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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC99-98

HAVOC0 OF AMERICA, LTD.

Petitioner,

v.

ELMER C. HILL,

Respondent.

Certified Question From The Eleventh Circuit District Court of Appeal
Lower Tribunal Case Number: 97-2277

AMICUS CURIAE BRIEF OF FLORIDA BANKERS ASSOCIATION, FLORIDA RETAIL FEDERATION, NACM OF FLORIDA, INC. AND NACM FLORIDA GULF COAST UNIT, INC. IN SUPPORT OF PETITIONER, HAVOC0 OF AMERICA, LTD.

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STATEMENT OF THE CASE AND THE FACTS

Amici', Florida Bankers Association, Florida Retail Federation, NACM of Florida, Inc., and NACM Florida Gulf Coast Unit, Inc., accept Petitioner's Statement of the Case and the facts insofar as they relate to the particular proceedings below. However, amici believe the facts of this case, disturbing as they may be, barely serve to illuminate the scope of the issue here before the Court. Respondent Elmer Hill is neither unique nor particularly egregious in his manipulation of the protection the people of the state of Florida reserved to themselves by exempting homestead from forced sale in Article X, Section 4 of the Florida Constitution ("Homestead Exemption").

Others, like Mr. Hill, have used the Homestead Exemption not to protect a family from becoming destitute and wards of the community, but to protect their wealth while failing to make a good faith attempt to satisfy at least some portion of their just and legal obligations to creditors. In 1986, Gary Froid, a

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[1] Florida Retail Federation, NACM of Florida, Inc., and NACM Florida Gulf Coast Unit, Inc., jointly moved for leave to appear as amici curiae. That motion was granted on February 3, 2000. Undersigned counsel would like to clarify the nature of the business of and the relationship between the two NACM groups which was inadvertently misstated in the Motion. Both are associations which represent businesses from the credit management side, but they do not themselves manage credit. Also, both entities are separate and distinct chapters of the national association and are not otherwise related.

successful insurance agent, faced bankruptcy when the bank of which he was a director--and in which he held stock--failed. At the time of his bankruptcy, he owned a home valued at $700,000, IRA's and life insurance policies which the Constitution and the law of Florida exempt from the reach of creditors. However, Mr. Froid was not content with the generous exemptions already afforded him. Prior to declaring bankruptcy, he cashed out a non-exempt $75,000 certificate of deposit to pay down the mortgage on his home and liquidated another $35,000 in non-exempt assets which he invested in his life insurance policies. Thus, at the time he declared bankruptcy, his exemption had increased by $11 O,OOO--money which was legally owed to his creditors.*

Roy Talmo, former principal of Data Lease Financial Corporation, used $700,000 of the company's assets to pay down the mortgage on his home in Florida. The company could not recover those assets, or any portion of them, when Talmo declared bankruptcy in 1993, declaring the home as exempt homestead under the Florida Constitution.[3]

William Durham, much like Mr. Hill in the instant case, acquired his

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[2] St. Petersburg Times, February 4, 1990.

[3] The Palm Beach Post, October 18, 1994. Of course, once the creditors' claims were extinguished in the bankruptcy proceeding, Mr. Talmo was free to sell or remortgage his homestead to pull out excess equity for his own enjoyment.

wealth through defrauding others. When judgment--and forced restitution--seemed inevitable, however, Mr. Durham sold his home in Kentucky and came to Florida, purchasing a condominium in Pinellas County. Those he had injured were unable to recoup their losses because Mr. Durham was able to raise Florida's Homestead Exemption as a bar to their claims.[4]

In a case currently pending in the United States Bankruptcy Court for the Middle District of Florida, In re Jeffrey A. Weston, Case No. 97-1859-8G7 (Bankr. M.D. Fla), the bankruptcy court judge found the following facts: Jeffrey Weston, a resident of Indiana, stole trade secrets and confidential information from his employer so that he, Weston, could set himself up in competition. The employer sued Weston in Indiana state court for, among other things, unfair competition, misappropriation of trade secrets and confidential information, and unjust enrichment. When it became obvious that the trial was going badly for Mr. Weston, he executed a promissory note to his attorney (his step-uncle) in the amount of $71,750, which he secured with a mortgage on his home in Indiana. The home was otherwise free of liens.

The jury returned a verdict against Mr. Weston in the amount of $271,780.07, finding him guilty of misappropriation of the trade secret he had

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[4] St. Petersburg Times, February 4, 1990.

used to generate income. The judgment reflected the amount of profit Mr. Weston had derived from the illegal use of the trade secrets over a two-year period.

Once the judgment was entered, Mr. Weston closed his banking account and no longer dealt with banks. The income he received from his business was unaccounted for thereafter. He paid the bulk of his expenses with cashiers' checks, but the source of the funds used to purchase those checks was not recorded sufficiently to give the court a picture of his financial condition. Thus, discharge was denied.

Mr. Weston's scheme to protect his assets was not entirely futile, however. Three months after the judgment was entered against him, and without selling his home in Indiana, Mr. Weston came to Florida and purchased a home in Sarasota, Florida, for $153,490.03 *in cash.* He has declared that residence his homestead and, therefore, exempt from forced sale to satisfy the just and legal judgment entered against him in favor of the employer he cheated and abused."

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[5] The United States Bankruptcy Court's Findings of Fact and Memorandum of Law in In re Weston are attached hereto as Appendix A.

These and other reported cases[6] demonstrate that the issue here before the Court is neither academic nor immaterial. What was intended by the people of the state of Florida as a refuge for honest householders who have fallen into financial crisis through bad luck, bad times, or bad fiscal management has become the refuge of the well-to-do who would prefer to maintain their personal wealth rather than to fulfill their financial obligations to creditors.

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[6] See, e.g., In re Miller, 188 B.R. 302 (Bkrtcy.M.D.Fla. 1995) (shortly after $530,000 in notes came due, debtor sold $461,000 in non-exempt real estate for $250,000, using cash proceeds to buy homestead and pay off loans against life insurance); In re Bandkau 187 B.R. 373 (Bkrtcy.M.D.Fla. 1995) (court found solvent debtors converted most non-exempt assets to exempt annuities and homestead equity to shield assets from single major creditor); In re Thomas, 172 B.R. 674 (Bkrtcy.M.D.Fla. 1994) (two days prior to bankruptcy, debtors sold non-exempt automobile, using bulk of proceeds to pay down homestead mortgage); In re Coplan, 156 B.R. 88 (BkrtcyM.D.Fla. 1993) (facing liability on guarantee, "financially sophisticated" debtors sold home in Wisconsin ($40,000 homestead exemption), bought $228,000 home in Florida for cash); In re Schwarb 150 B.R. 470 (Bkrtcy.M.D.Fla. 1992) (facing $100,000 judgment, debtor sold $210,000 in non-exempt real estate and mutual funds, bought $85,000 in annuities, used balance to pay off mortgage on homestead); In re Decker, 105 B.R. 79 (Bkrtcy.M.D.Fla. 1989) (facing impending bankruptcy, debtors cashed in CD early for substantial penalty and sold note at substantial discount, using resulting cash to pay off $67,000 mortgage on homestead); In re Blum, 41 B.R. 816 (Bkrtcy.S.D.Fla. 1984) (facing liability on guarantee, debtor liquidated various securities and bank accounts in months prior to filing, used proceeds to pay down homestead mortgage and buy annuities).

SUMMARY OF THE ARGUMENT

The earliest interpretations of Florida's Homestead Exemption recognized that the goal of protecting the family from losing its home and means of subsistence was not served by extending the scope of Homestead Exemption to protect the wealth of an individual who could pay debts, but refused to do so. In determining whether an asset ostensibly entitled to Homestead Exemption was beyond the reach of the claimant, the Court consistently looked to the good faith of the debtor asserting the exemption and to the source of the investment in the protected asset. In those cases in which the debtor had used funds rightfully owed to another to purchase or improve homestead property, this Court was prompt to set aside that part of the exemption created in fraud of the creditor by imposing an equitable lien against the homestead property. This application satisfies the Court's fundamental requirements that the Homestead Exemption must be liberally construed for the protection of the family, but must not, itself, become an instrument of fraud on creditors.

In recent years, some bankruptcy courts have failed to heed the warning against misapplying Homestead Exemption so as to condone fraud on creditors. This has resulted from a misunderstanding of a case this Court

decided in a context unrelated to the issue here before the Court. In a case in which the state was attempting to require forfeiture of homestead used in the commission of a felony, the Court recognized that the three express exceptions to constitutional Homestead Exemption did not authorize the legislature to impose loss of homestead as a statutory penalty for criminal behavior. However, the issue before the Court is not whether the legislature may vacate constitutional homestead protections. Rather, it is whether the constitution itself may be used to perpetrate a fraud on creditors. This Court has consistently answered the question in the negative.

Testing whether assets have been converted from non-exempt to exempt in order to hinder, delay or defeat the claims of creditors does not create any unfair burden on the courts or on debtors. The issue has arisen in most of the cases cited herein, with the burden of proof of fraud and overreaching on the party attempting to obtain an equitable lien against homestead. The courts are well equipped to receive and weigh the evidence required to determine the motivation behind the conversion of assets from non-exempt to homestead.

The policy underlying the concept of Homestead Exemption is ill served by allowing debtors to hinder, delay or defeat their creditors by converting non-

exempt assets to exempt assets. Florida adopted homestead exemptions, whether by statute or by constitutional fiat, in order to create a stable, economically viable society. This was accomplished by allowing families to retain a roof over their heads and the ability to support themselves so that society at large would not be burdened with the support of those who lost homestead to creditors. Historically, the scope of homestead was limited to that which was required for subsistence. While Florida's constitutional Homestead Exemption is unlimited, it is not intended to be a mechanism for converting wealth otherwise available for the payment of just debts and obligations into protected assets.

Ironically, applying Florida's constitutional Homestead Exemption so as to allow debtors to convert non-exempt assets to exempt homestead with impunity does nothing to protect the individuals who were the intended beneficiaries of the provision. Most individuals seeking bankruptcy protection are truly without assets with which to pay creditors. Those who have a homestead typically hold it subject to a mortgage which falls within an express exception to Homestead Exemption and which may therefore be foreclosed and lost to the debtor. It is only the relatively well-to-do debtor (who could make some payment on his obligations without being reduced to poverty) who

will be able to liquidate non-exempt assets and to invest them in homestead or other exempt assets. Thus, Florida's Homestead Exemption has become a magnet for the debtor with assets who wishes to defraud creditors. The people of the state of Florida neither intended such an application of their constitution nor welcome the consequences of ignoring the fundamental precepts of fairness and equity which militate against it.

ARGUMENT

The earliest cases in which this Court analyzed the purpose and effect of Florida's constitutional Homestead Exemption recognized two specific rules for its application: First, the exemption should be liberally applied to protect the family home. Second, the exemption should not become a means of defrauding or imposing upon creditors. Milton v. Milton, 58 So. 718 (Fla. 1912); Drucker v. Rosenstein, 19 Fla. 191. 199 (1882). Federal courts in Florida have faithfully followed the Court's guidance on the first precept; however, they have applied it to the exclusion of the second.[7] See, e.g., Bank Leumi Trust Company of New York v. Lang, 898 F. Supp. 883 (S.D. Fla.

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[7] Although bankruptcy is a federal proceeding controlled by federal rule and statute, the Bankruptcy Code permits the individual states to opt out of the federal scheme of exemptions and make state exemptions applicable in bankruptcy. 11 U.S.C. § 522(b). Florida opted out of the federal exemptions. § 222.20, Fla. Stat.

1995).

I. THE FLORIDA SUPREME COURT HAS NOT INTERPRETED ARTICLE X. SECTION 4 OF THE FLORIDA CONSTITUTION AS A SAFE HARBOR FOR FRAUD AND IMPOSITION ON CREDITORS.

From its earliest interpretations of Florida's Homestead Exemption, the Florida Supreme Court has acknowledged that the people of the state of Florida did not intend that protection to extend sanctuary to the well advised, well-to-do debtor who has the means and ability to manipulate the law to preserve his wealth at his creditors' expense.

Where the Court found that a debtor had improperly increased his homestead with the intent to defraud those entitled to the benefit of the assets used to increase it, the Court did not hesitate to impose an equitable lien against the homestead to recoup the assets rightfully owing to the creditor.

As early as 1912, in Milton, 58 So. at 718, the Court raised the question of bad faith to determine whether the defendant had a valid Homestead Exemption. William Milton, the debtor, had inherited land from his mother after he had incurred and defaulted on debts. Within weeks of his mother's death, Milton moved his family onto the land and declared it his homestead. In the meantime, his creditors attempted to execute against the property to recover the moneys owed them. The Court determined that Milton was entitled to

Homestead Exemption, under the facts of this case. But the context in which the decision was made raises the clear implication that other facts could have yielded a different result: **"There is no sufficient showing of bad faith** on the part of William Milton in moving on and claiming homestead rights in the lands." Id. at 719 (emphasis added).

In Jones v. Carpenter, 106 So. 127 (Fla. 1925), the Court met those different facts. In that case, J. Weller Carpenter purchased a home and moved into it with his family, thus creating a homestead. Carpenter was the president of Jacksonville Bread Company which, a few years after Carpenter's purchase of his home, went into bankruptcy. In the ensuing proceedings, it became clear that Carpenter had been expending corporate funds for improvements and maintenance to his home. When the bankruptcy trustee attempted to recoup those funds through imposition of an equitable lien on the property, Carpenter raised the defense of Homestead Exemption.

The Court found that the equitable lien was an available and appropriate remedy. A cursory reading of the case may lead one to the conclusion that the lien was imposed because of the determination that the claim fell within the exception to Homestead Exemption relating to improvements on homestead

property.[8] However, it is unmistakable on the record that the contractual obligations for the improvements to the homestead had been satisfied. The workers had been paid. On the other hand, Carpenter had no express contract with the corporation to reimburse it for the funds he had misappropriated to finance the improvements. Thus, the Court recognized the fundamental principle that use of funds rightfully belonging or owed to another to improve (or to purchase) homestead property will not protect the homestead owner from the ultimate obligation to repay those funds, even where no express contract exists or where no judgment has been entered prior to the expenditure of the funds.

In the instant case, Hill gained great wealth by misappropriating business opportunities and income from others to whom he owed a fiduciary duty. He then used those funds to purchase a homestead. Like Carpenter, he seeks to avoid his legal responsibility to those he injured by converting non-exempt assets to exempt so as to keep the benefit of his illegal acts for his own enjoyment. As the Florida Supreme Court implied in Milton and expressly

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[8] But no property shall be exempt from sale . . . for the payment of obligations contracted . . . for the erection or repair of improvements on the real estate exempted.

Article X, § 1, Fla. Const. (1868).

ruled in Carpenter, the protection of ill-gotten gains against those from whom they were taken is not a valid exercise of Homestead Exemption.

The Florida Supreme Court again recognized that an equitable lien was appropriate where the homestead claimant sought to convert the assets and effort of another to his own benefit in Sonneman v. Tuszynski, 191 So. 18 (Fla. 1939). There, the Court found that the protection of Homestead Exemption did not permit the owner of homestead to ignore obligations to others which had allowed him to obtain and to enhance the value of his homestead. In that case, Mrs. Sonneman had become the benefactor of the defendant, Tuszynski, living with him in an almost maternal relationship. Over the course of the years, she had provided housekeeping services and had advanced funds for his benefit--funds which had allowed him to acquire a business he later sold and converted into a homestead in Florida. During this time, the defendant had consistently promised to provide for Mrs. Sonneman for the rest of her life. However, that promise was revoked when the defendant married[9] and his wife undertook to force her off the property and out of their lives The plaintiff, then 78 years old and penniless, turned to the courts for relief. The

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[9] Under the 1868 Constitution, Mr. Tuszynski could not claim homestead prior to his marriage, as he was not a "head-of-household." Homestead exemptions were limited to heads of households at that time.

defendant, not unexpectedly, asserted the protection of the Homestead Exemption to avoid his moral obligation to Mrs. Sonneman.

The Florida Supreme Court was unimpressed. It found that the funds and sweat equity Mrs. Sonneman had invested in Mr. Tuszynski's property and welfare, both before and after his move to Florida and the creation of his homestead, entitled Mrs. Sonneman to an equitable lien against the property.

> Our conclusion is that [Mrs. Sonneman] is entitled to an equitable lien on the real property . . . for money advanced by her to the defendant in the sum of $1700, with interest at the rate of six per cent per annum from and after November 1, 1934, until paid. Likewise, for labor and service by her performed for the defendant at the sum of $50 per month . . . with interest at the rate of six per cent per annum until paid. **The equitable lien hereby declared may be enforced against the appellees' homestead exemption.**

Id. at 21 (emphasis added). In short, the Court found that Mrs. Sonneman had also invested in the property. Mr. Tuszynski was not permitted to void her interest through a declaration of homestead. Significantly, there was no finding that at the time Mr. Tuszynski accepted Mrs. Sonneman's largess, he intended to cheat her. Rather, the change in his circumstances came after he had received the benefits and after he had established homestead status.

By contrast, Mr. Hill intended to gain his wealth by cheating those to whom he owed a duty of loyalty. When it became obvious that he was going to be held accountable for his wrongdoing, he brought that wealth to Florida as a non-exempt asset and is attempting to take advantage of Florida's unlimited Homestead Exemption by converting those non-exempt assets to exempt homestead. The purpose and effect can only be to prevent those he had injured and defrauded from any remedy for their injury.

It is these cases and the salutary and equitable principles enunciated therein[10] which have been ignored in the wake of Bank Leumi, 898 F. Supp. at 883. In Bank Leumi, the Langs were being sued on a personal guarantee of $1.8 million. To avoid liability, they sold their home in New Jersey (where they would have been entitled to exempt only $30,000 of their homestead) and moved to Florida. Once within the jurisdiction of Florida's unlimited Homestead Exemption, they purchased a home for $522,000 in cash and invested another $500,000 in annuities (which are subject to statutory exemption pursuant to Florida Statutes section 222.14). Thereafter, a

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[10] These cases illustrate one further precept: Florida courts have always provided a remedy for fraud and have consistently refused to reward those who perpetrate it. It is untenable to argue that the Constitution of the state creates a means of perpetrating fraud for which there is no remedy.

judgment was entered against the Langs for the full amount of the guarantees, and Bank Leumi attempted to collect its judgment in federal court in Florida by levying against the home and the annuities. The Langs asserted the exempt status of those assets; Bank Leumi sought to avoid the exemption by proving that non-exempt assets had been converted to exempt assets for the purpose of hindering, delaying or defrauding their creditors. The Bank Leumi court made the express finding that the sole purpose for the Langs' move to Florida and their purchase of the home and the annuities had been to hinder the creditors and to defeat their claims. Nonetheless, the court refused to set aside any portion of the Homestead Exemption, narrowly construing the language of Article X, section 4 of the Florida Constitution. In other words, the court there protected the family home **even though** the home had been purchased for the express purpose of defrauding and imposing on creditors.

In reaching this decision, the Bank Leumi court relied on an over-expansive reading of a decision of this Court, Butterworth v. Caaaiano, 605 So. 2d 56 (Fla. 1992). Caaaiano involved an attempt by the state to forfeit homestead property used in commission of a crime. Caggiano had been convicted of racketeering in violation of the Florida RICO Act for bookmaking out of his home. Caggiano asserted Homestead Exemption as a defense to

the forfeiture. On appeal, the Florida Supreme Court determined that the state could not, by statute, avoid the protection granted by Article X, section 4 of the Constitution. The Court went on to note that the people of the state had acknowledged only three exceptions to the exemption and had not provided for the loss of homestead as a criminal penalty. The Caggiano Court's enumeration of the three exceptions to Homestead Exemption" led the Bank Leumi court to ignore the overarching precept repeatedly recognized in earlier Florida Supreme Court decisions--that the Homestead Exemption may not be used fraudulently to convert assets otherwise available to satisfy the claims of creditors to exempt status.

This case does not present the Caaaiano issue. The Court is not asked to remove the protections of bankruptcy as a penalty for wrong-doing. Rather, the issue here is whether an equitable lien can be pressed against that portion of homestead which was created by the conversion of non-exempt assets into exempt assets for the specific purpose of defrauding creditors. In other words, does the state of Florida protect that portion of homestead which is, itself,

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[11] Failure to pay taxes or assessments on the homestead, obligations contracted for the purchase, improvement or repair of the homestead, or obligations contracted for labor performed on the homestead. These exceptions appeared in the original constitutional declaration of the exemption. See, Article X, § 1 , Fla. Const. (1 868).

fraudulent?

The Constitution of the State of Florida does not compel United States Bankruptcy Courts (or any other courts) to reward a debtor's clear intent to hinder, delay or defraud his creditors by recognizing the Homestead Exemption as a bar to the creditor's claims. Moreover, public policy militates strongly against so expansive and unfair an application of the protection.

II. DENYING HOMESTEAD EXEMPTION TO THE EXTENT NON-EXEMPT ASSETS HAVE BEEN CONVERTED TO EXEMPT ASSETS IN FRAUD OF CREDITORS DOES NOT CREATE AN UNFAIR BURDEN ON THE COURTS OR ON DEBTORS.

Milton, Carpenter, and Sonneman also illustrate that the burden of proof of the bad faith of the debtor sufficient to impose an equitable lien on homestead falls on the party claiming entitlement to the remedy. This creates no extraordinary burden on either the debtor or the courts, even though such findings will, of necessity, turn on the specific facts of each case. The trial courts of this state are well equipped to make the determination[12], on all of the facts before them, as to whether the debtor, like Mr. Milton, has acted in good faith, or like Messrs. Carpenter and Tuszynski, has attempted to convert and

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[12] Since the events giving rise to this case occurred, the Florida legislature enacted Florida Statutes sections 222.29 and 229.30, which explicitly impose upon the courts the obligation to determine whether assets other than homestead claimed as exempt were converted in order to commit a fraud on creditors.

protect wealth to which he had no moral or equitable right. Such a determination was clearly within the scope of the inquiry in both Bank Leumi and In re Weston. Explicitly recognizing the existence of this remedy where homestead protection has been claimed for assets which were converted from non-exempt status to exempt status will not create an unworkable burden on the courts; neither will it weaken the significant protections intended to be created by the Homestead Exemption. Rather, it will advance the policies giving rise to the protections of Homestead Exemption.

III. PUBLIC POLICY DOES NOT FAVOR INTERPRETING THE HOMESTEAD EXEMPTION TO PERMIT THE WELL-TO-DO TO AVOID JUST, LEGAL OBLIGATIONS TO CREDITORS.

Since its initial appearance in Florida law, the Homestead Exemption was intended to encourage settlement and development in Florida. Prior to the first provision of a Homestead Exemption in the 1868 Constitution, the concept of protecting the homestead had evolved in Florida from English common law. See Dennis Wall, Homestead and the Process of Histoty, 6 Fla. St. U. L. Rev. 877, 895-96 (1 978)[13]. After Florida had abolished imprisonment for debt in 1822, some portion of the real property holdings of a debtor were

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[13] Mr. Wall's article is well worth reading. It is both scholarly and informative and dispels a number of misconceptions about the history of and policy underlying "homestead" exemptions from Roman times to the present.

subject to levy for debts. In 1862, Congress passed the Homestead Act which granted up to 160 acres of land to anyone who would move onto the land and farm it. The purpose, obviously, was to encourage actual settlement and cultivation of lands in the federal public domain. Lewton v. Hower, 18 Fla. 872 (1882). See also, Adams v. Church, 190 U.S. 510, 516 (I 904).

It was in the context of the federal Homestead Act, then, that the people of Florida first gave constitutional protection to the homestead, echoing much of the language of the federal act and adopting the same acreage limitations. In Lewton, the Florida Supreme Court acknowledged that the purpose of Florida's Homestead Exemption was the same as the purpose of the Congressional act-- to encourage settlement and to benefit the family. 18 Fla. at 881. Notably, Florida limited the exemption to heads of families at that time, further recognition that the purpose of the exemption was to attract stable, industrious citizens to the state. The limitation to heads-of-households has been removed in recognition of the changes in society in the past century, but the policy underlying the exemption has not changed.

Our society and our economy operate on the principle that people should pay their debts. Most people do. Allowing homesteads acquired in fraud of creditors as exempt encourages people to not pay their debts and to hide their

wealth in their exempt homesteads. It causes creditors to remain unpaid while the debtor enjoys the benefit of the homestead with impunity.

The Homestead Exemption is intended to protect a fairly acquired homestead but not one fraudulently acquired. If an individual buys a homestead in Florida, makes a down payment in a reasonable amount, and pays off or reduces the mortgage by regular payments over a period of years and enjoys an increase in the equity in the homestead by paying down the mortgage (or if the owner has the good fortune to see the market value of the homestead go up), that homestead is protected from the claims of creditors. Even a homestead purchased for cash when the owner is not in financial distress and therefore not purchasing it to defraud creditors is protected by the exemption. That protection operates to preserve some means of shelter and survival when the owner of homestead faces claims arising from any of the misfortunes that may happen over the course of a person's life or even from his own improvidence.

The reported cases, including the representative sample set out in the Statement of Facts and the Case, indicate that there has been a migration of debtors to Florida from other states where there is no homestead exemption, or where the homestead exemption is limited in value. Attorneys who regularly

file bankruptcy for debtors tell of the several calls a month they receive from out-of-state debtors or their attorneys calling to confirm that homesteads acquired in Florida in fraud of creditors may be kept as exempt. The subject has been covered on the 60 Minutes program on CBS television. Florida's reputation as a haven for wealthy debtors has even become the subject of comment in a leading bankruptcy treatise: "The combination of a favorable climate and a liberal homestead exemption has led some debtors to Florida. Simply by relocating, the debtor may avoid both a cold climate and the heat generated by creditors asserting claims against the debtor." 4 Collier on Bankruptcy (15th ed.) §522.08[4] (internal citations omitted).

Clearly, this publicity has attracted to Florida the exact opposite of the type of settler the Homestead Exemption was designed to attract. instead of attracting hard-working, stable contributors to the sound economic growth of the state, the overbroad applications of the protection of Homestead Exemption have become a magnet for those who have gained wealth at the expense of others and who feel no compunction about turning their backs on their just and legal obligations.

The allowance of a homestead acquired in fraud of creditors as exempt works solely in favor of the debtor with some wealth. Most individuals in

financial trouble either have no homestead or have a homestead with a modest equity, encumbered by a mortgage which may be foreclosed without regard to the protections of bankruptcy or of the Homestead Exemption. It is the debtor with some significant wealth who can afford legal advice from the experienced lawyers with sophisticated knowledge of the most current judicial interpretations of the available exemptions It is the debtor with wealth to preserve who can sell an out-of-state home, pull up stakes and move to Florida to buy a homestead. It is the debtor with wealth to preserve who can juggle assets, liquidate the non-exempt ones and put the proceeds into a homestead. It is the debtor with wealth to preserve who attempts to use the Homestead Exemption as a sword against the creditors instead of the shield that it is intended to be.

Homestead exemption was never intended to put creditors at risk that debtors would avoid paying those debts reasonably collectible. Exemptions are

> founded in a humane and enlightened policy, having respect to the **common welfare,** as well as to the benefit of the individual debtor. Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; **security of the state from the burden of pauperism, and of the individual citizen from destitution.**

West Florida Grocery Co. v. Teutonia Fire Insurance Co., 77 so. 209, 212 (Fla. 1917)(emphasis added). "The object of the exemption laws is to protect people **of limited means** and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want . . .." Carter's Administrator v. Carter, 20 Fla. 558 (1884)(emphasis added).

If this Court pronounces authoritatively that debtors can keep as exempt homesteads acquired in fraud of creditors, lawyers must ethically advise their debtor clients that the law permits this.[14] Debtors will undoubtedly take advantage in this. More debtors will acquire homesteads in fraud of their creditors. This will likely cause people who loan money and extend credit to seek mortgages on homesteads of borrowers to protect the creditors from the debtors' increasing their equity in their homesteads or selling one homestead to acquire a more valuable one in fraud of creditors.

The result will be more loans and extensions of credit secured by mortgages on homesteads. When there is a default, there will be no question then that the creditor holding a mortgage on the homestead will be entitled to

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[14] In fact, it would seem obvious that bankruptcy counsel, in the zealous representation of their clients' interests, would be ethically obligated to advise debtors to relocate to Florida and to convert non-exempt assets to protected homestead. This obviously creates a tension with Rule of Professional Conduct 4-8.4(c) "A lawyer shall not . . . engage in conduct involving dishonest, fraud . . .."

foreclose it. Thus, it is likely that more honestly impecunious debtors will lose their homesteads than do now. This will work to the disadvantage of the debtors with modest equities in their homesteads.

If debtors may keep homesteads acquired in fraud of creditors as exempt, then the creditor-debtor relationship becomes a game in which the creditor will be at an unfair disadvantage. When a debtor defaults in payment of a debt, the creditor's remedy is to file suit to collect the debt. The creditor often has no idea what the debtor's non-exempt assets are. The creditor cannot use discovery to find out the debtor's assets; such information usually is not relevant to the litigation until after the creditor obtains judgement.

Therefore, when the debt goes into default and the creditor files suit, the creditor is not able to pursue pre-judgement attachment or garnishment of assets before the debtor liquidates the assets and puts the proceeds into a homestead. If the creditor does know of non-exempt assets, the creditor must convince a judge of the necessity for a pre-judgment attachment or garnishmenl: and must bear the expense of the attorneys' fees to obtain it, as well as the cost of a bond. If the creditor cannot identify non-exempt assets or cannot get a pre-judgment attachment, all the debtor need do is stand by and, at the time it appears the creditor will inevitably obtain a judgment,

liquidate the non-exempt assets and use the proceeds to acquire a homestead or to pay down the mortgage or to make improvements to an existing homestead? This is not a fair playing field for the creditor who may have extended credit based upon the debtor's financial statement showing the non-exempt assets as assets that would presumably be available to pay the debt. It is not good for society at large; it is certainly deleterious to the economy of this state. It was not the intent of the people of the state of Florida who reserved the homestead protection to themselves in the Florida Constitution.

On the other hand, if the Florida Supreme Court reinforces the message of Milton, Carpenter, and Tuszynski, solvent debtors will no longer flee to this state to avoid facing their obligations. Solvent Floridians will not engage in fraudulent pre-bankruptcy planning to place assets beyond the reach of creditors. Those citizens of this state who are fairly entitled to the Homestead Exemption will have lost nothing--they will still be protected from the forced sale of their honestly acquired homestead property. The only prejudice will be to those who intend to use the homestead laws to the detriment of those who made their wealth possible.

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[15] This will inevitably be the case where the wealthy individual, like Hill, faces entry of a judgment for claims arising out tortious behavior. In that case, the claimant, like Havoco, is completely helpless to enjoin the conversion of assets prior to entry of the judgment.

It appears that the United States Bankruptcy Courts have place too great an emphasis on the protection of the debtor by homestead, without acknowledging the implicit obligation of those who claim the homestead to have dealt fairly with creditors. The state of Florida requires and deserves a more enlightened application of its constitutional Homestead Exemption.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request this Honorable Court to answer the question certified by the United States Circuit Court of Appeals for the Eleventh Circuit in the negative and to explicitly state that Florida's exemptions do not and have not ever been intended to protect those who use them with the specific intent of hindering, delaying or defrauding creditors.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

The brief is submitted in Arial Regular at 14 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by first class mail, postage pre-paid, this 15th day of February, 2000, to John E. Venn, Jr., Esquire, of John E. Venn, Jr., P.A. at 220 West Garden State, Suite 603, Pensacola, Florida 32501; Louis K. Rosenbloum, Exquire, of Louis K. Rosenbloum, P.A., at Post Office Box 12443, Pensacola, Florida 32582-2443; and to J. Nixon Daniel, Ill, Esquire and John P. Daniel, Esquire, of Beggs & Lane, at Post Office Box 12950, Pensacola, Florida 32576.

Virginia B. Townes

Virginia B. Townes, Esquire
Florida Bar Number: 361879

INDEX TO APPENDIX

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No. 97-1859-8G7

JEFFREY A. WESTON,
d/b/a JEFF WESTON DENT REMOVAL,

Debtor.

Chapter 7

RICHARD L. BUCKLEY, JR,

Plaintiff,

vs.

Adv. No. 97-506

JEFFREY A WESTON,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION

THIS CASE came before the Court for a final evidentiary hearing to consider the Complaint to Determine Eligibility for Discharge and Dischargeability of Debt and to Impose Constructive or Equitable Trust. The Complaint was filed by Richard L. Buckley, Jr. (Buckley).

On September 28.1995, a judgment was entered in Indiana in favor of Buckley, and against the Debtor, Jeffrey A. Weston. The court in Indiana found that the Debtor had misappropriated Buckley's trade secret regarding a paintless dent removal process. The Debtor and Buckley both resided in Indiana at the time that the judgment was entered. In December of 1995, three months after the entry of the judgment, the Debtor paid in excess of $150.000 in cash to purchase a home in Sarasota, Florida. On February 7, 1997, the Debtor filed a petition under chapter 7 of the Bankruptcy Code in the Middle District of Florida.

In his Complaint, Buckley seeks the entry of an order denying the Debtor's discharge, determining that the particular debt owed to him is nondischargeable, and imposing a lien on assets acquired by the Debtor with the proceeds of the misappropriated trade secret.

The Complaint contains seven counts. Count I is an action to deny the Debtor's discharge under §727(a)(3) of the Bankruptcy Code based on the Debtor's failure to keep books and records from which the Debtor's financial condition or business transactions might be ascertained. Count II is an action to deny the Debtor's discharge under §727(a)(4) based on a false oath made in connection with the case. Count III is an action to deny the Debtor's discharge under §727(a)(5) based on the Debtor's failure to satisfactorily explain a loss of assets. Count IV is an action to deny the Debtor's discharge under §727(a)(2)(A) based on the Debtor's transfers and concealment of property within one year before the date of the filing of the petition. Count V is an action to determine the dischargeability of the debt owed to Buckley under §523(a)(4) based on the Debtor's larceny or defalcation while acting in a fiduciary capacity. Count VI is an action to determine the dischargeability of the debt owed to Buckley under §523(a)(6) based on a willful and malicious injury caused by the Debtor's misappropriation of the trade secret. Count VII is an action to impose a constructive or equitable trust on assets acquired by the Debtor with funds received from the misappropriated trade secret.

In response, the Debtor contends that he has never failed to comply with any court process regarding his assets, and that Buckley has failed to satisfy his burden of proving the elements of each cause of action by a preponderance of the evidence.

Background

Buckley owns and operates a sole proprietorship in Indiana known as Press-A-Dent. The business of Press-A-Dent involves the painless dent removal from automobiles. On June 8, 1991, the Debtor

and Buckley entered an agreement entitled Agreement with Independent Contractor. Pursuant to the Agreement, the Debtor learned the process of paintless dent removal and performed such dent removals in association with Buckley until October of 1992. The agreement was terminated as of October 30, 1992.

Commencing in November of 1992, the Debtor operated his own paintless dent removal business in Indiana, initially as a solo proprietorship, and subsequently as a corporation known as Papa Dent, Inc. The Debtor was the sole shareholder of Papa Dent, Inc.

In January of 1994, Buckley sued the Debtor in state court in Indiana. In the state court complaint, Buckley primarily alleged that the Debtor used Buckley's trade secrets and confidential information to establish his paintless dent removal business. Buckley sought declaratory and injunctive relief, compensatory damages, and punitive damages.

On April 6, 1995, after three days of the state court trial in Indiana but prior to its completion, the Debtor executed a promissory note in the amount of $71,750 secured by a mortgage on his home in Indiana, in favor of his attorney, for legal fees. The attorney was also the Debtor's step-father's brother. The home in Indiana was otherwise lien free.

On September 28, 1995, the state court in Indiana entered a judgment against the Debtor, which provided in part that:

> 1. The Debtor misappropriated a trade secret belonging to Buckley. The trade secret related to the paintless dent removal process.
>
> 2. The damages suffered by Buckley as a result of the Debtor's misappropriation of the trade secret were in the amount of $271,780.07 through December 31, 1994. This amount represented the Debtor's gross sales from November 6, 1992, until December 31, 1994, less his estimated operating costs during that period.
>
> 3. The Debtor's misappropriation was not willful and malicious.

4. The Debtor also breached his contract with Buckley, which entitled Buckley to attorney's fees.

5. Buckley's request for exemplary damages was denied.

6. Judgment was entered against the Debtor for the sum of $271,780.07.

After entry of the Judgment, the Debtor generally discontinued regular banking activities.

On November 29, 1995, Papa Dent, Inc. sold all of its assets to a friend of the Debtor, Mary Rose. Papa Dent, Inc. was dissolved.

On December 26, 1995, three months after the entry of the judgment in Indiana, the Debtor signed a Contract for Sale of Real Estate. Pursuant to the Contract, the Debtor agreed to purchase a home located at 4300 Marcott Circle, Sarasota, Florida. On December 28, 1995, the seller of the home signed a Warranty Deed conveying the property to the Debtor. The closing statement reflects that the total purchase price was $153,490.03, and that the Debtor paid the purchase price in cash. On the same day, the seller also signed a bill of sale transferring certain appliances and other personal property associated with the home to the Debtor.

The Debtor did not sell his home in Indiana.

On December 28, 1995, the Debtor also obtained a Florida Driver's license and registered to vote in Florida

In January of 1996, the Debtor established a bank account at Nationsbank in Florida, and made an initial deposit into the account in the amount of $3,925.20 on January 24, 1996.

On December 20, 1996, Buckley filed a Motion to Determine Certain Conversion of Assets to be Fraudulent and to Adjudicate Defendant's Assertion of Homestead Exemption against the Debtor in

the Circuit Court for Sarasota County, Florida. A deposition of the Debtor was scheduled in the Circuit Court action for February 7, 1997.

The Debtor filed his petition under chapter 7 of the Bankruptcy Code on February 7.1997. The Debtor filed his schedule of assets and liabilities on February 21, 1997. On his schedule of real property, the Debtor listed the home on Marcott Circle in Sarasota, and also a residence in Churubusco, Indiana. The personal property listed by the Debtor includes the following:

Cash	$ 77.85
Checking account	$ 12.55
Deposit with Florida Power & Light	$ 100.00 (est)
IRA	$ 57,712.64
Tax refund	Unknown

The Debtor also listed specified household furnishings, miscellaneous clothing, fishing equipment, a county occupational license, a 1964 Larsen boat and trailer, dent removal tools, and specified inventory located in Churubusco, Indiana. The total value of his personal property, including the individual [redacted]t account, is $60,819.04.

The Debtor claimed all of the personal property as exempt except the boat and trailer and the inventory located in Indiana. The scheduled value of the personal property claimed as exempt, with the exception of the IRA, is $1,156.40.

The Debtor also filed a statement of his current income. On this statement, the Debtor listed his occupation as an auto body repairman for Jeff Weston Dent Removal, a sole proprietorship, and stated that his income from the operation of his business was $2,000 per month.

Burden of proof

Rule 4005 of the Federal Rules of Bankruptcy Procedure provides that at the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection. See In re Chalik, 748

F.2d 616, 619 (11th Cir. 1984). The plaintiff bears the burden of proving that the debtor's discharge should be denied by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991). Further, it is well-established that the provisions regarding the denial of a discharge are generally construed liberally in favor of the debtor and strictly against the objecting party. 6 Collier on Bankruptcy, ¶ 727.01[4] (15th ed.).

Count I - §727(a)(3)

Section 727(a)(3) of the Bankruptcy Code provides:

> **11 USC § 727. Discharge**
>
> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

To prevail under this section, a plaintiff must show that the debtor "had failed to maintain and preserve adequate records and that the failure made it impossible to ascertain his financial condition and material business transactions." In re Brown, 108 F.3d 1290, 1295 (10th Cir. 1997). "The initial burden is on the objecting party to show reasonable grounds to believe that the books or records are Inadequate." In re Milam, 172 B.R. 371,375 (Bankr. M.D. Fla. 1995).

In this case, Buckley's claims appear to center on his contention that the Debtor essentially lived on a cash basis for more than a year prior to the filing of the chapter 7 petition. Buckley supports his claims with the following evidence and arguments:

1. The Debtor maintained only one bank account from January of 19% until after the bankruptcy petition was filed, (See Transcript of final hearing, Vol. 2,

p.123). It appears that this account, which was maintained at Nationsbank, generally contained no more than a few thousand dollars, and was used primarily to pay utility bills. (Plaintiff's Exhibit 2).

2. In November of 1996, the Debtor was ordered to "produce all documentation showing sources of income for his business which are responsive to the plaintiff's prior notice of taking the defendant's deposition in aid of execution." (Plaintiff's Exhibit 32). The Debtor produced no documents regarding income earned in Florida in 1996. Buckley contends that the absence of records regarding income earned in Florida is inconsistent with the Debtor's statement of current income filed in his bankruptcy case, which lists monthly income in the amount of $2,000 from a business in Sarasota known as Jeff Weston Dent Removal.

3. The Debtor asserts that he earned approximately $43,000 in May, June, and July of 1996 for work performed on two trips to Indiana. (Defendant's Exhibit 33). This income was not deposited into his bank account. The Debtor did, however, purchase in excess of $39,000 in cashier's checks between June 17, 1996, and February 6, 1997, for payment to third parties. (Plaintiff's Exhibit 22). The funds to purchase the cashier's checks were not derived from the Debtor's bank account.

4. The Debtor has no records of any business expenses, either from his two trips to Indiana in 1996, during which he earned $43,000, or from his business efforts in Florida during that time. With specific reference to the business in Florida, the Debtor claims that he operates a racing company as a sole proprietorship (Transcript of final hearing, Vol. 1, pp. 205-06), and that he traveled to various racing events during 1996. (Transcript, Vol. 1, p. 178). He produced no records regarding any expenses incurred or paid as a result of his travels.

5. JW Racing, the Debtor's sole proprietorship, received the approximate sum of $29,500 during the first six months of 1995. (Transcript, Vol. 1, pp. 205-06). JW Racing does not have a bank account, however, and the only documentation presented to reflect how the money was spent is a one-page handwritten summary of income and expenses for JW Racing for 1995. (Plaintiff's Exhibit 7).

In response, the Debtor contends that Buckley complained in his complaint only about the period commencing in December of 1995 and ending in February of 1997, and that the evidence established that his income or cash receipts for this period was $66,763.27. This total consists of cash on hand in January of 1996 ($4,000), earnings from dent removal in 19% ($47,490.20), tax refunds ($4,606), a refund from an investment club and an overpayment of an IRA ($2,129.31), a refund from his

attorney's trust account ($3,159.26), earnings from dent repair in 1997 ($1,928.50), the sale of certain personal property ($2,950), and a gift from his mother ($500). (Defendant's Post-Trial Brief, p. 26).

Additionally, the Debtor contends that his documented expenses for the same period totaled $55,589.73. This figure consists of the check transactions on the Nationsbank account ($15,502.09), bank charges ($111), and cashier's checks or money orders purchased for payment to creditors ($39,976.64). (Defendant's Post-Trial Brief, p. 27).

Consequently, the Debtor contends that the undocumented difference between his income and his expenses amounts to $11,173.54, which is consistent with the amount that the Debtor would spend in cash for the thirteen-month period at issue. Accordingly, the Debtor asserts that Buckley has not established that the Debtor's records were so inadequate that his financial condition could not be ascertained.

The evidence should be assessed in view of the purpose of §727(a)(3) of the Bankruptcy Code.

> The purpose of the Bankruptcy Code ("Code") §727(a)(3), which precludes the discharge of a debtor who has failed to keep or preserve adequate recorded information pertaining to the debtor's business transactions and financial condition, is to insure that dependable information be supplied to the trustee and to creditors upon which they can rely in tracing the debtor's financial history; the trustee and creditors are entitled to complete and accurate information showing what property has passed through the debtor's hands during the period prior to bankruptcy.

In re Ridley, 115 B.R. 731, 734-35 (Bankr. D. Mass. 1990). "The purpose of this provision is to ensure that the trustee and creditors receive sufficient information to trace a debtor's financial history for a reasonable period past to present." In re Lordy, 214 B.R. 650, 665 (Bankr. SD. Fla. 1997)(quoting In re Trogdon, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990). The policy of the Bankruptcy Code is to encourage adequate record-keeping practices. The policy is important because

"the court should not have to guess about the debtor's financial condition when he fails to keep adequate records." Meridian Bank v. Alten, 1991 WL 333927, at 4 (D.N.J.).

It is well-established that a determination under §727(a)(3) is dependent upon the facts and circumstances of the particular case. "A determination of what constitutes 'accurate' records and books encompasses the reasonableness and particular circumstances that accompany the facts of each individual case." Vetri v. Meadowbrook Mall Company, 174 B.R. 143, 146 (M.D. Fla 1994). "Failure to keep records is not an absolute bar to receipt of a discharge. "[E]ach case is decided on the facts peculiar to it" In re Wilbur, 211 B.R. 98,103 (Bankr. M.D. Fla. 1997).

Factors that should be considered in determining whether books and records are adequate include the experience and sophistication of the debtor, the volume of the debtor's business, the complexity of the business, and the amount of credit extended to the debtor. Meridian Bank v. Alten, 1991 WL 333927, at 3 (D.N.J.). The adequacy of the debtor's books and records "must be commensurate with the Debtor's business activities and transactions." In re Maynard, 162 B.R. 349, 354 (Bankr. M.D. Fla. 1993).

In this case, the Court finds that the Debtor has failed to keep or preserve recorded information from which his financial condition or business transactions might be ascertained, and that the failure was not justified under the circumstances of the case.

The Debtor was a capable businessman. While the Debtor lived and worked in Indiana, he operated a business that had gross sales in the amount of $417,046.25 from approximately November of 1992 through December of 1994. (Plaintiffs Exhibit 9, Indiana Judgment, 978, p.9). The amount of the judgment against the Debtor is 9271280.07, which represents his estimated profit from the business during that period. (Plaintiff's Exhibit 9, Indiana Judgment, ¶80, p. 9). While the Debtor

operated the business in Indiana, he maintained a bank account at Star Financial Bank in the name of Papa Dent or Papa Dent, Inc. The statements from this bank account reflect steady activity, in that deposits were regularly made into the account, and checks were regularly written from the account. (Plaintiff's Exhibits 4 and 5).

After the Judgment was entered, the Debtor generally discontinued regular banking activities. He ceased the practice of depositing income, and began paying most of his expenses with cashier's checks and cash.

The Debtor purchased the home in Florida, with cash, in late December of 1995. He filed the petition under chapter 7 on February 7, 1997. The Court finds that the Debtor has not produced books and records from which his financial condition or business transactions can be determined in the period commencing with the purchase of the home in December of 1995 and extending to the date of the filing of the chapter 7 petition in February of 1997.

The Debtor's "Schedule I - Current Income of Individual Debtors" indicates that the Debtor was employed as an auto body repairman for Jeff Weston Dent Removal, with a post office address in Florida, from January of 1996 to the date that the schedules were prepared in February of 1997. The Debtor further stated that his income from the operation of his business was $2,000 per month. The Debtor has provided no evidence, however, that he earned any income in Florida in 1996, and his schedules reflect that his inventory and automobile repair tools are located in Indiana.

Instead, the Debtor contends that he earned approximately $43,000 for approximately three weeks' work in Indiana in the late spring and summer of 1996. According to the Debtor, he earned this sum by performing paintless dent removals from automobiles following hailstorms. The evidence of this income consists of copies of invoices to the customers in Indiana. (Defendant's Exhibit 33). The

receipts from the work were never deposited into any bank account, even though the Debtor's prior practice in Indiana had been to utilize a bank account for his business income and expenses.

The Debtor maintained one bank account in the year prior to the filing of the chapter 7 petition. (Plaintiff's Exhibit 2). In the period between January of 1996 and February of 1997, eight deposits were made into the account. The deposits totaled $15,625.77, and were made in increments ranging from $150 to $3,925.20. After January of 1996, when the initial deposit was made, the beginning or ending monthly balance in the account exceeded $1.000 only one time, in April of 1996. It appears that the amounts of the Debtor's deposits were calculated to match the projected disbursements from the account each month, and not to accumulate in the account.

Further, the Debtor asserts that he traveled throughout the state of Florida during the remainder of 1996, when he was not in Indiana, attending automobile racing events and generally surveying the state. (Transcript, Vol. 1, p. 178). It appears that the Debtor paid for these travels in cash, however, and did not retain any records of his expenses for transportation or lodging.

Finally, it appears that the Debtor purchased cashier's checks in the total amount of $39,976.64 during the period from June 17, 1996 to February 6, 1997. (Plaintiff's Exhibit 22). These cashier's checks were primarily purchased to pay legal fees and tax claims. The money used to acquire the cashier's checks was not derived from any bank account, and the source of the funds is unclear from the record. Additionally, some of the transactions were unexplainable.[1]

At the time that he filed his chapter 7 case, the Debtor stated in his schedules that he had less than $100 in cash and in his bank account.

[1] For example, it appears that the Debtor made a payment of estimated income taxes for 1996 by obtaining two separate washier's checks in equal amounts from two separate branches of The same bank on the same day. (Transcript, Vol 1,p. 180).

Considering these factors, the Court is not satisfied that it has "complete and accurate information showing what property has passed through the debtor's hands during the period prior to bankruptcy." In re Ridley, 115 B.R. at 735.

It appears that significant amounts of cash came into and out of the Debtor's possession in the year preceding the filing of his bankruptcy petition, with no corroborating documentation to show how much money was received and spent. The Debtor is not unsophisticated in financial matters, as evidenced by his prior operation of a profitable business over a period of several years. The Debtor's books and records regarding even ordinary expenses, however, are incomplete. The Debtor has not accounted for his transportation, household, or personal expenses, for example, or for the costs of his travels through Florida or to Indiana in 1996, even though he expressly testified to such travels. Further, the Debtor purchased approximately $39,000 in cashier's checks in 1996, but has not identified the source of the funds used to purchase them. The cashier's checks were not purchased with funds contained in any bank account.

The Court cannot ascertain the Debtor's financial condition and business transactions in the year prior to the bankruptcy petition. The inability to determine his financial condition is caused in part by the Debtor's failure to maintain a bank account for his business income and expenses, a failure which represents a departure from his prior practice in Indiana. The Debtor's discharge should be denied pursuant to §727(a)(3) based on the Debtor's failure to keep or preserve recorded information from which his financial condition or business transactions might be ascertained.

Count II - §727(a)(4)

Section 727(a)(4) of the Bankruptcy Code provides:

11 USC § 727. Discharge

(a) The court shall grant the debtor a discharge unless–

. . .

(4) the debtor knowingly and fraudulently, in or in connection with the case–

(A) made a false oath or account;

(B) presented or used a false claim.

Generally, the analysis under this section focuses on the impact to the bankruptcy case of the debtor's sworn statement. "The subject matter of a false oath is 'material' and thus, sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns a discovery of assets, business dealings or the existence or disposition of his property." In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984). Factors for consideration include the number of errors, omissions, or inaccurate statements made by the debtor, and the value of the assets involved. See In re Lordy, 214 B.R. 650 666 (Bankr. S.D. Fla. 1997).

Buckley contends that the Debtor attempted to claim personal property exemptions in excess of $1,000, and that such a claim constitutes a false oath or false claim within the meaning of §727(a)(4). Specifically, Buckley asserts that the items of personal property with ascribed values which were claimed as exempt total $1,156.40, which on its face is an excessive claim of exemption. Further, Buckley contends that a tax refund was claimed as exempt in an undetermined value, and that a utility deposit was claimed as exempt in an understated amount. The amount of the tax refund was $241, and the amount by which the utility deposit was understated was $120. (Plaintiff's Post-trial Brief, pp. 33-35). Additionally, Buckley asserts that the Debtor failed to list certain appliances that were purchased with the home in Sarasota.

The Court finds that the errors or omissions about which Buckley complains are not sufficient to bar the Debtor's discharge under §727(a)(4). In view of the number of errors, the value of the assets involved, and the impact on the bankruptcy estate, the Court finds that Buckley has not satisfied his burden of proof under that section.

Count III - §727(a)(5)

Section 727(a)(5) of the Bankruptcy Code provides:

> **11 USC § 727. Discharge**
>
> (a) The court shall grant the debtor a discharge, unless—
>
> . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

The objecting party has the initial burden of proving its objection under §727(a)(5), and must show with more than mere allegations that the debtor failed to explain a loss of assets. In re Hawley, 51 F.3d 246 (11th Cir. 1995); In re Wade, 189 B.R. 522, 526 (Bankr. M.D. Fla. 1995). The plaintiff must show that the debtor at one time owned specific assets and that the assets are no longer available for the debtor's creditors. In re Brien, 208 B.R. 255, 258 (1st Cir. BAP 1997), quoting In re Potter, 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988). If the creditor is able to satisfy its initial burden that specific assets belonging to the debtor were not included in his estate, the debtor must then convince the judge that he has not hidden or improperly shielded the assets. In re Halperin, 215 B.R. 321, 333 (Bankr. E.D.N.Y. 1997); In re Comer, 214 B.R. 86, 95 (Bankr. E.D.N.Y. 1997).

Buckley contends that the Debtor received net income in excess of $271,000 from his appropriation of Buckley's trade secrets, as set forth in the judgment of the Indiana state court, and that

he also liquidated his business assets in Indiana. (Plaintiff's Post-Trial Brief, p. 37). Buckley asserts, however, that the Debtor has not accounted for any of these funds or proceeds, other than the purchase price paid for the home in Sarasota.

The Court finds that Buckley has not shown that the Debtor failed to explain satisfactorily the loss of an asset within the meaning of §727(a)(5) of the Bankruptcy Code. The Judgment entered in Indiana states that the Debtor profited from misappropriating Buckley's paintless dent removal process in the amount of $271,780.07. This profit occurred over a period of more than two years from November 6, 1992, until the end of 1994, and represents the Debtor's gross sales during that period, less his estimated operating costs. (Plaintiff's Exhibit 9). The Debtor filed his chapter 7 petition more than two years later, in February of 1997.

Accordingly, the Court finds that Buckley has not shown that the Debtor had a specific fund of money at a specific point in time prior to the bankruptcy, and that he has failed to explain the loss of the fund. See In re Brien, supra. Buckley has not satisfied his burden of proof under §727(a)(5) of the Bankruptcy Code.

Count IV - §727(a)(2)

Section 727(a)(2) of the Bankruptcy Code provides:

> **11 USC § 727. Discharge**
>
> (a) The court shall grant the debtor a discharge, unless–
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–

(A) property of the debtor, within one year before the date of the filing of the petition.

To prevail under subsection (A) of this section, a plaintiff must show that (1) a transfer (or concealment) occurred; (2) the property was property of the debtor; (3) the transfer (or concealment) was made within one year before the petition; and (4) the debtor intended to hinder, delay, or defraud a creditor at the time of the transfer (or concealment). In re Wilbur, 211 B.R. 98, 103 (Bankr. M.D. Fla. 1997). With respect to the fourth element of this claim, the creditor must prove actual intent to hinder, delay, or defraud creditors. Constructive intent is not sufficient. In re Wilbur, 211 B.R. at 103.

Buckley contends that the debtor has concealed property within one year prior to the filing of the chapter 7 case with the intent to hinder, delay, or defraud Buckley. The concealed property consists of the proceeds of the misappropriated trade secret, the proceeds of the sale of his business assets in Indiana, and a refund from Thomas Swihart, the attorney who represented him in the Indiana litigation. (Plaintiff's Post-Trial Brief, p.40).

By its terms, §727(a)(2) applies to a transfer or concealment of property of the debtor within one year prior to the filing of the bankruptcy petition. In this case, therefore, the period extends from February 7, 1997, back to February 7, 1996. This period does not include the Debtor's granting of the mortgage on his home in Indiana to secure the payment of legal fees and leaving the mortgage in place at the conclusion of the trial "[b]ecause the house in Indiana could still be seized" (Transcript, Vol. 1, p. 183), the assembly of assets into cash in mid-1995 (Transcript, Vol. 1, p. 156), the sale of the assets of Papa Dent, Inc. and dissolution of the corporation after the Judgment and when the Debtor was aware that Buckley could seek to attach the stock in Papa Dent, Inc. if he continued in business in Indiana (Transcript, Vol 1, p. 144), or the purchase of the home in Sarasota with the knowledge of

Florida's homestead exemption (Transcript, Vol 1, p. 182). The Court makes no determination in this decision as to whether the transfers involved in these actions were transfers intended to hinder, delay, or defraud creditors. The determination must be made for transfers or concealments occurring within the period provided by the statute.

Buckley has identified sources of money that the Debtor received prior to or during this one-year period. During the period, however, the Debtor made significant disbursements, including certain checks written on his bank account and the purchase of cashier's checks totaling $39,000 for payment to creditors. Consequently, even though the Debtor failed to keep or preserve recorded information from which the Debtor's financial condition or business transactions might be ascertained, Buckley has not established that the Debtor intentionally transferred or concealed, within one year before the date of the filing of the petition, with the intent to hinder, delay, or defraud a creditor, any specific portion of the money that he received. Even though the Debtor's records are too inadequate to ascertain his business transactions, the Debtor contends that he has simply spent the money rather than conceal it. Buckley has not satisfied the burden of proving that the Debtor transferred or concealed property within one year before the petition with the intent to hinder or defraud a creditor.

Count V and VI- §523(a)(4) and §523(a)(6)

In Counts V and VI, Buckley contends that the particular debt owed to him should be nondischargeable pursuant to §523(a)(4), based on the Debtor's larceny or defalcation while acting in a fiduciary capacity, and pursuant to §523(a)(6), based on the Debtor's willful and malicious injury to Buckley or to Buckley's property. Since the Court has determined that the Debtor's discharge should be denied pursuant to §727(a)(3) of the Bankruptcy Code, no determination will be made on Counts V and VI as to the dischargeability of any particular debt.

Count VII - Constructive or equitable trust

The Debtor claimed the home in Sarasota and an individual retirement account as exempt on his bankruptcy schedules. Buckley contends that these assets were acquired with funds from the Debtor's paintless dent removal business, and that the business used the trade secrets misappropriated from Buckley. Consequently, Buckley requests that the Court impose a constructive or equitable trust on the home and the IRA.

The Bankruptcy Court in In re Tsiolas, 236 B.R. 85, 88-89 (Bankr. M.D. Fla. 1999) recently discussed the imposition of an equitable lien on homestead real property as well as on a specified fund of money.

> When determining whether an equitable lien should be imposed, the Court must look to applicable state law. . . . The prevailing view in Florida is that equitable liens may be founded on two bases: (1) a written contract that indicates an intention to charge a particular property with a debt or obligation; or (2) a declaration by a court out of general considerations of right or justice as applied to the particular circumstances of a case.

With respect to the second ground for the imposition of an equitable lien, the Court further divided the requests for an equitable lien into two categories. If the creditor seeks to impose an equitable lien on homestead real property, it must establish a ground for the court's equitable power such as fraud, reprehensible or egregious conduct, or other equitable ground. See In re Tsiolas, 236 B.R. at 88. If the creditor seeks to impose an equitable lien on a fund of money, however, a different standard may apply.

> While the Court agrees that a special and peculiar equitable basis is required to support the imposition of an equitable lien on a specified fund, that basis need not rise to the level of fraud, egregious behavior, or reprehensible conduct. . . . [T]he doctrine of equitable liens will be utilized if ". . . the general considerations of right and justice dictate that one party has a special right to a particular property and where there is an absence of an available lien or no adequate remedy at law."

Id. at 89(quoting In re G & R Builders, Inc., 123 B.R. 654, 659 (Bankr. M.D. Fla. 1990)). The Court has discussed the imposition of equitable liens on exempt property more extensively in its Order on Objection to Exemptions which it is entering simultaneously in the Debtor's case.

In this case, Buckley seeks to impose an equitable trust on the Debtor's homestead real property as well as on his individual retirement account. The Court finds that Buckley has not proven either that the Debtor engaged in fraud or reprehensible conduct, or that he has a special right to the IRA. The Judgment entered against the Debtor in Indiana expressly found that the Debtor's misappropriation of Buckley's trade secret was not willful and malicious. (Judgment, ¶81). The amount of the judgment represented a measure of damages based on the Debtor's profit from the misappropriated trade secret from November of 1992 until December 31, 1994. Buckley contends that the Debtor thereafter orchestrated a scheme to remove assets from Buckley's reach. Nevertheless, Buckley did not establish that either the cash used to purchase the home in Florida, or the funds deposited into the IRA, were directly traceable to any specific profit earned from the trade secret. Buckley is a judgment creditor of the Debtor, with no specific rights in either the home in Sarasota or the Debtor's IRA. Consequently, Count VII of the Complaint should be dismissed.

Conclusion

In conclusion, the Court finds that the Debtor failed to keep books and records from which his financial condition or business transactions might be ascertained within the meaning of §727(a)(3) of the Bankruptcy Code. Accordingly, a final judgment should be entered in favor of Buckley and against the Debtor as to Count I of the Complaint, and the Debtor's discharge should be denied pursuant to §727(a)(3). With respect to Count II, Count III, and Count IV, the Court finds that

Buckley did not satisfy the burden of proof under §727(a)(4), §727(a)(5), and §727(a)(2) respectively, and Count II, Count III, and Count IV should be dismissed. With respect to Count V and Count VI, the Court makes no determination regarding the dischargeability of the particular debt owed to Buckley under §523(a)(4) and §523(a)(6) respectively, in view of the denial of the Debtor's discharge pursuant to §727(a)(3). With respect to Count VII, the Court finds that Buckley failed to establish his entitlement to the imposition of a constructive or equitable trust on assets of the Debtor under Florida law, with the result that Count VII should be dismissed.

Accordingly:

IT IS ORDERED that:

1. With respect to Count I, a final judgment shall be entered in favor of the Plaintiff, Richard L. Buckley, Jr., and against the Debtor, Jeffrey A. Weston, and the discharge of the Debtor shall be denied pursuant to §727(a)(3) of the Bankruptcy Code.

2. Count II, Count III, Count IV, and Count VII of the Complaint to Determine Eligibility for Discharge and Dischargeability of Debt and to Impose Constructive or Equitable Trust are dismissed.

3. A separate Final Judgment shall be entered consistent with this Opinion.

DATED this 13 day of October, 1999.

BY **THE** COURT

PAUL M. GLENN
United States Bankruptcy Judge