**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. NV-09-1263-DJuP |
| ARNEL FLORES and MARIA RODRIGUEZ-FLORES, | Bk. No. 08-21047-MKN |
| Debtors. | |
| ARNEL FLORES; MARIA RODRIGUEZ-FLORES, | |
| Appellants, | |
| v. | **M E M O R A N D U M**[1] |
| RICK A. YARNALL, Chapter 13 Trustee, | |
| Appellee. | |

Argued and Submitted on March 19, 2010
at Pasadena, California

Filed - April 6, 2010

Appeal from the United States Bankruptcy Court
for the District of Nevada

Hon. Mike K. Nakagawa, Chief Bankruptcy Judge, Presiding.

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Before: DUNN, JURY and PERRIS,[2] Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Elizabeth L. Perris, Chief Judge of the Bankruptcy Court for the District of Oregon, sitting by designation.

Arnel Flores ("Mr. Flores") and Maria Rodriguez-Flores ("Mrs. Flores") (collectively, "the Floreses") claimed as exempt a medical malpractice claim and a loss of consortium claim (collectively, "injury claims") on their amended Schedule C.[3] The chapter 13 trustee, Rick A. Yarnall (the "trustee"), objected to Mrs. Flores exempting the loss of consortium claim as a personal injury claim under Nev. Rev. Stat. ("N.R.S.") § 21.090(1)(u).

The Floreses countered his objection, arguing that neither of the injury claims was property of the estate because the injury claims were so personal to them that, as a matter of public policy, the injury claims should be excluded from the estate. The bankruptcy court determined that, though the injury claims were property of the estate, Mrs. Flores could exempt her loss of consortium claim as a personal injury claim under N.R.S. § 21.090(1)(u). The Floreses appeal the bankruptcy court's determination that the injury claims were property of the estate.[4]

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[4] In his opening brief, the trustee contends that the bankruptcy court erred in allowing Mrs. Flores to exempt her loss of consortium claim as a personal injury claim under N.R.S. § 21.090(1)(u). The Floreses point out in their reply brief that the trustee did not file a notice of cross-appeal. At oral argument, counsel for the trustee conceded that the trustee did not file a cross-appeal. We lack jurisdiction to address issues raised by appellees in the absence of a notice of cross-appeal. See Abrams v. Sea Palms Assocs., Ltd. (In re Abrams), 229 B.R.

(continued...)

We AFFIRM.

**FACTS**

Six years before filing for bankruptcy, Mr. Flores sustained a brain injury while undergoing sinus surgery. The Floreses initiated a medical malpractice lawsuit against the physician who performed the surgery. Among the causes of action asserted in the medical malpractice lawsuit,[5] the Floreses included a loss of consortium claim on behalf of Mrs. Flores.

The Floreses filed their chapter 13 petition on September 23, 2008. On their Schedule B, the Floreses listed three lawsuits, one of which they described as a "medical lawsuit" with a $0 value. On their Schedule C, the Floreses claimed the medical lawsuit as exempt with a value of $0 under N.R.S. § 21.090(1)(u).[6]

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[4](...continued)
784, 788 (9th Cir. BAP 1999), aff'd 242 F.3d 380 (9th Cir. 2000). We therefore do not address the trustee's arguments on the issue of Mrs. Flores's claimed exemption in her loss of consortium claim.

[5] The Floreses also asserted negligence, negligent infliction of emotional distress, and breach of fiduciary duty.

[6] Nevada has opted out of the federal exemption scheme. See N.R.S. § 21.090(3).

N.R.S. § 21.090 provides in relevant part:

> 1. The following property is exempt from execution, except as otherwise specifically provided in this section or required by federal law:
> . . .

(continued...)

The Floreses amended their Schedule B and Schedule C four times over the course of their bankruptcy case.[7] On their second amended Schedule B and Schedule C, the Floreses recast the medical lawsuit as a "medical malpractice lawsuit" with an "unknown" value and claimed it as exempt in the value of $16,150.[8]

On their third amended Schedule B, the Floreses added a second medical malpractice lawsuit; they listed Mr. Flores as the plaintiff in both medical malpractice lawsuits and assigned the medical malpractice lawsuits "unknown" values. On their third amended Schedule C, the Floreses claimed both medical malpractice lawsuits as exempt, each in the value of $16,150.

On their fourth amended Schedule B,[9] the Floreses modified their description of the medical malpractice lawsuits; they

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[6](...continued)

> (u) Payments, in an amount not to exceed $16,150, received as compensation for personal injury, not including compensation for pain and suffering or actual pecuniary loss, by the judgment debtor or by a person upon whom the judgment debtor is dependent at the time the payment is received.

NEV. REV. STAT. ANN. § 21.090(1)(u) (2008).

[7] The Floreses amended their Schedule B and Schedule C on October 10, 2008, December 19, 2008, January 2, 2009 and January 13, 2009.

[8] The Floreses claimed the medical malpractice lawsuit as exempt under N.R.S. § 21.090(1)(u) in every amended Schedule C.

[9] The Floreses apparently filed their fourth amended Schedule B and Schedule C in response to the trustee's objection to their third amended Schedule B and Schedule C.

listed Mr. Flores as the plaintiff in the first medical malpractice lawsuit and Mrs. Flores as the plaintiff in the second medical malpractice lawsuit (i.e., loss of consortium claim).[10] The Floreses assigned each medical malpractice lawsuit a value of $175,000.[11] On their fourth amended Schedule C, the Floreses claimed both medical malpractice lawsuits as exempt, each in the value of $16,150.

The medical malpractice claims settled for a total of $175,000 pursuant to an order entered by the bankruptcy court on January 21, 2009 (the "settlement"). Approximately $75,000 remained from the settlement after payment of attorney's fees and costs.

The trustee objected to Mrs. Flores's exemption of the loss of consortium claim as listed on the fourth amended Schedule C. Relying on Suter v. Goedert, 396 B.R. 535 (D. Nev. 2008), the trustee contended that a debtor may exempt a personal injury claim under N.R.S. § 21.090(1)(u) only if the personal injury claim arose from harm done to his or her own person (i.e., a bodily injury). Only Mr. Flores sustained a "personal injury" within the meaning of N.R.S. § 21.090(1)(u). Mrs. Flores's loss of consortium claim was derivative from Mr. Flores's medical malpractice claim. Because Mrs. Flores had no personal injury

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[10] The Floreses clarified in subsequent pleadings before the bankruptcy court that Mrs. Flores's medical malpractice claim was in fact her loss of consortium claim.

[11] The Floreses apparently assigned the medical malpractice lawsuits these values based on the $175,000 settlement of all of the related claims.

claim separately from Mr. Flores, the trustee argued, she could not exempt her loss of consortium claim under N.R.S. § 21.090(1)(u).

The Floreses raised two arguments in response to the trustee's objection. First, they contended that the injury claims were not property of the estate under § 541 because the injury claims were so personal to them as to be excluded from the estate on public policy grounds and/or were non-assignable under state law.[12] Second, the Floreses argued that, assuming that the injury claims were property of the estate, Mrs. Flores's loss of consortium claim constituted a personal injury claim within the meaning of N.R.S. § 21.090(1)(u) that was exempt up to $16,150.

The bankruptcy court held an evidentiary hearing, at which Mrs. Flores testified, and a hearing for argument on legal issues. On August 4, 2009, the bankruptcy court issued its ruling in a memorandum decision, determining that the injury claims were not so personal to the Floreses as to be excluded from the estate. The bankruptcy court found, however, that Mrs. Flores's loss of consortium claim constituted a personal injury within the meaning of N.R.S. § 21.090(1)(u). As such, the bankruptcy court concluded, Mrs. Flores could claim an exemption in her loss of consortium claim. The bankruptcy court entered an

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[12] The trustee did not object to Mr. Flores's exemption of the medical malpractice claim in either his written objection or at final argument. In fact, counsel for the trustee stated at final argument that the trustee's objection "was simply [to] Mrs. [Flores] taking and [sic] additional personal injury exemption under N.R.S. § 21.090U [sic] in the [$]16,150 from the settlement of the [medical malpractice claim]." Tr. of June 24, 2009 Hr'g, 5:2-5.

order, consistent with its ruling, on the same day. The Floreses filed a timely notice of appeal.

## JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

## ISSUE

Whether the bankruptcy court erred in finding that the injury claims were property of the estate.

## STANDARDS OF REVIEW

We review questions regarding a debtor's right to claim exemptions as questions of law subject to de novo review. Arnold v. Gill (In re Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000). We review questions as to whether property is included in a bankruptcy estate also as questions of law subject to de novo review. Cisneros v. Kim (In re Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000), aff'd 35 Fed. Appx. 592 (9th Cir. 2002).

## DISCUSSION

The Floreses argued before the bankruptcy court that their injury claims were so personal to them that, as a matter of public policy, the injury claims should be excluded from property of the estate. In making their argument, the Floreses relied on Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705 (9th Cir. 1986), and Suter v. Goedert, 396 B.R. 535 (D. Nev. 2008).

In Sierra Switchboard Co., the debtor initiated a state court action against Westinghouse regarding certain commercial transactions between them. 789 F.2d at 706. Ella Fehl, co-owner and manager of the debtor, cross-complained against Westinghouse for emotional distress arising from its interference with the debtor's contractual and business relationships and for breaches of a credit agreement and a security agreement under which Ms. Fehl personally guaranteed the debtor's debts. After Ms. Fehl and the debtor filed for bankruptcy, the action, along with Ms. Fehl's emotional distress claim, was removed to the bankruptcy court. Westinghouse, Ms. Fehl, the trustee for Ms. Fehl's bankruptcy case and others stipulated to a dismissal of the action, including the emotional distress claim, without prejudice, with a condition that any party could refile the action within one year. Ms. Fehl refiled her emotional distress claim in the bankruptcy court. The bankruptcy court determined, however, that Ms. Fehl had no standing to refile her emotional distress claim because it was property of the estate. The district court affirmed the bankruptcy court.

The Ninth Circuit agreed with the bankruptcy court and the district court, determining that the broad definition of property of the estate under the Bankruptcy Reform Act of 1978 included personal injury causes of action, such as emotional distress claims. Id. at 707-09. The Ninth Circuit noted in passing, however, that in some circumstances, an emotional distress claim might be so personal to the debtor that, on public policy grounds, it would not become property of the estate. Id. at 709 n.3.

Twenty-two years later, the debtors in Suter attempted to exclude a legal malpractice claim from the estate on several grounds, including the public policy ground noted in Sierra Switchboard Co. Suter, 396 B.R. at 545. The debtors prepetition initiated an action against a medical facility and its physicians for the improper treatment of their daughter ("medical malpractice action"). After the medical malpractice action resulted partially in a judgment against the debtors, they initiated a legal malpractice action against the attorneys who had represented them in the medical malpractice action. Id. at 539. The debtors sought to exclude the legal malpractice claim as an asset of their chapter 7 estate on the ground that their legal malpractice claim was so personal to them that it was not property of the estate. Id. at 545.

Noting that Sierra Switchboard Co. provided "limited guidance," the district court in Suter set forth "three related reasons for finding an action to be so personal as to exclude it from the bankruptcy estate: (1) permitting the debtor to prosecute intimately personal claims serves as a type of catharsis for the debtor; (2) it seems unfair to allow a defendant to 'buy' his or her own wrong and to keep it from public scrutiny; and (3) compensation for personal injury claims [is] intended to make a plaintiff whole, not merely to pay off a debt." Id. at 546. The district court emphasized that "[e]ach of these reasons stem[med] from righting a wrong done to a plaintiff herself. As the court wrote in Sierra Switchboard [Co.], the claim must be 'personal,' that is, it must belong to the plaintiff." Id.

The district court in Suter ultimately concluded that the debtors' legal malpractice claim was not so personal to them as to exclude it from the estate because they sought to recover for harm that arose from injuries, not to their own persons, but to their daughter. Id.

Here, the bankruptcy court found that, because the debtors' medical malpractice and loss of consortium claims settled, none of the factors set forth in Suter applied.[13] The bankruptcy court went through each factor outlined in Suter in determining that the Floreses' injury claims remained property of the estate.

The bankruptcy court first found that the Floreses had no reason to exclude their injury claims from the estate in order to prosecute them to achieve catharsis. The bankruptcy court did not consider Mr. Flores's medical malpractice claim as "intimately personal" to him given that many personal injury tort claims involved similar circumstances (e.g., physical injury, damage to cognitive functions). Memorandum Decision, 6:25-27, 7:1. Though the bankruptcy court acknowledged that Mrs. Flores's loss of consortium claim was "intimately personal," it concluded that she did not need to have her loss of consortium claim

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[13] The Floreses contend in their opening brief that, contrary to the bankruptcy court's determination, the issue is not moot because the trustee had not distributed the settlement proceeds that they seek to exempt. Appellant's Opening Brief at 7. In its memorandum decision, the bankruptcy court concluded that the Floreses' arguments "based on Suter [were] moot inasmuch as the medical malpractice claim [had] been settled." Memorandum Decision, 6:22-24. The Floreses misapprehend the bankruptcy court's use of the term. The bankruptcy court merely meant that, because the medical malpractice lawsuit was settled, the reasons set forth in Suter were irrelevant (i.e., inapplicable).

excluded from the estate to achieve catharsis through prosecuting it. Memorandum Decision, 7:1-11. She "had her day in court" by testifying at the evidentiary hearing, even though her loss of consortium claim still remained part of the estate. Memorandum Decision, 7:8-11. Moreover, the bankruptcy court reasoned, the settlement obviated the Floreses' need for prosecution.

The bankruptcy court next determined that there was no reason for the Floreses to exclude the injury claims from the estate in order to right the wrong done to them, again, in light of the approved settlement. Nothing in the record indicated that the defendants in the medical malpractice lawsuit were "attempting to keep their alleged misdeeds from public scrutiny." Memorandum Decision, 7:17. As the bankruptcy court noted, the medical malpractice lawsuit was settled after notice to all interested parties and a hearing.

The bankruptcy court finally found that there was no reason for the Floreses to exclude the injury claims from the estate in order to right the wrong against them, as the settlement provided compensation sufficient to make the Floreses whole.

The Floreses contend that the bankruptcy court erred in its application of Suter to the instant case. The Floreses assert that all of the Suter factors were present for finding that the injury claims were so personal to them as to be excluded from the estate as a matter of public policy.

The Floreses argue that the bankruptcy court missed the purpose of the first factor. A victim's "day in court," the Floreses contend, consists of actually prosecuting the claim. Here, Mrs. Flores did not have her "day in court" until she

testified at the evidentiary hearing, which took place after the medical malpractice lawsuit was settled.

As to the second Suter factor, the Floreses claim that, contrary to the bankruptcy court's conclusion, the defendants did manage to keep their wrong from public scrutiny. None of the documents relating to the settlement filed in the bankruptcy case, the Floreses point out, reveal the names of the medical personnel defendants. Moreover, the Floreses add, only creditors received notice of the settlement.

The Floreses also contend that the bankruptcy court ignored the intent of the third Suter factor. According to the Floreses, making plaintiffs whole through compensation for their personal injury claims is the "exact reason to exclude" such claims from property of the estate.

We note that, since Sierra Switchboard Co. was decided in 1986, no court in any circuit has determined that personal injury claims are so personal to the debtor that they should be excluded from the estate. No decision that we or the Floreses have found applies the Suter analysis to arrive at the result the Floreses want. Suter developed a test based on dictum in Sierra Switchboard Co. that has never been applied, in the Ninth Circuit or elsewhere, to exclude debtors' personal injury claims from their bankruptcy estates.

The Ninth Circuit cited In re Brooks, 12 B.R. 22, 24-25 (S.D. Ohio 1981), in suggesting in Sierra Switchboard Co. that there may be some circumstances in which an emotional distress claim may "be so personal to the debtor that it would be undesirable, on public policy grounds, to transfer the property

interest to the bankruptcy trustee." 789 F.2d at 709 n.3. But the bankruptcy court in Brooks did not find any public policy ground on which to exclude personal injury claims from property of the estate. Brooks, 12 B.R. at 25.

In Brooks, the debtor argued that § 541 violated public policy in including personal injury claims as property of the estate. Id. at 24-25. In support of his argument, the debtor in Brooks cited Cesner v. Schmelzer (In re Schmelzer), 480 F.2d 1074 (6th Cir. 1973), which dealt with § 70(a)(5) of the Bankruptcy Act of 1898. Section 70(a)(5), predecessor to § 541, vested the bankruptcy trustee with the debtor's title to causes of action, except personal injury causes of action, unless, under state law, personal injury causes of action were subject to judicial process. 480 F.2d at 1075. The bankruptcy trustee thus had to demonstrate that a cause of action was property within the meaning of the Act and was subject to judicial process under state law to include such claims as property of the estate. Id. The Sixth Circuit found that, under Ohio law, a personal injury cause of action was not subject to judicial process. Id. at 1076-77. The bankruptcy trustee thus lacked title to personal injury causes of action. Id. The Sixth Circuit further reasoned in support of its holding that, in light of the basic purpose of the Bankruptcy Act to provide the debtor a "fresh start," it seemed contrary to public policy to allow the trustee to take over and prosecute in his name the debtor's unliquidated claims for personal injury. Id. at 1077.

The bankruptcy court in Brooks declined to apply Schmelzer, determining that § 541 did not violate public policy in including

personal injury claims as property of the estate. The bankruptcy court reasoned that, though it had considered public policy, Congress intentionally broadened the definition of "property of the estate" to "include virtually every imaginable equitable or legal interest of the debtor in any property." 12 B.R. at 25. The bankruptcy court concluded that, in light of Congress's intent, it had "no reason to tamper" with Congress's choice to expand the definition of "property of the estate." Id.

Based on our review of Brooks and Schmelzer, we determine that public policy considerations do not exclude personal injury claims from becoming property of the estate under § 541 of the Bankruptcy Code. As the bankruptcy court in Brooks recognized, Congress broadened the definition of property of the estate, despite the public policy considerations underlying bankruptcy law.[14] Moreover, we underline the fact that Schmelzer dealt with § 70(a)(5) of the Bankruptcy Act of 1898, which sets forth a narrower definition of property of the estate than § 541.

After Sierra Switchboard Co. was decided and after twenty-four subsequent years of decisions interpreting § 541, no court has determined that personal injury claims are not property of the estate under § 541. The scope of section § 541 is very broad. United States v. Whiting Pools, Inc., 462 U.S. 198, 205 (1983). Section 541(a)(1) provides that the estate is comprised

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[14] We note that, although one of the public policies served by the current Bankruptcy Code is to provide the debtor a financial "fresh start," it is not the only public policy served; the Bankruptcy Code balances this public policy consideration with other competing public policy concerns, such as equitable distribution of estate assets.

of "all legal or equitable interests of the debtor in property as of the commencement of the case . . . wherever located and by whomever held." (emphasis added). Claims for relief sounding in tort, such as personal injury claims, constitute property of the estate. Ileto v. Glock, Inc., 565 F.3d 1126, 1148 n.1 (9th Cir. 2009) (Berzon, J., concurring in part, dissenting in part). See also In re Wischan, 77 F.3d 875, 877 (5th Cir. 1996); In re Yonikus, 974 F.2d 901, 905 (7th Cir. 1992). Plainly read, § 541 includes personal injury claims as property of the estate. See Hartford Underwriters Ins. Co. v. Union Planters Bank, NA, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (internal quotation and citation omitted). Nothing in § 541, implicitly or explicitly, provides a public policy exception for excluding personal injury claims from property of the estate. Because § 541, plainly read, includes personal injury claims, we conclude that the bankruptcy court did not err in determining that the Floreses' injury claims were property of the estate.

We further point out that Nevada also does not consider personal injury claims to be "so personal to the debtor" as to prevent judgment creditors from executing on amounts over and above the $16,150 state law exemption.

The crux of the Floreses' argument is that the injury claims are "personal" to them. Yet, the settlement encompassed economic loss as well as personal injury loss. The settlement did not differentiate between the economic and personal injury losses the Floreses sustained. The fact that the settlement covered both

the economic and personal injury losses of the Floreses cuts against a determination that the injury claims are "so personal" to the Floreses that they cannot be considered property of the estate.

Alternatively, the Floreses argue, the injury claims are not property of the estate because they are non-assignable under Nevada law. Though the Floreses themselves acknowledge that, under Sierra Switchboard Co., the transferability or assignability of property is no longer a consideration when determining whether it becomes property of the estate, they nonetheless urge us to reconsider this issue.

The Floreses contend that, even though federal law (i.e., § 541) determines what interests of the debtor are property of the estate, under Butner v. United States, 440 U.S. 48 (1979), state law determines the existence and scope of the debtor's interest in a particular asset. In Nevada, the right of an injured plaintiff to recover against the tortfeasor in a tort claim cannot be assigned to a third party. Sierra Switchboard Co. holds, however, that "regardless of whether a personal injury claim is transferable or assignable under state law, such claims become part of the bankruptcy estate under section 541." Sierra Switchboard Co., 789 F.2d at 709. The holding in Sierra Switchboard Co., the Floreses assert, contradicts the holding in Butner.

Sierra Switchboard Co. is not inconsistent with Butner. Sierra Switchboard Co. explains that § 541 establishes the scope of property of the estate – what property of the debtor comes into the bankruptcy estate, which, in Sierra Switchboard Co.,

included an emotional distress claim. Id. at 708-09. Butner explains that state law creates and defines the debtor's property interests – state law establishes the debtor's ownership interests in property. Id. at 55. Sierra Switchboard Co. therefore is not at odds with Butner. Because Sierra Switchboard Co. holds that a personal injury claim still becomes property of the estate, even if state law prohibits its transfer or assignability to a third party, we disagree with the Floreses that the injury claims are not property of the estate.

In seeking to exclude their injury claims from property of the estate, the Floreses in effect attempt to establish a new common law exemption scheme that does not comport with either the federal or Nevada exemption schemes. Section 522(d)(11)(D) allows a debtor to exempt up to $20,200 in proceeds from a personal injury claim; N.R.S. § 21.090(1)(u) allows a debtor to exempt up to $16,150 in proceeds from a personal injury claim. Both statutes limit the amount of proceeds from a personal injury claim that a debtor may exempt. The Floreses propose an exemption scheme that would allow them to exempt the entirety of their injury claims, which neither federal nor Nevada exemption schemes allow or contemplate.

**CONCLUSION**

Neither public policy considerations nor a plain reading of § 541(a)(1) exclude the Floreses' injury claims from property of their bankruptcy estate. We therefore conclude that the bankruptcy court did not err in finding that the Floreses' injury claims were property of the estate, and AFFIRM.