



**IT IS ORDERED** as set forth below:

**Date: September 24, 2007**

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBER</b>
	:	
JEFFREY SHANE LOWERY	:	BANKRUPTCY CASE
TABITHA LYNNE LOWERY,	:	NO. 05-13536-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtors.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Objection to Exemption filed by Gary W. Brown, the Chapter 7 Trustee in the above-captioned bankruptcy proceeding. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction.

*See* 28 U.S.C. § 1334; § 157(b)(2)(A).

## **BACKGROUND AND PROCEDURAL HISTORY**

Jeffrey Lowery (hereinafter the "Debtor") filed a voluntary petition under Chapter 7 of the Code on October 4, 2005. Gary W. Brown (hereinafter the "Trustee") was appointed as the Chapter 7 Trustee. Prior to the petition date, the Debtor was involved in a motor vehicle accident. As a result of the accident, the Debtor suffered serious bodily injury, including multiple fractures that required numerous surgeries to correct. These injuries have resulted in the Debtor's inability to work for several years, and the Debtor anticipates being unable to return to work for several more years.

At the time of the filing of the petition, the Trustee succeeded to the Debtor's claim for damages arising out of this accident. The Trustee hired special counsel to pursue the matter. Special counsel advised the Trustee to settle the claim with the insurance company for \$100,000. The Debtor and the insurance company negotiated a release that would allocate certain portions of the settlement payment as payment for pain and suffering, lost wages, and future lost wages. The Trustee did not participate in the negotiation of this release and does not agree that the settlement proceeds should be considered to have been in payment for these categories of losses.

The Debtor has claimed an exemption in the remaining proceeds of

approximately \$66,000 pursuant to Section 44-13-100(a)(6) and (a)(11)(D) and (E) of the Official Code of Georgia. Specifically, the Debtor claims an exemption of \$11,115 pursuant to Section 44-13-100(a)(6), which has previously been allowed, \$10,000 pursuant to Section 44-13-100(a)(11)(D), and \$45,548.78 pursuant to Section 44-13-100(a)(11)(E). On December 14, 2006, the Trustee objected to the amendment on the basis that the Debtor may not exempt the \$10,000 under Section 44-13-100(a)(11)(D) because the settlement funds represent damages for pain and suffering and actual pecuniary loss, which are not exempt under that subsection, and that the Debtor is not entitled to exempt any amount under Section 44-13-100(a)(11)(E) because that subsection does not permit the exemption of funds paid to compensate for future lost wages if the loss of the wages was caused by a personal bodily injury. The Court held a hearing on the Trustee's objection on January 19, 2007.

### **CONCLUSIONS OF LAW**

Having considered the briefs filed by the parties, the Court concurs with the Trustee that the Court cannot base its decision as to the Debtor's entitlement to an exemption simply on whether the release, which was negotiated by the Debtor without the Trustee's participation, labels certain portions of the damages as

compensation for pain and suffering or as compensation for lost wages. In order to determine whether the settlement proceeds were payment on account of a personal bodily injury, lost future earnings, or pain and suffering, the Court must consider evidence regarding the nature of the Debtor's injuries and the extent of the pecuniary losses suffered, including the likelihood that the Debtor will suffer future losses of wages. *See In re Whitson*, 319 B.R. 614 (Bankr. E.D. Ark. 2005). For this reason, the Court finds that the release, although it may be some evidence as to the nature of the damages provided for in the settlement, is not entitled to preclusive effect as to the exemption issue.<sup>1</sup>

That being said, the parties have apparently agreed to defer a ruling regarding the nature of the damages until after the Court has ruled on the legal argument raised by the Trustee in his objection. Accordingly, the Court will resolve the legal question of whether, if a portion of the settlement proceeds represents future lost earnings, those amounts are exemptible under Section 44-13-100(a)(11)(E).

Section 44-13-100(a)(11)(D) provides that "any debtor who is a natural person

---

<sup>1</sup> The Court notes, however, that it remains the Trustee's burden of production and persuasion as to whether the Debtor is entitled to the exemption as claimed. *See In re Holt*, 357 B.R. 917 (Bankr. M.D. Ga. 2006); *In re Whitson*, 319 B.R. 614 (Bankr. E.D. Ark. 2005); FED. R. BANKR. P. 4003. Accordingly, the Trustee will be required to present sufficient evidence that the damage amounts should not be allocated in the amounts contained in the release. *See In re Reschick*, 343 B.R. 151 (Bankr. W.D. Pa. 2006).

may exempt, pursuant to this article, for purposes of bankruptcy . . . a payment, not to exceed \$10,000, on account of personal bodily injury, not including pain suffering or compensation for actual pecuniary loss, of the debtor." O.C.G.A. § 44-13-100(a)(11)(D). Section 44-13-100(a)(11)(E) states that "any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy . . . [a] payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor or any dependent of the debtor." O.C.G.A. § 44-13-100(a)(11)(E).

The Trustee reasons that damages arising from a personal bodily injury are specifically addressed by subsection 100(a)(11)(D), that subsection 100(a)(11)(D) clearly states that compensation for actual pecuniary loss is not exempt under that section, and that compensation for future lost wages compensates for "actual pecuniary loss." Accordingly, the Trustee argues that permitting an unlimited exemption for future lost wages arising from a personal bodily injury under section 100(a)(11)(E) would frustrate the purpose of subsection 100(a)(11)(D), which limits the exemption under that subsection to \$10,000 and to compensation paid for non-pecuniary losses. In effect, the Trustee asserts that permitting the exemption of the settlement proceeds by calling the proceeds compensation for future lost wages would permit the Debtor to make "an end run" around the requirements of subsection

100(a)(11)(E). The Trustee also submits that the use of the conjunction "or" instead of "and" to join the five different types of payments that are exempt under subsection 100(a)(11) indicates that a debtor must choose one of these five payment types and may not exempt portions of a single settlement under two different exemption provisions.

In response, the Debtor submits that the plain language of subsection 100(a)(11)(E) does not contain any limitation on the exemption for lost future earnings, other than the requirement that the earnings be reasonably necessary for the support of the debtor and his dependents. For example, the statute does not state that the exemption is limited to lost future earnings arising only on account of employment discrimination, wrongful termination, or illness. By the same token, the statute does not state that the exemption does not apply to compensation paid for future wages lost as a result of a personal bodily injury. Further, the Debtor reminds the Court that exemption statutes are to be interpreted broadly in favor of permitting the exemption, when possible. In other words, when in doubt, the statute should be construed in favor of the Debtor. The Debtor also notes that debtors are generally allowed to "stack" exemptions in order to exempt the largest amount of property possible.

Under subsection 100(a)(11)(D), a debtor "may not exempt the portion of his

claim which represents his actual pecuniary loss" resulting from medical bills and property damage. *In re Geis*, 66 B.R. 563 (Bankr. N.D. Ga. 1986) (Drake, J.). This Court has previously opined that a damage award ought to be exempt under subsection 100(a)(11)(D) if the debtor's injuries are extensive enough to account for the amount of the damage award, less amounts attributable to medical bills and property damage. *See id.* In *In re Geis*, the Court left open the possibility that, as the Debtor argues here, amounts paid in compensation for lost future wages, may be exemptible under subsection 100(a)(11)(E). *See id.* Similarly, in *In re Howard*, Judge Davis, sitting in the Southern District of Georgia, was not required to reach the issue of whether a debtor can exempt portions of a personal injury settlement under both subsections 100(a)(11)(D) and 100(a)(11)(E), but did state that the use "of the conjunctive 'or' between subsections (D) and (E) . . . at least raises an inference that an election might be required as between those two subsections." 169 B.R. 77, 81 n.4 (Bankr. S.D. Ga. 1994) (citing *In re Russell*, 148 B.R. 564, 566 (Bankr. E.D. Ark.1992)).

Courts interpreting the identical provisions of section 522(a)(11)(D) and (E) have allowed a debtor to exempt compensation for lost future wages, notwithstanding the fact that the claim for lost future wages arose from a personal bodily injury. *See In re Scotti*, 245 B.R. 17 (Bankr. D.N.J. 2000); *In re Bova*, 205

B.R. 467 (Bankr. E.D. Pa. 1997); *In re Rockefeller*, 100 B.R. 874 (Bankr. E.D. Mich. 1989); *In re Claude*, 206 B.R. 374 (Bankr. W.D. Pa. 1997). The Court agrees with the holdings in these cases.

Subsection 100(a)(11)(E) contains no language that would limit a debtor's ability to exempt compensation paid on account of lost future wages, other than the requirement that the compensation be reasonably necessary for the support of the debtor and/or the debtor's dependents. This interpretation does justice to the plain language of the statute and also furthers the primary purpose of the exemption provisions, which is to ensure that debtors leave the protection of the bankruptcy system with a "fresh start" and do not become a burden on the public. *See Rousey v. Jacoway*, 544 U.S. 320 (2005) (noting that exemptions help the debtor "obtain a fresh start"); *In re Belsome*, 434 F.3d 774 (5th Cir. 2005) (noting that the purpose of exemption statutes is to "provide for the subsistence, welfare, and 'fresh start' of the debtor, to the end that his or her family will not be destitute and so that the debtor will not become a charge on the state").

The Court also rejects the Trustee's argument that the use of the word "or" in subsection 100(a)(11) evidences legislative intent to preclude a debtor from exempting one settlement payment as both a payment on account of personal bodily injury and a payment for lost future earnings. It appears that most courts have

assumed that section 522(d)(11) permits the exemption of a portion of a personal injury settlement or award under section 522(d)(11)(D) and a portion under section 522(d)(11)(E). See *In re Bova*, 205 B.R. 467 (Bankr. E.D. Pa. 1997) (citing *In re Smith*, 179 B.R. 437, 446-47 n.4 (Bankr. E.D. Pa. 1995); *In re Ziegler*, 156 B.R. 151, 154 (Bankr. W.D. Pa.1993); *In re Cramer*, 130 B.R. 193, 193-95 (Bankr. E.D. Pa. 1991); *In re Rockefeller*, 100 B.R. 874, 877 (Bankr. E.D. Mich. 1989); *In re Sidebotham*, 77 B.R. 504, 506 (Bankr. E.D. Pa. 1987); *In re Harris*, 50 B.R. 157, 159-60 (Bankr. E.D. Wisc. 1985); *In re Territo*, 36 B.R. 667, 671 (Bankr. E.D.N.Y. 1984). The Court holds, as did the court in *In re Bova*, that "both sections of 522(d)(11) can be invoked to exempt different portions of a recovery from a single incident." *In re Bova*, 205 B.R. at 478. This result is consistent with the general rule that exemptions should be construed liberally in favor of the debtor and furthers the primary purpose of the exemption scheme.

The Court has concluded that the Debtor is entitled to exempt, pursuant to Section 44-13-100(a)(11)(E), any portion of the settlement proceeds that constitutes "[a] payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor or any dependent of the debtor." The Debtor may also be entitled to exempt up to \$10,000 of the proceeds pursuant to Section 44-13-100(a)(11)(D), depending on the severity of his injury.

To resolve the Trustee's objection, the Court must consider evidence with regard to the nature of the damages represented by the settlement proceeds, the Debtor's injury, and whether and to what extent the proceeds are reasonably necessary for the support of the Debtor or his dependents.

The Court will do so at a hearing to be held on **October 23, 2007 at 10:00 a.m.** in Second Floor Courtroom, 18 Greenville Street, Newnan, Georgia.

**END OF DOCUMENT**

**Distribution List**

**Michael Todd Camp**

Camp Law Offices, PC  
P O Box 27  
7274 W Bankhead Highway  
Douglasville, GA 30133

**Jeffrey Shane Lowery**

80 Woodbine Dr.  
Carrollton, GA 30117

**Tabitha Lynne Lowery**

80 Woodbine Dr.  
Carrollton, GA 30117

**Gary W. Brown**

Harwell, Brown & Harwell, PC  
12 Jackson Street  
Newnan, GA 30263

**Office of the US Trustee**

Suite 362  
75 Spring Street, SW  
Atlanta, GA 30303