

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 24th *day of* October, 2014.

Michelle Clark, Appellant,

against Record No. 132042
Circuit Court No. CL11-836

Health Tech Resources, LLC, et al., Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of Spotsylvania County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the circuit court.

Michelle Clark and her husband filed a joint petition for protection under Chapter 13 of the Bankruptcy Code on September 4, 2009, in the United States Bankruptcy Court of the Eastern District of Virginia. On December 8, 2009, the bankruptcy court entered an order confirming the Chapter 13 plan. On December 18, 2009, Clark was injured in the parking lot of her workplace on premises owned and/or operated by Health Tech Resources, LLC (Health Tech), and St. Clair Management Group, LTD (St. Clair). On March 28, 2011, Clark and her husband filed a notice of intention to convert their bankruptcy case from Chapter 13 to Chapter 7. The bankruptcy court entered an order converting their case on March 30, 2011. On April 26, 2011, Clark and her husband filed schedules in connection with the Chapter 7 case and listed a workers' compensation claim in connection with the injury Clark sustained on December 18, 2009, but did not list a personal injury claim.

On July 7, 2011, Clark filed a complaint in the circuit court seeking damages from Health Tech and St. Clair for personal injuries sustained on December 18, 2009. Health Tech and St. Clair filed pleas in bar and asserted that Clark lacked standing to pursue her personal injury action because she failed to list her personal injury claim as an asset acquired after filing her original Chapter 13 petition.¹

Relying on Kocher v. Campbell, 282 Va. 113, 712 S.E.2d 477 (2011), the circuit court sustained the pleas in bar, concluding that Clark lacked standing to maintain her personal injury action. In Kocher, this Court held that a plaintiff lacked standing to maintain his action for personal injuries where his cause of action accrued prior to filing a voluntary Chapter 7 petition in bankruptcy and his petition did not list his inchoate personal injury claim. We explained that, as a result of plaintiff's filing a petition in bankruptcy, his inchoate personal injury claim passed to his bankruptcy estate on the date of his filing of the bankruptcy petition and could only be asserted by the bankruptcy trustee unless exempted by the bankruptcy court. Kocher, 282 Va. at 117-118, 712 S.E.2d at 479-80.

Our holding in Kocher does not apply in this case. Clark's cause of action for personal injuries accrued after she and her husband filed their Chapter 13 bankruptcy petition. Pursuant to 11 U.S.C. § 348(f)(1)(A), when a case under Chapter 13 is converted to

¹ Health Tech and St. Clair also asserted that Clark was judicially estopped from pursuing her personal injury claim because she failed to list this claim on her updated schedule of assets following the conversion. The circuit court did not rule upon the issue of judicial estoppel.

a case under another chapter, the property of the bankruptcy estate "shall consist of property of the estate, as of the date of filing of the petition." However, if the debtor converts a case "in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." 11 U.S.C. § 348(f)(2).² Thus, Clark's personal injury claim, which did not accrue until December 18, 2009, does not become part of the converted Chapter 7 bankruptcy estate unless and until a determination of a bad faith conversion is made by the bankruptcy court. Although the bankruptcy trustee has filed a motion for turnover in the bankruptcy court seeking an order requiring Clark to "turnover" her claim for personal injury, the bankruptcy court has not yet ruled upon the motion and has not made a determination of bad faith.³ Accordingly, Clark's personal injury claim has not become part of her bankruptcy estate, and she has standing to pursue her claim at this time.⁴

² On April 29, 2013, Clark and her husband filed an amended schedule in the bankruptcy court listing Clark's personal injury suit as a post-Chapter 13 asset and claiming it was not the property of the Chapter 7 bankruptcy estate pursuant to 11 U.S.C. § 348(f)(1)(A).

³ The original motion for turnover was filed on April 18, 2013, and an amended motion for turnover was filed on September 16, 2013.

⁴ Since the bankruptcy court has not determined that the personal injury claim is part of the bankruptcy estate, we will not address the issue of judicial estoppel.

For these reasons, we reverse the judgment of the circuit court and remand this case for further proceedings.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Pat L Hammit

Clerk