IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 24-10265-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant
v.
PEGGY PROFFITT
Defendant-Appellee
(District Court No.1:23-cv-00219-KD-N)

Case No. 24-10264-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant
v.
JOHNNY HILL and LISA JO ANN BOUTWELL
Defendants-Appellees
(District Court No. 1:23-00221-KD-N

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

APPELLEES' ANSWERING BRIEF

ATTORNEY FOR APPELLEES
Lacy S. Robertson
PADGETT & ROBERTSON
4317 Downtowner Loop N
Mobile, AL 36609
(251) 342-0264 Telephone
lrobertson@hermandpadgett.com

August 23, 2024

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Appellee is an individual.

2. Appellee certifies that the following individuals/entities may have an interest in the outcome of this matter:

- Boutwell, Lisa Jo Ann, Defendant/Appellee
- Callaway, Honorable Judge Henry A., U.S. Bankruptcy Judge for the Southern District of Alabama
- Conte, Christopher, Appellant/Chapter 13 Trustee
- Friedman, Barry A., Attorney for Special counsel, Long & Long
- Hartley, Jeffery J., Counsel for Appellant
- Hill, Johnny, Defendant/Appellee
- Long & Long, PC, Special counsel for Debtor/Appellee Lisa Boutwell
- Padgett, Herman D., Attorney for Debtors/Appellees
- Proffitt, Peggy, Defendant/Appellee
- Steele, Jason K., Special counsel for Debtor/Appellee Peggy Proffitt

- Watts, III, William W., Counsel for Appellant
- Zimlich, Mark, Bankruptcy Administrator for Southern District of Alabama

Lacy S. Robertson
Attorney for Appellee Peggy Proffitt

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Appellees are individuals.

2. Appellee certifies that the following individuals/entities may have an interest in the outcome of this matter:

   - Boutwell, Lisa Jo Ann, Defendant/Appellee
   - Callaway, Honorable Judge Henry A., U.S. Bankruptcy Judge for the Southern District of Alabama
   - Conte, Christopher, Appellant/Chapter 13 Trustee
   - Friedman, Barry A., Attorney for Special counsel, Long & Long
   - Hartley, Jeffery J., Counsel for Appellant
   - Hill, Johnny, Defendant/Appellee
   - Long & Long, PC, Special counsel for Debtor/Appellee Lisa Boutwell
   - Padgett, Herman D., Attorney for Debtors/Appellees
   - Proffitt, Peggy, Defendant/Appellee

- Steele, Jason K., Special counsel for Debtor/Appellee Peggy Proffitt
- Watts, III, William W., Counsel for Appellant
- Zimlich, Mark, Bankruptcy Administrator for Southern District of Alabama

Lacy S. Robertson
Attorney for Appellees Johnny Hill &
Lisa Jo Ann Boutwell

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument. The facts and legal arguments in this case are adequately presented in briefs and the record and the decision process would not be significantly aided by oral argument.

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SUMMARY OF THE ARGUMENT

The facts presented in these two cases on appeal are like many others brought before the bankruptcy court each year. A debtor in chapter 13 suffers an unexpected injury through no fault of their own and they seek redress through the legal system. The bankruptcy court took extensive testimony from both debtors regarding their accidents. Mrs. Boutwell was shopping at Dollar General when large merchandise fell from a shelf onto her head. While Ms. Proffitt caught her foot on a misplaced mat leaving Walmart and fell flat onto concrete.

The trustee sought to modify their plans under §1329 to treat the net settlement proceeds as an additional dividend and increase the percentage paid to unsecured creditors. If granted, the debtors will receive virtually no funds, their monthly plan payment will not change nor will their plan term decrease. The bankruptcy court did not err nor abuse its discretion in denying the modifications proposed by the trustee.

Under §1329 the bankruptcy court may approve the modification but it is not required to do so. First, the disposable income test is not applicable to the settlement proceeds. They do not meet the statutory definition of disposable income and must instead be treated not as income but as an asset. Second, in a

hypothetical conversion, the best interest of creditors test is based on assets that would have been available if the case was originally filed under Chapter 7, not on assets at the time of the modification. Absent bad faith, the proceeds from a post-petition personal injury claim that did not exist on the date of filing would not be available to a chapter 7 trustee. Lastly, and most importantly, the approval of a plan modification is at the discretion of the bankruptcy court. Even if the proposed modification meets all other requirements the bankruptcy court can decide to confirm or deny the modification. Thus, the bankruptcy court's decision should be affirmed.

ARGUMENT

I. NON-EXEMPT SETTLEMENT PROCEEDS RECEIVED FROM POST-PETITION PERSONAL INJURY CLAIMS ARE NOT "INCOME" THAT INCREASED THE DEBTORS' DISPOSABLE INCOME UNDER §1325(b) AND SHOULD NOT BE REQUIRED TO INCREASE PAYMENTS TO UNSECURED CREDITORS

A. The non-exempt settlement proceeds are property of the estate

Under §541 and §1306 the bankruptcy estate consists of all interest in property the debtor has at the time of filing and that the debtor acquires after filing. The local plan form used in the Southern District of Alabama provides that property of the estate does not vest in the debtor until dismissal or discharge. There is no dispute that the non-exempt proceeds at issue are property of the estate.

B. The settlement proceeds are not "income" but are an "asset"

The term "income" is not defined in the Code. Where the code does not define a term, the court must look to its ordinary meaning. *See In re Frysinger,* 648 B.R. 386, 388 (Bank. Or. 2022). Generally, "income" is defined as:

> "a gain or recurrent benefit usually measured in money that derives from capital or labor *also* : the amount of such gain received in a period of time" "income." Mirriam-Webster, *Definition of income*, https://www.merriam-webster.com/dictionary/income (last visited August 21, 2024)

A common theme is that income is not an asset itself, but is instead revenue accruing on account of an asset or performance of a service over time. *Id.* at 389.

As the bankruptcy court noted income and assets are different concepts. In *Brown,* the trustee objected to confirmation seeking to increase the amount paid to unsecured creditors due to the cash surrender value of their whole life insurance policy. See *In re Brown,* Case No. 13-35593-GMH (Bankr. E.D. Wis. Sep 24, 2014) at 3-4. In finding that the insurance policy was not income—

> "courts have repeatedly held that only regular income and substitutes therefore can be counted in the determination of disposable income for purposes of the chapter 13 test. The test is whether the asset in question is an anticipated stream of payments. If it is a stream of payments, the payments must be included in projected income. If the asset is not a stream of payments, it is not included." *Id.* (quoting *In re Burgie*, 239 B.R. 406, 410 (9th Cir. B.A.P. 1999)

Further, after BAPCPA[1], a debtor's receipt of a post-confirmation asset cannot be disposable income under its statutory definition because the debtor did not receive it during the six months preceding the filing of the petition. "Disposable income" is defined as "current monthly income received by the debtor…less amounts reasonably necessary to be expended for the maintenance

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[1] Referencing the Bankruptcy Abuse and Prevention Act of 2005 (BAPCPA)(Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005). Prior to BAPCPA, the statute defined "disposable monthly income" simply as "income which is received by the debtor and which is not reasonably necessary to be expended" for specified purposes. *See In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga 2014) at 418. Thus, a debtor's receipt of a post-confirmation asset could be determined to be "disposable income" within this statutory definition. *Id.*

and support of the debtor". *See* §1325(b)(2). "Current monthly income" is the average monthly income from all sources that the debtor received during the 6-month period before the case is filed. *See* §101(10A)(A). Current monthly income is a backward-looking calculation.

The bankruptcy court correctly found that in the present cases the settlement proceeds were not 'income" and thus the disposable income test under §1325(b) did not apply.

II. NON-EXEMPT SETTLEMENT PROCEEDS RECEVIED FROM POST-PETITION PERSONAL INJURY CLAIMS ARE NOT INCLUDED IN THE LIQUIDATION TEST UNDER §1325(a)(4) WHEN CONSIDERING PLAN MODIFICATION UNDER §1329

Under §1329 a proposed plan modification must also meet the requirements of §1325(a)(4)--the best interests of creditors test a/k/a liquidation test. The unsecured creditors should receive no less than they would be paid under a hypothetical chapter 7 liquidation. The problem in applying this test to plan modifications is two-fold: (1) the Code does not define "effective date of the plan"-is it the original plan (typically the date of filing) or is it the date of the proposed modification and (2) what Code section defines the property to be included in the

hypothetical liquidation as of that date? *See In re Taylor*, 631 B.R. 346, 351 (Bankr. Kan. 2021).

The bankruptcy court found that though post-petition personal injury claims are added to the estate under §1306 they are excluded in the liquidation analysis because under §§541(a) and 348(f) they would not be included as part of the hypothetical chapter 7 if the case were converted. Under §348(f), absent bad faith, property of the estate upon conversion consists of property of the estate as of the date of filing of the petition that remains in possession or is under the control of the debtor on the date of conversion. The purpose of the liquidation value is to provide a floor to ensure that creditors receive in a chapter 13 at least as much as they would receive in a Chapter 7 case. *See In re Madrid,* 19-42260-MJH (Bankr. W.D. Wash. May 18, 2023) at 11.

The Trustee asserts that for purposes of plan modification under §1329 that §348(f) is not at play because the debtor is not converting and that §348(f) should not be construed to supersede §1306. Legislative history and case law support that §348(f) controls. When Congress amended §348(f) in 1994 it expressly overruled prior cases which held that if the case is converted, all after acquired property becomes part of the estate. *Id.* at 12. Congress' intent was to give courts discretion by adding a bad faith component but also to encourage chapter 13 filings and avoid

penalizing debtors for their chapter 13 efforts by placing them in the same economic position they would have occupied had they filed chapter 7 originally. *Id.*

Further, §1306 is a general statute augmenting the estate defined in §541 for chapter 13 cases, while §348(f) is a specific statute defining property of the estate in cases converted from chapter 13 to chapter 7. *Taylor,* 631 B.R. at 353. The hypothetical liquidation included in the best interest test assumes conversion of the chapter 13 case to chapter 7. *Id.* If debtor's post-petition personal injury claim did not exist on the date of filing; its proceeds would not be available to a chapter 7 trustee and are excluded from the best interest test calculation. *Id.* 353-354.

The *Ludin on Chapter 13* treatise observes that the outcomes of cases holding that post-petition windfalls must be used for the benefit of creditors, avoids a result that some courts find "unpalatable" and "are driven more by policy considerations than by analysis of the Code." He notes that although excluding windfall property produces harsh outcomes for creditors, "no pre-petition creditor has any (reasonable) expectation of payment from such property and exclusion of the windfall promotes the fresh start policy. *Taylor,* 631 B.R. at 354 (quoting Keith M. Lundin, *Lundin on Chapter 13 §122.2, at ¶¶3,6*)

The trustee argues that the hypothetical "liquidation-upon-conversion" test used by the court renders the liquidation test so insignificant as to be violation of the surplusage canon and that to apply the analysis to pre-petition property again would be a superfluous exercise. But, as the bankruptcy court noted, applying the liquidation test to a modification in this way does not render the test obsolete; pre-petition property as well as inheritances, divorce property settlements and life insurance within 180 days are still included in the analysis. And a modification cannot be approved if it lowers payments to creditors to an amount lower than they would have received if a chapter 7 case had been filed instead of a chapter 13 case.

Further, practical application of the best interests of creditors test to assets acquired post-petition does not work. The Code does not define "effective date of the plan"- is it the original plan (typically the date of filing) or is it the date of the proposed modification? At filing, a snapshot is created of the Debtor's assets and liabilities and exemptions are claimed based on the present value of the debtor's property. If the new effective date is the date of the modification, then the liquidation analysis must be reapplied as of the time of the modification. *See In re Madrid,* 19-42260-MJH (Bankr. W.D. Wash. May 18, 2023) at 8.

Thus, for any post-confirmation plan modification, a debtor would have to amend the schedules to adjust the value of *all* property to account for any

appreciation or depreciation having occurred since the date of filing. Additionally, Debtors in states like Alabama whose property exemptions increase periodically, may have higher exemptions available to them at the time of the modification.[2] Hypothetically, in a housing market boom, a trustee could move to modify the plan based on the post-petition appreciation property value and cause a plan to become unfeasible even where the debtor met the liquidation test on the date of filing and is performing under the plan. Or conversely, the Debtor's home or vehicle may decrease in value after filing and they could ask to modify the plan to reduce the percentage to creditors based on the depreciation. Simply adding assets that arise post-confirmation but ignoring the depreciation of existing assets does not work. Worst of all, a debtor whose income has gone down and who therefore needs a reduction in plan payments to complete the plan would not be able to modify the plan at all if there was an appreciation in the value of the debtor's nonexempt home equity or other assets.

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[2] Alabama Code §6-10-12 provides for adjustments to exemption values every 3 years. When the debtors' bankruptcy cases were filed in 2018 the homestead exemption per individual was $15,500 and the personal property "wildcard" exemption was $7,750. The exemption amounts have subsequently increased on April 1st in 2021 and 2024. The current homestead exemption is $18,800 and personal property is $9,400.

III. UNDER §1329 THE COURT IS NOT REQUIRED TO APPROVE A PLAN MODIFICATION EVEN WHERE BOTH THE DISPOSABLE INCOME AND LIQUIDATION TESTS CAN ONLY BE MET BY PAYMENT OF SETTLEMENT PROCEEDS TO THE UNSECURED CREDITORS AS ADDITIONAL PAYMENT

A chapter 13 plan confirmation "has res judicata effect" unless later modified by order of the court. *See In re Davis,* 314 F.3d 567, 570 (11th Cir. 2002). Section 1327 treats a confirmed plan like the final judgments of district courts, immune from collateral attacks. *See In re Guillen*, 972 F.3d 1221, 1225 (11th Cir. 2020). Section 1329 carves out a limited exception and permits debtors, trustees and allowed unsecured claimants to move to modify the confirmed plans so long as they satisfy certain statutory requirements. *Id* at 126. Application of §1329 involves a two-step process. First, the court must determine whether a proposed modification meets the mandatory requirements that §1329 prescribes. Second, if it does, the court must then determine whether to approve the modification. *See In re McAllister*, 510 B.R. 409, 412 (Bankr. N.D. Ga. 2014).

In *Guillen*, this court answered a question of first impression: whether bankruptcy courts must find some change in circumstances before permitting debtors to modify confirmed plans under §1329? The debtor was seeking to modify the plan to reduce the percentage to unsecured creditors due to additional

attorney fees because of an adversary proceeding. The Trustee objected because there had been no change in circumstances. The Court found that on its face §1329 does not impose a requirement that the bankruptcy court find any change in circumstances before modifying a confirmed plan. *Guillien,* 972 F.3d at 1226.

Throughout the bankruptcy code when congress sought to impose a "circumstances" requirement it said so.[3] *Id*. The court found unpersuasive the policy argument that such a requirement would prevent an onslaught of modification motions. *Id.* at 1228. For one, only a limited universe of parties may seek to modify confirmed chapter 13 plans- debtors, trustees, and unsecured creditors. *Id*. Next, these parties may seek to modify only for limited purposes. *Id.* at 1229. Moreover, the modified plans must still satisfy the requirements of §1325(a) along with §1322(a), (b) and (c). *Id*. Lastly, even where modified plans

[3] For examples, §1328(b) the court may grant a discharge to a debtor that has not completed payments under the plan only if--(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not be held accountable.; §1308(b)(2) if the debtor demonstrates…that the failure to file a tax return ..is attributable to circumstances beyond the control of the debtor, the court may extend the filing period; §727(a) The court shall grant the debtor as discharge, unless-(3)….such act or failure to act was justified under all of the circumstance; and §1127(b)…such modified plan becomes the plan only if circumstances warrant and such modification and the court, after notice and hearing, confirms such plan as modified.

satisfy these express limits, the statute reserves to the discretion of the bankruptcy court whether to confirm a modified plan. *Id.*

> "Even where modified plans satisfy these express limits, the statutes reserves to the discretion of the bankruptcy court whether to confirm a modified plan. The bankruptcy court "shall confirm" a chapter 13 plan if it meets the requirements of §1325(a), but the court has the discretion to confirm modified plans. Plans "may be modified" if they meet the requirements of §1329. Nothing prevents a bankruptcy court from refusing to confirm a modified plan put before it. As we have recognized bankruptcy courts retain ample powers to prevent successive or abusive attempted modification." *Id.*

When a bankruptcy court faces a modified plan that satisfies the requirements of §1329 it may properly consider whether there has been some change in circumstances when deciding whether to confirm the plan as modified.

> "It remains true that an unforeseen change in circumstances is a good reason to permit a modification that otherwise satisfies §1329. But that is not to say it is the only reason. And we reject the Trustee's attempt to convert a sufficient condition into a necessary one. When a bankruptcy court faces a modified plan that satisfies the requirements of §1329, it may properly consider whether there has been some change in circumstances when deciding whether to confirm the plan as modified. But it is free to confirm the modified plan even where it has not found any change in circumstances." *Id.* at 1229-1230.

The Trustee argues that the court's denial of the modification is inconsistent with *In re Waldron* in which this court held that the debtor's post-petition uninsured motorist settlement proceeds had to be disclosed. *See In re Waldron*, 536

F.3d 1239 (11th Cir. 2008). He concludes that if the settlement proceeds do not increase a debtor's ability to pay there would be no reason for the required disclosure. In *Waldron*, the 11th Circuit found the bankruptcy court did not abuse its discretion to order debtors to amend their schedules to disclose a post-petition personal injury claim, however, the court did not consider the specifics of plan modification under §1329.

Waldron does not mandate disclosure of all acquisitions of any property interest after confirmation but allows the bankruptcy court discretion under Rule 1009 to require a debtor to amend his schedules of assets to disclose new property interests acquired after confirmation. *Id.* at 1246. Such disclosure of post-confirmation assets gives the trustee and creditors a meaningful right to request, under §1329, a modification of the debtor's plan to pay his creditors. *Id.* at 1245. The court recognized that "post-confirmation disclosure reinforces the ability to pay standard of Chapter 13" and that Congress "did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors". *Id.* (quoting *In re Arnold*, 869 F.2d 240, 241-242 (4th Cir. 1989)). However, neither *Waldron* nor any other court of appeals decision has found that section 1325(b) applies to modifications or the best interests of creditors test of section 1325(a)(4) should be recomputed based on post-petition

events to determine whether a plan can be modified. The issues of income and assets are left to the bankruptcy court's discretion in considering all of the circumstances of the case, as long as unsecured creditors receive at least as much as they would have received had the case originally been filed under chapter 7.

Section 1329(a) provides that a plan *may* be modified but has no standards to guide the Court in the exercise of its discretion. *McAllister*, 510 B.R. at 430. When a debtor discloses assets acquired after confirmation to the court his creditors may share in any unanticipated gain if the court determines that these assets are available to repay debts. Although ability to pay is important, the proper exercise of discretion does not exclude consideration of other factors. *Id.* at 431. The determination of whether modification is warranted requires a realistic assessment of the debtor's financial situation and must include consideration of the debtor's future needs. *Id.*

Although plan modification does not require a change in circumstance the court must still determine whether there is a legitimate reason for the proposed modification. *Guillen,* 972 F.3d at 1230. Such a reason may be an increase in income or a windfall. A windfall occurs when a debtor receives an unanticipated, fortuitous, and significant benefit without earning it or planning it. Examples include winning the lottery, receiving a substantial inheritance or life insurance

proceeds upon the death or someone other than a spouse. *McAllister,* 540 B.R. at 432.

The Trustee states the Debtors in these cases have not demonstrated a change in circumstance, i.e., they have not filed amended schedules reflecting changes to their income and expenses or their own motions to modify.[4] However, he asserts that such a modification proposed by the Debtor must be denied because the only modification that could be approved, regardless of the proponent, is one that distributes the entire settlement proceeds to the unsecured creditors as an additional dividend. Such inflexibility leaves no room for judicial discretion which the plain language of §1329 modifications require.

In chapter 13, the Code "creates a balance between certainty and flexibility" … "the ability to request that change…is not unlimited, and the Court serves as the gatekeeper. In this role, the Court must ensure that the ultimate goals of the Bankruptcy Code—a fresh start for debtors and fair distributions to creditors—are

[4] Mrs. Boutwell did file a Motion to modify the plan as a result of the personal injury which was granted by the court, however, the percentage to creditors was not modified. Both Debtors had pre-petition, non-exempt equity in property so if a Motion to modify the plan to reduce the percentage to unsecured creditors and/or reduce plan payment had been filed then the pre-petition equity would have affected that calculation, and their plan payment would not have been substantially reduced.

balanced and acknowledged throughout the bankruptcy process." *In re Nachon-Torres*, 520 B.R. 306, 316 (Bankr. N.D. Ga 2014). As the bankruptcy court held in the *Connor/Davis* cases the issues related to post-confirmation modifications when there is a realization of non-exempt post-petition assets is "case and fact specific." *See In re Davis and In re Connor*, No. 16-03550 & 18-01935 HAC (S.D.A.L. Sept. 13, 2022) at 5. Those issues "will have to be sorted out on a case-by-case basis and not every post-petition asset will constitute a "windfall" to the debtor that warrants plan modification." *Id.*

In *McAllister*, the court denied the trustee's motion to modify the plan when the joint debtor/spouse passed away two years into the case and Debtor received $250,000 in life insurance proceeds. The court found that although ability to pay is important, the proper exercise of discretion does not exclude consideration of other factors.

> "A primary factor for the Court to consider when exercising its discretion to approve or disapprove a modification is the debtor's ability to pay. It is true that a substantial amount of money is available to pay creditors in full. But doing so would severely impair an aging, disabled debtor with little prospects for significant future income or any way to replace an asset that he and his wife counted on to sustain them in future years. ….
>
> Application of the ability to pay standard in this manner is not unfair to creditors. They could not have expected the untimely death of Mrs. McAllister. They did not extend credit on the basis of her life insurance

> policy, and they are receiving no less than what the original plan promised or what they would receive if this were a chapter 7 case." *McAllister,* 510, B.R. at 432.

The situation in *McAllister* was a tragedy not a windfall. No concept of fairness to creditors in a bankruptcy case requires that they received the benefit of her death due to the fortuitous circumstance that it occurred before the completion of payments under the plan. *Id*. at 433.

In contrast, in *Madrid* the debtor's mother died in month thirty-one of her plan and she became entitled to receive an inheritance of $71,852.00. *See Madrid,* 19-42260-MJH (Bankr. W.D. Wash. May 18, 2023) at 2. The unsecured claims totaled $24,981.52. *Id.* The court found in its discretion that although unanticipated the inheritance which was approximately 1425% more than the total aggregate plan payment called for in her plan was a significant improvement in financial condition that warranted increase the distribution to unsecured creditors. *Id.* at 14.

The Chapter 13 Trustee asserts that this decision by the bankruptcy court creates a radical, new rule that will alter bankruptcy practice in this Circuit preventing the distribution of any post-petition personal injury settlements to unsecured creditors as an additional dividend in any case in this Circuit. That is not the case. One, the ruling applies only to unanticipated post-petition personal injury

settlements. Second, for purposes of plan modification the court has discretion to review each case on an individual basis and determine whether the percentage to unsecured creditors should be modified. As the bankruptcy court stated a large verdict for punitive damages would be a different situation. Or, some above median income debtors may want to pay off their plan at 100% and receive a discharge in lieu staying in chapter 13 plan for sixty (60) months.

In these cases the bankruptcy court did not abuse its use of judicial discretion to find that the debtors' post-petition personal injury claims were not a windfall that increased their ability to pay creditors. The court heard extensive testimony from both debtors regarding their injuries. Their pain and suffering were not a fortuitous event for the debtors and neither experienced an improved financial condition or an increase in their ability to pay except for the existence of the settlement proceeds.

The Trustee argues that the bankruptcy court has created by judicial fiat a new unlimited exemption for post-petition personal injury settlements that is at odds with the bankruptcy code. However, in section 522 there is already an unlimited exemption for pain and suffering and actual pecuniary loss of the debtor. Under §522(d)(11)(D) "the debtor's right to receive—a payment, not to exceed $27,900.00, 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" is exempt.

While Alabama has opted out of the Federal exemptions the distinction made between compensatory and punitive damages is still relevant. The bankruptcy court found that the damages in these cases were compensatory. The court recognized that typically the tort claims are settled out of court by negotiation and often adjusted to account for disputed liability and insurance limits. Logically, absent a trial by judge or jury, very few defendants would agree to pay punitive damages. Further, after payment of attorney fees, costs, subrogation and medical expenses, the injured debtor is left with only a fraction of the amount supposed to represent compensation. The court distinguished these settlements from situations where a debtor receives large punitive damages or an outsized jury verdict.

Lastly, the proceeds have not been distributed to the debtors to be used for their immediate use. Under the court's previous ruling in *Davis/Connor* the trustee will hold the nonexempt post-petition assets. By requiring the nonexempt post-petition assets to be held by the trustee it ensures that the money will be safeguarded if the debtor does not complete his or her plan.

CONCLUSION

In conclusion, the bankruptcy court did not err in its judgment nor abuse its discretion and the order denying the trustee's motion to modify under §1329 should be affirmed.

LACY S. ROBERTSON
Counsel for Appellees
Padgett & Robertson
4317 Downtowner Loop N
Mobile, AL 36609
(251) 342-0264
Email:lrobertson@hermandpadgett.com

CERTIFICATE OF COMPLIANCE

1. I certify that this Motion complies with the word limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this document contains 4,442 words.

2. I further certify that this document complies with the font requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Romans 14 font.

Lacy S. Robertson

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of August, 2024, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties to this proceeding and/or served a copy by U.S. Mail as follows

Via Electronic Service:

Christopher T. Conte
Chapter 13 Trustee/Appellant

William W. Watts, III
Counsel for Appellant

Jeffery J. Hartley
Counsel for Appellant

Lacy S. Robertson