

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION**

**IN RE:**

**DONNIE RAY SLUSHER and  
TRACIE LYNN SLUSHER  
Debtors**

**Chapter 7  
Case No. 09-60313  
Judge Joseph M. Scott**

**MEMORANDUM OPINION AND ORDER**

This matter comes before the Court pursuant to the Debtors' Motion for Entry of an Order Compelling Trustee to Disburse Funds (Doc. 41), Maxie Higgason's ("Higgason") Objection to Debtors' Claim of Exemptions and Response to Motion for Payment (Doc. 43), Higgason's Motion for Administrative Carveout Allowance (Doc. 44), Higgason's Objection to the Debtors' motion (Doc. 45), and the United States Trustee's Objection to Higgason's Motion for Administrative Carveout Allowance (Doc. 46). A hearing having been held on April 20, 2011, and the Court having been otherwise fully informed, for the reasons cited hereafter it is hereby ORDERED that the Debtors' motion to compel Higgason to disburse funds is GRANTED and Higgason's motion for an administrative carveout is DENIED. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

**I.**

The Debtors filed their Chapter 7 petition on March 6, 2009. Their original Schedule C exempted a claim resulting from a car accident in 2008 under § 522(d)(11)(D) in the amount of \$40,400.00. Maxie Higgason, in his capacity as the trustee in the Debtors' case, received this Court's approval to employ Roy Collins on July 14, 2009 to represent the Debtors' bankruptcy estate in the litigation arising from the personal injury claim. The parties to the litigation reached a settlement which was approved by this Court on January 10, 2011. Under this settlement each Debtor received \$9,000.00 from the insurer for the state court defendants. Mr. Collins received a 1/3 contingency fee, which was approved and paid from the funds received in the settlement.

The Debtors then amended their Schedule C to add an additional exemption of the personal injury claim under § 522(d)(5).

The Debtors now seek an order compelling Higgason to turn over the personal injury proceeds which are now being held by Higgason. In his response, Higgason does not object to the turnover of the funds, but does seek a carveout from this amount as an administrative payment for his services as trustee and for expenses incurred or anticipated in filing the various reports required by the U.S. Trustee. Higgason also contends that the Debtors' injuries were of a "soft tissue character" and the specific recovery amount is uncertain, which, as Higgason argues, would disallow an exemption for the funds under § 522(d)(11). The U.S. Trustee objects to Higgason's motion on the basis that it violates the requirement of § 326 that a trustee may not receive compensation from money that has been turned over to the debtor. The U.S. Trustee further argues that Higgason's argument concerning the validity of the underlying exemption is untimely under Rule 4003. The U.S. Trustee also filed a response in which he supports the Debtors' motion.

## II.

As a preliminary matter, the Court notes that Higgason's claim that the funds are not subject to exemption is untimely. Higgason raised no objection to the Debtors' claimed exemptions in their schedules. It was not until the Debtors sought turnover of the funds that Higgason raised the issue of whether the funds are exempt under § 522(d)(11)(D). Rule 4003 requires a party in interest to object to a claimed exemption within 30 days of the first meeting of creditors. Fed. R. Bankr. P. 4003(b)(1). Higgason never filed an objection within that time frame concerning the § 522(d)(11)(D) exemption. Indeed, it was not until nearly two years later that he raised an objection on that basis. Therefore, his objection is overruled to the extent that it concerns the validity of the Debtors' claimed exemption under § 522(d)(11)(D).

Regarding Higgason's proposed carveout, § 326(a) provides that a Chapter 7 trustee may be paid reasonable compensation based "upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims." 11 U.S.C. § 326(a). By these terms, the trustee may not be compensated based upon funds turned over to the debtor:

The trustee's compensation is based upon the monies the trustee distributes to parties in interest. The phrase "parties in interest," for the purpose of section 326(a), includes holders of secured claims, but the statute explicitly excludes distributions to the debtor from the calculation of the cap. The language of subsection 326(a) explicitly requires that trustee compensation be based on disbursements *made by the trustee*.

3 COLLIER ON BANKRUPTCY ¶ 326.02[1][f] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (emphasis in original). Because the turnover of exempt funds is not a disbursement made by Higgason in his capacity as the Chapter 7 Trustee, he cannot receive compensation from the exempt funds. *Id.* at 326[1][f][ii] ("[W]hen a trustee simply turns property over . . . those values are not included in the amount from which the trustee's maximum compensation is determined.") This is true even though the legal work performed in the personal injury case was not done by Higgason. *Id.* at ¶ 326.02[1][d] ("The limitation on compensation for the trustee's services applies whether or not the trustee has actually performed or delegated a particular duty to another.").

Because Higgason's objection to the claimed exemption was not timely, and because he cannot receive compensation from exempt funds, the Debtors' Motion for Entry of an Order Compelling Trustee to Disburse Funds is GRANTED. Higgason is hereby ORDERED to disburse to the Debtors the full amount of personal injury proceeds now being held by him, up to the maximum available exemption of \$62,050.00. This disbursement shall be made to the Debtors on or before **May 5, 2011**. Higgason shall also submit a notice to the Court of the disbursement with an accounting of the amount disbursed by **May 11, 2011**.

Copies to:

Maxie Higgason, Esq.  
Fred N. Owens, Jr. Esq.  
John L. Daugherty, Esq.  
Debtors

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, April 20, 2011**  
**(jms)**