

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID PULICE,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL, JOHN D.  
PARMELY, D.O., JOHN D. PARMELY, D.O.,  
P.C., d/b/a SPECIALIST IN GENERAL  
SURGERY, JEFFREY SERWIN, D.O., and  
BOTSFORD ANESTHESIOLOGISTS, P.C.,

Defendants-Appellees.

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UNPUBLISHED  
March 6, 2012

No. 302092  
Oakland Circuit Court  
LC No. 2009-099290-NH

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants summary disposition in plaintiff's medical malpractice action. The trial court concluded that plaintiff lacked standing to sue defendants because plaintiff was involved in a bankruptcy proceeding and the trustee in bankruptcy, not plaintiff, had the right to pursue the claim. We reverse, concluding that plaintiff had standing to bring the lawsuit.

**I. BASIC FACTS**

On April 25, 2008, before plaintiff filed his medical malpractice action against defendants, he filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Eastern District of Michigan. As part of his bankruptcy filing, he was required to list all of his personal property, as well as property that he was claiming as exempt. Under Schedule B – Personal Property, he described his potential lawsuit as follows: “Debtor has consulted with 5 attorneys regarding a possible medical malpractice action, all attorneys have declined to take the case. LISTED FOR DISCLOSURE PURPOSES.” Under Schedule C – Property Claimed as Exempt, plaintiff listed the following under the heading of “Other Contingent and Unliquidated Claims of Every Nature”: “Debtor has consulted with 5 attorneys regarding a possible medical malpractice action, all attorneys have declined to take the case. LISTED FOR DISCLOSURE PURPOSES.” Plaintiff claimed as exempt the statutory maximum value for his lawsuit, \$20,200. He listed the current value of the lawsuit, however, as “unknown.”

On August 5, 2008, plaintiff received a discharge of his debts from the bankruptcy court. Plaintiff filed his malpractice action against defendants on March 20, 2009. Plaintiff did not inform the trustee that he filed the lawsuit. On June 7, 2010, the trustee in plaintiff's case issued a final report, listing assets that were abandoned by the trustee as well as assets that were exempt. The trustee asked to be discharged from his duties as trustee, and stated that he was unable to satisfy any of plaintiff's debts from the assets in the estate. At the time the lawsuit was filed, plaintiff's bankruptcy filing was still pending, and his estate had not yet been closed.

After both sides engaged in discovery in the malpractice action, defendants moved for, and were granted, leave to amend their answer and affirmative defenses. Defendants alleged that plaintiff lacked standing and/or the capacity to sue. Additionally, defendants moved for summary disposition under MCR 2.116(C)(5), arguing that only the trustee, as the representative of the bankruptcy estate, could pursue the cause of action.

Pursuant to MCR 2.116(C)(5), the trial court granted defendants' motion for summary, finding that plaintiff lacked the legal capacity to sue defendants:

The plaintiff here did list several possible causes--causes of action as an exemption and these have been discussed on the record; he did this under 11 USC 522(D)(11)(d). The statute allows an exemption of \$21,000 roughly, for a payment on the account of personal bodily injury of the debtor. Plaintiff's lawsuit, by virtue of this Court's jurisdiction has an alleged value in excess of \$25,000.

No documents were presented establishing that plaintiff disclosed the civil lawsuit to the bankruptcy court or that the bankruptcy case has had a final closing. The Court finds, based on the case law, that plaintiff lacks standing to sue at the time this suit was filed, and that it appears that the standing rests with the trustee until abandoned.

Before plaintiff as a debtor may pursue a claim there must be a judicial determination that the trustee in bankruptcy has abandoned that claim. Without that determination a debtor seeking to pursue a claim cannot see--cannot maintain it.

11 USC 554 provides a trustee may abandoned [sic] any property of the estate after a notice and hearing. While plaintiff argues that the potential suit was listed and abandoned by the trustee, plaintiff did not provide support that the actual lawsuit was disclosed giving the trustee an opportunity to abandon that suit.

The trial court also denied plaintiff's subsequent motion for reconsideration on December 28, 2010:

This Court determined that Plaintiff lacked standing to pursue this lawsuit and found instead that the asset belonged to the bankruptcy trustee. Specifically, the Court noted that Plaintiff failed to present any evidence establishing that Plaintiff disclosed this lawsuit to the bankruptcy court or that the bankruptcy case had a final closing. Contrary to Plaintiff's argument, the Court did consider

Schedule C, attached to Plaintiff's response brief at Exhibit 2. The property claimed as exempt listed a "possible medical malpractice action" with a claimed exemption of \$20,200.00 and current value as ["unknown["]. As Defendants' [sic] argue, where a statutory exemption is claimed, the trustee need not object to preserve the estate's ability to recover the value in the asset beyond the exemption declared by the debtor. *Schwab, supra*. Furthermore, the cause of action asset remains the property of the bankruptcy estate. *Taylor, supra*.

Plaintiff now appeals as of right.

## II. ANALYSIS

### A. THE REAL PARTY IN INTEREST

Plaintiff argues that he properly designated an exemption for his medical malpractice claim on Schedule B and Schedule C of his bankruptcy disclosures and that the exemption went unchallenged by the trustee; as such, the cause of action was no longer part of the bankruptcy estate and reverted back to plaintiff. We agree that, absent an objection by the trustee, plaintiff had a legal interest in the amount up to the exemption. Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 56; 698 NW2d 900 (2005). Additionally, this Court's review of a trial court's decision to grant summary disposition is a question of law that is reviewed de novo. *Latham v Barton Marlow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In the context of a motion brought under MCR 2.116(C)(5), we must review the pleadings, admissions, affidavits and other relevant documentary evidence to determine whether as a matter of law the plaintiff lacked the capacity to bring the lawsuit. *Edgewood Development, Inc v Landskroener*, 262 Mich App 162, 165; 684 NW2d 387 (2004); *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003).

The issue of whether plaintiff has standing to pursue his malpractice claim rests upon whether he was a "real party in interest." A prospective plaintiff is not a real party in interest unless he is "vested with the right of action on a given claim . . . ." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007), quoting *Blue Cross & Blue Shield of Mich v Eaton Rapids Comm Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997).

When a prospective plaintiff in a civil lawsuit files a Chapter 7 bankruptcy petition, all of his assets become the property of the bankruptcy estate, subject to the debtor's right to reclaim certain property as "exempt." *Schwab v Reilly*, \_\_ US \_\_; 130 S Ct 2652, 2657; 177 L Ed 2d 234 (2010); 11 USC § 541.<sup>1</sup> Indeed, such a filing creates a separate estate over which the trustee has possession. *Schwab*, \_\_ US \_\_; 130 S Ct at 2657. Among the items included in this separate estate are causes of action or potential causes of action that a debtor has against another. *Bauer v*

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<sup>1</sup> "The commencement of a case under . . . this title creates an estate." 11 USC § 541(a). This estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 USC § 541(a)(1).

*Commerce Union Bank*, 859 F2d 438, 441 (CA 6, 1988). Accordingly, if a debtor files for bankruptcy under Chapter 7, the trustee has possession over his lawsuit. *Miller*, 477 Mich at 106. As such, the trustee, not the debtor, becomes the real party in interest, and is the only party who can pursue the litigation. *Id.*

However, despite the creation of a separate estate upon the filing of a bankruptcy petition, the debtor may exempt certain property, thereby preventing the property from becoming part of the bankruptcy estate. 11 USC § 522(b)(1) and (l); *Schwab*, \_\_\_ US \_\_\_; 130 S Ct at 2657; *Taylor v Freeland & Kronz*, 503 US 638, 642-643; 112 S Ct 1644; 118 L Ed 2d 280 (1992). If the debtor claims a valid exemption, the exempted property does not become the possession of the bankruptcy estate; rather, the debtor retains it. *Id.*

The debtor’s ability to exempt assets from the bankruptcy estate permits a debtor to exempt her potential lawsuit from the bankruptcy estate up to the statutory limit. See, e.g., *Taylor*, 503 US at 642-643; *Simaan v Wells Fargo Bank, NA*, \_\_\_ F Supp 2d \_\_\_ (ED Mich, 2011) (Docket No. 10-12848, issued February 4, 2011), slip op at 2; *Wissman v Pittsburg Nat Bank*, 942 F2d 867, 870-872 (CA 4, 1991). If the lawsuit is properly exempted, the debtor maintains standing to pursue the claim. *Id.*

Here, Schedule C of plaintiff’s bankruptcy petition provided as follows:

Schedule C-Property Claimed as Exempt			
Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
<u>Other Contingent and Unliquidated Claims of Every Nature</u>			
Debtor has consulted with 5 attorneys regarding a possible medical malpractice action, all attorneys have declined to take the case. LISTED FOR DISCLOSURE PURPOSES	11 U.S.C. 522(d)(11)(D)	20,200.00	Unknown

Plaintiff’s potential lawsuit was listed under 11 USC § 522(d)(11)(D), which allows for an exemption on “[t]he debtor’s right to receive, or property that is traceable to . . . a payment, not to exceed \$21,625, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.” At the time of the instant action, the exempted value was \$20,200. See 11 USC § 104. The trustee did not object to the exemption.

Here, the trial court concluded that plaintiff could not pursue the claim until the trustee affirmatively abandoned it or until the debtor's bankruptcy case was closed. The trial court cited 11 USC 554, which provides:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title [11 USC 521(a)(1)] not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title [11 USC 350.]

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

“[U]pon abandonment . . . the trustee is . . . divested of control of the property because it is no longer part of the estate. . . . Property abandoned under [§] 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed.” *Kane v Nat'l Union Fire Ins*, 535 F 3d 380, 385 (CA 5, 2008), quoting 5 Collier on Bankruptcy § 554.02[3]. Plaintiff's bankruptcy estate was not closed at the time he filed his malpractice suit, nor did the trustee affirmatively abandon the asset.

Contrary to the trial court's conclusion, however, we hold that a cause of action that is properly claimed as an exemption and that is not objected to by the trustee may be pursued without formal abandonment by the trustee. Plaintiff exempted his lawsuit from the bankruptcy estate. By exempting his cause of action on his Schedule C filing, plaintiff retained the ability to pursue the lawsuit on his own. *Simaan*, slip op at 2; *Wissman*, 942 F2d at 870-872. In *Wissman*, the Fourth Circuit expressly held that abandonment is not a prerequisite to a plaintiff/debtor pursuing a cause of action in a case where the plaintiff/debtor has properly exempted the lawsuit from his bankruptcy estate. *Id.* *Bottcher v Emigrant Mtg Co*, 441 BR 1 (2010), citing *Wissman v Pittsburgh Nat'l Bank*, 942 F2d 867, 870 (CA 4, 1991), provides:

If a debtor can show that a prepetition cause of action is exempt from the bankruptcy estate, then he has standing to assert that cause of action to the extent of the exemption even if the trustee has not abandoned the estate's interest in the claim. . . .

. . . . Because the plaintiff has exempted the property and the first \$16,500 of recovery on his claims, he is a real party in interest and has standing to bring this action. *Wissman*, 942 F 2d at 870. If the plaintiff is successful, the Chapter 7 Trustee will be entitled to receive a portion of any recovery over and above that

amount. *Schwab v Reilly*, \_\_\_ US \_\_\_; 130 S Ct 2652, 2669; 177 L Ed 2d 234 (2010). [*Bottcher*, 441 BR at 4.]

Plaintiff affirmatively asserted his interest in the property by disclosing the potential lawsuit and claiming the exemption. Because the trustee filed no objection, the lawsuit reverted back to plaintiff. Accordingly, plaintiff had standing to pursue his cause of action against defendants.<sup>2</sup>

## B. VALUE OF THE EXEMPTION

Plaintiff argues that his recovery on the lawsuit should not be limited to the statutory maximum for such an exemption where the trustee failed to object when plaintiff listed the current value of his lawsuit as “unknown.” We disagree and instead conclude that the trustee had no duty to object to plaintiff’s exemption because the value of the exemption was within the statutory limitation.

In *Schwab*, the debtor appropriately claimed as exempt a value for her property that was within the statutory limits. *Schwab*, \_\_ US \_\_; 130 S Ct at 2657. However, she listed the current value of her property at an amount higher than the statutory maximum for her exemptions. *Id.* The trustee failed to object to her exemptions, and she claimed that his failure to object entitled her to receive the full value of her property, rather than the statutory maximum. *Id.* The Court disagreed, and held that a trustee’s duty to object only arises when the value of the exemption claimed is above the statutory maximum, or where the amount claimed as exempt is listed as “unknown.” *Id.* at 2664-2667. It cited the statutory authority for exemptions, 11 USC 522(1), and found that the only amount on a Schedule C that the trustee needed to concern herself with was the amount of the property *claimed as exempt*. *Id.* at 2666. In doing so, it found that the amount listed by a debtor for the current market value of the property had no bearing on a

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<sup>2</sup> We recognize that a recent case from the Western District of Michigan, *In re Richard Hugh Livingston*, \_\_ F Supp 2d \_\_ (Bkrcty WD Mich, 2011) (Docket No. 09-07953, issued June 23, 2011), slip op at 2, held that a plaintiff/debtor did not have standing to pursue his cause of action despite the fact that he properly claimed an exemption for the cause of action. The case did not cite any authority for the proposition, but in a footnote determined that the holding in *Schwab*, \_\_ US \_\_; 130 S Ct at 2652 compelled its decision. *Id.*, slip op at 2 n 2. The Western District did not cite any specific language from *Schwab* that supported its holding; rather, in passing it declared that *Schwab* “suggests” a plaintiff/debtor has no standing in this situation. *Id.* However, *Schwab* does not support such a finding. Indeed, *Schwab*, involved a debtor who attempted to exempt personal property and maintain title to that personal property. In a footnote, the Court noted that it was “questionable” whether the debtor could retain such title. *Id.* at 2668 n 21. Nonetheless, the case made no mention of whether a plaintiff/debtor had standing to pursue a cause of action that was properly exempted in a bankruptcy petition. Indeed, *Schwab*, clarified parts of the holding of *Taylor*, 503 US 638, a case in which the plaintiff/debtor was permitted to pursue a cause of action that was exempted from her estate, but it failed to comment on the issue of a plaintiff/debtor’s standing to pursue a claim. Thus, *Schwab* does not support the proposition for which it was cited in *Livingston*. Accordingly, we do not find *Livingston* to be on point. Plaintiff had standing to pursue his claim against defendants.

trustee's duty to object. *Id.* Thus, if the trustee fails to object when he has a duty to do so, the debtor is entitled to the entire value of the improperly exempted asset; however, when a debtor claims as exempt an amount that is within the statutory limits, the trustee has no duty to object to the claimed exemption.

Plaintiff's Schedule C listed the statutory maximum for his exemption; therefore, the trustee had no duty to object to his claimed exemption. Moreover, nothing listed in this amount indicated that plaintiff intended to claim as exempt the entire value of his lawsuit. Accordingly, the trustee had no reason to object to plaintiff's exemption.

Plaintiff argues that his Schedule C raised "red flags" that should have caused the trustee to object. He notes that he listed the current value of his lawsuit as "unknown," and argues that this should have alerted the trustee that he intended to claim as exempt his entire lawsuit, even if this amount was greater than the statutory maximum. Because the trustee did not object, he argues that he should be permitted to exempt the entire value of his lawsuit from the bankruptcy estate. However, plaintiff's argument is without merit. As noted above, the United States Supreme Court determined that the only relevant inquiry for the trustee is whether the amount claimed as exempt was within the statutory limit. Here, the amount claimed as exempt by plaintiff was at that limit. Therefore, the trustee had no duty to object to plaintiff's claimed exemption. Plaintiff's recovery is, therefore, limited to the amount of the claimed exemption.

### C. JURISDICTION OF THE CIRCUIT COURT

We reject defendants' claim that plaintiff's cause of action did not properly invoke the jurisdiction of the circuit court because the amount he could pursue -- \$20,200 -- was below the \$25,000 threshold for invoking the circuit court's jurisdiction. While plaintiff is limited to recovering the amount of the exemption, there is no authority that declares that plaintiff may not pursue his claim for the entire amount. Indeed, because the bankruptcy estate was still open when plaintiff filed suit, any amount that plaintiff recovered beyond \$20,200 must be distributed to the trustee. See, generally, *Schwab*, \_\_ US \_\_; 130 S Ct at 2657-2658; *Wissman*, 942 F2d at 872-873. Accordingly, in order to allow creditors to recover from plaintiff's estate, plaintiff should be permitted to pursue the asset for its entire value. See, *id.* (allowing the debtor to pursue the cause of action permits the estate to maximize its potential recovery for the debtor's creditors). *Taylor*, 503 US at 642-643; *Simaan*, slip op at 2. While the proper distribution of any excess is a matter for the bankruptcy court to decide, there is no authority for the proposition that plaintiff may not pursue his claim for its full value before turning over the excess amount to the trustee. Therefore, plaintiff may pursue the cause of action for its full value.<sup>3</sup>

Accordingly, because plaintiff may pursue the entire claim, there is no basis for finding, as defendants contend, that the circuit court lacks jurisdiction over the claim. Indeed, in order to find that plaintiff's complaint did not satisfy the requisite amount in controversy (\$25,000), this Court must find with "legal certainty," that the allegations in the complaint do not meet the

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<sup>3</sup> We note that plaintiff could only retain the exempt amount after the administration costs of the bankruptcy were satisfied.

minimum threshold. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 474-475; 628 NW2d 577 (2001). Plaintiff alleged an amount greater than \$25,000 in his complaint. Further, the allegations in plaintiff's complaint allege a great degree of harm, such that this Court could not conclude with "legal certainty" that the amount in controversy is less than \$25,000. For instance, the complaint alleges that defendants' medical malpractice caused plaintiff to suffer from a number of serious health defects, including, but not limited to, pulmonary fibrosis and scarring, decreased pulmonary capacity, choking spells, hearing and vision defects, and chronic weakness. Thus, because plaintiff is entitled to pursue his cause of action for the entire amount, there is no basis for finding that he failed to properly invoke the jurisdiction of the circuit court.

#### D. JUDICIAL ESTOPPEL

Finally, we reject defendants' claim that plaintiff is judicially estopped from pursuing the malpractice action. Judicial estoppel is a doctrine that "allows courts to bar parties who have prevailed on a position in one proceeding from asserting wholly inconsistent positions in subsequent proceedings." *Wolverine Power Coop v DEQ*, 285 Mich App 548, 566-567; 777 NW2d 1 (2009). Moreover, judicial estoppel is an extraordinary remedy 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). In *Young v Independent Bank & Independent Mtg Co*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 299192, issued September 20, 2011), slip op at 3, we discussed the doctrine of judicial estoppel in a situation where a plaintiff/debtor took inconsistent positions in his bankruptcy proceedings and in a subsequent civil action. We held that judicial estoppel would apply to prevent a plaintiff/debtor from filing for bankruptcy and indicating that she was unaware of any potential legal claims, but then subsequently bringing a cause of action that should have been disclosed to the bankruptcy court. *Id.* at 2-3. This direct conflict in the plaintiff's claims could warrant the extraordinary remedy of judicial estoppel. *Id.*

Defendants allege that the doctrine of judicial estoppel should prevent plaintiff from bringing his claim because they contend that plaintiff's bankruptcy petition identified the potential medical malpractice lawsuit as a worthless case. In particular, defendants note that plaintiff indicated that the claim had been reviewed by five attorneys, and that each attorney declined to take the case. They allege that this position is inconsistent with his current position, where he alleges that the claim has value in excess of \$25,000. Defendants' argument lacks merit. In this case, plaintiff disclosed his claim to the bankruptcy court by including its existence in his Schedule C filing. Also, despite defendants' allegations, plaintiff's filing indicated that the lawsuit had a value of at least \$20,200, the value plaintiff was claiming as exempt. Now, in his claim against defendants, plaintiff merely pleads the value necessary for invoking the jurisdiction of the circuit court, i.e., \$25,000. Neither of plaintiff's positions directly conflicts with the other; therefore, nothing about his positions requires this Court to invoke the extraordinary remedy of judicial estoppel. Indeed, there was no direct conflict between plaintiff's position in the bankruptcy proceedings and his position in the case at bar; rather, in both proceedings he indicated that his lawsuit had value. Accordingly, the doctrine of judicial estoppel should not preclude plaintiff's claim in the case at bar.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Michael J. Talbot  
/s/ Kirsten Frank Kelly