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SUPERIOR STATE COURT
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IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

ROSEMARY SHELL ,

Plaintiff

v.

WAYNE GIBBS,

Defendant

C.A. No. 2007-CV-1638B

COPY SENT TO JUDGE

MOTION FOR NEW TRIAL

Defendant moves this Court to set aside the verdict rendered against him on July 23, 2008 and to set aside the judgment entered thereon on August 4, 2008 and to grant a new trial on the following grounds:

(1) The verdict is contrary to the law;

(2) The verdict is contrary to the evidence;

(3) The verdict is strongly against the weight of the evidence.

A brief in support of the motion is attached.

This 29th day of August, 2008.

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IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

ROSEMARY SHELL,	:	
	:	
Plaintiff	:	
	:	
v.	:	**C.A. No. 2007-CV-1638B**
	:	
WAYNE GIBBS,	:	
	:	
Defendant	:	

BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

STATEMENT OF FACTS

The Plaintiff and Defendant are in their mid to late fifties, and both have been married before. The parties dated off and on for five (5) years before the relationship ended permanently in March, 2007. T. 121-122. The relationship between Ms. Shell and Mr. Gibbs was not always harmonious and the parties broke up several times, each time because of Mr. Gibbs' reluctance to marry Ms. Shell. T. 196. In frustration, the Plaintiff relocated to Pensacola, Florida in the Spring of 2006, where she worked for Gannett Corporation. T. 197-199.

After Ms. Shell left Gainesville for Florida, Mr. Gibbs reconsidered his relationship with the Plaintiff and he went to Florida to see her in October or November, 2006. T. 133. The parties' relationship rekindled very quickly and Mr. Gibbs asked Ms. Shell to marry him and gave her a ring on that first trip to Florida.[1] T. 128, 133.

The Plaintiff then quit her job and returned to Gainesville, and the parties set a wedding date for December 2, 2006. T. 170, 171.

[1] The Plaintiff is now trying to sell the ring for $15,000 as set forth in Exhibit A attached.

After Ms. Shell returned to Georgia, Mr. Gibbs began to have second thoughts and was concerned about the Plaintiff's consumer debt, which Ms. Shell said was approximately $30,000. T. 131, 283. Mr. Gibbs was also concerned that his fiancée was drinking excessively. T. 142. Notwithstanding those concerns, Mr. Gibbs gave the Plaintiff $33,000 to pay off her creditors.[2] T. 247.

Mr. Gibbs' concern got the better of him, and shortly before the wedding was to take place, Mr. Gibbs left the Plaintiff a note that he did not want to go forward with the wedding with a check made payable to Plaintiff in the amount of $5,000. T. 143. The check was cashed by the Plaintiff. T. 223.

The Plaintiff filed bankruptcy on December 28, 2006,[3] but the Defendant continued to support her for several months by paying her rent and allowing Ms. Shell to use his debit card. T. 212, 215, 257.

The parties broke up for good in March, 2007. T. 217. After the final breakup, Ms. Shell discovered that Mr. Gibbs was seeing another woman, and she became angry and vowed to get even with Mr. Gibbs. T. 219, 232. Without amending her bankruptcy schedules to disclose the value of the ring or the existence of her claim against Mr. Gibbs and without petitioning her bankruptcy trustee to abandon the cause of action against Mr. Gibbs' pursuant to BR 6007 (b). Ms. Shell filed the instant action on June 6, 2007 for breach of a promise to marry.[4]

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[2] As the Plaintiff filed for Chapter 7 bankruptcy and listed unsecured creditors of $23,620, the record is unclear what the Plaintiff did with the money that Defendant gave to her. While the schedules do reflect lumps um payments to of her creditors in the aggregate amount of almost $17,000 on November 2, 2007, the balance of the transfers from the Defendant to the Plaintiff are unaccounted for in the bankruptcy petition. A certified copy of the Plaintiff's Bankruptcy file is attached as Exhibit B, and the bankruptcy schedules are included in Document 1 of that file.

[3] The bankruptcy petition and schedules fail to list the diamond ring as an asset. The filings also fail to identify the cause of action against Mr. Gibbs.

[4] Unlike Florida which abolished the cause of action for breach of a promise to marry in 1945, 65 Florida Statutes 770.01,Georgia courts apparently subscribe to the view espoused by Justice Bradley in his concurring opinion denying the right of a married female petitioner to practice law in the State of Illinois. "On the contrary, the civil

Ms. Shell received her discharge in bankruptcy on May 8, 2007 and as of this date, the Bankruptcy Trustee has collected $7,307.83 from preferential transfers made by the Plaintiff to American Express. At the present, those are the only available funds in the estate to pay the expenses of the trustee's attorney and accountant and for distribution among the Plaintiff's secured and unsecured indebtedness of $198,987.86.[5]

This case was tried before a jury which awarded the Plaintiff $150,000, which award was made the order of this Court on August 4, 2008. The Defendant filed his timely Motion for New Trial.

ISSUES AND ARGUMENTS PRESENTED

Issue 1: **Should the verdict be set aside as a matter of law, the evidence and justice based on the Plaintiff's fraud when the Plaintiff defrauded her creditors in failing to disclose the true value of the ring given by the Defendant to the Plaintiff and the existence of the cause of action asserted by the Plaintiff against the Defendant when she filed bankruptcy?**

Argument 1: **The verdict was contrary to the law, the evidence and justice as it was procured by fraud. The Plaintiff obtained a discharge of her debts from the Bankruptcy Court and perpetrated a fraud on her creditors by failing to properly disclose the true value of the engagement ring and the existence of the cause of action against the Defendant. The Plaintiff then used the fraudulently obtained discharge and relied upon it in the evidence to obtain the verdict against the Defendant, and the Court should set aside the verdict as contrary to the law, the evidence and justice.**

Issue 2: **Is the verdict contrary to the evidence in this case?**

Argument 2: **The jury's verdict is contrary to the evidence and a new trial is required as a matter of law.**

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law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupancies of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

[5] Trustee in Bankruptcy First Interim Report dated January 29, 2008 and Document 38 in Exhibit B.

ARGUMENT AND CITATION OF AUTHORITY

Argument 1: The verdict was contrary to the law, the evidence and justice as it was procured by fraud. The Plaintiff obtained a discharge of her debts from the Bankruptcy Court and perpetrated a fraud on her creditors by failing to properly disclose the true value of the engagement ring and the existence of the cause of action against the Defendant. The Plaintiff then used the fraudulently obtained discharge and relied upon it in the evidence to obtain the verdict against the Defendant, and the Court should set aside the verdict as contrary to the law, the evidence and justice.

A debtor in a bankruptcy action has an affirmative duty to list unliquidated and contingent claims and any possible asset, including a contract claim which arose before the filing of a bankruptcy. *Wolfork v. Tackett*, 241 Ga. App. 633, 526 S.E. 2d. 436 (1999); *Cochran v. Emory University*, 251 Ga. App. 737, 555 S.E. 2d 96 (2001).

In *Cochran*, the Court of Appeals affirmed the grant of summary judgment against a medical malpractice plaintiff who had filed bankruptcy and failed to disclose or amend her schedules to identify the existence of the unliquidated contingent claim against Emory University. The Court affirmed the application of judicial estoppel to bar the plaintiff's claim:

> The federal doctrine of judicial estoppel precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding. This doctrine is commonly applied to preclude a bankruptcy debtor from pursuing a damages claim that he failed to include in his assets in the bankruptcy petition. **A failure to reveal assets, including unliquidated tort claims, operates as a denial that such claims exist, deprives the bankruptcy court of the full information that it needs to evaluate and rule upon a bankruptcy petition, and deprives creditors of resources that may satisfy unpaid obligations.** The application of the doctrine preserves the integrity of the judicial forum by not permitting a

> debtor to take inconsistent positions to manipulate the system. *Id* at 738. (emphasis added)

In her bankruptcy petition, the Plaintiff swore under penalty of perjury that her jewelry had a value of $500, but she now contends that the fair market value of the engagement ring is $15,000. Exhibit A. Ms. Shell also failed to absolutely list the unliquidated contingent claim which she had against Mr. Gibbs, nor did she amend her schedules to reflect the existence of the claim after suit was filed.

In the presentation of the Plaintiff's case, the Plaintiff and her counsel repeatedly argued to the jury that her bankruptcy petition was a result of the Defendant's breach of the promise to marry. T. 108, 218-219, 247. The jury awarded the Plaintiff a verdict of $150,000. However, when the Plaintiff filed bankruptcy and subsequently received her discharge, she did not disclose the existence of the lawsuit or the true value of the engagement ring, did not amend her schedules to identify the existence of the claim after suit was filed, and did not obtain an order of abandonment returning the lawsuit to the Plaintiff for prosecution. As a result of the inconsistent positions taken by the Plaintiff, her bankruptcy creditors have been defrauded, and her discharge granted in controvertion of 11 U.S.C. §727 (a) (2), (4) and (d) (1).

Ms. Shell's cause of action arose after the December 2, 2006 wedding was cancelled, and she filed this action on June 6, 2007. Her bankruptcy petition was filed on December 28, 2006, and the copy of the bankruptcy file indicates that the cause of action against Mr. Gibbs was never disclosed in her original schedules and that the schedules were never amended to disclose the existence of the lawsuit after the claim was filed. Finally the Plaintiff's bankruptcy file also fails to indicate that the claim against Mr. Gibbs was ever abandoned by her bankruptcy trustee to the Plaintiff pursuant to B.R. 6007 (b).

"A debtor's pending legal action is the property of the bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it. 11 U.S.C.A. § 541(a)(1)." *Lee v. Owenby & Associates, Inc.* 279 Ga. App. 446, 631 S.E. 2d 478 at 480 (2006). "In a Chapter 7 bankruptcy proceeding, the trustee is appointed by the bankruptcy court and charged with the duty to liquidate property in the debtor's estate to satisfy creditor's claims." *Johnson v. Alvarez*, 224 F. 3d 1273, 1277, N. 9 (11th Cir. 2000) quoted in *Gingold v. Allen*, 272 Ga. App. 673, 613 S.E. 2d 173 at 175. (2005) **Further, the Court of Appeals held that the existence of an accrued cause of action was property of the estate, even though the debtor failed to schedule the cause of action in his bankruptcy schedules.** *Id* at 175, 176. As a consequence, the Court of Appeals held that "when the Trustee is unaware of the accrued cause of action and as a consequence, it is neither abandoned or administered in the bankruptcy estate, **it remains the property of the estate... and the debtor is not the real party in interest.**" *Id* at 176. (emphasis added.)

Because the Plaintiff is barred as a matter of law both by virtue of the doctrine of judicial estoppel as well as the fact that the Plaintiff is not the real party at interest, and the verdict is contrary to the evidence and justice, this Court should grant a new trial, give notice to the Plaintiff's Trustee, and allow the Trustee to be substituted as the real party at interest. This result would protect the rights of the Plaintiff's creditors and protect the interests of justice.

While the Plaintiff may argue that this objection is untimely filed since the Defendant did not raise this issue in the proceedings before the motion for a new trial, the "primary purpose of the doctrine [of judicial estoppel] is not to protect the litigants, but to protect the integrity of the judiciary." *Southmark Corporation v. Trotter, Smith and Jacobs*, 212 Ga. App. 454, 422 S.E. 2d 265 (1994). As the grant of a new trial would prevent a substantial injustice to the parties in this

case and to the creditors of the Plaintiff, the trial court as a matter of law should grant a new trial. *Warren v. Mann*, 117 Ga. App. 787 , 163 Ga. App. 894 (1968).

Argument 2: The jury's verdict is contrary to the evidence and a new trial is required as a matter of law.

The essence of Ms. Shell's case is that she should have been compensated because she quit her at will job in Florida, making in excess of $80,000 a year, which also included health insurance, based on her reliance of Mr. Gibbs' promise to marry her. She also contended throughout the trial that Mr. Gibbs' actions in calling the marriage off, in essence, forced her into bankruptcy as she quit her job and could not pay her bills. T. 108,218-219, 245, 247.

The verdict for $150,000 was contrary to the evidence, as well as excessive and was not supported by the evidence. The evidence is uncontroverted that Mr. Gibbs gave the Plaintiff $38,000 in cash and an engagement ring which she now values at $15,000. Ms. Shell repeatedly emphasized that her installment debt in November 2006 when she quit her job, was between $30,000 and $42,000. Assuming Ms. Shell's testimony about her debt situation was true, all of her installment debt would have been substantially paid off if the $38,000 had been exclusively devoted to debt payment. In addition, Ms. Shell testified that incidental living expenses as well as cash was given to her by the Defendant after the engagement was made and continued for at least four months after the engagement was broken.

When the Trial Court considers these facts along with the fact that the Plaintiff intentionally kept the bankruptcy court from knowing the true status of her financial situation at the time of the bankruptcy filing, the contention that Mr. Gibbs forced her into bankruptcy as the result of his failure to marry her was clearly not supported by the evidence.

. The $150,000 verdict was clearly excessive when adjusted to the evidence as it made no provision for finding Ms. Shell was an at-will employee, had a sketchy job history, and most important, Mr. Gibbs paid her in excess of $38,000 after the promise was made, paid her rent for four months and paid her living expenses for approximately four or five months after the promise was made. For these reasons, the court should grant a new trial due to the excessive nature of the verdict received when adjusted to the facts of this case.

Respectfully submitted this 29th day of August, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Motion for New Trial and Brief in Support of Motion for New Trial by depositing same in the United States mail with proper postage affixed thereto upon the following:

Lydia Sartain, Esq.
Stewart, Melvin & Frost, LLP
P.O. Box 3280
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This 29th day of August, 2008.

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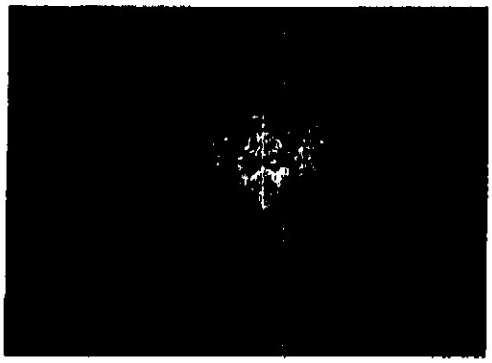

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EXHIBIT A