

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)	Chapter 7
)	BKY Case No. 03-40673-NCD
Cristina Renee Hanson,)	
)	<u>SUPPLEMENTAL MEMORANDUM IN</u>
Debtor.)	<u>SUPPORT OF MOTION OBJECTING</u>
)	<u>TO CLAIMED EXEMPT PROPERTY</u>

In support of her objection to the Debtor's claim of exemption in proceeds from a personal injury case, the Trustee states as follows:

Debtor admits her claim arises from an automobile accident that occurred January 31, 2002 and that she had retained counsel to pursue representation of her interests in 2002. *See*, Debtor's Memorandum, para. 2. Debtor filed bankruptcy on January 28, 2003. In Debtor's sworn schedules, signed under penalty of perjury on January 24, 2003, on file and of record herein, where Debtor was asked to list her assets, she failed to identify her claims arising from the accident in any manner. Debtor asserts a lack of recall as to her testimony under oath at the March 6, 2003 oral examination by the trustee. However, as in all cases, the Trustee retains in her file as part of the routine record of the case and has reviewed minutes of the questioning indicating Debtor responded to all the standard questions confirming that she first read and then signed the schedules, that all the information in the schedules was true and correct and that she had listed all her assets. There is no record of disclosure by Debtor of the claim in question. Even Debtor's counsel acknowledges the likelihood that action with regard to the unlisted asset would have been taken at that time, if the debtor had raised it in her testimony. *See*, Debtor's Memorandum, para. 4. Debtor's excuse that she doesn't remember being asked by the Trustee about this particular car accident case (*See*, Debtor's Memorandum, para. 4) is

disingenuous at best. The Trustee could hardly have asked, “What about that car accident case last January?” when the debtor had failed to reveal its existence.

Debtor’s position seems to be that telling the Trustee about the claim in May 2004, 15 (fifteen) months after her filing and approximately a year after the case was closed, and then filing an amended Schedule C on June 29, 2004, another eight weeks later, should be sufficient. That position is not supported by 11 U.S.C. §541, setting forth the debtor’s duties of disclosure and surrender of information, or by relevant case law. Debtor attempts to distinguish cited cases holding that debtors may lose their exemption right if they conceal an asset by opining it is excusable here that the debtor did not list or reveal the asset for 15 (fifteen) months because she did eventually do so without the Trustee receiving the information from another source. There is no such free pass on failure to comply with the debtor’s duties. The Eighth Circuit upheld a debtor’s right to file a late amendment to assert an exemption but only after determining the evidence supported a factual finding that, upon learning of a potential claim, the debtor promptly sought to amend his schedules and moved to exempt the asset. *See, Kaelin v. Bassett (In re Kaelin)*, 308 F.3d 885 (8th Cir. 2002).

Thus, such belated disclosure can be justified only if the evidence shows the debtor disclosed the asset and asserted the exemption *as soon as the debtor knew about the asset*. Here, the debtor clearly knew about the asset in 2002. She was being treated and pursuing recovery through legal representation in 2002. Vague and circuitous professions of confusion as to the meaning of “claim” notwithstanding, the debtor knew about the asset when she filed her bankruptcy. She specifically had it in mind when contemplating bankruptcy. *See, Debtor’s Memorandum*, para. 2. Further, refuting any remaining doubt, is the evidence provided by Debtor and her counsel in their jointly verified Response, that Debtor was told as early as **July 2003** that she must amend her bankruptcy and must list her accident as one of the assets of her bankruptcy estate. *See, Debtor’s Response*,

Exhibit C-1, para. one. It was another 9 (nine) to 10 (ten) months before anyone contacted the Trustee to give any indication of the existence of the asset. That is not a prompt correction of an inadvertent oversight. That is concealment.

Exhibit C-1 also shows the debtor cannot hide behind any excuse that she did not understand the legal ramifications or that her attorneys advised her not to tell the Court or the Trustee. This debtor's personal injury attorney told her no later than July 2003 she had an asset that was part of the bankruptcy case and that she must list the claim. She continued to withhold that information from the Trustee and the Court for an extended period of time.

Accordingly, on the record before the Court, Debtor's belated attempt to exempt this omitted asset was not in good faith and should be denied.

Debtor asserts her amended claims under 11 U.S.C. §522(d)(5) to the extent of \$6,975, under 11 U.S.C. §522(d)(11)(D) to the extent of \$17,425 and under 11 U.S.C. §(d)(10)(E) to the extent of 100%. Debtor identifies the settlement amount requested as \$75,000. *See*, Debtor's Amended Schedule C. This raises several issues. First, Debtor is exhausting the limits under §(d)(5). If the debtor had properly disclosed this asset in her original schedules and made the claims of exemption she is making now, the Trustee would have routinely investigated for other assets for which there was no corresponding exemption, most notably in cases such as these, but not exclusively, tax refunds issued for 2002, all of which would have been non-exempt property of the estate. The Trustee has lost that opportunity and that is prejudicial to the estate and the creditors. Secondly, §(d)(11)(D) has a monetary cap of \$17,425 and is limited to damages excluding pain and suffering or compensation for actual pecuniary loss. That appears to include the arbitrator's award of damages already settled before the Trustee was advised of the asset. Finally, any attempt by Debtor to retain all interest in proceeds of her personal injury action by the reference to 100% under the

future earnings provision of §(d)(10)(E) is inappropriate. Even if Debtor had claimed her exemption in good faith and without prejudice to creditors, the exemption could not extend beyond the limits of the personal injury statute.

The Debtor's claim of exemption in the personal injury action and any proceeds arising therefrom should be denied.

Dated: August 2, 2004

/e/ Julia A. Christians

Julia A. Christians, Trustee
One Financial Plaza, Suite 2500
120 South Sixth Street
Minneapolis, MN 55402
(612) 338-5815

VERIFICATION

Julia A. Christians, being duly sworn, says that she is the Chapter 7 Trustee in this action, that she has read this Memorandum of Facts and Law in Support of Objection To Claimed Exempt Property and that the facts stated therein are true of her own knowledge, to the best of her information.

/e/ Julia A. Christians

Julia A. Christians

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UNSWORN CERTIFICATE OF SERVICE

I, Sarah L. Fortin, declare under penalty of perjury that on August 2, 2004, I faxed copies of the attached **Supplemental Memorandum in Support of Motion Objecting to Claimed Exempt Property** by facsimile to each entity named below at the facsimile number stated below for each entity:

Craig W. Andresen, Esq.
2001 Killebrew Drive, Suite 330
Bloomington, MN 55425

FAX: 952-854-4114

Executed on: August 2, 2004

/s/ Sarah L. Fortin
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Lapp, Libra, Thomson, Stuebner &
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