

SUPREME COURT NO. 69065

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

DAVID JOHN KAPLAN

Appellant

- v -

Chapter Seven Trustee, Allen Dutra
Respondent

FILED

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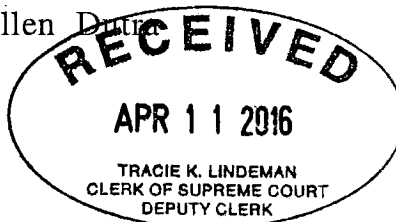
Bankruptcy Case No. BK-N-10-54568-GWZ

RESPONDENT'S ANSWERING BRIEF

From the United States Bankruptcy Court District of Nevada

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16-11192

IN THE SUPREME COURT OF THE STATE OF NEVADA

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CHAPTER SEVEN TRUSTEE, ALLEN
DUTRA

Respondent

-----/

RESPONDENT'S ANSWERING BRIEF

Respondent, Allen Dutra, by and through his counsel of record,
Michael Lehnert, Esq., hereby submits his Answering Brief.

Dated: This 8 day of April, 2016

By: 

Michael Lehnert, Esq.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Supreme Court No. 69065

Appellant

BK-N-10-54568-GWZ

- v -

CHAPTER SEVEN TRUSTEE, ALLEN
DUTRA

Respondent

_____ /

NRAP 26.1 DISCLOSURES

Corporate Affiliations:

None

Counsel for Respondent:

Michael Lehnars, Esq.

Pseudonyms:

None

Dated: This 8 day of April, 2016

By: _____


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I

Summary of Argument

The issue is not one of liberally construing exemptions in favor of the Debtor. Rather, the issue is one of statutory construction. Exemptions cannot exceed the language of the statute that created them. While it is true Mr. Kaplan had two separate accidents, the relevant statute exempts payments for "personal injury". The statute does not say each personal injury or each incident. To award the statutory cap for each event creates an exemption that is beyond the literal language of the statute.

II

Statement regarding NRAP 28(b)

The Respondent accepts the Appellant's statement of issues, the statement of the case and the statement of facts.

III

Argument

1. APPELLANT MAY NOT APPLY RULES OF STATUTORY CONSTRUCTION BECAUSE NRS 21.090(1)(u) IS NOT AMBIGUOUS.

The Appellant is correct that this exemption issue is governed by state, not federal, law. The Appellant is also correct that the Respondent bears the burden of objecting to an exemption, and that exemptions are to be liberally construed.

Where Appellant and Respondent disagree is the interpretation of NRS 21.090(1)(u). Appellant argues this statute does not say only one personal injury claim is exempt. Therefore, one must look to the remainder of NRS 21.090 to determine legislative intent. Appellant cites NRS 21.090(1)(f) which says a debtor may exempt one motor vehicle. By the use of the term "one", the Legislature knows how to limit an exemption numerically. That is, when a statute has a limitation in one section, but not another, it is to be assumed the omission was intentional.

While Appellant's statement of the legal principle is correct, it is simply not applicable in this situation.

Statutory construction begins with the language of the statute at issue. Here,

NRS 21.090(1)(u) exempts:

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.

Emphasis supplied

Issues of statutory construction are reviewed de novo. *State, Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 86, 40 P.3d 423, 425 (2002). When the words of the statute have a definite and ordinary meaning, a court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 81 P.3d 532, (Nev. 2003), citing *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001).

However, if a statute is ambiguous, the plain meaning rule of statutory construction is inapplicable, and the drafter's intent becomes the controlling factor in statutory construction. *Id.* A statute's language is ambiguous when it is capable of more than one reasonable interpretation. *Orion Portfolio Services 2 LLC v. County of Clark ex rel. University Medical Center of Southern Nevada*, 126 Nev. 397, 245 P.3d 527, (Nev. 2010).

NRS 21.090(1)(u) is not ambiguous. It has two parts: (1) "*Payments, in an amount not to exceed \$16,150 received as compensation for personal injury*", and (2) "*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.*"

The first part defines the exemption. The second part limits its application. The first part is clear. What is exempt? Payments are exempt. How much in payments? \$16,150.00. What kind of payments? Those received as compensation for personal injury.

The second part is the exclusionary part of the statute. The payments cannot be compensation for pain and suffering or actual pecuniary loss.

To apply rules of statutory construction, the Appellant must first pass the "ambiguous" threshold. For a statute to be ambiguous there must be more than one reasonable interpretation. NRS 21.090(1)(u) is susceptible to only one interpretation which is \$16,150 is the absolute cap on payments for personal injury, whether or not there are multiple accidents or payments.

This interpretation is supported by the grammatical construction of the statute. The noun "payments" is modified by two adjectives. The first is the phrase "not to exceed \$16,150". The second adjective is the phrase "for personal injury". The two adjectives are not nouns. Rather, they each modify a noun. That noun is "payments", which is the property that is exempt.

The Respondent can not identify any language in the statute that suggests it is \$16,150 per incident. His argument is based upon statutory construction. Those principles are not triggered without first identifying more than one reasonable meaning.

2. THE BANKRUPTCY COURT PROPERLY SUSTAINED THE TRUSTEE'S OBJECTION TO THE DEBTOR'S AMENDED EXEMPTION.

Judge Zive referred this question under Nev. R. App. Pro. 5. However, he carefully read the briefs of the parties and set forth a detailed analysis on the record. The Trustee had cited *In re Rhodes* 147 B.R. 443 (Bkrtcy N.D. Illinois 1992) because it involved a state exemption for personal injury proceeds in a bankruptcy court. The Illinois statute grants each debtor the right to exempt "[t]he debtor's right to receive, or property that is traceable to, ... a payment, not to exceed \$7500 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent." *Id* at 445.

Mr. Rhodes claimed multiple \$7,500.00 exemptions for multiple accidents. The Court denied the exemption. The Court said what is exempted is the debtor's right to receive, or property that is traceable to a payment on account of personal bodily injury. This language exempts (1) the debtor's right to receive payment of a particular type and (2) property that is traceable to such a payment. The Court

found the nature of the payment is specified by the phrase "on account of personal bodily injury." Paragraph (h)(4) contains no language relating to the number of personal injuries. Accordingly, the statutory language, on its face, offers no support for an exemption that varies in amount depending on the number of personal injuries affecting a debtor. *Id* at 446.

While Nevada's statute uses the word payments, plural, and the Illinois statute used the word payment, singular, there was no basis to multiply the exemption based upon the number of incidents.

Judge Zive was persuaded by Judge Wedoff's reasoning in *Rhodes*, *supra*.

"If you take a look at Rhodes where Judge Wedoff was resolving an Illinois statute, the word was "payment," singular. Nevada has used the plural. So unlike Gene Wedoff, Judge Wedoff, I would not have to apply any exception to that rule. So payments in an amount not to exceed 16,150. That not to exceed 16,150 in my mind clearly modifies the word "payments" received as compensation for personal injury. So now we know the amount and we know the nature of the

exemption, personal injury. It doesn't say personal injuries. It doesn't indicate for more than one incident, two incidents, or ten incidents. It doesn't. It says you get a total of \$16,150 in payment for personal injury, and that those payments could be for one injury, two injuries, or any number of injuries. To me, it's relatively straightforward."

Bankruptcy Court Transcript, pages 6-7.

NRS 21.090(1)(u) statute exempts payments for personal injury. The use of the plural, payments, envisions more than one settlement and more than one event. The term "payments" is modified by the phrase "in an amount not to exceed \$16,150". It does not matter how many times the Appellant was injured, because the aggregate payments are capped at \$16,150.

3. THE CASES INTERPRETING FEDERAL EXEMPTION LAW ARE
NOT CONTROLLING

11 U.S.C. §522(d)(11) exempts *"a payment, not to exceed \$22,975, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom*

the debtor is a dependent". The cases are split on whether or not multiple accidents authorize exempting more than the \$22,975 statutory cap.

However, Nevada is an "opt out" state. This makes the exemption issue one of state, not federal, law. More importantly, NRS 21.090(1)(d) differs from 11 U.S.C. §522(d)(11) in two important aspects. First, §522(d)(11) must be read in harmony with 11 U.S.C. §102(7), which is a federal rule of statutory construction. 11 U.S.C. §102(7) says "the singular includes the plural". Nevada has no such rule, and the cases that allow stacking under §522(d)(11) must recognize §102(7)'s directive. Secondly, §522(d) uses the term "aggregate" for some exemptions but not for others.

In re Comeaux, 305 B.R. 802, (Bankr. E.D. Tex. 2003) allowed the debtors to claim three separate personal injury exemptions under §522(d)(11). The *Comeaux* court based its conclusion, in part, on its observation that Congress demonstrated its ability to utilize numeric and aggregate limits elsewhere in §522 and did not do so in §522(d)(11)(D). NRS 21.090(1) does not use the term "aggregate".

IV

Conclusion

The rules of statutory construction and the directive that exemptions be liberally construed have limits. Principles of statutory construction are simply not applicable where the statute is unambiguous. A liberal construction cannot create exemptions out of whole cloth. Any cases that allow stacking of the federal personal injury exemption are not applicable here, even by analogy. The federal exemption uses a word not present in the state exemption, and the state exemption is not subject to the federal rule of statutory construction. For those reasons, the Respondent respectfully requests that Appellant's exemption be limited to \$16,150.

Dated: This 8 day of April, 2016

By: 

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NRAP 28.2 ATTORNEY'S CERTIFICATE

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

1 This brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 4.0 in Times 14 point font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 1,667 words and it does not exceed 30 pages.

3. Finally, I certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. Pro. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated: This 8 day of April, 2016

By: 

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CERTIFICATE OF SERVICE BY MAIL

I CERTIFY THAT ON THE 11 DAY OF APRIL, 2016, I RE-DEPOSITED
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