No. 24-2745

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Johnie Lee Nance,

Appellant

v.

Lawrence J. Warfield, Trustee

Appellee.

On Appeal from the United States District Court
for the District of Arizona

No. 2:23-cv-00504-DWL

Hon. Dominic W. Lanza

Appellee's Answering Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. STATEMENT OF JURISDICTION

The appellee agrees with the jurisdictional statement of the appellant.

II. STATEMENT OF THE ISSUE

Appellant Johnie Lee Nance ("Nance") identifies the second issue as, "Did the District Court err by holding that the bankruptcy court was unable to determine which federal exemptions would apply to Mr. Nance." That issue was not presented to the district court. ER-5.

The district was asked the following question: Did the bankruptcy court commit reversible error in allowing an exemption that the debtor never claimed? The district court framed the question as, "whether the bankruptcy court erred in *sua sponte* granting Debtor an exemption in the RV under 11 U.S.C. §522(d)(5)." ER-5. The district court, the Hon. David W. Lanza presiding, held that the bankruptcy court lacked authority to allow an exemption that the debtor himself had never claimed. ER-22.

III. STATEMENT OF THE CASE

A. Corrections to appellant's statement of the case.

The appellee provides the following corrections to the appellant's statement of the case.

Nance says: A debtor cannot entertain multiple theories simultaneously when it comes to exemptions. Appellant's Opening Brief (Op. Br.) 7.

This statement by Nance is a legal conclusion, not a statement of the facts of the case. Moreover, it is inaccurate. Nothing prevents a debtor in a bankruptcy case from claiming multiple or alternate exemptions in the same asset at the same time, when an asset may legitimately be protected by more than one exemption scheme. In fact, it is often done in bankruptcy court. *See, e.g., In re Yelverton*, 2013 WL 453080, *4-5 (Bankr.D.Col.). Nance failed to avail himself of this option in this case. Instead, he chose to assert serial exemptions as prior exemptions were denied.

Nance says: Johnie Lee Nance, Debtor/Appellant, had a stroke a few years ago and it greatly affected him. Op. Br. 7

There are no facts in the record which support this assertion; it is simply an assertion made by counsel at oral argument. ER-29. More importantly, the physical condition of Nance is irrelevant to any of the issues before this Court, or the exemptions claimed by Nance. It should be disregarded. The district court agreed. ER-22-23.

B. Appellee's statement of the case.

Judge Lanza accurately recited the history of this case in his ruling. ER-5-11. That history includes the following items:

A voluntary Chapter 7 case was commenced in the District of Arizona by Nance on May 31, 2022. ER-123.

Nance asserted a homestead exemption under Arizona law in real property at 11689 Hopi Street Welton, AZ (the "land") and in a 2019 Keystone RV (the "RV"). ER-89.

The trustee objected to Nance's exemption of these assets. ER-78-80. In particular, the trustee's objection pointed out that Nance was not entitled to use Arizona exemptions since he had not been in Arizona for the full time period required by the bankruptcy code (730 days). Id.

Nance then amended his exemptions. This time, he claimed the land and the RV as homestead property exempt under Washington law. ER75-77. Nance did not, however, timely respond to the objection that the trustee had previously filed in opposition to the Arizona exemptions claimed by Nance. As a result, an order was entered denying the Arizona exemptions that Nance had previously attempted to claim. ER-74.

The trustee then objected to the new Washington homestead exemptions

that Nance claimed in the land and the RV. ER-60-73. In particular, the Washington Supreme Court had held that such exemptions were not valid for property located outside the state of Washington. *Id*.

Once again, Nance did not timely respond and an order was entered on November 23, 2022 denying the second homestead exemption claimed by Nance in the land and the RV. ER-59.

Nance did not appeal or otherwise challenge the second order denying his second attempt to exempt both the land and the RV. Instead, on December 19, 2022, Nance filed yet a third claim of exemption for the land and the RV. ER-56-58. This time, Nance claimed the land and the RV as exempt homestead property under the federal homestead exemption, 11 U.S.C. §522(d)(1). *Id*. Nance did not claim any other exemption for the RV other than the federal homestead exemption.

The trustee then filed an objection to Nance's third attempt to exempt these very same assets as homestead property. ER-43-47. This time, the trustee pointed out that Nance was legally precluded from once again attempting to exempt these same assets under a different legal theory since his previous exemption claims had been denied by final orders of the bankruptcy court. *Id*.

The bankruptcy court overruled the trustee's objection and allowed the third amended homestead exemption. ER-107-108. In addition, although Nance had not claimed any other exemption in the RV, the Court also gratuitously held that Nance could exempt the RV under the federal wildcard exemption. Id. A final order overruling the trustee's objection was entered. ER-118.

IV. SUMMARY OF THE ARGUMENT

The ruling of Judge Lanza should be affirmed by this Court.

This case is not about liberally construing an exemption statute. This case is about denying a debtor's attempt to assert one exemption after another after

a prior exemption has been denied. While exemptions can be amended, the amended exemptions do not have to be allowed. Res judicata is a valid legal objection to an amended exemption claim. That legal defense was appropriately applied in this case.

V. ARGUMENT

A. This case has nothing to do with liberal construction.

Every exemption brief by a debtor begins with the same mantra - "exemption statutes are to be liberally construed." This case is no different. However, that talisman is inapplicable to this case.

What this court said in *In re Lee*, 889 F.3d 639, 646 (9th Cir. 2018) is this:

> Lee invokes our rule that "[e]xemption statutes in bankruptcy law should be construed liberally in favor of the debtor," meaning that "[w]here the text of a statutory exemption is ambiguous as to whether it applies, the debtor is entitled to the exemption."

Here, there is no issue about statutory construction. There are no factual questions or legal arguments about whether any asset fits within the terms of the statute, nor is there any question about what a statute says or means or about what the legislature intended. No, the question is whether, as a matter of law, Nance can claim different exemptions in the same assets when his prior claims have been denied by a final order. There is nothing to liberally construe.

B. Just because amended exemptions can be filed does not mean they must be allowed.

As Nance points out, the bankruptcy rules contain a provision that permits amendments to the schedules to be filed. Op. Br. 10. However, just because a debtor *can* file an amended exemption claim does not mean that the new exemption

has to be allowed just because it has been filed. *In re Albert*, 988 F.3d 1088, 1091 (9th Cir. 2021).

C. Res judicata barred the third homestead exemption.

The law is clear that a debtor in bankruptcy like Nance may not wait until the trustee has prevailed on an objection to his asserted exemptions and then try a second time, and then a third time, to exempt the same asset in a different fashion. *In re Bryan*, 466 B.R. 460, 465 (8th Cir. BAP 2012); *In re Magallanes*, 96 B.R. 253, 256 (9th Cir. BAP 1988); *In re Cogliano*, 355 B.R. 792 (9th Cir. BAP 2006). Yet, that is exactly what Nance has attempted to do.

In *Bryan*, the debtor attempted to claim new exemptions in the same asset (an annuity) after her prior exemption claims had been denied. The court held that *res judicata* bars "the relitigation of a claim on grounds that were raised or could have been raised in the prior suit." *Id*. at 465-66. Thus, the debtor was not permitted to try, once again, to exempt the same annuity.

In *Magallanes*, the debtor also attempted to exempt the same assets that the bankruptcy court had previously ruled were not exempt. Like *Bryan*, the court held that *res judicata*, or claim preclusion, bars relitigation of a cause of action that was decided previously in a valid and final judgment between the same parties. *Magallanes*, 96 B.R. at 256. That bar included "all matters that were our could have been litigated." *Id*. Thus, the debtor was precluded from once again litigating the exempt character of the same assets.

In *Cogliano*, the court also held that claim preclusion includes another action on the same claim even if the particular cause of action has never been litigated. *Cogliano*, 355 B.R. at 803. The debtor in *Cogliano* would have also failed in her effort to once again litigate the estate's claims to her assets except that the court found that the new issue that she was raising (whether the asset was estate property)

had to be determined in the context of an adversary proceeding and, absent that, the court had no jurisdiction to determine that issue. *Id*. at 804 ("Here, however, there is no adversary proceeding and no adversary proceeding judgment that might have claim or issue preclusive effect."). But, that loophole does not exist in this case. There is no claim that these assets are not estate property. No, this is just the assertion of new exemptions based on different legal theories over, and over and over.

Res judicata does not permit such serial litigation. If it did, litigation would never end. Defendants and debtors would trot out one defense (or claim) at a time and wait for that horse to falter before bringing forth the next.

This is claim preclusion. As set forth *Cogliano*, supra, 355 B.R. at 803, "the broader brush of claim preclusion may bar a cause of action that has never been litigated." When there has been a final judgment, "the right to obtain remedies against the estate with respect to that claim is extinguished." *Id*.

An order sustaining a trustee's objection to an exemption is a final judgment that satisfies the elements of *res judicata*. *In re St. Hill*, 2005 WL 6522764, *8-9, (Bankr. E.D. Pa.). Once a trustee files an objection to an asserted exemption, the debtor is obligated to consider his choice and, if necessary, modify his selected exemption BEFORE a final order denying the objection is entered:

> Bankruptcy Rule 1009 does not prevent the trustee from objecting to a newly asserted exemption, nor does it prevent the bankruptcy court from denying a new theory for exempting property on the grounds of *res judicata*.
>
> In other words, where a debtor has claimed certain property as exempt, the bankruptcy trustee has objected to that exemption claim, and there has been a final, non-appealed

> ruling sustaining the trustee's objection, **all of the elements of claim preclusion have been established**, **and so the debtor cannot later amend her exemptions to claim that same property as exempt under a different statute**:
>
> Once an objection to the exemption of an asset has been filed, the debtor must raise all theories for the exemption of that asset prior to the resolution of the exemption issue. **Otherwise, *res judicata* prevents a later attempt to exempt the asset on a different theory.**

Id. at *9 (emphasis added); accord, *In re Walls*, 249 B.R. 506 (Bankr. D. Minn.2000) (amended exemption claimed under state law denied after federal exemption had been denied); *In re Romano*, 378 B.R. 454, 464 (Bankr. E.D. Pa. 2007).

Similar exemption tactics came before the court in *In re McFarland*, 2016 WL 953147 (Bankr. S.D. Ga.). The court held:

> After the entry of the Eleventh Circuit's final order, Debtor amended his schedules for the sixth time in an effort to raise different statutory exemption theories than previously asserted. Dckt. No. 353 He attempts to avoid the implications of res judicata through the general rule in bankruptcy that debtors may freely amend their schedules. Fed. R. Bankr.P. 1009(a). However, Bankruptcy Rule 1009(a) does not trump or foreclose the application of res judicata where a debtor could have raised such arguments in the prior litigation, and failed to do so. *In re Gress*, 517 B.R. 543, 548–49 (Bankr. M.D. Pa. 2014) ("Claim

> preclusion is relevant in the context of resolving objections to debtor's claim of exemption .... Claim preclusion bars matters that could have been raised and defenses that could have been asserted as well as those actually raised. Therefore, a debtor cannot later amend his exemptions to relitigate the issue even if the exemption is being asserted under another provision of [the exemption statute].... Debtors cannot continue to file amendments [after entry of a non-appealable final order] in a never-ending effort to exempt items that are subject to the Turnover Order."); In re Wilson, 446 B.R. 555, 563 (Bankr. M.D. Fla. 2011) (Res judicata mandates that claims of exemption that could have or should have been raised in a previous action but were not, cannot be asserted later) citing Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503, n. 4 (11th Cir.1984); Gatzemever v. Vogel, 589 F.2d 360, 363 (8th Cir. 1978) (Res judicata bars attempts to subsequently assert an alternative theory of recovery when such arguments could have, and should have, been asserted in the previous litigation).

Accord, *In re Broughton*, 2018 WL 10418734, *1 (E.D.N.C.); *In re Wilson*, 446 B.R. 555 (Bankr. M.D. Fla. 2011); *In re Gress*, 517 B.R. 543 (Bankr. M.D. Pa. 2014); *In re Gonzalez*, 2022 WL 11712036 (Bankr. C.D. Cal.); *In re Bryan*, 466 B.R. 460 (8th Cir. BAP 2012).

As recently as 2021, this Court confirmed the applicability of *res judicata* in exemption litigation. *In re Albert*, 988 F.3d 1088, 1091 (9th Cir. 2021).

Res judicata has also been applied in this Circuit to efforts to claim new exemptions after a plan of reorganization has been confirmed, since the same principles of *res judicata* apply to confirmation orders. *In re Wolfberg*, 255 B.R. 879 (9th Cir. BAP 2000); *accord, In re Adams*, 2014 WL 409043 (Bankr. M.D. Fla.). Since *res judicata* applies even in plan confirmation, there is no legal reason why it does also apply when an amendment of a previously denied exemption is at issue.

D. A change in legal theory is insufficient.

Nance claims that his change in the legal theory for his asserted homestead exemption permits serial litigation over the same asset. It does not.

The essence of *res judicata* is the assertion of a claim that arises out of the same facts:

> The second doctrine is claim preclusion (sometimes itself called res judicata). Unlike issue preclusion, claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated. If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *1595 Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); see also Wright & Miller § 4407. Suits involve the same claim (or "cause of action") when they " 'aris[e] from the same transaction,' " United States v. Tohono O'odham Nation, 563 U.S. 307, 316, 131 S.Ct. 1723, 179 L.Ed.2d

> 723 (2011) (quoting Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482, n. 22, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)), or involve a "common nucleus of operative facts," Restatement (Second) of Judgments § 24, Comment b, p. 199 (1982) (Restatement (Second)).

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 590 U.S. 405, 140 S.Ct. 1594, 1595 (2020).

Outside of bankruptcy a plaintiff cannot sue on a set of facts, lose, and then file a second lawsuit against the same defendants for the same incident under a different legal theory. Not surprisingly, the rules are no different in bankruptcy court.

Here, the facts have never changed. No, the *only* thing that has changed is the legal theory which serves as the basis for the asserted relief. First, it was an Arizona statute, then it was a Washington statute, and now it is a federal statute. But, the underlying facts never changed.

As the Supreme Court notes, "issues that could have been raised and decided in a prior action—even if they were not actually litigated" are barred. *Id*. When the trustee objected to Nance's Arizona exemptions for these two assets, Nance could have immediately filed an amendment to claim (a) the Washington exemptions or (b) the federal exemptions or (c) a combination thereof in the alternative.

When the trustee objected to the Arizona exemptions claimed by Nance, Nance availed himself of that opportunity by claiming the Washington homestead exemption. But, when the trustee objected to the Washington exemption because it was not permitted by Washington law, Nance elected to stand on his claimed Washington exemption and lost. ER-59. Having elected to do so, he cannot now make a new claim, based on a different legal theory. *Res judicata* prohibits it.

E. Ladd is not controlling and should not be followed.

Nance argues that his third homestead exemption claim could not be denied because the Arizona, Washington and federal homestead exemptions each have different requirements. Op. Br. 10-20. This argument does not find a basis in 9th Circuit law. This argument is based on a ruling from the 8th Circuit, *In re Ladd*, 450 F.3d 751 (8th Cir. 2006).

In *Ladd*, the 8th Circuit permitted the debtors in that case to assert a new state law homestead exemption after the federal exemption they claimed had been denied. Why the 8th Circuit reached that result is not entirely clear.

First, the court noted that it would not apply *res judicata* where the parties involved have little motivation or incentive to litigate an issue. Id. at 753. Yet, as the *Romano* court pointed out, Supreme Court authority makes it clear that *res judicata* applies even when there has been a judgment by default. *Romano*, 378 B.R. at 466.

Next, the *Ladd* court stated that the "operative facts" needed to determine the allowance of a federal exemption would have been different from the facts needed to allow a state law exemption. While that may have been true, the "operative facts" never changed. All that changed was which of those unchanged facts would be *relevant* to the statute before the court. That is not a "change" in the operative facts, that is a change in relevancy brought about by the change in legal theories.

The relevant facts for a fraud claim are not necessarily the same facts that are relevant for a RICO claim. But, when the plaintiff's claim against the same defendant arises out of the same transaction, then *res judicata* prohibits a second lawsuit even if a new legal theory of recovery is asserted. Yet, based on *Ladd*, that is apparently what can be done in the 8th Circuit.

This Court is not obligated to follow *Ladd's* perilous lead. Even the 8th Cir. BAP went out of its way to sidestep *Ladd* in *In re Bryan*, 466 B.R. 460, 466 (8th Cir. BAP 2012). Indeed, after distinguishing *Ladd*, the *Bryan* court noted that the asset at issue in the *Bryan* case (for which the court found that *res judicata* applied) "has not changed since the Debtor's first attempt to claim it as exempt." *Id*. *Bryan* makes it painfully clear that the 8th Cir. BAP does not agree with the outcome in *Ladd*.

Assume that John Doe is run over and injured by Young Driver. John sues Young for negligence and loses after a jury trial. John then files a second lawsuit against Young for intentional infliction of emotional distress arising from the same motor vehicle accident. Can the second suit proceed? Of course not. *See, generally, Bailey v. United States*, 2001 WL 361482 (D. Ariz. 2001), *aff'd*, 42 F.Appx. 79 (9th Cir. 2002) ("Plaintiff is reminded that a plaintiff cannot revive previously litigated causes of action by changing his legal theory.")

While John's second lawsuit requires proof of some facts that were not relevant to his negligence claim (e.g., intent), his underlying claim, damages for his injuries, arises out of the same claim - the car accident. The fact that John has added "intent" to the mix by changing the legal theory does not permit John to sue Young over and over again, each time changing the legal theory of recovery.

That is exactly what Nance advocates here. Nance first claimed a homestead exemption under Arizona law for his real property (11689 Hopi St., Welton, AZ) and RV. ER-89. Denied. ER-74. Then, he tried to claim the SAME PROPERTY exempt under a different legal theory, this time Washington law. ER-75. Denied. ER-59. Then he tried to claim the SAME PROPERTY exempt under a third legal theory, this time federal law.

Like John Doe, Nance simply changed legal theories to assert a

homestead exemption claim for the very same assets. *Res judicata* does not permit such serial litigation based on changed legal theories.

Just like John's second law suit against Young Driver, the fact that Nance's new legal theory makes certain facts relevant which were not previously relevant does not destroy the "identity of the claim." Judge Lanza agreed. ER-15-20.

District Judge Lanza also took the time to distinguish *Ladd*. As Judge Lanza noted, one exemption in *Ladd* depended on acreage, the second depended on value. ER-15. Here, all of the exemptions depended on usage and a maximum value, none of which were ever contested. None of the exemption objections concerned either the value, or whether Nance actually resided in the property. They all dealt with the Nance's legal entitlement to the exemption he had claimed.

F. Disastrous results can easily be avoided.

Nance asserts that applying *res judicata* to exemptions will "cause disastrous results for debtors if allowed to stand." Op. Br. 12. False.

Debtors like Nance hold the keys to the perceived disaster in the palm of their hand. When the trustee objects to a debtor's exemptions the debtor is put on notice of the problem. The debtor can then decide whether to put the estate to the expense of a fight, or change the exemption.

Nance had those same opportunities in this case. When the trustee objected to Nance's Arizona exemptions, Nance amended before a final order was entered. ER-75, ER-78. Crisis averted. Why he didn't the second time, and then the third time, is known only to Nance.

The estate and its creditors are the ones harmed by serial litigation. The estate is put to the expense of litigating one exemption, then the next, then next. It is the same reason that John Doe is not permitted to sue Young Driver over and over

and over again for the same car accident.

This "disastrous results" argument was not made by Nance to the bankruptcy court or to the district court. There are no exceptional circumstances identified by Nance to permit it to be considered for the first time on appeal. *El Paso City v. America West Airlines, Inc. (In re America West Airlines, Inc.),* 217 F.3d 1161, 1165 (9th Cir.2000).

G. Nance had every opportunity to protect himself.

Nance complains that he could not "assert an alternate exemption scheme." Op. Br. 22. Nance is wrong.

First, Nance asserted an alternate exemption scheme when the trustee objected to his Arizona exemptions. He did so the very same day that the trustee's objection was filed. ER-78, 75.

The second time, Nance did nothing, even though the trustee's objection provided the ruling from the Washington Supreme Court that was on point. ER-60. Nance could have filed a response and pled an alternate exemption. Or, he could have amended as he did the first time. Instead, he did nothing, and he expects this Court to rescue him. There is no reason to do so.

Furthermore, nothing prohibited Nance from asserting some exemptions in the alternative, just as John Doe could plead negligence and an intentional tort in the same complaint (within the bounds of Rule 11). For example, a part of a debtor's wages in Arizona are exempt under A.R.S. §33-1131(B). Some wages are also exempt under federal law. 15 U.S.C. §1573. There is nothing in the Code (including 11 U.S.C. §522(b)(1)) which prohibits a debtor from claiming one, or the other, or both in the alternative. Or, in this case, immediately changing from one to the other if the first one is challenged. But, what can't happen is what Nance did here - stand on the exemption until it is denied by a final order and then try to change.

Debtors can, and do, "mix and match" exemptions when more than one exemption scheme is legally available. Debtors who claim state law exemptions often claim their retirement funds exempt under federal law, 11 U.S.C. §522(b)(3)(C). Nothing prohibits it. Arizona also provides a retirement exemption, A.R.S. §33-1126(B). Some debtors claim both. Nothing prohibits it. They are entitled to both. Indeed, 11 U.S.C. §522(b)(3)(A) permits debtors to claim exemptions under federal law or state law or local law, excluding only property exempt under §522(d).

The assertion by Nance that the Code and the official bankruptcy schedules preclude it (Op. Br. 23) is misleading. The election between 11 U.S.C. §522(b)(2) exemptions and §522(b)(3)(A) exemptions only requires a debtor to elect (if permitted by State law) the federal exemptions available under §522(d) or the exemptions identified in §522(b)(3)(A), but not both. More importantly, it does not prohibit debtors, like Nance, from changing their asserted exemptions when it has been brought to their attention that what they have claimed is not legally permitted. But, it does not permit debtors like Nance to put the bankruptcy estate to the expense of serial litigation only to change horses after a final order is entered.

What debtors cannot do is claim inconsistent exemptions (e.g. both §522(d) and §522(b)(3)(A) exemptions) or exemptions which they are not entitled to by law. In this case, Nance was ineligible for Arizona exemptions because he had not been in Arizona long enough before he filed. ER-78. When he was called on it, Nance immediately switched to Washington exemptions. ER-75. The problem was that Washington did not permit him the homestead exemption he was claiming. ER-74. But, this time, Nance did not amend until after a final order denying the Washington homestead exemption was entered.

Nance could have responded. He could have pled in his response, in the alternative, that he was entitled to the federal homestead exemption. But, he did not.

Instead, he simply sat and allowed a final order to be entered, without pleading, and without amending. His own free choices are his undoing. There was nothing about the Bankruptcy Code, or the official forms, that tied his hands.

This "lack of alternatives" argument was not made by Nance to the bankruptcy court or to the district court. ER-5-11; ER-13-15. There are no exceptional circumstances identified by Nance to permit it to be considered for the first time on appeal. *America West, supra.*

H. There is no public policy violation.

Nance had every incentive, and opportunity, to get his exemptions right. He changed his exemptions when he was challenged on his ineligibility for Arizona exemptions. ER-75, 78. But, when his homestead under Washington law was challenged, he failed to act.

Nance seems to believe that he is the only one with rights. Nance ignores that fact that his creditors, who he already has failed to pay once, are being once again burdened, this time by his serial litigation tactics. Each time that Nance claimed exemptions, he was put on notice that there was a problem. Yet, only once did he elect to make a timely change. The rest of the time, he elected to stand on his exemption until a final order was entered. His election to do so came at the expense of his creditors. There is no public policy violation in forcing debtors like Nance to decide if they have meritorious exemption claims before they decide to litigate them.

This "public policy" argument was not made by Nance to the bankruptcy court or to the district court. ER-5-11; ER-13-15. There are no exceptional circumstances identified by Nance to permit it to be considered for the first time on appeal. *America West, supra.*

I. The bankruptcy court's selection and allowance of an unclaimed exemption was impermissible.

In the bankruptcy court's oral ruling, the bankruptcy court held that Nance's RV could be exempted under the federal wildcard statute, 11 U.S.C. §522(d)(5). ER-12-13. However, Nance never asserted any such exemption in any of the exemption claims that he filed with the court. ER-81, ER-75, ER-48.

Nance never once asserted the federal wildcard exemption that the bankruptcy court allowed in the RV. Instead, the bankruptcy court identified this exemption *sua sponte*, and then allowed it, *sua sponte*.

The United States Supreme Court spoke to this sort of judicial advocacy in *Greenlaw v. U.S.*, 554 U.S. 237, 243-44; 128 S.Ct. 2559, 171 L.Ed.2nd. 399 (2008):

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.
>
> * * *
>
> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.

Judge Berzon, in his dissent in *Thompson v. Runnells*, 705 F.3d 1089, 1106 (9th Cir. 2013), put it this way:

> The Supreme Court has instructed us that federal judges "have no obligation to act as counsel or paralegal to *pro se*

> litigants,".... We lose credibility as an impartial arbiter of habeas cases when we discard the "ordinar[]y" rules of "civil litigation" to save governmental parties from their own litigation choices. *Wood,* 132 S.Ct. at 1832. ....
>
> * * *
>
> As a practical matter, "we rely on the parties to frame the issues for decision," as "our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."

In *Eriline Co., S.A. v. Johnson*, 440 F.3d 648, 654 (4th Cir. 2012), the United States District Court for the Western District of North Carolina dismissed the plaintiffs' state law claims *sua sponte*, finding that the statute of limitations had extinguished those claims, much like the bankruptcy court here ferreted out, and then allowed, an exemption that Nance had never claimed. The 4th Circuit reversed. The Court stated: "'The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system from the inquisitorial one.' And because it "erod[es] the principal of party representation so basic to our system of adjudication,' the Supreme Court has cautioned that *sua sponte* consideration of the statute of limitations defense should be done sparingly by the trial courts, even in those narrow circumstances where it is authorized." (Citations omitted.) *See also, Sternberg v. Johnston*, 492 Fed.Appx. 724, 725 (9thCir.2012) ("In the adversarial system, the courts act as neutral arbitrators of issues properly raised by parties.")

In this case, there was no basis for the bankruptcy court to "sally forth" to find and allow exemptions for the benefit of Nance, exemptions that Nance himself

had never claimed. Nance had legal counsel, and it is the obligation of legal counsel to be the debtor's advocate. The bankruptcy court's selection of an exemption on behalf of Nance, and then allowing that exemption, exceeded the jurisdiction and authority of the bankruptcy court.

Like any federal court, the bankruptcy court can only decide actual cases and controversies which are brought before the court. *See, In re Halvorson*, 2018 WL 6728484, *9 (C.D. Cal.). Here, no party presented to the bankruptcy court the question of whether Nance could exempt his RV under the federal wildcard statute. The bankruptcy court's unilateral selection of an exemption, and then allowing the exemption that the court had selected, exceeded the jurisdiction and the authority of the court. Any "suggestion that the court should skip the formalities" and allow an exemption the debtor himself has never claimed must be rejected. *In re Northdruft*, 521 B.R. 640, 642 (Bankr. C.D. Il. 2014).

Judge Lanza's ruling was spot on. ER-25-26. The bankruptcy court had no business selecting, and then allowing, an exemption that Nance himself never claimed. The case law cited by Nance does not compel a different outcome. Nance cites this Court to no case, statute or rule that permits a bankruptcy judge, *sua sponte*, to select and then allow an exemption which a debtor has not first claimed. Judge Lanza's ruling should be affirmed.

In an effort to defend the bankruptcy court's selection and allowance of an exemption never claimed by Nance, Nance argues that the court can always "identify and apply the correct legal standard." Op. Br. 25. While that is true to a point, that is not what happened here.

What happened here is that the court ventured off on its own to identify, select and then allow an exemption for Nance when Nance himself had never claimed such an exemption. That cannot be confused with identifying and applying the

correct legal standard. That is the wholesale representation of a debtor in bankruptcy.

Further, Nance asserts that the court also has the right to "order additional briefing". Op. Br. 26. Again, while true to a point, that also did not happen here. Here, the court plucked a new exemption for Nance from the Bankruptcy Code and, without notice or any other formality, bestowed it upon Nance. In doing so, the bankruptcy court not only denied the trustee (and the other creditors) due process, the court dispensed with the opportunity of the trustee and the creditors to object as permitted by the rules of bankruptcy procedure. See, BR 4003(b)(1).

While the court certainly has the authority to manage the business of the court, and to protect the resources of the court, and while the court is not expected to be a "rubber stamp", that authority does not extend to selecting and allowing exemptions for debtors. The role of the court is to be a decision maker, not an advocate or a participant in the litigation. The exemption selected by the court and allowed at the very same instant does not comply with the rules of bankruptcy procedure and the court abused its discretion in making those decisions. Judge Lanza agreed, and his decision should be affirmed.

VI. CONCLUSION

Wherefore, the trustee prays that this Court will affirm the decision of the district court.

DATED: July 22, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024 I electronically transmitted the foregoing document to the Clerk's Office using the ECF system for filing, and transmitted a copy of the filed document to the following ECF registrants:

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STATEMENT OF RELATED CASES

The undersigned certifies that the following are known related cases and appeals:

None.

DATED July 22, 2024.

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party. This brief contains 6293 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief *(select only one)*:

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DATED July 22, 2024.

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