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SUPREME COURT NO. 69065

**IN THE SUPREME COURT
OF THE STATE OF NEVADA**

DAVID JOHN KAPLAN,
Appellant

-v-

CHAPTER 7 TRUSTEE, ALLEN DUTRA
Respondent.

Bankruptcy Case No.: BK-N-10-54568-GWZ

APPELLANT'S OPENING BRIEF
from the United States Bankruptcy Court District of Nevada

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DAVID JOHN KAPLAN

Appellant.

VS.

CHAPTER 7 TRUSTEE, ALLEN DUTRA

Respondent.

Supreme Court No. 69065

BK-N-10-54568-GWZ

APPELLANTS OPENING BRIEF

Appellant, David John Kaplan, by and through his counsel of record, Christopher P. Burke, Esq., hereby submits his Opening Brief in accordance with the provisions of NRAP 28.

Dated this 8th day of March 2016.

/s/ Christopher P. Burke, Esq.
Christopher P. Burke, Esq.
Attorney for Appellant

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 **DAVID JOHN KAPLAN**

4)
5 **Appellant.**)

6 **vs.**)

7 **CHAPTER 7 TRUSTEE,**)
8 **ALLEN DUTRA**)

9 **Respondent.**)
10)

Supreme Court No. 69065

**ORIGINAL PROCEEDING
CERTIFIED QUESTION
(NRAP 5)**

BK-N-10-54568-GWZ

11 **NRAP 26.1 DISCLOSURES**

12 The undersigned counsel of record certifies that the following are
13
14 persons and entities as described in NRAP 26.1(a) and must be
15
16 disclosed:

17 Corporate Affiliations: None

18
19 Counsel for Appellant: Christopher P. Burke, Esq.

20 Pseudonyms: None
21
22
23

24 Dated this 8th day of March 2016.

25
26 /s/ Christopher P. Burke, Esq.
27 Christopher P. Burke, Esq.
28 Attorney for Appellant

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STATUTES:

NRS §21.090	4, 6, 7, 8
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I

SUMMARY OF ARGUMENT

In Nevada, exemptions are liberally construed. Nevada does allow an individual to exempt money for personal injuries. Notably, the statute does not restrict that exemption to one personal injury claim. Here, Kaplan had two separate personal injuries, from two separate events prior to filing his bankruptcy. Since the statute does not restrict the number of personal injury claims, only the amount of a particular claim, shouldn't he be allowed to protect both claims up to the exemption amount?

II

ROUTING STATEMENT

Pursuant to NRAP 28 (a)(5), the Supreme Court should retain this case as it involves a question of law certified from a federal court. NRAP 17 (a)(7). (Ex. of Rec. '5' p. 24).

III

STATEMENT OF ISSUES

In Nevada, can a debtor exempt more than one personal injury claim up to \$16,150 each?

1 **IV**
2 **STATEMENT OF CASE**

3 This is a certified appeal from the Bankruptcy Court, based upon
4 Chapter 7 Trustee, Allen Dutra, Objection to Debtor's Claim of
5 Exemptions filed on May 7, 2015 (Ex. of Rec. '2').
6

7 **V**
8 **STATEMENT OF FACTS**

9 Kaplan, in pro se, filed his Chapter 11 bankruptcy (Case No. 10-
10 54568-GWZ) on November 19, 2010. That case was converted to
11 chapter 7 on September 5, 2012 (Dkt. 60). Prior to filing, he was
12 involved in two personal injury cases. One, on March 18, 2009, where
13 Kaplan was involved in a dog attack and hurt his back (Rivera matter).
14 The second personal injury occurred, when Kaplan was rear-ended on
15 May 4, 2010 and he hurt his lower back (Connell matter). Six weeks
16 prior to the second injury, Kaplan had back surgery. The second
17 accident hampered his recovery from the back surgery. Kaplan then
18 had to have a second back surgery in July 2011.
19
20
21

22 Kaplan, who is on social security disability, has a plethora of
23 health problems, including diabetes and osteoporosis. In addition, he
24 takes care of his twenty-six year old disabled son (Ex. of Rec. '3' p.20).
25

26 Originally, Kaplan exempted only one of his personal injury
27 claims on Schedule C which was filed on December 22, 2010 (Dkt. 21).
28

1 Kaplan amended Schedule C of his bankruptcy on May 5, 2015 to
2 include two different personal injury exemptions, i.e. \$16,150 for
3 personal injury settlement stemming from a dog attack (Kaplan vs.
4 River) and another \$16,150 exemption stemming from an auto
5 accident (Kaplan vs. Connell) (Ex. of Rec. '1').

7 Chapter 7 Trustee, Allen Dutra, filed an Objection to Debtors
8 Claim of Exemptions on May 7, 2015 (Ex. of Rec. '2'). On October 19,
9 2015 the Bankruptcy Court certified this issue to the Nevada Supreme
10 Court (Ex. of Rec. '5').

12 VI 13 ARGUMENT

14 **1. Bankruptcy debtor's in Nevada are entitled to the state** 15 **exemptions.**

17 Upon the filing of a bankruptcy petition, an estate is created
18 consisting of all legal and equitable interests of the debtor in property
19 as of the date of the filing of the petition. 11 U.S.C. §541(a)(1). In
20 return, Section 522(d) allows a debtor to exempt certain property from
21 his or her estate, protecting it from creditors. But the Bankruptcy
22 Code provides an opt-out provision whereby a state can either require
23 the debtor to exempt property under the state law exemptions or grant
24 the debtor the option of choosing between state and federal
25
26

1 exemptions. See 11 U.S.C. §522(b)(2). Nevada is an opt-out state. See
2 NRS §21.090(3) and *In re Kane*, 366 B.R. 477, 489 (Bankr.D.Nev.
3 2006).

4 As such, the validity of a claimed state exemption is controlled by
5 the applicable state law. *In re Goldman*, 70 F.3d 1028, 1029 (9th Cir.
6 1995). Therefore, Nevada law governs the substantive issues regarding
7 this exemption. Here, the Bankruptcy Court acknowledged that this
8 “issue is solely and purely a matter of state law”. (Ex. of Rec. ‘6’ p.33.
9 ln. 6-7)

12 **2. Exemptions are liberally construed.**

13 Exemptions are to be liberally construed in favor of the debtor
14 who claims the exemption. *In re Arrol*, 170 F.3d 934, 937 (9th Cir.
15 1999); *In re Christensen*, 122 Nev. 1309, 1312 (Nev. 2006) (“We
16 liberally and beneficially construe our state exemption statutes in
17 favor of the debtor.”). “The purpose of Nevada’s exemption statutes is
18 ‘to secure to the debtor the necessary means of gaining a livelihood.’ ”
19 *Savage v. Pierson*, 123 Nev. 86, 90 (2007) (quoting *Kreig v. Fellows*,
20 21 Nev. 307, 310 (1892)). If a statutory phrase is left undefined, the
21 court construes the phrase, according to its plain and ordinary
22 meaning. *In re Resort at Summerlin Lit.*, 122Nev. 177, 180 (2006).
23 The court generally presumes, that the plain meaning of the words
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1 reflect the legislature's intent, unless the reading violates the spirit of
2 the act or leads to an absurd result. *Villanueva v. State*, 117 Nev. 664,
3 667 (2001). Here, as shown below, it would be an absurd result and
4 negate the statutes liberal presumption, to read the statute as limiting
5 a debtor to only one personal injury exemption of \$16,150.
6

7 **3. The burden in objecting to Kaplan's exemption is on the**
8 **Trustee.**

9 A claim of exemption is presumed valid, and the burden is on the
10 objecting party, i.e. the Trustee in this case, to prove by a
11 preponderance of the evidence, that an exemption is improperly
12 claimed. *In re Nicholson*, 435 B.R. 622, 634 (9th Cir. BAP 2010);
13 Fed.R. Bankr.P. 4003(c). The court may also be aided by looking to
14 well- reasoned decisions from other jurisdictions. *Takahashi v.*
15 *Loomis Armored Car Service*, 625 F.2d 314, 316, (9th Cir. 1980).
16

17 The court must interpret a statute consistent with the intent of
18 the legislature, must ascribe an intent which will accomplish a
19 reasonable result, and must resolve any doubt as to legislative intent
20 so as to avoid an absurd result. *Steward v. Steward*, 11 Nev. 295, 302
21 (1995). A statute may be interpreted by considering the reason or
22 spirit of the law, the causes which induced the legislature to enact it,
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1 and the entire subject matter and policy for the law. *Cragun v.*
2 *Nevada Pub. Employees' Ret. Bd.*, 92 Nev. 202, 205 (1976). When
3 interpreting a statutory provision, Nevada courts look first to the plain
4 language of the statute, and ascribe words their plain meanings.
5 *Savage v. Pierson*, 123 Nev. 86,88 (2007). A bankruptcy court is
6 bound by the state's rules of construction when interpreting a state
7 statute. *Goldman*, 70 F. 3d at 1029.

8
9 In this case, although the Bankruptcy Court noted it was leaning
10 more toward the trustees view, it saw "no reason that I ... should
11 engage in an exercise in trying to determine how the Nevada Supreme
12 Court would resolve this issue because applicable state law [on this
13 issue] has not been determined by Nevada's highest court "(Ex. of Rec.
14 '6' p.33, ln. 24-25 and p.34, ln. 1-3)

17 **4. Kaplan's personal injury exemptions are valid.**

18 In this case, the Nevada Revised Statutes provide: "payments in
19 an amount not to exceed \$16,150, received as compensation for
20 personal injury . . . by the judgment debtor." NRS 21.090(1)(u). Here,
21 Kaplan seeks to exempt \$16,150 each from two separate personal
22 injury claims under NRS 21.090(1)(u). Clearly, one of these claims is
23 exempt. However, the Trustee is objecting to Kaplan's second
24 personal injury claim of exemption.
25
26

1 **5. Nevada law would allow both personal injury exemptions.**

2 Though not deciding the issue, the Bankruptcy Court found the
3 use of the word “payments” as opposed to “payment” significant (Ex.
4 of Rec. ‘6’ p.34, ln. 8 and 16). However, that still would not resolve the
5 issue of allowing a debtor more than one personal injury exemption.
6
7 In fact, the Bankruptcy Court even agreed one could exempt more
8 than one personal injury case if the payments were less than \$16,150!
9 “[T]hose payments could be for one injury, two injuries, or any
10 number of injuries” (Ex. of Rec. ‘6’ p.35, ln. 2-3). Thus, the court
11 would have only limited the total amount of payments, not the number
12 of personal injury claims, if it were deciding this issue.
13

14 But the problem is, that NRS 21.090(1)(u) does not say only *one*
15 personal injury claim for \$16,150. Therefore, the answer to the
16 question of whether a debtor can exempt two separate personal injury
17 claims, can actually be found within NRS 21.090 itself. For instance,
18 NRS 21.090(1)(f) specifically states a debtor is allowed to exempt *one*
19 vehicle not to exceed \$15,000 in value. Thus, showing the Nevada
20 legislature knew how to limit an exemption to only one and for a
21 specific amount, if it desired to do so. Here, in relation to personal
22 injury claims, it did not limited it to one claim for \$16,150. Therefore,
23 a logical reading of the statute, is that it only limits each personal
24
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1 injury claim to \$16,150.

2 While the Nevada legislature has specifically included a qualifier
3 in NRS 21.090(1)(f), such an exclusion is absent from N.R.S.

4 §21.090(1)(u). “It is a basic tenet of statutory construction that if the
5 legislature includes a qualification in one statute, but omits the
6 qualification in another related statute, it should be inferred that the
7 omission was *intentional*.” *In re Norris* 203 BR 463, 467 (Bankr. NV
8 1996), citing, see also *Ex Parte Arascada*, 44 Nev. 30, 35, (1990) (“the
9 failure of a statute to include a matter is an indication that exclusion
10 was intended”). The often quoted maxim of statutory interpretation,
11 *expressio unius est exclusio alterius*, tells us that when a legislature
12 “includes particular language in one section of a statute . . . it is
13 generally presumed that [the legislature] acts intentionally and
14 purposely in the disparate inclusion or exclusion.” *Russello v. United*
15 *States*, 464 U.S. 16, 23 (1983).

16 “It is assumed that the provisions of *N.R.S* § 21.090, the
17 statutory scheme for exemptions, were carefully drafted; they are a
18 result of a legislative drafting process which began in 1911 and they
19 have been the subject of numerous legislative revisions since that time.
20 Based upon this premise, this Court will not supply a statutory
21 provision when it is reasonable to suppose the Legislature intended to
22

omit it.” *Norris* at 467. Arguably, Nevada’s statute, like the federal one, is not plain but is ambiguous as to whether it exempts more than one personal injury. However, the key is that it can be reconciled within itself, because the legislature did not restrict it to *one* personal injury claim. Therefore, Kaplan should be able to protect \$16,150 from each personal injury claim.

6. The majority of cases both state and the federal agree with Kaplan.

In discussing the law, the Bankruptcy Court erred when it summarily dismissed the handful of other cases that have decided this issue under the federal exemption found in 11 USC §522 (d)(11) or (12). (Ex. of Rec. ‘6’ p.33, ln. 8-16) However, to the extent this Court seeks guidance on this issue from those few cases, the majority favor Kaplan by a four to two margin. For instance, in the case of *In re Marcus*, 172 BR 502 (Bankr. D.Conn. 1994), under the federal exemptions that use the word “payment”, a debtor was allowed to exempt both of his personal injury claims up to the maximum amount in the statute. *Id* at 505. See also, *In re Comeaux*, 305 BR 802, 807 (Bankr.E.D. Tex. 2003)(same); and *In re Daly*, 344 BR 304 (Bankr. M.D. Penn. 2005). The other case that is in accord with the debtor’s position is *In re Anderson* 932 P.2d 1110 (Okla. 1997) (state law). “We

1 find ... an Oklahoma debtor may exempt up to \$50,000 for each
2 interest in a separate and distinct claim for personal injury”. *Id* at 1115.

3 There is one circuit level case that has opined on this issue and
4 favors the Trustee. See *In re Christo*, 192 F.3d 36 (1st Cir. 1999). In
5 *Christo*, the debtor suffered three separate pre-petition accidents, and
6 sought to exempt the sum of \$15,000 for each. In a 2-1 decision, the
7 First Circuit ruled against the debtor. However, it is the dissent in
8 *Christo* that makes the most sense. It noted, the “*Christo* majority
9 ignore[d] the potentially horrendous impact multiple accidents could
10 impose upon the financial circumstances of a single debtor...”

11 *Comeaux* at 807. And further, that the majority erroneously relied on
12 *In re Rhodes*, 147 BR 443 (Bankr. N.D. Ill. 1992) in rendering its
13 decision, because *Rhodes* was based upon a number of incorrect
14 assumptions. To begin with, “*Rhodes* also referred to the fact that the
15 statutory list of exemptions distinguishes between exempted and
16 unexempted property by its nature and not number. . . [But] this
17 proves little, however, as those subparagraphs in the federal statute
18 enumerating property which may be aggregated list either groupings
19 of types of property such as household furnishings, . . ., or certain
20 enumerated property [such as an] interest in life insurance contracts .
21 . .” *Christo* at 40 (dissent).

1 Thus, the logic in the cases that allow a debtor to exempt more
2 than one personal injury claim for the maximum amount, makes
3 perfect sense. As, one court noted, it would be entirely rational “if a
4 debtor lost one limb in one accident and another limb in another
5 accident, the debtor should not be limited to one exemption” [for the
6 entire amount]. *Marcus* at 505. Here, Mr. Kaplan should be allowed
7 two personal injury exemptions for \$16,150 each.
8

9 VI

10 CONCLUSION

11 Exemptions are to be liberally construed. The legislature knows
12 how to limit an exemption to one item when it wants to. Here, it chose
13 not to limit the number of personal injury exemptions. Therefore, this
14 Court should not put itself in place of the legislature and unnecessarily
15 limit Kaplan’s exemption.
16
17

18 Dated this 8th day of March 2016.
19

20
21
22 /S/CHRISTOPHER P. BURKE, ESQ.
23 CHRISTOPHER P. BURKE, ESQ.
24 Attorney for Appellant
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NRAP 28.2 CERTIFICATE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP (a)(6) because:
5

6 This brief has been prepared in a proportionately spaced typeface
7 using Word Perfect 12 in 15 point font, Georgia. It contains 3,208
8 words and it does not exceed 30 pages.
9

10 2. I further certify that this brief complies with the page or type
11 volume limitations of NRAP 32(a)(7) because, excluding the parts of
12 the brief exempted by NRAP 32 (a)(7)(c) it is either:
13

14 3. Finally, I hereby certify that I have read this Appellant Opening
15 Brief, and to the best of my knowledge, information and belief, it is not
16 frivolous or interposed for any improper purpose. I further certify that
17 this brief complies with all applicable Nevada Rules of Appellate
18 Procedure, in particular NRAP 28(e)(1), which requires every
19 assertion in the brief regarding matters in the record to be supported
20 by a reference to the page and volume number, if any, of the transcript
21 or appendix where the matter relied on is to be found. I understand
22 that I may be subject to sanctions in the event that the accompanying
23
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28

1 brief is not in conformity with the Nevada Rules of Appellate
2 Procedure.

3
4
5 Dated: this 8th day of March 2016.

6
7
8 By: /s/ Christopher P. Burke, Esq.

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1
2
3 **CERTIFICATE OF MAILING APPELLANT'S OPENING BRIEF**
4

5 I hereby certify that on the 8th day of March 2016, I caused the
6 above and foregoing **APPELLANT'S OPENING BRIEF** to be sent by
7 electronic notice and depositing same in the United States Mail, first
8 class, postage prepaid, in a securely sealed envelope and addressed to
9 the last known address of the following:
10

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