STATE OF MICHIGAN

COURT OF APPEALS

KYM TEDDER,

Plaintiff-Appellant/Cross-Appellee,

and

MASCHEL SANCHEZ,

Plaintiff,

v

GEICO INDEMNITY COMPANY,

Defendant-Appellee/Cross-Appellant,

and

KINGDOM IMAGE CLEANING SERVICES, LLC, BETTY NEWMAN, and RAFAEL ANTONIO RODRIGUEZ,

Defendants.

UNPUBLISHED
November 23, 2021

No. 354910
Lenawee Circuit Court
LC No. 18-006134-NI

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

In this first-party no-fault action, plaintiff, Kym Tedder, appeals as of right the trial court order dismissing her claim without prejudice against defendant, Geico Indemnity Company.[1] Plaintiff contends that the trial court erred when it determined that she failed to properly exempt her first-party no-fault claim from prior bankruptcy proceedings, and that thereafter, plaintiff's

[1] Plaintiff Tedder and Defendant Geico are the only parties to this appeal.

bankruptcy trustee—and not plaintiff—became the owner of plaintiff's claim. Defendant cross-appeals arguing that not only was plaintiff not the proper party to bring her first-party no-fault claim but that plaintiff should have been judicially estopped from bringing the claim in the first instance because she failed to disclose her ownership of the claim to the bankruptcy court. We affirm the trial court's order dismissing the case.

I. FACTUAL BACKGROUND

The relevant facts are not in dispute. On October 6, 2017, plaintiff was involved in an automobile accident. In May 2018, plaintiff filed for Chapter 7 bankruptcy. Plaintiff did not initially disclose any interest in no-fault proceedings to the bankruptcy court. However, in July 2018, plaintiff amended her bankruptcy petition to include her ownership of an "automobile negligence claim," listed the date of the accident and the name, address and phone number of her attorney. Plaintiff sought to exempt that claim from her bankruptcy estate pursuant to 11 USC 522(d)(11)(D). In August 2018, the bankruptcy court entered an order of discharge on plaintiff's behalf.

In October 2018, plaintiff brought the present suit. Plaintiff alleged, among other things, that defendant failed to pay personal protection insurance (PIP) benefits on plaintiff's behalf for injuries she sustained in the October 2017 accident. Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10), alleging that (1) plaintiff's claim was barred by the doctrine of judicial estoppel because plaintiff did not apprise the bankruptcy court of the claim's existence, and alternatively, (2) plaintiff lacked standing to bring her claim because she did not exempt it from her bankruptcy estate, and thus, the bankruptcy trustee was the proper party in interest. The trial court disagreed as to both issues. Defendant then moved for reconsideration as to the second issue. On reconsideration, while maintaining that plaintiff was not barred by the doctrine of judicial estoppel, the trial court decided that plaintiff had, in fact, failed to exempt her first-party claim from her bankruptcy estate and that she therefore lacked standing to bring the claim. On that basis, the court dismissed plaintiff's first-party claim against defendant without prejudice. This appeal followed.

II. THE PROPER PARTY IN INTEREST

Plaintiff contends that the trial court erred when it concluded that she was not the proper party in interest to bring the first-party claim because she failed to exempt the claim from her bankruptcy estate.

With respect to this issue, the trial court granted summary disposition pursuant to MCR 2.116(C)(10). Under that rule, summary disposition is appropriate where, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In reviewing a motion under subsection (C)(10), "this Court considers 'affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion.' " *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013), quoting *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), superseded in part on other grounds by statute as stated in *Dell v Citizens Ins Co of America*, 312 Mich App 734, 742; 880 NW2d 280 (2015). "[R]eview is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

"When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate, see 11 U.S.C § 541, subject to the debtor's right to reclaim certain property as 'exempt,' see § 522(l)." *Schwab v Reilly*, 560 US 770, 774; 130 S Ct 2652; 177 L Ed 2d 234 (2010). As noted above, a debtor's interest in a cause of action constitutes an asset for the purposes of bankruptcy, and the debtor has a duty to disclose that action to the bankruptcy court. *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 481-482; 822 NW2d 239 (2012). Upon filing for bankruptcy, "the right to pursue causes of action formerly belonging to the debtor vests in the trustee for the benefit of the estate." *Young v Independent Bank*, 294 Mich App 141, 144; 818 NW2d 406 (2011) (quotation marks and citation omitted). Thereafter, "[t]he debtor has no standing to pursue such causes of action." *Id*. (quotation marks and citation omitted). An exception to this general rule applies where the debtor properly "exempts" the cause of action from the bankruptcy estate. See *Szyszlo v Akowitz*, 296 Mich App 40, 50; 818 NW2d 424 (2012) (indicating that where a plaintiff had properly exempted a potential lawsuit from the bankruptcy estate, the plaintiff "had standing and was [the] proper party to bring [the] suit").

Here, when plaintiff amended her bankruptcy schedules to include her "automobile negligence claim," she listed the claim as exempt from the bankruptcy estate under 11 USC 522(d)(11)(D). The statute provides, in pertinent part:

> (d) The following property may be exempted under subsection (b)(2) of this section:
>
> (11) The debtor's right to receive, or property that is traceable to—
>
> (D) a payment, not to exceed $25,150,[2] 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 . . . . [11 USC § 522(d)(11)(D).]

Defendant's argument to the trial court was two-fold: (1) that plaintiff failed to list the first-party claim as an exemption in the first instance, and (2) that the cited exemption would not apply to a first-party claim even if plaintiff had properly listed it. We agree on both accounts.

First, and as is relevant to both issues raised on appeal, we conclude that plaintiff's listing of an "automobile negligence claim" in her amended bankruptcy schedules did not include the listing of her first-party no-fault claim. At first blush one might conclude that plaintiff's listing of a potential "automobile negligence claim" as an asset would include all claims filed relative to the accident, particularly because plaintiff also listed the date of the accident and her attorney handling the matter. However, and not even considering that plaintiff in fact made three negligence claims, the law simply does not support the argument that listing "automobile negligence claim" was sufficient to apprise the bankruptcy court that plaintiff also intended to bring a first-party claim

[2] The statute originally limited the payment to $15,000, but that amount is routinely adjusted to reflect changes in the Consumer Price Index, and at present, is set at $25,150. See 11 USC 104; 84 Fed Reg 3488-01 (February 12, 2019).

against an insurer.[3] As discussed below, this holds true because under state law a negligence claim and first party claim are entirely distinct claims, and because the type of damages sought in a first-party claim are not entitled to exemption under federal law.

A first-party no-fault claim is undoubtedly *not* the same as a third-party negligence claim, despite the fact that both might, to some extent, arise out of the same incident. See *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 719; 822 NW2d 522 (2012) ("A claim for no-fault benefits is not a tort claim, nor is it comparable to one."). In fact, in *Atkins*, the Court clearly noted:

> A person who proves his entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. Therefore, notice of a claim for first-party benefits is not the equivalent of notice of a third-party tort claim. [*Id*. at 718.]

And, not only are the proofs necessary to sustain an automobile negligence claim and a first-party no-fault claim different, but the damages that can be recovered from either of the two claims are completely dissimilar. See *Adam v Bell*, 311 Mich App 528, 533-535; 879 NW2d 879 (2015) (noting the differences between a first-party and third-party no-fault claim for the purposes of res judicata); *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012) (noting the difference in damages recoverable from a third-party tort action and a first-party insurance action). The damages recoverable in a first-party no-fault claim are purely economic. "In exchange for ensuring certain and prompt recovery for economic loss, the act also limited tort liability." *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010), citing MCL 500.3135. See also MCL 500.3107(1)(b) (first-party work-loss benefits were payable only for the "loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.").

Based on this law, plaintiff did not properly exempt her first-party no-fault claim from her bankruptcy estate because she simply did not list the claim in her bankruptcy petition in the first instance. On that ground alone, the trial court was correct to hold that plaintiff failed to exempt her first-party claim from the bankruptcy estate. Likewise, because the damages recoverable for a first-party claim are economic alone, plaintiff's first-party claim categorically does not fall under the exemption prescribed by 11 USC § 522(d)(11)(D). See *In re Holley*, 609 BR 269, 278 (D NM, 2019) (Distinguishing between types of damages that are exempt and not exempt for the same injury); *In re Territo*, 32 BR 377, 381 (EDNY, 1983)("the personal injury exemption mentioned in section 522(d)(11)(D)(3) does not cover pain and suffering or compensation for actual pecuniary

[3] We noted in *Spohn* that failure to disclose a potential lawsuit is contrary to the bankruptcy code, "which requires a debtor to file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." *Spohn*, 296 Mich App at 481. Potential causes of action constitute assets that must be disclosed in bankruptcy, and "*any* claim with potential must be disclosed." *Id*. at 481-482 (quotation marks and citation omitted) (emphasis added). "The disclosure obligations of debtors are considered to be *essential* to the bankruptcy process." *Id*. at 482 (emphasis added).

loss, the exemption is designed to cover only payments covering actual bodily injury, e.g., the loss of a limb.").[4]

Plaintiff argues that dismissal of her claim was improper because some of her first-party damages may have yet to accrue. That is, plaintiff suggests that she could incur future post-bankruptcy-discharge debts that, undoubtedly, could not be considered part of the bankruptcy estate. However, plaintiff provided no evidence that she has or will incur such debts. Nor has plaintiff provided any authority to support the assertion that she was not required to properly exempt an actually-accrued claim on the basis that future debts related to that climb might arise. See *Wilson v Tyler*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted).

In light of these conclusions, we cannot discern error on the trial court's part for granting defendant's motion for summary disposition and dismissing plaintiff's first-party claim on the basis that plaintiff failed to exempt that claim from her bankruptcy estate, and thus, any right to sue on the claim had vested in plaintiff's bankruptcy trustee. See *Young*, 294 Mich App at 144.[5]

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Michael J. Riordan

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[4] Because these conclusions are dispositive of the appeal, we need not address the judicial estoppel issue.

[5] As an aside, plaintiff briefly suggests for the first time on appeal that dismissal was improper because plaintiff should have been permitted to substitute her bankruptcy trustee in as the plaintiff before the claim was dismissed. Plaintiff refers this Court to MCR 2.202(B), which provides:

> If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity.

Forgetting that plaintiff did not raise this issue before the trial court, her citation to MCR 2.202(B) suggests a transfer of interests during the pendency of the lawsuit. However, plaintiff lacked standing to bring her first-party claim in the first instance, and for that reason, this argument is without merit. See *Young*, 294 Mich App at 144. Plaintiff further refers this Court, without explanation or analysis, to *Bauer v Commerce Union Bank*, 859 F2d 438, 439-441 (CA 6, 1988), wherein the United States Court of Appeals for the Sixth Circuit—in dicta—noted that it could discern no abuse of discretion on the part of a district court that had permitted a bankruptcy trustee to substitute in place of the plaintiffs after it was found that the plaintiffs' claim actually belonged to their bankruptcy estate. Again, no corollary request was made in this case and thus no decision was rendered on that request by the trial court.