

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

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CONNIE SIELICKI, ANTHONY SIELICKI, and  
CHARLES J. TAUNT, Trustee,

UNPUBLISHED  
August 14, 2014

Plaintiffs-Appellees,

v

No. 310994  
Wayne Circuit Court  
LC No. 11-006387-NI

CLIFFORD THOMAS, JR.,

Defendant-Appellant,

and

PROGRESSIVE MICHIGAN INSURANCE  
COMPANY,

Defendant.

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Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant Clifford Thomas, Jr. appeals by leave granted the trial court orders denying his motion for summary disposition and granting plaintiff's motion to amend the pleadings to add her bankruptcy trustee, Charles J. Taunt, as a party plaintiff.<sup>1</sup> For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

**I. FACTS**

This case arises out of an automobile accident involving plaintiff and defendant on May 6, 2009. As a result, plaintiff allegedly sustained severe injuries to her back and neck. Following the accident, plaintiff retained an attorney to represent her with regard to the injuries she sustained in the accident. On December 14, 2009, her attorney sent a letter to defendant's

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<sup>1</sup> Throughout this opinion, "defendant" refers to defendant Clifford Thomas, Jr. and "plaintiff" refers to plaintiff Connie Sielicki.

insurer demanding settlement for defendant's full policy limit of \$100,000 as compensation for plaintiff's injuries sustained in the accident.

On February 4, 2010, plaintiff filed a voluntary petition in the United States Bankruptcy Court seeking bankruptcy protection under Chapter 7. Plaintiff did not disclose any potential claim relating to the automobile accident in her bankruptcy filings. On February 19, 2010, during the pendency of the bankruptcy proceedings, a claims representative from defendant's insurer sent plaintiff's injury attorney a letter stating, "This letter is to confirm our conversation in which I offered \$30,000 in settlement of your client's claim." No settlement was reached.

On April 28, 2010, plaintiff's bankruptcy trustee, after reviewing and analyzing plaintiff's bankruptcy schedules, filed a "Report of No Distribution," indicating that there were no assets available for distribution to plaintiff's creditors. On May 18, 2010, the bankruptcy court granted plaintiff a discharge of her debts, without distribution, and on June 8, 2010, plaintiff's bankruptcy case was closed.

Approximately one year later, on May 27, 2011, plaintiff and her husband filed this instant cause of action against defendant. In Count I of the complaint, plaintiff alleged a claim of negligence against defendant for the personal injuries she sustained in the May 6, 2009 automobile accident. In Count II, plaintiff's husband alleged a claim for loss of consortium.<sup>2</sup>

After learning of plaintiff's prior bankruptcy, which plaintiff revealed during her deposition testimony in the instant case, defendant, upon motion granted by the trial court, alleged additional affirmative defenses and moved for summary disposition. Defendant argued that judicial estoppel barred plaintiff's personal injury claim because she had been aware of her claim before and during the bankruptcy proceedings yet failed to disclose it as a potential asset to the bankruptcy court, and plaintiff lacked standing to pursue her claim because the bankruptcy trustee, not plaintiff, was the real party in interest. Defendant also argued that plaintiff's claim was barred by the common law wrongful-conduct rule.

On April 10, 2012, plaintiff's former bankruptcy trustee, with plaintiff's concurrence, filed a motion in the bankruptcy court seeking to reopen plaintiff's bankruptcy case and to pursue plaintiff's personal injury claim on behalf of the bankruptcy estate. The bankruptcy court granted the motion, reopened plaintiff's bankruptcy case, and withdrew the trustee's previously filed "Report of No Distribution." Plaintiff then amended her bankruptcy petition to include the "[p]otential automobile injury accident claim arising out of an accident that occurred on May 6, 2009" equal to \$100,000.

On May 8, 2012, plaintiff moved to amend the pleadings in the instant case to add the bankruptcy trustee as a party plaintiff. In response, defendant claimed that the bankruptcy trustee could not be added as a party because the motion to amend was filed after the expiration

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<sup>2</sup> The complaint also named Progressive Michigan Insurance Company as a defendant for an alleged failure to pay personal protection benefits. Progressive is not party to this appeal and our opinion has no bearing on plaintiff's claim for such benefits or her suit against Progressive.

of the three-year statutory limitations period applicable to plaintiff's negligence claim. The trial court granted plaintiff's motion, after which plaintiff filed an amended complaint alleging the same personal injury claim and adding the bankruptcy trustee as a party plaintiff. Thereafter, the trial court denied defendant's motion for summary disposition seeking dismissal under the doctrine of judicial estoppel.

## II. JUDICIAL ESTOPPEL

Defendant claims that the trial court erred by denying his motion for summary disposition, concluding that plaintiff's personal injury claim was not barred under the doctrine of judicial estoppel.<sup>3</sup>

The controlling case regarding the application of judicial estoppel involving a Michigan civil injury claim and a federal bankruptcy action is *Spohn v Van Dyke Pub Sch*, 296 Mich App 470; 822 NW2d 239 (2012).

[I]n the context of bankruptcy proceedings, the federal courts have indicated that “to support a finding of judicial estoppel, [a reviewing court] must find that: (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 as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. [*Id.* at 480-481, quoting *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 478 (CA 6, 2010) (alterations in *Spohn*.)]

In *Spohn*, we found that the first requirement was satisfied because there was “no dispute that [the plaintiff] failed to include the sexual harassment claim on her bankruptcy petition, *or to amend that petition*,” 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.” *Id.* at 482 (emphasis added; quotation marks, citation, and brackets omitted). In this case, it is undisputed that plaintiff failed to include her potential injury claim in her original bankruptcy petition. It is also beyond dispute that this position was contrary to her position in the instant case, i.e., that she possesses a meritorious injury claim. However, the bankruptcy trustee, *with plaintiff's concurrence*, later moved to reopen the case and amend the petition to add the claim, and the amendment was accepted by the bankruptcy court. Thus, unlike the plaintiff in *Spohn*, plaintiff fulfilled her duty to disclose her potential cause of action by amending her bankruptcy petition and, therefore, defendant has not established the first requirement for judicial estoppel. This ruling is consistent with our previous statements on judicial estoppel, which is to be “applied with caution” and meant to be “an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a

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<sup>3</sup> We review de novo a trial court's denial of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). “When reviewing equitable actions, this Court reviews the trial court's decision de novo.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012).

technical defense for litigants seeking to derail potentially meritorious claims.” *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999) (quotation marks, editing marks, and citations omitted).

Moreover, the application of judicial estoppel is not necessary to avoid a miscarriage of justice in this case. Plaintiff’s failure to disclose her potential claim placed her creditors, not the instant defendant, in jeopardy. Indeed, the application of judicial estoppel in this case might *cause* a miscarriage of justice. If plaintiff’s negligence claim against defendant is meritorious, the jury may award damages that would become part of her bankruptcy estate, see 11 USC 541(a)(7), and be eligible for disbursement to her creditors. Were we to apply judicial estoppel and order dismissal of plaintiff’s injury claim, we could be preventing plaintiff’s creditors from receiving at least some of the amounts owed by plaintiff.

Finally, the principle of judicial estoppel is grounded in the need to “protect the judicial process[.]” *Spohn*, 296 Mich App at 489. In this case, the insult to the judicial process occurred in the bankruptcy court and the case remains pending there. The bankruptcy court has

essential authority to respond to debtor misconduct with meaningful sanctions . . . . There is ample authority to deny the dishonest debtor a discharge. See [11 USC] 727(a)(2)-(6) . . . . [B]ankruptcy’s analogue to [FR Civ P] 11 [] authorizes the court to impose sanctions for bad-faith litigation conduct, which may include “an order directing payment – of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.” Fed Rule Bkrtcy Proc 9011(c)(2). [*Law v Siegel*, 571 US \_\_; 134 S Ct 1188, 1198; 188 L Ed 2d 146 (2014).]

Rather than impose a sanction in this separate, but distinct case – a sanction that would work to the detriment of those nearly defrauded in the bankruptcy case – we defer to the bankruptcy court to determine the appropriate sanction to impose to “protect the judicial process.”<sup>4</sup>

Accordingly, because defendant has failed to satisfy the first requirement to invoke judicial estoppel in this case, the trial court did not err by denying defendant’s motion for summary disposition on those grounds.<sup>5</sup>

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<sup>4</sup> Moreover, “[j]udicial estoppel is an equitable doctrine, which ‘generally prevents a party from prevailing in one phase of a case or an argument and then relying on a contradictory argument to prevail in another phase.’” *Spohn*, 296 Mich App at 479, quoting *White*, 617 F3d at 476. In this case, plaintiff did not *prevail* in her bankruptcy proceedings by asserting a contrary position; her petition was amended and her potential injury claim added. Thus, her injury claim is not now “contradictory” to her position currently asserted in the bankruptcy court.

<sup>5</sup> While we need not address them, we note that defendant has likely satisfied the remaining two elements of judicial estoppel. See *Spohn*, 296 Mich App at 481.

### III. AMENDMENT OF PLEADINGS

Defendant next claims that the trial court erred by allowing the addition of the bankruptcy trustee as a party plaintiff after the statute of limitations expired for plaintiff's personal injury claim.<sup>6</sup>

Under MCR 2.118(A)(2), leave to amend pleadings "shall be freely given when justice so requires." "But 'leave to amend a complaint may be denied for particularized reasons, such as . . . where amendment would be futile.'" *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007).

Initially, we note that the parties do not dispute that plaintiff filed her motion to amend her pleadings to add the bankruptcy trustee as a party plaintiff one day outside of the applicable three-year statutory limitations period governing her personal injury claim. See MCL 600.5805(10). Thus, plaintiff's untimely amendment to add the bankruptcy trustee as a plaintiff is barred by the statute of limitations, unless it relates back to the date of the original complaint. Accordingly, the controlling issue is whether the relation back doctrine, MCR 2.118(D), applies to plaintiff's amendment to add the bankruptcy trustee as a party plaintiff. MCR 2.118(D) provides:

An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

Our Supreme Court has held that "[t]he relation-back doctrine [MCR 2.118(D)] does not apply to the addition of new parties." *Miller*, 477 Mich at 106 (citation omitted).

In *Miller*, relied on by defendant, the plaintiff filed for bankruptcy after she was involved in an automobile accident and later filed a personal injury claim against the defendants during the pendency of the bankruptcy proceedings. *Id.* at 104. The defendant sought summary disposition asserting that the bankruptcy trustee, not the plaintiff, was the real party in interest, and thus the plaintiff lacked standing to bring the cause of action. *Id.* The plaintiff then filed a motion for leave to file an amended complaint to add the bankruptcy trustee, which was filed after the limitations period expired. *Id.* at 104-105. The Supreme Court found that the bankruptcy trustee was, in fact, the real party in interest before the plaintiff filed her lawsuit and should have been the named plaintiff in the lawsuit, but concluded that the plaintiff's claim was barred because she moved to amend her pleadings to add her bankruptcy trustee as a plaintiff outside of the statutory limitations period. *Id.* at 106-107. In so deciding, the Court explicitly

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<sup>6</sup> We review a trial court's decision to grant a motion to amend pleadings for an abuse of discretion. *In re Estate of Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "Whether the relation-back doctrine is applicable is a question of law that this Court reviews de novo." *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 740-741; 832 NW2d 401 (2013).

held that the addition of the trustee as a new party does not relate back to the original complaint. *Id.* In reaching this conclusion, the Court relied on the statutory language of MCR 2.118(D), stating:

. . . MCR 2.118(D) specifies that an amendment relates back to the date of the original pleading only if it “adds a claim or a defense”; it does not specify that an amendment to add a new party also relates back to the date of the original pleading. Consequently, the Court of Appeals correctly affirmed the judgment of the trial court that the amendment to substitute plaintiff’s bankruptcy trustee as plaintiff after the period of limitations would be futile. [*Id.* at 107-108.]

The Court in *Miller* interpreted the language of MCR 2.118(D) as an exception, allowing an amendment to relate back to the original complaint only where the amendment adds a claim or defense arising out of the same conduct, transaction, or occurrence set forth in the original pleading. *Id.* at 107 n 1. Bound by *Miller*, *Negri v Slotkin*, 397 Mich 105, 110; 244 NW2d 98 (1976), we acknowledge that the relation-back doctrine under MCR 2.118(D) does not apply to the addition of new parties.

Applying *Miller* to the instant case, we find that the trial court abused its discretion by granting plaintiff’s motion to amend her pleadings to add the bankruptcy trustee as a party plaintiff after the applicable limitations period expired. Under MCR 2.118(D), an amendment relates back to the date of the original pleading only if it adds a claim or a defense that arose out of the conduct, transaction, or occurrence set forth in the original pleading. *Miller*, 477 Mich at 107-108. Like in *Miller*, plaintiff did not seek to add a new claim in her motion to amend her pleadings, but sought to add a new party — the bankruptcy trustee, who was the real party in interest at the time plaintiff filed her personal injury claim. Further, plaintiff filed her motion to amend her pleadings to add her bankruptcy trustee as a party plaintiff after the expiration of the statutory limitations period, and thus the amendment was untimely and barred by the statute of limitations, unless it related back to the original filing. *Id.* at 104-107. Accordingly, the trial court should have denied plaintiff’s motion to amend her pleadings to add the bankruptcy trustee as a party plaintiff as futile.<sup>7</sup>

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<sup>7</sup> We note that, despite the conclusion required under *Miller*, plaintiff’s lawsuit, if successful, will flow to the bankruptcy estate. 11 USC 541(a)(7) provides that a bankruptcy estate contains “[a]ny interest in property that the estate acquires after the commencement of the case[.]” and would, therefore, include any monetary judgment plaintiff receives in her negligence case. Moreover, plaintiff’s statutory exemption in bankruptcy “represents a present, substantial interest and provides the necessary standing for them to pursue [this] action.” *Szyszlo v Akowitz*, 296 Mich App 40, 49; 818 NW2d 424, lv den 492 Mich 857; 817 NW2d 88 (2012) (emphasis omitted), quoting *Wissman v Pittsburgh Nat’l Bank*, 942 F2d 867, 872 (CA 4, 1991).

#### IV. WRONGFUL-CONDUCT RULE

Defendant's final claim is that plaintiff's alleged wrongful conduct in concealing her personal injury claim from the bankruptcy court bars her from recovering on her injury claim pursuant to the wrongful-conduct rule.<sup>8</sup>

The wrongful-conduct rule is a common-law doctrine that precludes a plaintiff from recovering where his claim is based in whole or in part on his own wrongful conduct. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005). However, the rule only "applies if there exists a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages." *Id.* In this case, plaintiff's alleged concealment of her injury claim in her bankruptcy petition bears no causal relationship to her injuries. Indeed, her alleged concealment occurred after the automobile accident that resulted in her injuries. Therefore, the wrongful-conduct rule does not bar plaintiff's personal injury claim.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro

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<sup>8</sup> The application of the wrongful-conduct rule presents a question of law that we review de novo. *Brckett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008).