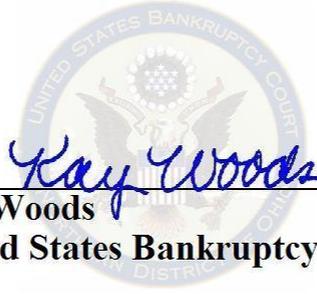


IT IS SO ORDERED.



**Dated: May 18, 2010
12:01:07 PM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:	*	CASE NUMBER 05-41609
	*	
EDWIN D. BAILEY and	*	CHAPTER 7
JAMIE S. BAILEY,	*	
	*	
Debtors.	*	HONORABLE KAY WOODS
	*	

MEMORANDUM OPINION REGARDING TRUSTEE'S OBJECTION TO EXEMPTION

This cause is before the Court on Objection to Exemption (Doc. # 129) filed by Andrew W. Suhar, Chapter 7 Trustee, on April 7, 2010. On May 6, 2010, Debtors Edwin D. Bailey and Jamie S. Bailey, acting *pro se*, filed Debtors' Pro Se Reply to Trustee's Objection to Exemption (Doc. # 135). The Court held a hearing on the Objection to Exemption on May 13, 2010 ("Objection Hearing"), at which appeared: (i) Andrew W. Suhar, Esq. on behalf of Trustee; and (ii) Mrs. Bailey on behalf of Debtors.

I. PROCEDURAL BACKGROUND

Debtors filed a voluntary chapter 7 bankruptcy petition on

March 28, 2005 ("Petition Date"). Debtors' Schedule B includes the following entry at line 20 regarding "[o]ther contingent and unliquidated claims:" "lawsuit against Ohio Department of Transportation in Cuyahoga County Common Pleas Court Case No. CV-01-443852 - for reinstatement of job." (hereinafter referred to as "ODOT Claim"). (Debtors' Sch. B at 2.)

Trustee filed Motion for Authority to Settle Controversy (Doc. # 83) on September 25, 2009, which sought to settle all pre-petition claims of Debtors against ODOT, the State of Ohio ("State"), and the agencies of the State for the sum of \$17,000.00 and a complete release of ODOT, the State, and the agencies of the State for all claims, known and unknown (including the ODOT Claim), which arose or were a result of actions or events occurring prior to the Petition Date ("Settlement"). Debtors objected to the Motion to Settle. The Court held an evidentiary hearing on the Motion to Settle on November 24, 2009, at which Trustee was represented by Andrew W. Suhar, Esq. and Debtors appeared *pro se*. Jack W. Decker, as a representative of the State, testified on behalf of Trustee and Mr. Bailey testified on behalf of Debtors. Mr. Bailey cross-examined Mr. Decker, but asked no questions concerning (i) how the \$17,000.00 Settlement amount was derived, or (ii) whether any portion of the \$17,000.00 Settlement related to or was in lieu of future earnings or front pay.

On December 10, 2009, the Court issued Memorandum Opinion Regarding Trustee's Motion for Authority to Settle Controversy ("Memo Opinion") (Doc. # 95) and Order Granting Trustee's Motion for

Authority to Settle Controversy (Doc. # 96) (collectively, "Order Approving Settlement"), which held, *inter alia*, that the ODOT Claim constituted property of the bankruptcy estate and that the Settlement was in the best interests of the creditors and the bankruptcy estate. As set forth in the Order Approving Settlement, at the start of the evidentiary hearing the parties stipulated to the following four undisputed facts:

1. Debtors filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on March 28, 2005.
2. Schedule B to Debtor's bankruptcy petition contained an item at line 20, as follows: "Lawsuit Against Ohio Department of Transportation in Cuyahoga County Common Pleas Court Case No. CV-01-443852 - for reinstatement of job."
3. Debtors scheduled the ODOT Claim because it constituted an asset of the bankruptcy estate.
4. Debtors did not claim any exemption regarding the ODOT Claim and no exemption was available to be claimed for such asset.

(Memo Op. at 7-8 (emphasis added).) Debtors expressly agreed that there was no dispute as to each of these facts.

Debtors appealed the Settlement Order (Doc. # 98) on December 18, 2009.¹ Approximately three and one-half months later,

¹On December 21, 2009, Debtors filed Debtors' Pro Se Motion for Reconsideration of Order Granting Trustee's Motion for Authority to Settle Controversy (Doc. # 105), which raised for the first time that the "grievance settlement agreement" upon which the ODOT Claim was based was an executory contract. Despite Debtors' failure to schedule any executory contracts, Debtors contended that Trustee had no right to the Settlement because it was based on an

on April 1, 2010, Debtors filed Debtors' Statement of Intention; Amendment to Schedules by Adding Exemption to Schedule C (Doc. # 126), pursuant to which Debtors assert an exemption under O.R.C. § 2329.66(A)(12)(d) in connection with "lawsuit against Ohio Department of Transportation in Cuyahoga County Common Pleas Court Case No. CV-01-443852 - for reinstatement of job."

II. TRUSTEE'S OBJECTION TO EXEMPTION

Trustee objects to Debtors' exemption on the basis that such exemption is not applicable. Debtors argue that the lawsuit "termed 'for reinstatement of job' . . . should be construed as lost future earnings" because the lawsuit "suggests that Mr. Bailey was wrongfully terminated from his position from ODOT." (Debtors' Reply at 1.)

O.R.C. § 2329.66(A)(12)(d) provides as follows:

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

* * *

(12) The person's right to receive, or moneys received during the preceding twelve calendar months from, any of the following:

* * *

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

executory contract, which Trustee had not assumed. The Motion for Reconsideration was not addressed by the Court because it was procedurally defective as a result of it being filed after Debtors appealed the Order Approving Settlement.

debtor's dependents.

Ohio Revised Code § 2329.66 (Westlaw 2010).

At the Objection Hearing, Mrs. Bailey admitted that Debtors did not want any part of the \$17,000.00 Settlement, but instead were claiming the exemption in an effort to pursue the state court litigation, which was settled as part of the Settlement. Debtors cannot pursue the litigation relating to the ODOT Claim UNLESS they prevail in their appeal of the Order Approving Settlement. Accordingly, to the extent Debtors are asserting the exemption to pursue the state court litigation, such assertion is an impermissible attempt to collaterally attack the Order Approving Settlement.

The instant case has several factual similarities to the facts in *In re Carson*, 82 B.R. 847 (Bankr. S.D. Ohio 1987), which also dealt with the assertion of an exemption following approval of a trustee's motion to compromise an employment discrimination action. In the *Carson* case, the debtors first asserted the exemption relating to future earnings at the hearing on the trustee's motion to compromise. Judge Cole noted that it was difficult to apply the lost earnings exemption to a settlement in a lump-sum, but noted that there was some case law in support of allocating a lump-sum between various exempt and non-exempt categories of damages. Judge Cole declined to apportion the *Carson* settlement, however, finding that there was "not a scintilla of evidence" to assist him in making any allocation. *Id.* at 857. Judge Cole noted that although the trustee bore the burden of proof to disallow the exemption, he would

not adopt debtors' characterization of the settlement because debtors had raised the exemption for the first time at the hearing on the motion to compromise, thus depriving the trustee of any notice that he would be required to adduce any evidence to defeat the exemption. As a consequence, Judge Cole set an evidentiary hearing to determine "what, if any, part of the Settlement should be allocated to compensation for loss of future earnings (front pay), and hence, subject to exemption under O.R.C. § 2329.66(A)(12)(d)." *Id.* at 858.

In the instant case, Debtors failed to assert any exemption relating to the ODOT Claim until more than (i) four months after conclusion of the evidentiary hearing, (ii) three and one-half months after entry of the Order Approving Settlement, and (iii) three months after Debtors filed their notice of appeal of the Order Approving Settlement. As a consequence, not only was Trustee not put on notice that he needed to adduce any evidence concerning the composition of the Settlement, but the Court is now deprived of jurisdiction to have the parties supplement the record of the evidentiary hearing. Indeed, Debtors not only failed to apprise Trustee and the Court that they considered all or part of the Settlement exempt, they EXPRESSLY STIPULATED THAT THERE WAS NO EXEMPTION AVAILABLE TO THE SETTLEMENT.

Despite failing to apprise Trustee of their intention to claim all or part of the Settlement as exempt, Debtors were provided with ample opportunity to question Mr. Decker concerning the Settlement and to ascertain if any part of the Settlement was attributable to

front pay or future earnings. Mr. Decker clearly testified that the Settlement was a compromised amount offered to settle all claims, known and unknown, that Debtors had asserted or might assert. The record is totally devoid of any evidence that the Settlement includes any amount that falls within the purview of O.R.C. § 2329.66(A)(12)(d).

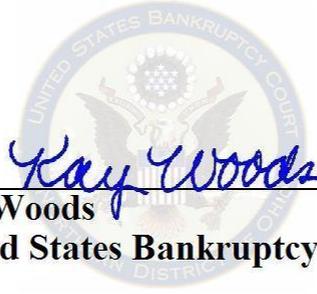
As a consequence, this Court will sustain Trustee's Objection to Exemption for the following two separate and independent reasons:

1. At the evidentiary hearing on November 24, 2009 (almost five years after Debtors commenced this bankruptcy case), Debtors stipulated that they did not claim any exemption regarding the ODOT Claim and no exemption was available to be claimed for such asset. Although Mrs. Bailey asserted at the Objection Hearing that Debtors did not know what "stipulate" meant, she conceded that they "agreed" with each of the facts to which they stipulated. Although Debtors can amend their schedules at any time before their case is closed, they are not free to attempt to change an evidentiary fact after conclusion of an evidentiary hearing.
2. The record contains no evidence or information whatsoever to support an inference that any part of the Settlement is based on or relates to future earnings. The ODOT Claim encompasses Mr. Bailey's allegation that he was wrongfully discharged from his job at ODOT, but there is no support that any part of the Settlement was offered as

front pay, as opposed to past damages.
An appropriate order will follow.

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IT IS SO ORDERED.



**Dated: May 18, 2010
12:01:07 PM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**EDWIN D. BAILEY and
JAMIE S. BAILEY,**

Debtors.

*
*
* **CASE NUMBER 05-41609**
*
* **CHAPTER 7**
*
*
* **HONORABLE KAY WOODS**
*

ORDER SUSTAINING TRUSTEE'S OBJECTION TO EXEMPTION

This cause is before the Court on Objection to Exemption (Doc. # 129) filed by Andrew W. Suhar, Chapter 7 Trustee, on April 7, 2010. On May 6, 2010, Debtors Edwin D. Bailey and Jamie S. Bailey, acting *pro se*, filed Debtors' Pro Se Reply to Trustee's Objection to Exemption (Doc. # 135). The Court held a hearing on the Objection to Exemption on May 13, 2010, at which appeared: (i) Andrew W. Suhar, Esq. on behalf of Trustee; and (ii) Mrs. Bailey on behalf of Debtors.

For the reasons set forth in this Court's Memorandum Opinion Regarding Trustee's Objection to Exemption entered on this date,

this Court hereby finds: (i) Debtors stipulated that no exemption was available to be claimed regarding the ODOT Claim; and (ii) the record contains no evidence to support an inference that any part of the Settlement is based on or relates to future earnings. Accordingly, Trustee's Objection to Exemption is sustained.

IT IS SO ORDERED.

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