

MAR 09 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6 In re:) BAP No. CC-05-1371-KPaJ
7)
8 PAUL E. MATHENY and DEBRA R.) Bk. No. SA 03-13469 JB
9 MATHENY,)
10 Debtors.)
11)
12)
13)
14 RICHARD A. MARSHACK, Chapter 7)
15 Trustee,)
16)
17)
18 Appellant,)
19)
20)
21 v.) **MEMORANDUM***
22)
23)
24 PAUL E. MATHENY; DEBRA R.)
25 MATHENY,)
26)
27)
28 Appellees.)

Argued and Submitted on February 23, 2006
at Pasadena, California

Filed - March 9, 2006

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable James N. Barr, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS and JAROSLOVSKY,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Hon. Alan Jaroslovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

1 workstation and a wall, causing injuries. Ms. Matheny alleged
2 that she suffered a soft-tissue back injury and was unable to
3 work as a result of the incident for an indefinite period of
4 time.

5 The debtors amended their schedules to provide more detail
6 about the lawsuit, which they now estimated to have a value of
7 \$400,000, and added by footnote:

8 This is only an estimate at this stage of the
9 litigation. The estimate is based upon an estimated
10 \$300,000 in compensation of loss of future earnings of
11 the debtor and \$100,000 for punitive damages awarded
not an [sic] of personal bodily injury, not including
pain and suffering or compensation for actual pecuniary
loss.

12 Amended Schedules filed on September 8, 2003, at pgs. 2-3.

13 The debtors revised their exemptions to claim: (1) \$18,225
14 for punitive damages pursuant to C.C.P. § 703.140(b)(5) ("wild
15 card"); (2) \$17,425 pursuant to C.C.P. § 703.140(b)(11)(D)
16 ("personal bodily injury"); (3) \$300,000 pursuant to C.C.P.
17 § 703.140(b)(11)(E) ("loss of earnings").

18 The trustee filed an objection to the claimed exemptions for
19 bodily injury and for loss of future earnings, but not to the
20 \$18,225 claimed under the California "wild card" exemption
21 applicable to "any property."

22 The objection was resolved in two installments. First,
23 there was a preliminary hearing on February 17, 2004, which
24 included a request by the debtors that the cause of action be
25 abandoned. The court deferred action on the exemption dispute as
26 premature before the outcome of the lawsuit was known and
27 declined to order the asset abandoned. The second installment
28 was the final hearing on the merits on August 17, 2005.

1 At a June 2005 status conference, it was reported that there
2 was an agreement to settle the lawsuit for \$100,000 that would
3 require court approval and that the parties needed a schedule for
4 litigating the exemption dispute. The court set a schedule and
5 fixed a hearing on the merits for August 17, 2005, which hearing
6 resulted in the order overruling the objection to exemptions.

7 The record considered at the final hearing included the
8 papers that had been presented at the initial February 2004
9 hearing that had been continued as premature, as well as
10 supplemental papers filed in preparation for the August 17
11 hearing.

12 The trustee's objection to an exemption for bodily injury
13 damages was predicated on inadequate evidence. The trustee
14 contended, citing In re Ciotaa, 222 B.R. 626, 633 (Bankr. C.D.
15 Cal. 1998) and In re Hanson, 226 B.R. 106 (Bankr. D. Idaho 1998)
16 (Oregon law), that the debtors had to present the court with
17 "convincing certification of the injury to demonstrate that she
18 [had] suffered an appreciable injury."

19 The trustee further contended that the evidence suggested
20 that the debtor did not suffer any bodily injury: (1) the report
21 submitted to the Anaheim Police Department did not mention
22 personal injuries; and (2) one of the witnesses reported that she
23 never saw anyone get pushed or fall during the altercation.

24 The trustee's objection to the debtors' exemption for loss
25 of future earnings was based on four grounds: (1) absence of
26 reported injuries in the police report; (2) the K-1 tax
27 statements from Ms. Matheny's beauty salon partnership for 2001
28 and 2002, which indicated that she made virtually no income

1 during these years, which, when compared with the \$2,500 per
2 month income stated on Schedule I, indicated that her income
3 increased after the alleged injury; (3) omission from the
4 original schedules of an assertion of a property interest in, and
5 claim of exemption for, lost income; and (4) any actual loss of
6 income was more likely due to the transfer of her partnership
7 interest in the beauty salon to her daughter in 2002.

8 The debtors' filed their initial response to the trustee's
9 objection in January 2004. Their response included Ms. Matheny's
10 declaration, as well as a legal argument invoking Federal Rule of
11 Bankruptcy Procedure 4003(c) and the Ninth Circuit decision in
12 Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029-30 n.3
13 (9th Cir. 1999). The debtors argued that the trustee's proffered
14 evidence did not "rebut the presumptively valid exemption" and
15 that the "[b]urden of [p]ersuasion always remains on the
16 objecting party."

17 The debtors contended that loss of income was, as a matter
18 of law, an element of damages for the cause of action that was
19 included in the original schedules and explained that her
20 compensation was from direct services performed at her work
21 station at the salon, which was free to her under the terms of
22 the partnership, and that the salon partnership itself never made
23 any money.

24 The record surviving from the February 2004 hearing included
25 the trustee's written evidentiary objections to four statements
26 in Ms. Matheny's declaration. The trustee objected to admission
27 of the debtor's statement that she suffered from "a soft tissue
28 back injury and resulting headaches" as a result of the

1 altercation with the customer and to the debtor's statements to
2 the effect that her back injury "impeded her ability to work."
3 The other two objections were to the debtor's statements that her
4 back injury "precluded" her from working. The evidentiary
5 theories were that the statements were inadmissible as a lay
6 opinion regarding a subject about which only an expert could
7 testify, as without proper foundation, as not relevant, as
8 hearsay not within a hearsay exception, and as not the best
9 evidence.

10 Once the \$100,000 outcome of the lawsuit was in view, the
11 trustee supplemented his objections to the exemptions. He did
12 not challenge the so-called "wild card" or "grubstake" exemption
13 under C.C.P. § 703.140(b)(5). He contended that the remaining
14 settlement funds that he calculated at \$39,745 were non-exempt
15 property of the estate because Ms. Matheny did not prove that she
16 suffered an "appreciable bodily injury." The trustee pointed to
17 the absence of medical evidence injury and to deposition
18 testimony of Ms. Matheny's physician, Paul F. Parks, Jr., M.D.,
19 an orthopaedic surgeon, that he could find no evidence that she
20 suffered any injury to her back.

21 As to the "loss of future compensation" exemption, the
22 trustee contended that under California law the right to the
23 claim for lost future wages required a finding that the loss was
24 the result of an injury, which made the physician's testimony
25 fatal to that exemption as well.

26 In the debtors' reply to the trustee's supplement to
27 objection, they contended: (1) the funds were for the settlement
28 of a "personal injury claim"; (2) the trustee must have agreed

1 that there was an injury because he had "hired special counsel to
2 prosecute the injury claim"; (3) the schedules, the state court
3 complaint, the amended schedules, and her declaration all
4 supported the debtor's contention that she had a bodily injury;
5 (4) the only supplemental proof submitted by the trustee was the
6 release in full of all claims and a copy of Dr. Park's deposition
7 wherein he could not specifically or generally explain the cause
8 of Ms. Matheny's back pain.

9 On August 17, 2005, the court issued a tentative ruling. As
10 to the exemption for personal bodily injury, the court
11 tentatively ruled:

12 Overrule the T's objection because he did not meet his
13 burden of proving that the exemption was not properly
14 claim[ed] as required by Fed. R. Bankr. P. 4003(b).
15 The T's reliance on In re Ciotta, 222 B.R. 626, 633
16 (Bankr. C.D. Cal. 1998) and In re Kris Hanson and Sandy
17 K Hanson, 222 B.R. 626, 633 (Bankr. C.D. Cal. 1998),
18 two non-binding trial court opinions, is misguided
19 because those cases are factually distinguishable.
20 Both the Ciotta and Hanson courts ruled that a debtor
21 who was trying to exempt the proceeds of a sexual
22 harassment lawsuit under a 'personal bodily injury' had
23 to make a showing that she suffered physical injury
24 (for that tort generally did not involve bodily
25 injuries). Here, the debtor filed an action for
26 battery which generally involves personal bodily
27 injury. The debtor also testified that she suffers
28 physical pain from the incident with Ms. Dalpe.
Finally, the police report provides that one of Ms.
Dalpe's children told an officer that his mother pushed
the debtor. Thus, there is some evidence that the
debtor suffered bodily injury.

23 Tentative Ruling, August 17, 2005, at pgs. 1-2.

24 Regarding the \$300,000 claimed exempt as compensation for
25 lost earnings, the court tentatively ruled:

26 Overrule the trustee's objection because he did not
27 meet his burden of proving that the exemption was not
28 properly claim[ed] as required by Fed. R. Bankr. P.
4003(b). Here, the evidence indicates that the debtor,
who is 51 years old, is currently earning approximately

1 \$29,000 less than her average income in 2001-2002. If
2 that amount is multiplied by the debtor's likely
3 remaining working years before retirement, the debtor
4 would have approximately \$330,000 in lost future wages.
5 Therefore, it cannot be said that the debtor's claimed
6 exemption for loss of future earnings has no reasonable
7 basis in fact.

8 Tentative Ruling, August 17, 2005, at p. 1.

9 At the final hearing, the discussion focused on: whether the
10 debtor's testimony established a bodily injury; the appropriate
11 burden of proof; and the trustee's evidentiary objections. All
12 of the evidence was admitted, except paragraph 16 of Ms.
13 Matheny's declaration ("My greatest concern is that my back
14 continues to prevent me from working and I do not know how much
15 longer I will be able to work, even part time."), which was
16 excluded as irrelevant.

17 The court did not make separately-documented findings of
18 fact and conclusions of law, but it did make its written
19 tentative ruling part of its record. No party requested that
20 direct examination or cross-examination be taken in the same
21 manner as in an adversary proceeding.

22 The trustee argued that the debtors' evidence did not
23 sufficiently establish that Ms. Matheny suffered an "appreciable
24 bodily injury" which he contended meant "an injury that can be
25 determined by some objective view point of a medical physician
26 ... something that was physically changed about that person's
27 body." The court responded to the effect that this analysis
28 might be too rigorous because soft tissue injuries might only be
29 evidenced by an inability to perform work.

30 The order overruling the objections to the debtors' claims
31 of exemptions was entered on August 30, 2005.

1 This timely appeal ensued.

2
3 JURISDICTION

4 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
5 We have jurisdiction under 28 U.S.C. § 158(a)(1).
6

7 ISSUES

8 1. Whether the court erred by overruling the trustee's
9 evidentiary objections' to debtor's declaration testimony
10 regarding her injuries.

11 2. Whether the court clearly erred in ruling that the
12 debtors could claim an exemption for personal bodily injury under
13 C.C.P. § 703.140(b)(11)(D).

14 3. Whether the court clearly erred in ruling that the
15 debtors could claim an exemption for compensation for loss of
16 earnings under C.C.P. § 703.140(b)(11)(E).
17

18 STANDARD OF REVIEW

19 We review the scope of a statutory exemption de novo, as a
20 question of law. Gonzalez v. Davis (In re Davis), 323 B.R. 732,
21 734 (9th Cir. BAP 2005). A bankruptcy court's findings of fact
22 are reviewed for clear error. Peklar v. Ikerd (In re Peklar),
23 260 F.3d 1035, 1037 (9th Cir. 2001). Clear error exists when,
24 after examining the evidence, the reviewing court is left with a
25 definite and firm conviction that a mistake has been committed.
26 Davis, 323 B.R. at 734, citing, United States v. United States
27 Gypsum Co., 333 U.S. 364, 395 (1948).
28

1 DISCUSSION

2 The fundamental issue in this appeal is sufficiency of
3 evidence to support the trial court's ruling.¹ As a mere factual
4 matter, the debtor's declaration testimony provided "some"
5 evidence of record to support the court's factual conclusions.
6 In essence, unless the debtor's declaration should have been
7 excluded in its entirety, any error in admitting evidence would
8 be harmless in the face of a clear error standard.

9
10 I

11 The trustee's first argument on appeal is that the court
12 erred by "allowing the medical testimony" in Ms. Matheny's
13 declaration. The court ruled:

14 (1) paragraph three: "I suffer from a soft tissue back
15 injury and resulting headaches" - overruled to the extent
that she stated that she had a back injury;

16 (2) paragraph four: "The injury to my ba[c]k, and headaches,
17 have seriously impeded my ability to work in the Salon" -
overruled, doesn't require expert testimony;

18 (3) paragraph six: "After the injury to my back, I was
19 unable to work the long hours in the Salon required of an
owner" - court stated that it was overruling all objections
20 to this point.

21 (3) paragraph 16: "My greatest concern is that my back
22 continues to prevent me from working and I do not know how
much longer I will be able to work even part time" - simply
23 a question of her concern, is not a statement of fact as to
condition, and irrelevant.

24 Tr. of Oral Ruling, at pgs. 14-16.

25 _____
26 ¹We do not address whether the trial court correctly
27 assessed the burden of proof. Cf., Gonzalez v. Davis (In re
28 Davis), 323 B.R. 732, 740 (9th Cir. BAP 2005) (Klein, J.,
concurring). Whether the trustee or the debtors bear that
burden, the court's ruling was correct.

1 The trustee contends that while Ms. Matheny is capable of
2 testifying whether she suffers pain, "her opinion that the pain
3 is a result of a back injury suffered at the hands of [the
4 defendant], is not made with sufficient scientific knowledge of
5 medicine to allow said testimony to be permitted under Federal
6 Rules of Evidence 701 and 702. Therefore any testimony of Debra
7 Matheny that she suffered an injury, that her pain was caused by
8 the injury or that she is unable to work as a result of the
9 injury is inadmissible lay opinion."

10 Federal Rule of Evidence 701 provides:

11 If the witness is not testifying as an expert, the
12 witness' testimony in the form of opinions or
13 inferences is limited to those opinions or inferences
14 which are (a) rationally based on the perception of the
15 witness, (b) helpful to a clear understanding of the
16 witness' testimony or the determination of a fact in
17 issue, and (c) not based on scientific, technical, or
18 other specialized knowledge within the scope of Rule
19 702.

20 Fed. R. Evid. 701.

21 In this instance, the court admitted Ms. Matheny's
22 statements as opinion testimony by a lay witness, not testimony
23 based upon scientific, technical, or other specialized knowledge
24 within the scope of Federal Rule of Evidence 702. Under Rule
25 701, Ms. Matheny may testify as to her own opinions regarding her
26 injured back and her inability to work as a result therefrom.
27 Thus, the court did not err in overruling the trustee's
28 objections and admitting the testimony. Any issue regarding the
testimony would go to weight not admissibility.

II

The trustee's central argument centers around the court's

1 finding that the debtor's evidence sufficiently established that
2 she sustained a bodily injury and that she was thus entitled to
3 an exemption under C.C.P. § 703.140(b)(11)(D).

4 A debtor may claim exemptions for property under either
5 state or federal law pursuant to 11 U.S.C. § 522. Sylvester v.
6 Hafif (In re Sylvester), 220 B.R. 89, 91 (9th Cir. BAP 1998).

7 When a debtor elects to claim an exemption under state law
8 pursuant to § 522, the bankruptcy court looks only to the state
9 law to determine the scope of that exemption. Id.

10 In this instance, \$17,425 of the settlement funds were
11 claimed exempt as on account of personal bodily injury under
12 C.C.P. § 703.140(b)(11)(D):

13 A payment, not to exceed seventeen thousand four
14 hundred twenty-five dollars (\$17,425), on account of
15 personal bodily injury, not including pain and
16 suffering or compensation for actual pecuniary loss, of
the debtor or an individual of whom the debtor is a
dependent.

17 Cal. Civ. Proc. § 703.140(b)(11)(D).

18 The trustee contends that the debtor's unsubstantiated
19 statements in her declaration that she had a back injury were not
20 enough to establish an "appreciable bodily injury" as articulated
21 in Ciotta and Hanson. The bankruptcy court inquired into the
22 term "appreciable" and stated that he was uncertain "where to put
23 that in the panoply of gauges in terms of the extent to which
24 there is injury ... where would you put appreciable in the range
25 of dead and living? ... Living and injured and dead."

26 The court was not persuaded by the non-binding trial court
27 opinions (Ciotta and Hanson) because they were factually
28 distinguishable - those cases dealt with debtors who were trying

1 to exempt the proceeds of sexual harassment lawsuits under a
2 "personal bodily injury" exemption. Ciotta, 222 B.R. at 633;
3 Hanson, 226 B.R. at 107. We agree with the court.

4 The record in the instant case does not necessarily turn on
5 a precise definition of "personal bodily injury." Simply put,
6 the court considered three pieces of evidence: (1) the debtor's
7 declaration; (2) the doctor's deposition testimony; and (3) the
8 police report (to which no one objected).

9 The court was persuaded by the debtor's declaration, wherein
10 she testified that as a result of the altercation with a customer
11 at the Canyon Hair & Nails Salon, she suffered from a back
12 injury, as well as headaches, that impeded her ability to work.
13 Although Dr. Park testified that all the tests he conducted came
14 back "normal," he also stated, as the debtor points out: "[T]here
15 are so many causes for back pain, all the way from inflammation,
16 muscular tears, strains, sprains. In this case, I was not able
17 to narrow it down to one specific diagnosis." Thus, the court
18 determined that Dr. Park's testimony was inconclusive.

19 Where two views of the evidence are permissible, the
20 factfinder's choice between them cannot be clearly erroneous.
21 United States v. Working, 224 F.3d 1093, 1102 (9th Cir. 2000).
22 Ultimately, the court gave the debtor's declaration more weight
23 than the doctor's deposition testimony. We cannot say that this
24 was a clearly erroneous assessment of the evidence. Hence, the
25 evidence of record supports the debtor's claimed exemption.

26
27 III

28 The trustee's final argument is that the court erred in

1 allowing the debtors an exemption for lost earnings under C.C.P.
2 § 703.140(b)(11)(E). This section provides, in pertinent part,
3 that a debtor may exempt:

4 A payment in compensation of loss of future earnings of
5 the debtor ... to the extent reasonably necessary for
6 the support of the debtor and any dependent of the
7 debtor.

8 Cal. Civ. Proc. § 703.140(b)(11)(E).

9 The debtors' Amended Schedule C exempted \$300,000. After
10 the monies for the personal injury exemption are deducted from
11 the debtors' settlement funds, the exemption for loss of earnings
12 is in the amount of \$22,320.

13 In determining that the debtors could exempt \$300,000, the
14 court explained that the debtor was 51 years old and was
15 currently "earning \$29,000 less than her average income in 2001-
16 2002. If that amount is multiplied by the debtor's likely
17 remaining working years before retirement, the debtor would have
18 approximately \$330,000 in lost future wages."

19 The trustee's argument on appeal regarding the loss of
20 earnings exemption is brief. In addition to his assertion that
21 there is no proof of injury, he contends that Ms. Matheny's K-1
22 tax forms indicate that she "virtually made no income" during
23 2001 and 2002, and that her Schedule I indicates that she now
24 earns more money than before the incident.

25 The debtors respond that the K-1s were for the partnership
26 only, not herself, and do not reflect the fees for services
27 performed by her at her work station at the salon.

28 The evidence presented by the debtor to explain why the K-1
tax forms did not reflect her actual income supports the court's

1 ruling. We perceive no error in this regard.²

2 As a consequence, any error regarding the debtors' long-term
3 needs would be harmless.

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5

CONCLUSION

6 For the foregoing reasons, we AFFIRM.

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²The trustee made clear during the hearing at the bankruptcy court that his argument turned only on whether or not the debtor sustained a physical injury. The court did not (and was not asked to) inquire into the debtors' present circumstances, other exempt property, present income, and any other factor relevant to determine whether the money is actually necessary to meet the debtor's basic needs. Hanson, 226 B.R. at 108. Nor did the trustee present any evidence in that regard.