

In re Cope

300-37575-TMB7

8/10/01

TMB

Published

Debtor objected to Trustee's Notice of Intent to Settle a pre-petition unlawful employment claim held by Mr. Cope and the trustee objected to the Debtors' claim of exemption in \$10,000 to be paid to Mr. Cope as "emotional distress" damages as part of that settlement. The court relying on In re Hanson, 226 B.R. 106 (Bankr. D. Id. 1998) (interpreting Oregon law) held that emotional distress damages were not subject to exemption under ORS 23.160(k) absent a clear showing that the debtor suffered some type of appreciable physical injury. The court reached its decision based on the plain language of the statute which allows a debtor to claim an exemption in funds received "on account of personal bodily injury to the debtor." The court reasoned that had the legislature intended to allow an exemption for pain and suffering (such as emotional distress) absent actual physical injury it would have required only that the funds be received on account of a personal injury, not a personal bodily injury.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
MARK E. COPE and ) 300-37575-tmb7  
REBECCA S. COPE, )  
 ) MEMORANDUM OPINION  
 )  
Debtors. )  
\_\_\_\_\_ )

This matter came before the court on the Debtors' objection to the Trustee's notice of intent to settle Mr. Cope's unlawful employment practices lawsuit against his employer and the Trustee's objection to the Debtors' claim of exemption in \$10,000 to be paid to Mr. Cope as "emotional distress damages" as part of that settlement.

FACTS

At the time this bankruptcy was filed Mr. Cope had a pending lawsuit against his employer for unlawful employment practices. The Debtors valued the lawsuit at \$130,000 and claimed 75% of those

1 funds as exempt under ORS 23.185 which allows a debtor to exempt 75%  
2 of any wages due and owing at the time of a bankruptcy filing.

3 On November 2, 2000, the Trustee filed objections to the  
4 claimed exemption stating "Discrimination Claim is of Record, suit  
5 claims only part of damages and lost wages. Trustee has no  
6 objection to 75% of wage portion of any award being exempt." The  
7 Debtors did not respond to the Trustee's objection and, therefore,  
8 the Debtor's exemption was disallowed.

9 On December 13, 2000, The Trustee then filed a Motion to  
10 Settle and Compromise the state court lawsuit on "terms that the  
11 defendants insist on remaining confidential." The Motion also  
12 stated that "[t]he proceeds from the settlement are sufficient to  
13 pay all the debtors' s scheduled claims." The Motion further stated  
14 that the settlement included an award of statutory attorney fees  
15 that would be paid directly to the Debtors' state court counsel and  
16 that the balance of the settlement funds would be paid to the  
17 trustee for distribution to creditors.

18 The Debtors timely objected to the Motion to Settle and  
19 Compromise on the grounds that 1) the settlement required them to  
20 waive exemptions and forfeit their interest in otherwise exempt  
21 property and 2) their bankruptcy counsel had not been informed of  
22 any settlement negotiations between their personal injury attorney  
23 and the trustee nor of the agreement to waive the Debtors' claim of  
24 exemption. The Debtors also moved for an extension of time to amend  
25 their exemptions.  
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1           On February 1, 2001, the Debtors filed amended schedules in  
2 which they claimed 75% of the proceeds of the lawsuit exempt as  
3 wages and claimed an additional \$10,000 exempt as payment for  
4 personal bodily injury under ORS 23.160(1)(k). The Trustee filed  
5 objections to the Debtors' claim of exemption under ORS  
6 23.160(1)(K). The Debtors did not respond to the Trustee's  
7 objection.

8           Following an initial hearing on the Debtors' Objections to  
9 the Trustee's Notice of Settlement and the Debtors' Motion to extend  
10 Time to Amend Schedules, the court directed the parties to submit  
11 briefs on the issue of whether Oregon law allows an exemption for  
12 emotional distress damages absent a showing that the debtor suffered  
13 actual physical injury.

#### 14   DISCUSSION

15           A debtor's right to claim exemptions is governed by § 522(d)  
16 of the Bankruptcy Code. This sections provides, in pertinent part:

17           (b) . . . an individual debtor may exempt from  
18 property of the estate the property listed in either  
19 paragraph (1) or, in the alternative, paragraph (2) of  
this subsection. . . . Such property is:

20                               (1) property that is specified under  
21 subsection (d) of this section, unless  
22 the State law that is applicable to the  
debtor under paragraph 2(A) of this  
subsection specifically does not so  
authorize; or, in the alternative,

23                               (2) any property that is exempt under  
24 Federal law, other than subsection (d)  
25 of this section, or State or local law  
26 that is applicable on the date of the  
filing of the petition at the place in  
which the debtor's domicile has been

1           located for the 180 days immediately  
2           preceding the date of the filing of the  
3           petition, or for a longer portion of  
          such 180-day period than in any other  
          place . . . .

4           In this case the Debtors' domicile was located in Oregon for  
5           the 180 day period prior to filing of the bankruptcy petition.  
6           Oregon has opted out of the federal bankruptcy exemptions. ORS  
7           23.305. Thus the court must look to the Oregon exemption statutes  
8           to determine the Debtors' right, if any, to exempt the funds at  
9           issue.

10          The Debtors claim that the funds at issue may be exempted  
11          under ORS 23.160(1)(k) which allows a debtor to exempt a:

12                 "right to receive, or property that is traceable to, a  
13                 payment or payments, not to exceed a total of \$10,000,  
               on account of personal bodily injury of the debtor. .  
14                 . . ."

15          The trustee contends that this section does not allow the  
16          Debtors to exempt funds received as emotional distress damages  
17          absent a showing that the distress was the result of bodily injury  
18          suffered by a debtor. In support of this contention he cites In re  
19          Hanson, 226 B.R. 106 (Bankr. D. Id. 1998).

20          In Hanson the court applied Oregon law and held that proceeds  
21          of a debtor's sexual harassment lawsuit against her employer were  
22          not exempt under ORS 23.160(1)(k) absent a "clear showing . . . that  
23          she suffered some type of appreciable physical injury. . . ." Id at  
24          108. In reaching this conclusion the court noted that the "personal  
25          bodily injury exemption under Oregon law . . . is very similar to  
26          Idaho's exemption in that it narrows the definition of personal

1 injury by adding the term 'bodily'". Id. at 109. The court noted  
2 it "had construed the term 'bodily injury' under the Idaho statute  
3 to refer 'to actual physical injury, and not pain and suffering  
4 consisting only of mental and emotional trauma.'" Id. at 108 It  
5 based this conclusion on the fact that the "legislature's use of  
6 [the] additional descriptive term [bodily] must have been  
7 significant, or it is mere surplusage." Id.

8 The Debtors contend that the Hanson decision was wrongly  
9 decided because it misconstrues Oregon law regarding a plaintiff's  
10 right to recover emotional distress damages. Under Oregon law  
11 emotional distress damages are generally not recoverable absent a  
12 showing of actual physical injury. However, such damages are  
13 allowed, without a showing of physical injury if they arise from 1)  
14 a specific intent to inflict emotional distress; 2) intentional  
15 misconduct by a person in a position of responsibility and with  
16 knowledge that it would cause grave distress; or 3) there is conduct  
17 that infringes upon a legally protected interest apart from the  
18 claimed distress. Bennett v. Baugh, 961 P.2d 883, 888, 154 Or. App.  
19 397 (Or 1998); affirmed in part, reversed in part, 329 Or. 282, 985  
20 P.2d 1281 (1999).

21 The Debtors argue that:

22 "[t]here would be no logical reason why the Oregon  
23 legislature would allow an exemption for emotional  
24 distress damages for someone who is physically  
25 impacted, but deny someone who suffers equally, simply  
26 because she received the damages based upon a  
different, yet no less recognized, theory under Oregon  
law. Further, it would be inequitable for emotional  
distress damages to be exempt under the general rule,

1 but not exempt under the three exceptional  
2 circumstances recognized by Oregon law." Debtors'  
Memorandum in Support of Claimed Exemption, page 3.

3 As a preliminary matter, I note that it is not the function  
4 of this court to decide whether the laws enacted by the legislature  
5 are "logical." Rather, our function is to interpret those laws and  
6 apply them to the facts of the case at hand. That said, there are a  
7 number of rules governing judicial interpretation of statutory  
8 provisions. Among these are the following:

9 "The interpretation of a statutory provision must  
10 begin with the plain meaning of its language. Where  
11 statutory language is unambiguous the judicial inquiry  
12 is complete. It is a cardinal principal of statutory  
13 construction that a court must give effect, if  
possible, to every clause and word of a statute. When  
the statutory scheme is coherent and consistent, there  
generally is no need for a court to inquire beyond the  
plain language."

14 In re Bonner Mall Partnership, 2 F.3d 899, 908 (9<sup>th</sup> Cir. 1993).

15 In this case the Oregon statute at issue allows a debtor to  
16 exempt up to \$10,000 in funds received "on account of personal  
17 bodily injury of the debtor." ORS 23.160(1)(k). Prior to 1995, this  
18 exemption could not be used to exempt funds received on account of  
19 "pain and suffering or compensation for actual pecuniary loss." The  
20 statute was amended in 1995 to eliminate the restriction on  
21 exemptions for funds received on account of pain and suffering or  
22 actual pecuniary loss. However, it did not eliminate the  
23 requirement that the funds to be exempted arise from "personal  
24 bodily injury." Thus the plain language of the current statute  
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1 allows an exemption for funds received as compensation for pain and  
2 suffering only if the pain and suffering arise from a bodily injury.

3 The Debtors further argue that the term "bodily" does not  
4 necessarily require actual physical injury to the debtor and that  
5 "it is just as plausible that the legislature used the term 'bodily'  
6 to differentiate between injury to a person's self and injury to  
7 personal property." I disagree. If the legislature merely intended  
8 to differentiate between injury to person and injury to property it  
9 could have done so by simply allowing a deduction for personal  
10 injury. It did not do so. Rather, it chose to allow an exemption  
11 only for funds received on account of personal "bodily" injury. The  
12 use of the modifier "bodily" after the word "personal" implies a  
13 legislative intent to limit this exemption to funds received on  
14 account of a physical injury to the body of the debtor.

15 I find, therefore that the Debtors may not claim an exemption  
16 in funds traceable to emotional distress damages absent a showing  
17 that the distress arose from actual physical injury. I will set the  
18 matter for an evidentiary hearing to address the issue of whether  
19 the debtor suffered such injury.

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Bankruptcy Judge

23 cc: David B. Mills  
24 Joseph F. Ammirati  
25 United States Trustee  
26 Michael A. Grassmueck