STATE OF MICHIGAN

COURT OF APPEALS

JANICE J. VANZANDT, formerly known as JANICE J. CHAPMAN,

Plaintiff-Appellant,

v

BRANDON TYRELL PEAKS and ROCK-WAY, LLC,

Defendants-Appellees.

UNPUBLISHED
November 23, 2021

No. 354819
Wayne Circuit Court
LC No. 2019-006143-NI

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants, Brandon Tyrell Peaks and Rock-Way, LLC, and dismissing plaintiff's automobile negligence claim on the basis of judicial estoppel. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Plaintiff filed a petition for Chapter 13 bankruptcy protection on March 28, 2016. In plaintiff's bankruptcy petition, she averred that she did not have any claims against third parties. The bankruptcy court approved her bankruptcy payment plan on July 25, 2016. On September 28, 2016, plaintiff notified the bankruptcy court of a slight decrease in her income.

Germane to this case, on August 25, 2017, plaintiff was rear-ended while driving by defendant Peaks, in his capacity as an employee of defendant Rock-Way. Following the accident, plaintiff did not amend her bankruptcy filing to reflect a potential claim against defendants. On September 25, 2017, the bankruptcy trustee moved to dismiss the bankruptcy petition for failing to make plan payments for the previous four months. Plaintiff hired an attorney to represent her against defendants on October 12, 2017. Again, plaintiff did not amend her bankruptcy payment plan, nor did she inform the bankruptcy trustee or the bankruptcy court of this development. The bankruptcy court granted the motion to dismiss the bankruptcy petition on October 24, 2017.

Plaintiff filed a complaint against defendants on April 25, 2019, alleging that defendant Peaks—and, through vicarious liability, defendant Rock-Way—had been negligent and that their negligence caused plaintiff to experience serious injuries. On April 8, 2020, defendants moved the trial court for summary disposition under MCR 2.116(C)(7). Defendants argued, because plaintiff "fail[ed] to disclose her claims to the bankruptcy court[, she] is judicially estopped from pursuing this lawsuit." The trial court granted defendants' motion for summary disposition on the basis of judicial estoppel. The trial court reasoned:

> I think Defendant has clearly demonstrated that Plaintiff assumed a position in this law suit that was contrary, contrary to the one she asserted[] under oath[] in her Bankruptcy proceedings, by asserting her—or failing to . . . show that she had a . . . substantial asset[] that she was not claiming. And you [are] required to update those . . . papers[] in Bankruptcy Court[] as your situation changes. And clearly, as pointed out b[y] Defense, she knew, or her attorney knew . . . how to make those changes . . . . [A]nd also, the Bankruptcy Court adopted that contrary position . . . . [A]nd that Plaintiff's omission did not result from mistake, or inadvertence. I'm making those findings. And granting Defense counsel's Motion for Summary Disposition . . . .

This appeal followed.

II. ANALYSIS

Defendants sought, and the trial court granted, summary disposition under MCR 2.116(C)(7). "MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). We review de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(7). *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020); *Roby v City of Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2006). The de novo standard of review requires us to review the legal issues at hand without deferring to the trial court. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009), citing *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714 n 33; 624 NW2d 443 (2000). "When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). The court must consider that evidence in the light most favorable to the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

The de novo standard of review applies to our interpretation of both Michigan statutes and the Michigan Rules of Court. *State Farm Fire & Casualty Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006); *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003). Legal questions are likewise reviewed de novo. *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006), citing *Roan v Murray*, 219 Mich App 562, 565; 556 NW2d 893 (1996). The application of judicial estoppel is an equitable doctrine that we also review de novo. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012).

In her appeal, plaintiff argues the trial court erred in granting defendants' motion for summary disposition on the basis of the doctrine of judicial estoppel. Judicial estoppel "is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system." *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994), quoting Bigelow, *Estoppel* (6th ed), p 783. It is considered an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999) (quotation marks and citations omitted). 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." *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). The contradictory positions must be within "the same or related litigation." *Wolverine Power Supply Coop v DEQ*, 285 Mich App 548, 567; 777 NW2d 1 (2009). "Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped." *Spohn*, 296 Mich App at 489.

Chapter 13 bankruptcy involves what is essentially an agreement between the debtor and the bankruptcy court and creditors. The debtor agrees to be bound by certain obligations—including a duty to disclose all of his or her assets to the bankruptcy court—in return for a discharge of debts. *Spohn*, 296 Mich App at 481. This duty to disclose continues throughout the pendency of the bankruptcy action. *Id*. at 482 (internal citations omitted) (noting that "the duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action.").

This Court in *Spohn*, 296 Mich App 480-481, set forth the procedure for a trial court to employ when deciding whether the doctrine of judicial estoppel should to apply to bankruptcy proceedings. According to the *Spohn* Court, a trial court must find:

> (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. In determining whether [the plaintiff's] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff's] "attempts" to advise the bankruptcy court of [the plaintiff's] omitted claim. [*Id*. at 480-481, citing *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 478 (CA 6, 2010).]

If these three elements are met, then judicial estoppel may be invoked by the reviewing court "at its discretion." *Opland*, 234 Mich App at 365.

The first element of judicial estoppel requires the reviewing court to find that plaintiff "assumed a position that was contrary to the one that she asserted under oath at the bankruptcy proceedings." *Spohn*, 296 Mich App at 480. When plaintiff filed her petition for bankruptcy, she

assumed a duty to disclose information to her creditors and the court that continued throughout the pendency of the bankruptcy action. *Id*. at 482. Plaintiff stated in her bankruptcy filing that she did not have any claims against third parties. The trial court correctly recognized that plaintiff was "required to update those . . . papers[] in Bankruptcy Court[] as [her] situation changes." Acting in accordance with this duty to disclose, plaintiff subsequently notified the bankruptcy court of a slight decrease in her income. However, after the automobile accident occurred on August 25, 2017, plaintiff did not notify the bankruptcy court of her change in asset status because of her potential claim against defendants. Plaintiff directly admitted this in her answer to defendants' motion for summary disposition. On October 17, 2017, before the bankruptcy petition was dismissed by the bankruptcy court, plaintiff hired an attorney to represent her against defendants. Again, plaintiff failed to notify the bankruptcy court of her known potential claim against defendants.

Plaintiff then filed her negligence suit on April 25, 2019, against defendants. In doing so, she "assumed a position that was contrary to the one that she asserted under oath at the bankruptcy proceedings." *Spohn*, 296 Mich App at 480. The trial court recognized this, noting plaintiff failed to disclose to the bankruptcy court "that she had a . . . substantial asset[] that she was not claiming." The trial court also noted that plaintiff "knew, or her attorney knew . . . how to make those changes," yet she failed to disclose her negligence claim to the bankruptcy court and, in doing so, breached her continuing duty to disclose. *Spohn*, 296 Mich App at 482. Accordingly, the first element of judicial estoppel is satisfied.[1]

Plaintiff attempts to distinguish this case from *Spohn* by arguing that, whereas the plaintiffs in *Spohn* had a separate cause of action at the time they filed their bankruptcy petition, here, plaintiff's separate cause of action did not emerge until many months after she filed her bankruptcy petition. However, plaintiff fails to account for, or reconcile, that her duty to disclose was a continuing one. *Spohn*, 296 Mich App at 482. Indeed, the *Spohn* Court's decision that the first element of judicial estoppel was based on the plaintiff having "failed to include the sexual harassment claim on her bankruptcy petition, *or to amend that petition*." *Id*. at 482-483 (emphasis added). Therefore, the fact that plaintiff's answer on the bankruptcy questionnaire, at the time of filing, was truthful does not mean that her failure to disclose the potential negligence claim once the accident occurred was excusable or excepts her from the application of judicial estoppel. If nothing else, she should have disclosed the potential claim once she hired a lawyer to represent

[1] Defendants additionally cite *Kimberlin v Dollar Gen Corp*, 520 F Appx 312 (CA 6, 2013), as further support for the conclusion that the first element of judicial estoppel is satisfied in this case. In *Kimberlin*, the United States Court of Appeals for the Sixth Circuit held that an employee's tort claim was barred by judicial estoppel because she failed to amend her bankruptcy filing to disclose a potential claim. *Kimberlin*, 520 F Appx at 315. The Sixth Circuit noted that the employee had an ongoing duty to disclose potential claims as they arose to the bankruptcy court. *Id*. Likewise, plaintiff breached her ongoing duty to disclose potential claims to the bankruptcy court in this case when she failed to amend her bankruptcy filing to include her potential claim against defendants.

her against defendants. "[P]ursuing a cause of action that was not disclosed as an asset in a previous bankruptcy filing creates an inconsistency sufficient to support judicial estoppel." *Lewis v Weyerhaeuser Co*, 141 F Appx 420, 425 (CA 6, 2005).[2]

The second element of judicial estoppel requires the reviewing court to find that "the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition." *Spohn*, 296 Mich App at 480. This element is fulfilled because the bankruptcy court, relying on plaintiff's representations in her bankruptcy filing, adopted the contrary position—that there were no other potential claims—when it adopted plaintiff's bankruptcy petition and plan. As in *Spohn*, neither party disputes that the bankruptcy court adopted her bankruptcy plan. *Id*. at 483. Further, as the trial court recognized, the bankruptcy court's decision to dismiss the case was based on the information it had at the time, which did not include plaintiff's negligence claim against defendants.

To the extent plaintiff argues that her creditors may have been aided by her failure to update her bankruptcy petition, we find such arguments unpersuasive. Lacking all of the relevant information, the bankruptcy court was unable to make a proper determination of how to proceed and the creditors received nothing and were given no additional options, and were further precluded from pursuing their interests since plaintiff's bankruptcy filing imposed an automatic stay preventing the creditors from enforcing their rights against plaintiff. 11 USC 362(a); *Frederick v Fed-Mogul Corp*, 273 Mich App 334, 337; 733 NW2d 57 (2006) (noting that an "automatic stay in bankruptcy occurs with the initial bankruptcy filing" and that this "stay prohibits all activity for collecting a debt that arose before the bankruptcy filing."). This stay remained in place until the dismissal of the bankruptcy action in October of 2017. The creditors therefore missed out on a significant period of time in which they could have pursued a recovery from plaintiff.

The third element of judicial estoppel requires the reviewing court to find that plaintiff's omission "did not result from mistake or inadvertence." *Spohn*, 296 Mich App at 480. Determining whether plaintiff's omission resulted from mistake or inadvertence requires a reviewing court to analyze three factors: "whether . . . (1) [plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith." *Id*. at 480-481. Defendant concedes that at the time of initially filing her bankruptcy petition, plaintiff was unaware of any claim against defendant. However, plaintiff gained such knowledge once the accident happened, and plaintiff assuredly had such knowledge once she hired a lawyer to represent her against defendants. If, as plaintiff alleges, she sustained serious injuries as a result of the accident, her injuries would have alerted her to the possibility of a potential claim immediately following the accident. In sum, the trial court did not err in finding that plaintiff had knowledge of the factual basis of the undisclosed claim, and under her continuing duty to disclose, *id*. at 482, should have amended her bankruptcy filing to reflect

[2] "Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 727 n 5; 957 NW2d 858 (2020).

that knowledge. Plaintiff's claim that her failure to amend her filings was an inadvertent mistake is unsupported by the evidence.

The evidence also suggests that plaintiff had a motive for concealment. Michigan law presumes a motive to conceal "because '[i]t is always in a Chapter 13 petitioner's interest to minimize income and assets' in order to secure payment directly rather than to the debtor's estate." *Spohn*, 296 Mich App at 485, quoting *White*, 617 F3d at 479. Plaintiff has presented no evidence to overcome this presumption.

For similar reasons, the evidence does not support a finding by the trial court of an absence of bad faith. "In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [plaintiff's] 'attempts' to advise the bankruptcy court of [plaintiff's] omitted claim." *Spohn*, 296 Mich App at 481. Here, plaintiff made no attempts to advise the bankruptcy court of her omitted claim. While it may not present ironclad proof of bad faith, this fact certainly does not clearly "indicate an absence of bad faith." *Id*. at 481-482. In sum, the three factors for determining whether plaintiff's omission was the result of mistake or inadvertence suggest that plaintiff's failure to amend her bankruptcy filing to reflect her potential negligence claim was not the result of mistake or inadvertence.

Plaintiff raises two additional arguments on appeal that were not raised in the lower court and are therefore not preserved. We review unpreserved issues for plain error affecting substantial rights. *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 442; 906 NW2d 482 (2017). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. at 443 (internal citation omitted).

First, plaintiff argues that if she is unable to succeed on the elements of judicial estoppel, equitable considerations suggest the application of judicial estoppel in this case is unwarranted because defendants were not involved in plaintiff's bankruptcy proceeding. Plaintiff misreads Michigan law as this Court does not include equitable considerations as part of the doctrine of judicial estoppel. *Spohn*, 296 Mich App at 480-481. And, the fact that defendants were not part of plaintiff's bankruptcy proceedings has nothing to do with the applicability of judicial estoppel given that "[t]he purpose of the doctrine of judicial estoppel, especially in the context of bankruptcy proceedings, is to protect the judicial process, not the parties," *id*. at 489. Accordingly, defendants' lack of involvement in the bankruptcy proceedings is irrelevant.

Next, plaintiff states the reason for her failure to amend is unknown. Characterizing herself as a "litigation neophyte," and citing her medical recovery, plaintiff argues that her mistake was inadvertent. Plaintiff's familiarity with the legal field, however, is irrelevant to whether she inadvertently failed to disclose her negligence claim to the bankruptcy court. Further, plaintiff provides no evidence from which the trial court could have gleaned plaintiff's medical condition or recovery timeline.

Plaintiff also argues that judicial estoppel requires "inconsistent affirmative statements, not mere silence." Plaintiff' argument is contrary to law. "Under common law, a false representation can be established by an omission when there is a duty to disclose." *In re Eashai*, 87 F3d 1082, 1089 (CA 9, 1996).

Referencing the equities in this matter, plaintiff also contends dismissal of her negligence action actually hurts her creditors and provides an undeserved windfall to defendants. Addressing the application of the doctrine of judicial estoppel, the court in *Taylor v Comcast Cablevision of Arkansas, Inc*, 252 F Supp 2d 793, 798 (ED Ark, 2003) opined: "An overly strict application of judicial estoppel has been criticized as providing a windfall to the alleged wrongdoer and possibly depriving creditors, who are not parties to the non-bankruptcy action, of a potential bankruptcy asset." This supports the admonition that judicial estoppel is to be cautiously applied. See *Slater v United States Steel Corp*, 871 F3d 1174, 1188 (CA 11, 2017) ("Because the application of judicial estoppel may harm innocent creditors, equitable principles dictate that courts proceed with care and consider all the relevant circumstances.") By way of example, in *Shapp v Oakwood United Hosps*, 458 F Supp 2d 463, 473 (ED Mich, 2006) a plaintiff was not precluded from pursing a personal injury claim that was not disclosed in a bankruptcy proceeding because barring or declining to hear the case would permit the defendants, as potential tortfeasors, to obtain a windfall at the expense of the creditors in a bankruptcy.

Ultimately, plaintiff's "windfall" argument cannot not be sustained for two reasons. First, the application of judicial estoppel is contingent, in part, on a demonstration of a plaintiff's deliberate intention to mislead by having failed to disclose her potential civil cause of action in the bankruptcy proceeding, as demonstrated here. *Slater*, 871 F3d at 1185-1186. With the dismissal of the bankruptcy proceeding, there is no assurance that any of plaintiff's alleged creditors would obtain a benefit if the civil negligence action proceeded, since the control of the bankruptcy trustee is not currently available to secure and distribute any monetary benefit obtained by plaintiff from the civil litigation. Second, the bankruptcy action was in Chapter 13, and for judicial estoppel purposes, serves to affirm that the bankruptcy court "adopted the contrary position," *Spohn*, 296 Mich App 480-481, because the amount plaintiff's creditors would receive was premised on the adoption of the bankruptcy plan using plaintiff's "expected future earnings," *Slater*, 871 F3d at 1188, which was without the benefit of inclusion or consideration of plaintiff's potential for recovery in the civil litigation.

Further, plaintiff mistakenly assumes her creditors are without options because of the dismissal of her case against defendants, when in actuality they are no worse off, and perhaps better situated in some respects, than during the bankruptcy proceedings. As discussed in *In re Demery*, 570 B.R. 220, 226 (Bankr WD La, 2017) (citations omitted): "[A] Chapter 13 plan is no longer enforceable after a case is dismissed. A dismissal undoes the bankruptcy case as far as is practicable, and restores the debtor's property rights to the position that they were in at the time the case was filed. The dismissal of a Chapter 13 case requires disregarding the associated plan." Thus, plaintiff's creditors may still pursue payment from plaintiff, regardless of the dismissal of the civil litigation in favor of defendants, without the restrictions imposed by the Chapter 13 bankruptcy plan limiting payment or a stay of proceedings.

From this record we conclude that the trial court did not err in its findings that the elements necessary for a finding of judicial estoppel had been met. Additionally, we conclude that the trial court did err in its application of the doctrine of judicial estoppel. Accordingly, we affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7).

Affirmed. Defendants having prevailed may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra