IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Appeals No. 23-CV-21
Superior Court Case No. 2019-CA-008178-M

YOLANDA MARIA STEWART, *et al.*

Appellants,

v.

THE HOWARD UNIVERSITY

Appellee.

REPLY BRIEF FOR APPELLANTS

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A. Appellee Has Conceded that the Court Below Erroneously Denied Appellants' Motion to Substitute Mrs. Stewart's Bankruptcy Trustee as the Real Party in Interest, and that This Case Should be Remanded for Further Proceedings

Having vigorously opposed Appellants' Motion for Substitution below, *see* Appx. 247-251, Howard now admits that it had "no good faith basis" to do so, and concedes that the Order they sought and obtained from the trial court denying the Motion for Substitution should be vacated and the case remanded "for further proceedings." *See* Appellee's Brief at 44. On that much, the parties agree.

Where the parties still differ is on what those further proceedings should entail. Howard asks this Court to allow it to pursue whether the Motion for Substitution was filed "within a reasonable time,"[1] on the ground that the court below "did not reach" that issue, which was not "adequately explored on the record." (*Id*.) For their part, Appellants ask the Court to allow it to pursue whether Mrs. Stewart's omission of her malpractice claim from her bankruptcy schedules was deliberate. *See* Appellants' Brief at 17-31. As more fully explained in the following pages, the further proceedings below that both parties agree should

[1] SCR-Civ 17(a)(3) provides: "The Court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, *a reasonable time has been allowed* for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest." (Emphasis added).

occur, should not include inquiry into whether the Motion for Substitution was timely filed, but should include inquiry into whether Mrs. Stewart's omission of the malpractice claim from her bankruptcy schedules was deliberate.

B. On Remand, the Trial Court Should Be Instructed to Grant Appellants' Motion for Substitution, and to Hold an Evidentiary Hearing to Determine Whether Mrs. Stewart's Omission of the Malpractice Claim from her Bankruptcy Schedules was a Deliberate Attempt to Mislead

1. Proceedings on Remand Should Not Include Inquiry into Whether the Motion for Substitution Was Timely Filed

Howard's assertion that the court below "did not reach" the issue of whether the Motion for Substitution was timely filed, *i.e.*, "within a reasonable time," is misleading, as there was nothing for the court to "reach." While it is true that the court did not address the issue of timeliness, that is because Howard did not raise the issue.

Howard's Opposition to the Motion for Substitution made two overlapping, circular arguments: (i) that Mrs. Stewart "lacked standing" to request substitution because the Trustee was the real party in interest, *see* Appx. 247 ("as the debtor no longer possesses the claim, [she] has no standing to prosecute it"); and (ii) because the real party in interest was not (yet) in the case, the court "lacked jurisdiction." *See* Appx. 249 ("the court lacks subject matter jurisdiction based on the fact that Plaintiff did not have standing at the time she brought the instant action")

The court below apparently agreed with these ill-conceived arguments that violate the mandate of SCR-Civ 17(a)(3) that the court *may not* dismiss the case until the real party in interest has been given a reasonable time to be substituted into the action, as it granted summary judgment to Howard. In doing so, it entered judgment against Mrs. Stewart—the only person before it, who did not own the claim, *see* Appx. 9, and dismissed as "moot" the motion to substitute the person not yet before it, the Trustee, who did own the claim. *See* Appx. 64.

Although timeliness was the only authorized basis to challenge the Motion for Substitution ((*see* SCR 17(a)(3) and Appellants' Brief at 12-15)), there was not a word in Howard's Opposition to the Motion that questioned its timeliness. *See* Appx. 247-251. If the issue was not "adequately explored in the record" (*see* Appellee's Brief at 44), it was only because Howard failed to raise it.

Howard should not be allowed to raise on appeal or on remand an issue that they never raised below. *District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982) ("Ordinarily, matters not raised at the trial court level may not be raised for the first time on appeal.") (citation omitted); *see also Chatman v. Lawlor*, 831 A.2d 395, 404 (D.C. 2003) (concluding that an appellant's failure to make an "argument below precludes her from doing so on appeal[]") (citation omitted).

2. Proceedings on Remand Should Include Inquiry into Whether Mrs. Stewart's Omission of the Malpractice Claim From Her Bankruptcy Schedules was Deliberate

In contrast, the further proceedings on remand *should* include inquiry into whether Mrs. Stewart's omission of her malpractice claim from her bankruptcy schedules was deliberate, as Mrs. Stewart did raise that issue below and did come forward with admissible evidence to show that the omission of the malpractice claim from her bankruptcy schedules was not deliberate. Appx. 186-206. Mrs. Stewart vigorously argued below that the omission was not intended to mislead, that her lack of intent was material to a balancing of the equities, and that the material dispute of whether the omission was deliberate or intended to mislead could not properly be resolved on summary judgment. *See generally, id.*

In response, Howard argues that the court below correctly applied this Court's decision in *Dennis v. v. Jackson,* 258 A.3d 860 (D.C. 2021) *(Dennis)*, to preclude Mrs. Stewart from asserting her malpractice claim *in her own right*. But at least from the time she sought to reopen her bankruptcy case and have a Trustee appointed, and then filed the Motion for Substitution asking that the Trustee take her place as the plaintiff, Mrs. Stewart has not been seeking to pursue the claim in her own right. As Howard does not argue that Mrs. Stewart's failure to list the malpractice claim on her bankruptcy schedules is somehow imputed to the Trustee, whether Mrs. Stewart should be allowed to pursue the claim *in her own right*, is a moot point.

Moreover, while *Dennis* is controlling law, it is distinguishable on its facts. We noted the critical differences between *Dennis* and the facts of this case in our Brief, where we explained that:

> Mrs. Dennis was represented by counsel in her bankruptcy proceeding; in our case, Mrs. Stewart was not represented by counsel and completed the bankruptcy schedules on her own. [footnote omitted]. That difference is particularly significant because Mrs. Dennis actually discussed the omitted claim with her counsel, and then *deliberately* decided not to disclose it. She claimed that she had made a "legal mistake" by not disclosing it, because she "reasonably believed" that she did not have to disclose it as she did not know if she would be able to obtain expert opinion that the claim was viable, and she thought that some or all of the claim was exempt. [citation omitted]. The trial court declined to endorse a rule that would allow a debtor- plaintiff to avoid disclosing a potential claim by delaying obtaining an expert, or that left it to the debtor-plaintiff to decide whether a claim had sufficient merit to require disclosure, and this Court agreed. [citation omitted].
>
> None of that reasoning applies to our case, as Mrs. Stewart was not represented in the bankruptcy proceeding, there is no evidence that she discussed either her intention to file or the substance of her filing with anyone, much less counsel, and there is no evidence of a deliberate decision not to disclose anything. As this Court observed, the trial court in *Dennis* appropriately "examined in detail" how much Mrs. Dennis knew at the time she filed her bankruptcy petition. The Court held that there was no abuse of discretion in deciding that the equities favored application of judicial estoppel in *Dennis*, because Mrs. Dennis *"was represented by an attorney and . . . made a conscious decision not to disclose*." [citing *Dennis* at 868.] The same cannot be said of Mrs. Stewart.

Appellants' Brief at 29 (emphasis in original).

By word count, Howard's Brief mentions "Dennis" 96 times, yet it never comes to grips with these critical factual differences—representation by counsel, and the deliberate decision with the benefit of counsel not to disclose the tort

claim—or the importance this Court attached to these critical differences. *See* *Dennis*, *supra* at 868.

In lieu of competing argument, Howard offers Latin, repeatedly asserting that judicial estoppel should be imposed as it was in *Dennis*, "*a fortiori." See* Appellee's Brief at 11, 16, 31, 35, 48. But the facts here are not stronger in favor of judicial estoppel than they were in *Dennis*; they are far weaker because of the critical factual differences between the cases that Howard blithely ignores.

a. Mrs. Stewart Should Not be Precluded from "Receiving Any Benefit" from the Trustee's Claim

In seeming recognition of the irrelevance of whether Mrs. Stewart should be allowed to pursue the claim in her own right—as she has not been seeking to do since asking the bankruptcy court to reopen her case and appoint a trustee,[2] some three months before Howard filed for summary judgment[3]— Howard now makes a

[2] If the Trustee were to later abandon the claim, and Mrs. Stewart were to then seek to pursue the claim in her own right, Howard could raise the issue of judicial estoppel at that time. *See* Appellee's Brief at 45-47, where, after citing and relying on *Simmers v. National Railroad Passenger Corp*., 2020 U.S. Dist. LEXIS 227485, at *1-*7 (D.D.C. Dec. 1 2020) to support their Motion for Summary Judgment below (Appx. 223, 226), Howard vainly attempts to distinguish it. In the course of that effort, they helpfully provide *Simmers'*s subsequent history, and relate that that is exactly what happened there, when the Trustee later abandoned the claim. *See* Appellee's Brief at 47.

[3] The chronology is set forth in Howard's Motion for Summary Judgment at Appx. 90-93. Mrs. Stewart's request to the bankruptcy court was filed on 6/21/22. Howard's Motion was filed three months later, on 9/27/22.

different argument, that Mrs. Stewart should not be permitted to "receive any benefit" from the Trustee's pursuit of the claim. *See* Appellee's Brief at 19. No authority is cited for this proposed prohibition on Mrs. Stewart "receiving any benefit," which is without legal basis, would inappropriately limit the discretion of the court below on remand, and would seriously undermine the Trustee's ability to pursue the claim as a fiduciary.[4]

Further, as the claim at issue is for personal injury to Mrs. Stewart, precluding Mrs. Stewart from "receiving any benefit" from the claim could diminish her incentive to participate in its prosecution, and thereby deprive the Trustee of an essential witness to the facts necessary to prove the claim—which is no doubt Howard's unstated purpose.

b. Admissible Evidence that Mrs. Stewart Did Not Deliberately Conceal the Malpractice Claim Precluded Summary Judgment

The purported justification for precluding Mrs. Stewart from "receiving any benefit" is judicial estoppel, arising from her failure, as an unrepresented lay person, to understand that bankruptcy forms that asked about the existence of "claims against third parties, whether or not you have filed a lawsuit or made a

[4] As the Trustee noted during the motions hearing, "I think my primary responsibility is to creditors, but I'm a fiduciary for my bankruptcy estate and that includes both-- and I think case law supports this, both creditors and the debtor. I certainly wouldn't give away an asset if the creditors were being paid in full when it would be unfair, very blatantly unfair to deprive the debtor perhaps of some benefit as well." Appx. 33-34.

demand for payment," and "contingent and unliquidated claims," Appx. 121, encompassed her medical malpractice claim. As we argued below and in our Brief in this Court, the trial court should have considered the direct, admissible evidence that Mrs. Stewart's omission was unintentional. Given that evidence, summary judgment was precluded.

Howard's response is to seriously mischaracterize our argument, as if we were contending that Mrs. Stewart was entitled to a jury determination of the facts related to judicial estoppel. *See* Appellee's Brief 21-22, 36-37, 39 n.8, 41. As the court below observed, "*everyone* basically has acknowledged that this issue is one for the Court to consider based on what the Court of Appeals has said in there being no role for a jury to determine whether to apply judicial estoppel. That rests with me." Appx. 62-63 (emphasis added). "Everyone" included Mrs. Stewart. As the trial court noted, we acknowledged below— and reiterate here— that we do not contend that Mrs. Stewart had a right to a jury determination of whether the factual basis for judicial estoppel was present. The law is clear in this jurisdiction that the court is the trier of fact with respect to judicial estoppel. *Dennis v. Jackson*, 258 A.3d 860, 874-77 (D.C. 2021).

What we *do* contend is that where, as here, there are disputes of material fact on any issue, including an equitable defense such as judicial estoppel, the time for the court to find the material facts is at a full evidentiary hearing, where, for

example, the court can evaluate the credibility of witnesses. By Rule, summary judgment is not that time.

SCR-Civ 56 is perfectly clear that summary judgment is only appropriate where there are no genuine disputes of material fact: "The court shall grant summary judgment *if* the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." SCR-Civ. 56(a)(1) (emphasis added). Summary judgment is the time for the trial court to determine *if* there are genuine issues of material fact; it is not the time for the court to resolve genuine issues of material fact if they exist. Accordingly, Rule 56 also is perfectly clear that the procedure for moving or opposing summary judgment is by

> (A) citing to particular parts of materials *in the record*, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or material in the record, or
>
> (B) showing that the material cited do not establish the absence or presence of a genuine dispute, or that the adverse party cannot produced admissible evidence to support the fact.

SCR-Civ 56(c)(1) (emphasis added).

Howard asserts in its Brief that, at the motions hearing, undersigned counsel "recognized the right to call witnesses but did not do so." Appellee's Brief 10 n.3. No citation to the record is included in purported support of the assertion, which is flatly wrong and appears nowhere in the record. In fact, what undersigned counsel

"recognized" is what the Rule provides: that the procedure for supporting or opposing summary judgment is to direct the court to pertinent parts of the *written record*, including "affidavits . . . made for purposes of the motion." *See* SCR-Civ 56(c)(1). Having established the existence of a material fact in dispute through Mrs. Stewart's written Affidavit, Appx. 203-04, we followed the proper procedure and met our burden of showing that disputed material facts precluded summary judgment.

Despite the fact that we came forward with evidence to show that summary judgment for Howard was not appropriate, the trial court granted it anyway. It did so by assuming a motive to mislead from the mere fact that failing to disclose an asset is a potential benefit to the debtor, without considering whether Mrs. Stewart understood that the forms asked her to disclose that asset, or that by not disclosing it she might reap some improper advantage. As we argued below:

> the idea that there's a motive—that Mrs. Stewart had a motive not to disclose implies that she understood that there was some benefit from non-disclosure. Because if you have no knowledge that there's a benefit from non-disclosure, there can't be a motive . . . [T]he motive is absent.

Appx. 54-55. Nonetheless, the trial court found a motive

> in that a party can discharge all those debts and then keep whatever might be gained from this claim for themselves with no recourse quite frankly for those creditors if this is later revealed that the creditors had no opportunity to get involved.

Appx. 62. The problem with this reasoning is that it assumes the knowledge necessary to have the motive.

A "motive" is a reason or purpose for doing something. If Mrs. Stewart did not understand that the forms asked her to disclose her malpractice claim, and did not understand that a failure to disclose it could result in a benefit to her to which she was not entitled, then it is illogical to conclude that she had a motive or intent to reap some improper advantage from omitting it. As a matter of basic logic, a motive to act in a certain way to accomplish a certain result cannot arise without knowledge that the action can accomplish the result. Hence, whether Mrs. Stewart understood that the forms asked her to disclose the malpractice claim, and whether she understood that a failure to disclose it could result in some unfair benefit, are material facts that the court below should have considered in its judicial estoppel analysis. *See* Appellants' Brief 17-26 and cases and authorities there cited. Because it did not, it reached the wrong legal conclusion.

Howard seems to grasp the logical and evidentiary gaps in the trial court's attribution of a motive to Mrs. Stewart that the evidence did not support, when it proposes an entirely new legal principle to fill them: that of a "rebuttable presumption of improper motive or intent." Appellee's Brief at 23. However, whatever rebuttable presumptions may fill gaps in reasoning or evidence in other

contexts,[5] this Court has repeatedly said that summary judgment is particularly inappropriate where motive or intent is an issue. *See* Appellants' Brief at 30 and cases there cited.

Equity is not served by *presuming*, without proof and contrary to direct evidence to the contrary, that an unsophisticated party intended to mislead the court. But even if, contrary to basic fairness and the general presumption of good faith, a malign motive were to be "rebuttably presumed," the presumption would be rebutted by the direct evidence that Mrs. Stewart offered in her Affidavit, that she "never had any intention of concealing the medical malpractice claim from the bankruptcy court or from [her] creditors." Appx. 203-04. Whether to fully credit that direct evidence of Mrs. Stewart's lack of intent was for the trier of fact, after an evidentiary hearing where witness credibility can be assessed, not on summary judgment.

IV. CONCLUSION

As a result of the concession in Appellee's Brief that the trial court should not have denied the Motion for Substitution, this Court should vacate the Order that denied substitution as moot, and remand this case for further proceedings.

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[5] Such as the cases Howard relies on in its Brief at 23-24: *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp*., 702 F. Supp. 1317, 1329 (E.D. Mich. 1988) (whether an accident was "sudden and accidental"), and *Fischer & Porter Co. v. Liberty Mutual Ins. Co*., 656 F. Supp. 132, 140 (E.D. Pa. 1986) (same).

With respect to substitution, the remand should be with instructions to grant the Motion, as no legitimate basis to oppose substitution was raised below.

With respect to the summary judgment entered below in favor of Howard, the Court should vacate that Order as well, so that on remand, the trial court can hold an evidentiary hearing to assess whether Mrs. Stewart's failure to list her malpractice claim on her bankruptcy schedules was a deliberate attempt to mislead.

Respectfully submitted,

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I hereby certify that on this 22nd day of September, 2023, a true copy of the foregoing Reply Brief for Appellants was served electronically via the Appellate E-Filing System upon:

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