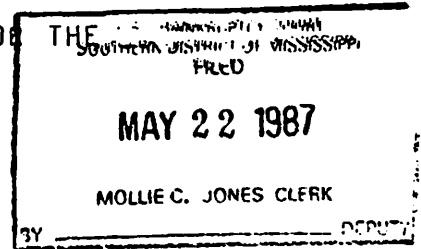


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

GEORGIA LEA WILSON-PICKENS

CASE NO. 8601209JC

Anne Winter Williams
Gillis, Gillis & Williams
109 Twenty-First Street
P. O. Drawer G
McComb, MS 39648

Attorney for Debtor

C. Ashley Atkinson
412 West Michigan
P. O. Box 1266
McComb, MS 39648

Attorney for First
Bank and Oliver
Building Supply,
Inc.

Edward Ellington, Bankruptcy Judge

**ORDER ON "OBJECTION TO EXEMPTIONS" FILED BY FIRST
BANK AND OLIVER BUILDING SUPPLY, INC. AND ORDER ON
"REPORT OF RECOVERY AND PETITION FOR AUTHORITY
TO DISBURSE JUDGMENT PROCEEDS" FILED BY DEBTOR**

On June 25, 1986, Georgia Lea Wilson-Pickens filed with this Court her petition under Chapter 7 of the Bankruptcy Code. On August 18, 1986, two creditors, First Bank and Oliver Building Supply, Inc., filed a joint "Objection to Exemptions." The objection alleges that the Debtor claimed as exempt her right to receive payment for pain and suffering pursuant to section 522(d), but that no such exemption is allowed

by the Bankruptcy Code. The objection also alleges that the Debtor claimed as exempt her right to receive payment in compensation for loss of future earnings pursuant to section 522(d)(11)(E), but that Debtor has suffered no loss of earnings, and therefore, no payment can be construed as future loss of earnings. The objection further alleges that the Debtor claimed as exempt a 1983 Ford LTD motor vehicle pursuant to section 522(d)(2), but that such motor vehicle is not owned by the Debtor and is not, therefore, part of the bankrupt estate.

On November 3, 1986, the Debtor filed a "Report of Recovery and Petition for Authority to Disburse Judgment Proceeds." The Debtor reports the net amount of recovery of a judgment as follows:

Amount of Judgment Rendered and Paid	\$30,078.90
Less: Out-of-Pocket Litigation Expenses	<u>(3,786.82)</u>
Adjusted Gross Recovery	\$26,292.08
Less: Attorney Fee approved by Court	<u>(8,755.27)</u>
Net Recovery Available to Debtor's Estate	\$17,536.81

The Debtor also reports that from said net recovery, there is due to be paid the sum of \$4,321.00 to certain insurance companies who have asserted subrogation claims.

The Objection to Exemptions filed by First Bank and Oliver Building Supply, Inc. and the report and petition filed by the Debtor came on for hearing on December 1, 1986. On the hearing date, the attorney for the Debtor and the attorney for First Bank and Oliver Building Supply appeared before the Court. Both attorneys agreed and requested that the Court should take the matter under advisement and allow the parties to submit a stipulation to the Court along with briefs in the form of letters from each attorney. Thereafter, a stipulation and briefs from the attorneys were received by the Court.

After reviewing the facts and considering the briefs of counsels, this Court finds that the Debtor should be allowed to exempt \$5,514.63 pursuant to section 522(d)(11)(E) as loss of future earnings that are reasonably necessary for the support of the Debtor. The Court further finds that no exemption is allowed for pain and suffering or compensation for actual pecuniary loss pursuant to section 522(d)(11)(D). Note that the Court makes no findings as to the exemption of the 1983 Ford LTD as no evidence was presented on this issue or briefed by either counsel.

STATEMENT OF THE CASE

On October 8, 1986, a jury returned a general verdict in favor of the Debtor in the amount of

\$30,000. This verdict represented an award for damages arising out of an automobile accident on August 12, 1983. In determining the damages, the jury was instructed to consider the injuries to the Debtor, pain and suffering and resulting mental anguish, medical expenses incurred, loss of wages, and any loss of future earnings. On October 24, 1986, \$30,078.90 was paid in satisfaction of the judgment.

The amount of \$30,078.90 has been tendered as property of the Debtor's bankruptcy estate. On July 30, 1986, this Court approved payment of expenses and a one-third contingent attorney fee in connection with the Debtor's state court action. Expenses in the suit were \$3,786.82 and the contingent attorney fees were \$8,755.27, leaving a balance of \$17,536.81 to the Debtor's estate.

At the time of the accident, the Debtor was a general contractor building FHA homes. The Debtor was injured in the accident and incurred medical expenses of \$4,443.28. Her primary injury was a head injury and she was diagnosed as having post-concussion syndrome and post-traumatic stress syndrome.

Although the Debtor continued to work for sometime after the accident, it became evident that her injury was impairing her performance. The Debtor's treating psychiatrist stated that as a result of the

injury, the Debtor experienced anxiety, agitation, depression, memory problems and impaired mental functioning and would not be able to work as a contractor. The Debtor's business became increasingly nonprofitable and her business slowed until she ceased doing business in January, 1986.

On June 25, 1986, Georgia Lea Wilson-Pickens filed with this Court her petition under Chapter 7 of the Bankruptcy Code. The Debtor claimed a \$7,500 exemption as payment on account of personal bodily injury pursuant to section 522(d)(11)(D). There is no objection filed as to this exemption claimed. The Debtor also claimed an unknown amount as exempt for pain and suffering pursuant to section 522(d) and First Bank and Oliver Building Supply have objected. The Debtor further claimed as exempt an amount that is considered to be reasonable support for loss of future earnings pursuant to section 522(d)(11)(E). The creditors have also objected to any exemption being claimed for loss of future earnings. The Debtor does not claim as exempt any compensation for actual pecuniary loss such as medical expenses or damage to her automobile.

DISCUSSION

Pertinent parts of Section 522 of the Bankruptcy Code provide:

(d) The following property may be exempted under subsection (b)(1) of this section:

. . .

(11) The debtor's right to receive, or property that is traceable to--

. . .

(D) a payment, not to exceed \$7,500, 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; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Bankruptcy Rule 4003, Exemptions, provides:

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

The Debtor claims \$7,500 as exempt for personal bodily injury pursuant to 522(d)(11)(D). There has been no objection filed, thus the Court has no proof or reason to deny the Debtor's exemption and classification of \$7,500 of the judgment as being for personal bodily injury.

The Debtor also claims an unknown amount as exempt for pain and suffering and two creditors have objected. The Court finds that section 522(d)(11)(D) of the Bankruptcy Code specifically denies any exemption for pain and suffering. Thus, the creditors' objection to this exemption claimed is well taken and is sustained.

The Debtor further claims loss of future earnings as being exempt to the extent of reasonable support pursuant to section 522(d)(11)(E). First Bank and Oliver Building Supply object to any exemption for loss of future earnings.

The general verdict of \$30,000 in favor of the Debtor may be broken down as follows:

Amount of Judgment Rendered and Paid	\$30,078.90
Less: Out-of-Pocket Litigation approved by Court	(3,786.82)
Less: Attorney Fee approved by Court	<u>(8,755.27)</u>
Net Recovery Available to Debtor's Estate	\$17,536.81

The question then becomes what part of this \$17,536.81 is exemptable by the Debtor.

Balance to Debtor's Estate	\$17,536.81
Less: Medical Expenses are actual pecuniary losses and are <u>not exempt</u> pursuant to 522(d)(11)(D).	(4,443.28)

Less: Post-judgment interest (78.90)
not exempt

Less: Exemption for personal (7,500.00)
bodily injury claimed pursuant
to 522(d)(11)(D) and no objec-
tion filed

Balance claimed as exempt by \$ 5,514.63
Debtor as loss of future
earnings to the extent
reasonably necessary for
support pursuant to
522(d)(11)(E)

Thus, the issue before this Court is to what extent, if any, can the remaining balance of \$5,514.63 be attributed to loss of future earnings of the Debtor and considered to be reasonably necessary for the support of the Debtor.

The Debtor cites four cases to the Court for consideration in determining what part of the \$5,514.63 can be claimed as exempt. In Re Haga, 48 B.R. 492 (Bkrctcy. E.D. Tenn. 1985); In Re Territo, 36 B.R. 667 (Bkrctcy. E.D. N.Y. 1984); In Re Miller, 36 B.R. 420 (Bkrctcy. D.N.M. 1984); and Matter of Harris, 50 B.R. 157 (Bkrctcy. E.D. Wis. 1985).

In Haga, *Supra*, the Debtor was a carpenter who was injured on the premises of a lumber company. The Debtor filed suit and like the present case before this Court, the jury returned a general verdict in the amount of \$30,000. The Court in Haga had to make a determination as to what part of the judgment proceeds were exempt by the Debtor. Haga broke the judgment down into parts and relying on Territo, *Supra*, stated

as follows:

In the instant case, the debtor's state court judgment was rendered by general verdict. Obviously, this Court cannot now reconvene the state court jury and ascertain what factors figured in the rendering of the judgment. This Court can only perform an analysis similar to that performed by the court in Territo. Here, the debtor's actual bodily injury and resulting disability are extensive enough to account for at least \$7,500 of the damages awarded. . . .

The debtor has claimed the balance of the judgment proceeds as exempt under Tenn. Code Ann. §26-2-111(3) (1980). . . .

As noted, the debtor's state court general verdict does not allocate a specific portion of the damages as compensation for loss of future earnings. The Tennessee exemption under §26-2-111(3) is identical to the federal exemption set forth in 11 U.S.C.A. §522(d)(11)(E)(1979). In Territo the court, faced with a settlement stipulation which failed to allocate specific portion of the settlement proceeds to lost earnings, nonetheless concluded "in the absence of any evidence to the contrary, that most, if not all of the money the debtor received from the settlement could be reasonably attributed to lost earnings, and be retained as exempt property" under §522(d)(11)(E). Territo, 36 B.R. at 671. The Court noted the debtor's continuing disability, his reduced income, and the speculative nature of any possibility that he would procure employment in the foreseeable future. Id.

In the instant case, subtracting from the \$26,040.00 claimed as exempt both the \$5,334.61

(representing non-exempt compensation for actual, pecuniary loss) and the \$7,500.00 (deemed exempt as compensation for actual bodily injury) leaves in question a balance of \$13,205.39. This Court is satisfied that such portion of the judgment proceeds may be reasonably attributed to loss of future earnings.

Such damages for loss of future earnings are exempt under the statute only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." Tenn. Code Ann. §26-2-111(3)(1980). In making this determination under the identical federal exemption, the courts have considered the debtor's present circumstances, other exempt property, the debtor's present income, and any other factors indicating what amount is truly necessary to meet the debtor's basic needs.

Haga 48 B.R. at 495 and 496.

The Court in Haga found that considering the facts of the case, the debtor was entitled to exempt the remaining portion of the judgment proceeds as loss of future earnings.

The Debtor also cites Miller, Supra, and Harris, Supra, which are two cases in which the objecting party to exemptions failed to produce evidence contradicting the debtor's characterization of the judgment or settlement as compensation for the loss of future earnings reasonably necessary for support. The Courts in both cases concluded that the exemption was proper as the burden of proof was on the objecting party and was not met. See Bankruptcy Rule 4003(c).

The Debtor contends that First Bank and Oliver Building Supply have not met their burden of proof to contradict the Debtor's characterization of the verdict as compensation for personal injury and for loss of future earnings. This Court agrees with the Debtor's contention.

The Stipulation submitted to the Court for its consideration in this case contained two depositions of the Debtor, one taken on August 23, 1984, and the other taken on August 6, 1986. Also in the Stipulation was a letter addressed to this Court from the Debtor's attorney. Attached to the letter were a deposition of the Debtor's treating psychiatrist, an appraisal summary for the Debtor prepared by an economist, and a copy of the jury instructions from the Debtor's lawsuit.

The Court finds that the jury instructions instructed the jury to consider basically five factors in determining the amount of damages. The factors are: 1) injuries to the Debtor, 2) pain and suffering and resulting mental anguish, 3) reasonable medical expenses, 4) any loss of earnings, 5) any loss of future earnings.

This Court cannot determine what weight the jury gave each of these factors in arriving at the \$30,000 verdict. However, the Court has reviewed all

of the documents submitted by counsel. It has considered the overall circumstances of Mrs. Pickens, her income and earning ability before and after the automobile accident and the amount of money necessary to achieve even a minimum level of human subsistence. The Court is persuaded that the jury easily could have found that the debtor would sustain loss of future earnings in an amount of at least \$5,514.63. The Court is further persuaded that this amount is reasonably necessary for the support of the debtor.

Considering that the Debtor is a 60 year old woman with no substantial income, has a continuing disability and an unlikely possibility of any future employment, this Court finds that the Debtor's circumstances and basic needs warrant the allowance of exempting \$5,514.63 of the \$30,000 judgment as loss of future earnings reasonably necessary for her support pursuant to section 522(d)(11)(E). There has been no evidence presented that would support any other conclusion than that the Debtor needs the exemption for her own basis needs and support.

CONCLUSION

For the reasons set out herein, it is the Court's opinion that the Debtor's characterization of \$5,514.63 of the \$30,000 judgment as being loss of

future earnings reasonably necessary for support is proper and should be allowed as an exemption pursuant to section 522(d)(11)(E). The Court further finds that no exemption may be claimed by the Debtor for pain and suffering pursuant to section 522(d)(11)(D).

THEREFORE, IT IS ORDERED that First Bank and Oliver Building Supply, Inc.'s Objection to the Debtor's exemption claimed as loss of future earnings is overruled and that the Debtor be allowed to exempt \$5,514.63 pursuant to section 522(d)(11)(E).

IT IS FURTHER ORDERED that First Bank and Oliver Building Supply, Inc.'s objection to the Debtor's exemption claimed as pain and suffering is sustained and that the Debtor will not be allowed to exempt any amount for pain and suffering pursuant to section 522(d)(11)(D).

IT IS FURTHER ORDERED that the Court will consider further the claimed exemption in regard to the 1983 Ford automobile if so requested by either party.

IT IS FURTHER ORDERED that this is a Final Order for purposes of appeal in regard to all issues except those related to the 1983 Ford automobile.

SO ORDERED, this the 22 day of May, 1987.


U. S. BANKRUPTCY JUDGE