the facts supporting his claim prior to January
20 15, 2005.

21 Hagler was first put on notice that there were no identified
22 assets or non-exempt assets from which to pay creditors on
23 September 5, 2001. On September 5, 2001, Roth amended her
24 bankruptcy schedules to add Hagler to the Matrix. At that time,
25 Roth, pursuant to Rule 2002, sent a § 341 meeting notice to
26 Hagler at the Granger street address. The notice informed Hagler
27 there did not appear to be property available to pay creditors.
28 Hagler could have, under Rule 4003(b)(1), objected to the

1 Exemption within 30 days of Roth's amendment. Hagler made no
2 objection.

3 The bankruptcy case docket shows the No-Asset Report was
4 entered on January 17, 2003,¹¹ and the case closed on January 21,
5 2003. Even if Hagler did not monitor the bankruptcy case docket,
6 he had notice on or about December 9, 2003, that Roth's
7 bankruptcy case was closed and the Inheritance abandoned. At
8 that time, Roth sent to the Matrix her motion to reopen the case
9 in order to rescind the discharge of Roth's husband and bifurcate
10 the case. The notice of hearing on the motion to reopen was also
11 sent to the Matrix with the motion.

12 Hagler received a second notification that the case was
13 closed (and that the Inheritance, was therefore, technically
14 abandoned) on February 5, 2004. The Trustee's Motion to Reopen
15 was noticed to the Matrix. Although Hagler denies receiving the
16 notice, there is nothing in the record indicating the Granger
17 street address was incorrect.

18 Additionally, Hagler had consulted an attorney in January
19 2004, to represent his interests in Debtor's bankruptcy. Hagler
20 submitted a declaration from his attorney stating that the
21 attorney checked the bankruptcy docket and wrote the Trustee
22 alerting the Trustee to the possible closure of Crumpler's
23 probate case and distribution to Roth and of his client's
24 interest in those proceeds. It was this letter that apparently
25 prompted the Trustee to file the Motion to Reopen. On February

26
27 ¹¹ When the Trustee filed the No-Asset Report, the case was
28 considered "fully administered." Rule 5009. After the case is
fully administered, the bankruptcy court must close the case. 11
U.S.C. § 350.

1 6, 2004, the Trustee sent a letter to Crumpler's probate attorney
2 informing him the Trustee had filed a Motion to Reopen to
3 administer the Inheritance and directing him to pay the funds to
4 the bankruptcy court pending further order from the court. The
5 Trustee copied this letter to Hagler's attorney the same day;
6 Hagler's attorney admits he received a copy of that letter on
7 February 6, 2004.

8 Therefore, there is no material issue of fact that Hagler
9 knew or should have known by, at the latest, January or February
10 2004, via his attorney, by the pleadings he received at the
11 Granger address he provided to the bankruptcy court, and by
12 reviewing the bankruptcy case docket, that Kilpatrick had not
13 objected to the Exemption, the Trustee filed a No-Asset Report,
14 the case was closed, and the Inheritance was technically
15 abandoned. See Allen v. State, 826 P.2d 200, 203 (Wash. 1992) (A
16 cause of action accrues when plaintiff knows or should know the
17 relevant facts, whether or not the plaintiff also knows the facts
18 are enough to establish a legal cause of action.).

19 The Complaint against the Trustee was filed December 31,
20 2007, several months outside the three-year state statute of
21 limitation for tort actions. RCW 4.16.080.

22 The evidence demonstrates Hagler was provided ample notice
23 of the facts supporting his Complaint, yet he did not act
24 diligently to pursue those claims. Accordingly, we affirm the
25 bankruptcy court's Reconsideration Order.

26 **B. Trustee's Cross Appeal.**

27 The Trustee assigns error to the bankruptcy court's denial
28 of an award for attorney's fees or imposition of other sanctions

1 against Hagler under Rule 9011, which gives the bankruptcy court
2 the authority to sanction parties for frivolous actions; and,
3 under RCW 4.84.185, which allows a court to order the non-
4 prevailing party to pay the reasonable expenses including
5 attorney's fees of the prevailing party when it finds an action
6 was frivolous.

7 The Motion for Summary Judgment sought sanctions and an
8 award of attorney's fees against Hagler, contending the Complaint
9 was meritless. The Trustee cited Rule 9011 and RCW 4.84.185 in
10 his request, but he failed to follow the requirement that a
11 request for sanctions be made by separate motion.¹² Rule
12 9011(c)(1)(A) ("A motion for sanctions under this rule shall be
13 made separately from other motions or requests . . ."); RCW
14 4.84.185 (the determination to award fees "shall be made upon
15 motion . . . after a . . . final order terminating the action as
16 to the prevailing party."). In any event, the denial of the
17 Summary Judgment Motion eviscerated the Trustee's contention that
18 the Complaint was frivolous.

19 The Trustee again sought the imposition of sanctions in the
20 Reconsideration Motion, but failed to specify the statutory
21 authority for his renewed request and again failed to make the
22 request by filing a separate motion. The Trustee did not
23 resurrect the original basis for sanctions; rather, he based his
24 request on the contention that Hagler had no claim at all against

25
26 ¹² Because Hagler initiated an adversary proceeding in the
27 bankruptcy court, Rule 9011 sanctions, rather than sanctions
28 under state law, apply. Hurd v. Ralph's Grocery Co., 824 F.2d
806, 808 (9th Cir. 1987); Wolf v. Kupetz (In re Wolf & Vine,
Inc.), 118 B.R. 761, 768 (Bankr. C.D. Cal. 1990) (federal court
applies state sanctions when the federal rule is inapplicable).

1 Roth's bankruptcy estate. However, Judge Glover never reached
2 the merits of Hagler's claim. Notwithstanding the language
3 inserted in the Reconsideration Order that "plaintiff's
4 underlying claim lacks merit and that this action lacks any basis
5 in fact or law," Judge Glover expressly stated, at the hearing on
6 the Reconsideration Motion, he was not reaching the merits of
7 Hagler's claim and that he would assume Hagler was entitled to a
8 benefit from Roth's estate. Hr'g Tr. 14:1-4 (November 7, 2008).

9 The sole basis for the Trustee's request for sanctions was
10 not reached by the bankruptcy court. Under these circumstances,
11 imposition of sanctions was not appropriate. Accordingly we do
12 not find the bankruptcy court abused its discretion by declining
13 to impose them.

14 VI. CONCLUSION

15 For the reasons given above, the bankruptcy court did not
16 abuse its discretion in ruling on the Reconsideration Motion.
17 The undisputed evidence demonstrates Hagler had knowledge of the
18 facts supporting his Complaint but did not file it until after
19 the statute of limitations had run. We do not find it was an
20 abuse of discretion for the bankruptcy court to decline to impose
21 sanctions. Accordingly, we AFFIRM the bankruptcy court's entry
22 of the Reconsideration Order dismissing Hagler's Complaint and
23 denying sanctions against Hagler.