COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1151 **Cir. Ct. No. 2013CV7688**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MICHAEL L. ROBINSON,

PLAINTIFF-APPELLANT,

V.

AURORA ST. LUKES MEDICAL CENTER, ERIK M. ALMEIDA, D.O., JONATHAN M. LEVIN, M.D. AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS,

MINHAJ U. HUSAIN, M.D.,

DEFENDANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael L. Robinson, *pro se*, appeals orders dismissing his medical malpractice suit. Because his suit is barred by the statute of limitations as to one respondent and by the doctrine of judicial estoppel as to the other respondents, we affirm.

BACKGROUND

¶2 On August 22, 2013, Robinson filed suit against Aurora St. Luke's Medical Center and several physicians (the Aurora parties). He alleged medical malpractice three years earlier during his treatment on August 24, 2010. In December 2013, he sought to add as an additional respondent the Wisconsin Patients Compensation Fund (the Fund).[1]

¶3 The circuit court dismissed the Fund from the lawsuit, holding that Robinson sued the Fund after the three-year statute of limitations had expired. A few weeks later, the circuit court dismissed the case in its entirety, concluding that the doctrine of judicial estoppel barred Robinson from pursuing his claims against the remaining parties. Robinson, the court explained, petitioned for federal bankruptcy protection in May 2013, and in his petition he denied owning "any contingent and unliquidated claims of every nature." On August 19, 2013, the federal bankruptcy court granted him a discharge of his debts and, a few days later, Robinson filed his medical malpractice suit. The circuit court held that Robinson's failure to disclose his potential malpractice claim in the successful

[1] Robinson named the Wisconsin Patients Compensation Fund as a respondent in this action. The entity is properly known as the Wisconsin injured patients and families compensation fund. *See* WIS. STAT. § 655.27(1) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

bankruptcy proceeding judicially estopped him from his later pursuit of that malpractice claim. Robinson appeals.

DISCUSSION

¶4 We first address whether the circuit court properly dismissed the Fund from this lawsuit. Robinson's medical malpractice suit is governed by a three-year statute of limitations. *See* WIS. STAT. § 893.55(1m)(a). The three-year deadline applies to any claim Robinson may have against the Fund. *See* WIS. STAT. § 655.27(5)(a)1. (stating that "[a] person filing a claim may recover from the [F]und only if ... the action against the [F]und is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced"). Accordingly, the deadline for Robinson to commence his lawsuit against the Fund fell on August 24, 2013. Robinson first filed a claim against the Fund in December 2013. He therefore did not meet the applicable deadline.

¶5 Robinson's appellate briefs fail to include any argument that the circuit court erred when it dismissed the Fund from this case based on the expiration of the statute of limitations. To the extent that such an argument may lurk within the pages of Robinson's appellate submissions, we must conclude that it is wholly undeveloped. We do not address arguments that are inadequately

briefed.[2] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶6 Robinson also fails to show that the circuit court improperly applied judicial estoppel to dismiss his claims against the Aurora parties.

> Judicial estoppel is intended "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions" in different legal proceedings. "The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." "[J]udicial estoppel is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery."
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> For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position.

State v. Ryan, 2012 WI 16, ¶¶32-33, 338 Wis. 2d 695, 809 N.W.2d 37 (citations omitted; brackets in ***Ryan***). If the elements of judicial estoppel are satisfied, the decision to apply the doctrine rests in the sound discretion of the circuit court. ***Id.***, ¶30.

¶7 In this case, the Aurora parties supported their judicial estoppel defense by pointing to Robinson's bankruptcy filing in May 2013, a filing in

[2] Robinson reminds us at the outset of his opening brief that he is a *pro se* litigant, and he asks us to hold him to a less rigorous standard than we apply to licensed attorneys. We, of course, liberally construe mislabeled pleadings from *pro se* litigants. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). We do not, however, abandon our neutrality to adopt and develop arguments on a party's behalf. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. We will not make an exception to that rule here.

which Robinson denied ownership of "contingent and unliquidated claims of every nature." The Aurora parties argued that this denial in Robinson's bankruptcy litigation was inconsistent with his later pursuit of a medical malpractice claim based on events that arose before Robinson sought bankruptcy protection. In response, Robinson filed a document denying any inconsistency and advising the circuit court that, *inter alia*: (1) he had spoken to a "reputable medical malpractice attorney" in February 2013, who told him that "there was not enough sufficient evidence to file a lawsuit"; (2) he "didn't have any idea that he could file a medical malpractice law suit without a medical malpractice attorney"; and (3) he learned only after his bankruptcy discharge "that he could file a medical malpractice complaint without a medical malpractice attorney."

¶8 The circuit court conducted a hearing at which Robinson provided further information on the record about the actions he took in regard to his medical malpractice claim before filing for bankruptcy. He told the circuit court: (1) he met with approximately eight lawyers to discuss his potential claim before his consultation with a ninth lawyer in February 2013; (2) after the February 2013 consultation he "was so broken hearted that they had got away, but [he] hadn't gave up [sic] hope for finding out what could be done"; and (3) two days after his bankruptcy discharge on August 19, 2013, he talked to "an assistant person.... [Robinson] just shared the misfortune that [he] had and [the person] told [Robinson] that it's not too late. [Robinson] said the statute of limitations is three or four days away. [The person] said, well, it will only take a few days to write up [a] complaint."

¶9 "The application of judicial estoppel in this state is consistent with the majority of the federal circuits recognizing the doctrine." ***State v. Petty***, 201 Wis. 2d 337, 350, 548 N.W.2d 817 (1996). Accordingly, the circuit court here

appropriately considered the Aurora parties' judicial estoppel defense in light of a Seventh Circuit case, ***Cannon-Stokes v. Potter***, 453 F.3d 446 (7th Cir. 2006). There, a litigant sued her employer after she had discharged her debts in a bankruptcy proceeding that included the litigant's denial that she had any "'contingent and unliquidated claims.'" *See* ***id.*** at 447. The employer responded to the suit by asserting that the doctrine of judicial estoppel barred the claim. ***Id.*** The ***Cannon-Stokes*** court concluded that the facts satisfied the requirements of the doctrine, noting that "all six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends." ***Id.*** at 447-48 (citing cases from the First, Third, Fifth, Eighth, Ninth, and Eleventh federal circuits.)

¶10 As the circuit court in the instant case observed, the facts here are markedly similar to those in ***Cannon-Stokes***. Robinson, like the debtor in ***Cannon-Stokes***, filed a bankruptcy petition representing that he had no claim against anyone, and the representation afforded him a discharge of his debts. *See* ***id.*** at 447. Now, also like the debtor in ***Cannon-Stokes***, he offers the inconsistent assertion that he does have a valuable claim "in order to win a second time." *See* ***id.*** As did the court in ***Cannon-Stokes***, the circuit court concluded that these facts establish judicial estoppel.

¶11 Robinson argues that his assertions in the bankruptcy proceeding were not inconsistent with his current claim. This is so, he says, because, at the time of the bankruptcy filing, he lacked knowledge of his claim in light of the discouraging advice he received from the ninth lawyer he consulted. The circuit court rejected this self-serving contention. Robinson admitted to the circuit court that he "hadn't gave up [sic] hope," and he also admitted knowing at the time of

the bankruptcy discharge that the statute of limitations governing the claim had not yet expired. The circuit court explained that "it is very clear from this record and Mr. Robinson's submissions that he knew full well about the possibility of a claim.... The knowledge of a claim was certainly there."

¶12 We defer to a circuit court's factual findings unless they have no support in the record. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. The record here clearly permits the circuit court both to find that Robinson knew about his malpractice claim when he filed for bankruptcy and to reject his contrary assertions. Moreover, as the ***Cannon-Stokes*** court explained in response to protestations similar to Robinson's:

> if [the debtor] were really making an honest attempt to pay [the] debts, then as soon as [the debtor] realized that [the claim] *had* been omitted, [the debtor] would have filed amended schedules and moved to reopen the bankruptcy, so that the creditors could benefit from any records. [The debtor] never did that; [the debtor] wants every penny of the judgment for herself.

Id., 453 F.3d at 448.

¶13 Because the elements of judicial estoppel are met in this case, the application of the doctrine rests in the circuit court's discretion. *See* ***Ryan***, 338 Wis. 2d 695, ¶30. We apply a deferential standard when we review a circuit court's exercise of discretion. ***State v. Velez***, 224 Wis. 2d 1, 19, 589 N.W.2d 9 (1999). We will uphold an exercise of discretion if the circuit court examined relevant facts, applied a proper legal standard, and reached a conclusion that a reasonable judge could reach. ***Management Computer Svcs., Inc. v. Hawkins, Ash, Baptie & Co.***, 224 Wis. 2d 312, 330, 592 N.W.2d 279 (Ct. App. 1998). The circuit court here considered the legal authority of ***Ryan*** and ***Cannon-Stokes*** and assessed Robinson's contentions in light of the record, including the undisputed

fact that Robinson represented in the bankruptcy proceeding that he had no unrealized or contingent claims of any sort. The circuit court then exercised its discretion to apply the doctrine of judicial estoppel.

¶14 Robinson nonetheless contends that the circuit court should not have applied judicial estoppel, asserting that the equities favor him. Our inquiry, however, is whether the circuit court exercised discretion, not whether the circuit court might have exercised discretion differently. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206. Robinson's arguments do not bring him close to the high bar imposed by our deferential standard of review. We affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.