STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL T. DOE and PATSY R. DOE,

Plaintiffs-Appellees,

v

JOHN HENKE, MD, and ANN ARBOR ORTHOPEDIC SURGERY,

Defendants-Appellants,

and

TRINITY HEALTH, d/b/a ST. JOSEPH MERCY HEALTH SYSTEM, d/b/a ST. JOSEPH MERCY HOSPITAL,

Defendant.

UNPUBLISHED
November 18, 2008

No. 278763
Washtenaw Circuit Court
LC No. 02-000141-NH

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendants appeal the trial court's order denying defendant John Henke, M.D.'s ("defendant Henke") motion for summary disposition by order of our Supreme Court, which remanded this case as on leave granted for consideration in light of *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007). The trial court held, before the publication of *Miller*, that plaintiffs had standing to pursue a claim of medical malpractice against defendant Henke despite the fact that they had filed for bankruptcy before sending him a notice of intent regarding the malpractice claim, and had not disclosed the possible malpractice settlement as a potential asset in the bankruptcy filing. We affirm.

I. FACTS

In June 2000, plaintiffs sought legal counsel to advise them whether they should pursue a medical malpractice claim against defendant Henke regarding Michael Doe's hip-replacement surgery on August 24, 1999. After a nine-month investigation, plaintiffs' legal counsel determined that there was no cause of action arising from the surgery.

On April 26, 2001, plaintiffs filed a petition for Chapter 7 bankruptcy protection in the Bankruptcy Court for the Eastern District of Michigan. A creditor's meeting was held on June 19, 2001, at which time, plaintiffs made no disclosure regarding the malpractice investigation. On June 20, 2001, the bankruptcy trustee issued a "NO ASSET" Report, stating that there was no property available for distribution to the creditors.

In July 2001, plaintiffs sought new legal counsel regarding the potential medical malpractice claim. On July 24, 2001, plaintiffs' new legal counsel filed a notice of intent and served notice on defendant Henke. Plaintiffs received bankruptcy discharge on August 23, 2001. The final decree was issued September 26, 2001.

In October 2001, plaintiffs' legal counsel notified plaintiffs of a conflict of interest and discontinued representation. Plaintiffs sought new legal representation, retaining current legal counsel in December 2001. Plaintiffs filed suit on February 8, 2002.

On April 27, 2005, defendant Henke filed a motion to strike/for summary disposition, alleging that the plaintiffs were not the real parties in interest and that their claim was barred by judicial estoppel. On May 6, 2005, plaintiffs filed an ex parte motion to reopen their bankruptcy case to amend schedules to add an undisclosed asset, i.e., the malpractice claim against defendants. On June 8, 2006, defendant Henke's motion for summary disposition was denied.

On July 27, 2006, defendants filed an application for leave to appeal to this Court, which was denied. On May 7, 2007, defendants filed an application for leave to appeal to the Michigan Supreme Court, and after *Miller*, *supra*, filed a motion for peremptory reversal. On May 25, 2007, the bankruptcy court ordered *nunc pro tunc* that plaintiffs' bankruptcy trustee was authorized to abandon property of plaintiffs' estate. On June 20, 2007, the Michigan Supreme Court remanded this case to this Court as if on leave granted. *Doe v Henke*, 478 Mich 909; 732 NW2d 542 (2007).

II. STANDARD OF REVIEW

We review decisions on summary disposition de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). We must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, granting the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Our review is limited to the evidence that was presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

III. ANALYSIS

A. Standing

On appeal, defendants first argue that under 11 USC § 541(a), a debtor loses all rights to his property when he declares bankruptcy and that omitting an asset from a bankruptcy schedule does not exempt the asset from this rule. The trial court rejected this argument because it found that plaintiffs had not intentionally omitted an asset from their bankruptcy filings; rather,

plaintiffs were unaware that they had a valid claim until after their bankruptcy case had been discharged. We agree.

11 USC § 541 provides, in pertinent part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –
>
> (A) under the sole, equal, or joint management and control of the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> ***
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

Defendants note that potential causes of action have been determined to be an interest of the estate by the Sixth Circuit. However, defendants do not cite any published cases in Michigan that address this issue.

Defendants cite *Kuriakuz v Community Nat'l Bank of Pontiac*, 107 Mich App 72; 308 NW2d 658 (1981), in support of their position that plaintiffs lack standing to pursue their malpractice claim against them. In *Kuriakuz*, the plaintiff filed for bankruptcy in November 1978. *Id.* at 74. Before filing for bankruptcy, a right of action accrued against the defendant, which the plaintiff did not disclose on the asset schedules he had filed with the bankruptcy court. *Id.* This Court held that when the plaintiff had filed his petition for bankruptcy, all of his assets became vested in the trustee in bankruptcy, including the right of action against the defendant. *Id.* Further, the Court held that "the only way that a bankrupt may bring suit on that right of action, at least during the pendency of the bankruptcy proceedings, is by showing abandonment or by receiving permission from the bankruptcy court." *Id.* at 75. The Court ultimately found that because the plaintiff had deliberately omitted to disclose his claim on his bankruptcy filings, he "'could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property.'" *Id.* at 75-76, quoting *First Nat'l Bank v Lasater*, 196 US 115, 119; 25 S Ct 206; 49 L Ed 408 (1905).

In the instant case, although defendants argued before the trial court that plaintiffs knew that they had a possible claim for malpractice at the time of their bankruptcy filing, the court's finding to the contrary was not error. As the court noted, plaintiffs sought the advice of an attorney who conducted a nine-month long investigation and advised plaintiffs that their claim would not be successful based on the information the attorney had received from an orthopedic surgeon. The court's finding that plaintiffs legitimately believed at the time of their bankruptcy filing that they did not have a valid claim to disclose was based on plaintiffs' reliance on the advice of the attorneys who initially investigated the matter. Although Michigan courts have not apparently addressed this issue in the context of bankruptcy, the courts have held that when an individual relies on his attorney's counsel in order to interpret a court order, she cannot be held liable for contempt of court if the attorney's advice is at odds with the court's order. *In re Contempt of Rapanos*, 143 Mich App 483, 495; 372 NW2d 598 (1985). Similarly, plaintiffs in the instant case should not be held liable for failing to disclose a claim when, based on the advice of counsel, plaintiffs did not understand that they had a valid claim to be disclosed in bankruptcy.

B. *Miller v Chapman Contracting*

Next, defendants argue that the trial court should have granted defendant Henke's motion for summary disposition based on our Supreme Court's holding in *Miller*. Again, we disagree.

In *Miller*, the plaintiff was injured in an automobile accident on December 28, 2000, and filed for bankruptcy on March 6, 2002. *Miller*, *supra* at 104. The defendants filed a motion for summary disposition, contending that the plaintiff lacked standing to sue because he was not the real party in interest due to his status as a bankrupt. *Id.* The plaintiff filed a motion to amend his complaint in order to correct what he termed a misidentification of the plaintiff; however, the trial court denied the motion, stating that it was futile, and granted the defendants' motion for summary disposition. *Id.* at 105. In denying the plaintiff's appeal, this Court stated that a motion to add a party was not the same as a motion to correct a misnomer and that MCR 2.118(D) did not extend the relation-back doctrine to new parties. *Id.*

The instant case is distinguishable from *Miller*. First, the plaintiff in *Miller* was apparently aware that he had a cause of action arising from the accident after he filed for bankruptcy. The plaintiff filed for bankruptcy in March 2002 and filed the negligence action in October 2003, while the bankruptcy was ongoing. *Miller*, *supra* at 109 (Kelly, J., dissenting). The plaintiff's trustee hired an attorney to pursue the negligence action, but apparently the attorney did not name the proper party as the plaintiff. *Id.* at 109-110. By contrast, plaintiffs in the instant case did not file their complaint in this action until the bankruptcy had been discharged. Further, plaintiffs did not file a motion to amend their complaint in this case, so the language in *Miller* regarding the relation-back doctrine is not relevant to this case.

C. Bankruptcy Court's Order

Defendants also ask this Court to review an order of the bankruptcy court in plaintiffs' bankruptcy case, granting plaintiffs' motion asking that the trustee be permitted to abandon this lawsuit as an asset, and ordering that the order be given retroactive, or *nunc pro tunc*, effect.

Although the trial court could not have considered this argument because the bankruptcy court's order was not issued until after the trial court's decision, the trial court lacked any jurisdiction to review the order of the bankruptcy court. Similarly, this Court does not have jurisdiction to review an order of the federal bankruptcy court. Under the Supremacy Clause, US Const, art VI, cl 2, "federal laws take precedence over state laws by express preemption, conflict preemption, or field preemption." *X v Peterson*, 240 Mich App 287, 289; 611 NW2d 566 (2000). 11 USC § 105(a) gives the bankruptcy court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Thus, the bankruptcy court has authority under the statute to administer the Bankruptcy Act; and under the Supremacy Clause, field preemption prohibits the state courts from administering the Act. Thus, we are without jurisdiction to review defendants' claim with respect to this issue.

D. Judicial Estoppel

Finally, defendants argue that judicial estoppel bars plaintiffs from asserting their malpractice claim. Again, we disagree.

Before the lower court, defendants argued that the doctrine was applicable because

> plaintiffs in this matter made a representation and in fact the schedules specifically state, under knowledge of perjury. They made a decision not to disclose this. . . . No matter what presumption they may have been under when the case was filed, they go ahead and get another lawyer for a second opinion and file an NOI before their discharge is ever issued. Under the doctrine of judicial estoppel they have made a statement under oath to the court that's a finding on the merits and should be estopped from asserting otherwise in a subsequent suit.

The trial court did not address this issue; plaintiffs contend on appeal that the doctrine is not applicable to this case.

In *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), our Supreme Court held that under the doctrine of judicial estoppel, "a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding" (emphasis in original; internal quotation marks and citations omitted). The Court stated further that "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, . . . the claims must be wholly inconsistent." *Id.* at 509-510.

Defendants have not presented any evidence that the claims presented by plaintiffs in this litigation are contrary or inconsistent to the claims raised during their bankruptcy proceedings. Plaintiffs did not claim to be unaware of their malpractice claim; rather, they pursued it but were told by the attorneys investigating the claim that it was not viable based on the advice of an orthopedic surgery expert. Plaintiffs sought a second opinion from a different attorney before the discharge of their bankruptcy case who did not review the claim, but did file a notice of intent in order to preserve the running of the statute of limitations. It was only after their bankruptcy was discharged that plaintiffs received a positive review on their malpractice claim.

Thus, to argue that plaintiffs deliberately asserted a contrary position before the bankruptcy court to the one they raised before the trial court is not accurate. The court's finding that plaintiffs did not deliberately omit information concerning the malpractice claim from their bankruptcy schedules was reasonable, and thus, defendants' claim that judicial estoppel is applicable lacks merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Bill Schuette