

action" premised on the IWCA's anti-retaliatory provisions.¹

On October 30, 1997, the Brandons filed for bankruptcy under Chapter 7. At that time, Randall Brandon had a retaliatory discharge suit against his former employer Schwan's pending in the Illinois Circuit Court of Franklin County ("the Franklin County lawsuit"). In it, Randall Brandon alleged that he was fired for filing a workers' compensation claim. Between August and October of 1998, the Trustee negotiated a settlement with Schwan's whereas Schwan's would pay the estate \$5,000 to settle and extinguish Randall Brandon's interest in the Franklin County lawsuit. On November 10, 1998, the Trustee gave notice of this proposed sale to the Brandons who lodged no objection. So, on January 19, 1999, the Trustee provided a bill of sale to Schwan's purporting to sell "all the interest which [the Brandons] had in and to any interest that [the Brandons] have in the [Franklin County lawsuit]."

Afterward, the Brandons opposed the sale. In June of 1999,

¹The parties do not dispute that Randall Brandon's retaliatory discharge cause of action is property of the bankruptcy estate under §541(a)(1). See Transcript of July 20, 1999 Oral Argument at 22; see also *Matter of Yonikus*, 974 F.2d 901, 904-05 (7th Cir. 1992)(debtor's pre-petition personal injury action was property of the estate). The only question is whether that property is exempt. Because Illinois elected to opt out of the federal exemption list, see 11 U.S.C. §522(B), only the exemptions that Illinois law affirmatively retained are proper exemptions, see 735 ILCS 5/12-1201.

Randall Brandon filed a motion in opposition to Schwan's motion to dismiss the Franklin County lawsuit. The Brandons also amended their Schedule C of exemptions, claiming that their interest in the retaliatory discharge case was 100% exempt under the IWCA. The trustee objected, arguing that the Franklin County lawsuit is not exempt. Judge Meyers agreed with the trustee, finding that the 100% exemption existing under 820 ILCS 305/21 for workers' compensation "claims"² did not extend to retaliatory discharge causes of action" premised on the anti-retaliatory provisions of the IWCA.³ Accordingly, he confirmed the sale of Randall Brandons' retaliatory discharge claim by the trustee in

²820 ILCS 305/21 provides: "No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages...."

³The anti-retaliatory provisions of the IWCA, 820 ILCS 305/4(h), are as follows:

It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

bankruptcy to the extent of the bankruptcy estate's interest.

II. STANDARD OF REVIEW

This Court, in its appellate function, upholds the bankruptcy court's findings of fact unless they are clearly erroneous and reviews pure questions of law *de novo*. See *In re Matter of UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993). Because this Court is determining the correctness of Bankruptcy Judge Meyers' interpretation of an Illinois statute, this Court reviews this question of law *de novo*. See *United States Fire Ins. Co. v. Barker Car Rental*, 132 F.3d 1153, 1156 (7th Cir. 1997).

III. DISCUSSION

The Brandons rely on section 305/21 of the IWCA: "No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages...." 820 ILCS 305/21. They argue that Randall Brandon's retaliatory discharge cause of action is a "claim" that arises "under th[e] Act" by virtue of section 305/4(h)'s anti-retaliatory provisions which prohibit an employer from retaliating against an employee for filing workers' compensation claims. As such, they argue that the retaliatory discharge cause of action is exempt from the bankruptcy estate section 305/21.

Schwan's, on the other hand, argues that, while there is a general prohibition against retaliation under section 305/4(h), this section is not the source of the retaliatory discharge tort. As such, retaliatory discharge causes of action are not "claims" arising "under th[e] Act" as required to be exempt under section 305/21. Schwan's maintains that Bankruptcy Judge Meyers was correct.

In resolving a question of Illinois law, this Court must "interpret the statute as [it] believes the Supreme Court of Illinois would interpret it if the matter were before that court today." *Id.* As such, this Court "must apply the same rules of statutory construction that the Supreme Court of Illinois would apply if it were faced with the task." *Id.*

Under Illinois law, the "primary rule is that courts should ascertain and give effect to the intention of the legislature." *Id.* (citing *Abrahamson v. Illinois Dep't of Prof'l Regulation*, 606 N.E.2d 1111, 1118 (Ill. 1992)). The best indicator of legislative intent is the plain and ordinary meaning of the words that the legislature used. See *id.* (citing *In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989*, 656 N.E.2d 1049, 1053 (Ill. 1995)). In interpreting the plain and ordinary meaning of the language, a court must evaluate the statute as a whole and consider other

statutes addressing the same subject. See *id* at 1157 (citing Abrahamson, 606 N.E.2d at 1118 (Ill. 1992); Sulser v. County Mut. Ins. Co., 591 N.E.2d 427, 429 (Ill. 1992)). Only if the meaning of the statute is unclear from the statutory language itself, may a court "look beyond the language employed and consider the purpose of the law and the evils the law was designed to remedy." *Id.* at 1157 (quoting *In re Application for Judgment*, 656 N.E.2d at 1053).

With these rules of statutory construction in mind, this Court turns to the issue at hand: whether Randall Brandons' retaliatory discharge cause of action was exempt from the bankruptcy estate as a "payment, claim, award or decision" arising under the IWCA.

First, Randall Brandon's retaliatory discharge cause of action is not a "claim" for purposes of the IWCA. The plain and ordinary meaning of a workers' compensation "claim" does not extend to "causes of action" for retaliatory discharge (i.e., a workers' compensation "claim" does not mean retaliatory discharge "cause of action"). Throughout the Act, the term "claim" consistently relates to compensation or benefits for fatal or non-fatal on-the-job physical injuries.⁴ Also,

⁴There are no references to causes of action for retaliatory discharge as being "claims" under the Act. In fact, references to the word "claim" almost unanimously relate

throughout the Act, when 305/21's terms of "payment," "claim," "award" or "decision" are used, they are used in reference to compensation or benefits for fatal or non-fatal on-the-job physical injuries.

And finally, the Illinois legislature used the phrase "cause of action" in other parts of the Act, see 820 ILCS 305/5(b) & 305/1(b)(3), but did not amend the language of section 305/21 to include "causes of action" in its prohibition against

to compensation for physical injuries. See 820 ILCS 305/1(a)(3), 305/1(a)(4), 305/2(d), 305/4a(1) (noting that a "claim [against group self-insurers] shall be paid by the pool" of funds for medical benefits under group's pooling agreement), 305/4a(5), 305/4a-5, 305/4a-6, 305/4a-8, 305/6(e), 305/7(f), 305/8(b)(16)(b), 305/8(f), 305/8(j) (referring to a "death claim" and a "disputed disability claim"), 305/9 (referring to "all claims for compensation for death"), 305/16a(A-C) (referring to attorney's fees "in connection with the initial or original claim for compensation" which would "reduce expenses to claimants for compensation under this Act"), 305/17 (referring to a "claim for compensation"), 305/19(a)(1-2) (referring to a "claim for disability or death" and a "claim for injury or death"), 305/25 (purpose of a "claim" under the Act is to compensate for injuries to or death of employees). There is no compensation formula for retaliatory discharge causes of action as there is for both fatal injuries, see 820 ILCS 305/7, and nonfatal ones, see 820 ILCS 305/8. See *Rubenstein Lumber Co. v. Aetna Life and Cas. Co.*, 462 N.E.2d 660, 661-62 (Ill. App. Ct. 1984) (holding that a retaliatory discharge cause of action seeking damages is not a proceeding seeking "compensation" or other benefits under the IWCA).

assignments. Thus, the plain language does not help the Brandons'

⁵ argument.

The legislative history does not help the Brandons' argument either. The Illinois legislature enacted the operative language, "payment, claim, decision or award," in 1951. See 820 ILCS 305/21 (effective July 9, 1951). This was long before either the anti-retaliatory provisions existed, 820 ILCS 305/4(h) (effective July 1, 1975), or the Illinois Supreme Court first implied a cause of action for retaliatory discharge for employees who were

⁵See 820 ILCS 305/5(b) (referring to "payments" that relate to compensation from an employer and "awards" as amounts an employee receives from third parties upon which an employer may claim a lien); 820 ILCS 305/8(j)(1) (noting that excess benefits received by an employee under the "Illinois Pension Code on a death *claim* or disputed disability *claim* shall be credited against any *payments* made or to be made by the State of Illinois to or on behalf of such employee under this Act, except for *payments* for medical expenses which have already been incurred at the time of the award."); 820 ILCS 305/19(g) (referring to an "award of the Arbitrator" and "the *decision* of the Commission" which both provide "*payment* of compensation according to this Act"; where an "employer refuses to pay compensation according to such final *award* or such final *decision* ... the court shall in entering judgment thereon, tax ... the reasonable costs and attorney fees in the arbitration proceedings...."); 820 ILCS 305/21 ("The compensation allowed by any *award* or *decision* of the Commission shall be entitled to a preference over the unsecured debts of the employer, wages excepted, contracted after the date of the injury to an employee. A *decision* or award of the Commission against an employer for compensation under this Act....").

terminated because they filed a claim under the IWCA, see *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978). Therefore, the Illinois legislature enacting the operative language could not have envisioned the words "payment, claim, decision or award" as extending to retaliatory discharge causes of action because the anti-retaliatory provisions and the *Kelsay* decision did not exist at that time. Since the Illinois legislature enacted the operative language in 1951, it has not amended it to include "causes of action."

Therefore, this Court predicts that the Illinois Supreme Court would determine that the Illinois legislature intended that the exemption for "claims" related only to claims for compensation or benefits for fatal or non-fatal on-the-job physical injuries -- not to causes of action for retaliatory discharge. Therefore, the "payment, claim, decision, or award" language does not encompass Randall Brandon's retaliatory discharge causes of action, and section 305/21 does not exempt the cause of action from the bankruptcy estate.

Even if Randall Brandon's retaliatory discharge cause of action is a "claim," it still did not arise "under th[e] Act" as required under the section 305/21 exemption. Section 305/4(h) prohibits an employer's discrimination and retaliation against an employee asserting his workers' compensation rights. But what

it conspicuously does not do is create a claim for compensation "under th[e] Act" (*i.e.*, there is no compensation formula as there is for physical injuries). Simply put, section 305/4(h) is not the source of any "payment, claim, award or decision under th[e] Act"; general tort law is. See *Garrison v. Industrial Comm'n*, 415 N.E.2d 352, 354 (Ill. 1980)(holding that an employee's retaliation discharge cause of action under Illinois workers' compensation laws "is properly brought in an independent tort action, not in a workmen's compensation proceeding"); *Rubenstein*, 462 N.E.2d at 661-62 (Ill. App. Ct. 1984)(noting that while "the Act expressly prohibits retaliatory discharge..., the Act does not provide for any compensation or benefits to an employee in the event that his employer violates the Act by discharging the employee in retaliation for filing a workers' compensation claim"). Put another way, section 305/4(h) does not provide a claim for relief itself, rather, it provides only the basis for a claim arising under general retaliatory tort law. Cf *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 725 (7th Cir. 1994)(holding that, for purposes of a statute barring the removal of actions "arising under the workmen's compensation laws of [a] State," a retaliatory discharge claim does not arise under the IWCA merely because section 305/4(h) "is a premise of the tort"). Because retaliatory discharge causes of action arise

under the general tort law and not the workers' compensation law, section 305/21 is inapplicable, and Randall Brandon's retaliatory discharge cause of action is not exempt.

In sum, this Court concludes, after a *de novo* review, that Bankruptcy Judge Meyers correctly determined that retaliatory discharge causes of action premised on Illinois workers' compensation laws are not exempt from the bankruptcy estate. As such, the decision of Bankruptcy Judge Meyers is **AFFIRMED**.

The Brandons only other argument fails. They argue that the Franklin County lawsuit should be exempt based on some common law public policy against assigning torts that are personal in nature. This argument is untimely. It was not listed as a basis for the claimed exemption in the Brandons' amended Schedule C. See Bankr. Doc. 28 (listing as the only basis for the exemption sections 305/21 and 305/4(h)). And it was never alluded to in the Brandons' written briefs to Bankruptcy Judge Meyers. See Adversarial No. 99-4062, Doc. 4 (relying solely on sections 305/21 and 305/4(h)). It was only in the closing moments of oral arguments that Brandons' counsel even hastily alluded to it. See Transcript of July 20, 1999 Oral Argument at 40-41. That mention was completely undeveloped and devoid of legal authority and analysis. This Court holds that the Brandons have therefore waived this argument on appeal because they never listed it in

their amended Schedule C and did not timely raise this argument (nor develop it) before the bankruptcy judge. See *Matter of Kroner*, 953 F.2d 317, 319-20 (7th Cir. 1992) (failure to raise an argument before the bankruptcy court waives it on de novo review in the district court absent exceptional circumstances); see also *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived....").

Even if this Court looked to the substance of the Brandons' argument, the result is the same. This Court assumes, for purposes of this appeal, that an Illinois common law exemption is a valid exemption under §522, though the answer to this question is unclear.⁶ In support, the Brandons rely on *Kleinwort*

⁶It is unclear whether an exemption may be based on a state's common law as opposed to being based on a state's statutes. Illinois courts look to federal law, wondering "whether the exemptions referred to in §522 are only statutory in nature." *Hoth v. Stogsdill*, 569 N.E.2d 34, 39 (Ill. App. Ct. 1991). And federal courts look to state law, wondering whether their opt-out statute includes state common law. See *Matter of Geise*, 992 F.2d 651, 656 (7th Cir. 1993) (noting that Wisconsin law limits §522 exemptions to constitutional or statutory law; "The right of a debtor to keep property free from the claims of creditors is not a common-law right.... In the absence of a statutory provision, therefore, all the debtor's property may be subjected to the payment of debts."). The Seventh Circuit's focus, in *Matter of Geise*, on whether the Wisconsin state constitution allows common law exemptions appears to presume that the exemptions referred to in §522

Benson North America, Inc. v. Quantum Financial Services, Inc., 692 N.E.2d 269,274 (Ill. 1998), which recognizes that Illinois public policy generally prohibits the assignment of (i) personal injury torts and (ii) torts that are so personal in nature that they "involve the reputation or feelings of the injured party." Randall Brandon argues that, because his "feelings ... were injured" by Schwan's allegedly unlawful conduct, his wrongful discharge tort should not be assignable.

That argument is not convincing. The Brandons have not cited any authority indicating that all wrongful discharge cases are too personal merely because the employee's feelings are hurt when the employer breaks the law. The only authority the Brandons rely on is *Kleinwort*, enunciating the general principle that "assignability is the rule and nonassignability is the exception." 692 N.E.2d at 274 (citing 6 Am.Jur.2d Assignments §§ 7, 29). The Brandons do not cite to any Illinois case law expanding this prohibition against assignment to wrongful discharge actions. On the contrary, Illinois courts have found retaliatory discharge actions to be assignable under certain

could be based on a state's common law if that state legislature made clear in its opt-out statute that it wanted to retain exemptions at common law. It does not appear that Illinois did such that in opting out. See 73 5 ILCS 5/12-1201. But because the Brandons have waived this argument on appeal, this Court need not decide this issue.

circumstances, indicating that Illinois public policy does not prohibit their assignment wholesale. See *Raisl v. Elwood Industries, Inc.*, 479 N.E.2d 1106, 1109-10 (Ill. App. Ct. 1985) (finding that IWCA retaliatory discharge actions survive the aggrieved employee's death and are thus assignable). The Brandons have not convinced this Court of why wrongful discharge actions should constitute an exception to the general rule of assignability. Therefore, not only have the Brandons waived this argument, but they also would fail if this Court reached the merits of their argument.

Finally, on its cross appeal, Schwan's appeals Bankruptcy Judge Meyers' decision not to grant an injunction prohibiting Randall Brandon from filing motions in the Franklin County lawsuit. Specifically, Randall Brandon filed a motion to set aside judgment in the Franklin County lawsuit after Schwan's had already settled it with the trustee who, in return, agreed to dismiss the suit. This occurred despite Bankruptcy Judge Meyers' decision to confirm the sale. Bankruptcy Judge Meyers found that the trustee sold all the interest it had in the lawsuit and therefore denied injunctive relief.

This Court reviews Bankruptcy Judge Meyers' "denial of declaratory or injunctive relief for abuse of discretion." *In re Schimmelpenninck*, 183 F.3d 347, 353 (5th Cir. 1999). "When such

relief has been granted or denied by a bankruptcy court, ... the district court ... review[s] the bankruptcy court's findings of fact for clear error and issues of law de novo." *Id.* at 354; see *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 641-642 (3d Cir.1991).

This Court finds no error in Bankruptcy Judge Meyers' decision. Clearly, Randall has no interest in the suit as it is property of the bankruptcy estate that is not exempt. There is no indication that the trustee abandoned the Franklin County lawsuit to the debtor. As the Brandons have no interest in this suit, this Court finds that Bankruptcy Judge Meyers committed no error in denying Schwan's injunctive relief. Finding no facts that Bankruptcy Judge Meyers relied to be clearly erroneous and finding that Bankruptcy Judge Meyers did not abuse his discretion, this Court **AFFIRMS** his decision. Schwan's is not without recourse in this matter. Schwan's is free to assert issue preclusion in the Franklin County lawsuit or even to seek sanctions against Randall Brandon if his filings do not comport with Illinois Supreme Court Rule 137.

IV. CONCLUSION

For the foregoing reasons, the Court rules as follows: (1) Brandons' motion for leave to file an untimely reply brief to Schwan's cross appeal (Doc. 6) is **GRANTED**; (2) Brandons' appeal

is **DENIED** (Doc. 3), and Schwan's cross-appeal (Doc. 5) is **DENIED**. Bankruptcy Judge Meyers' August 31, 1999 decision is hereby **AFFIRMED** in its entirety. The trustee's motion for noninvolvement (Doc. 4) is **DENIED** as moot.

IT IS SO ORDERED.

DATED: January 21, 2000

/s/ J. PHIL GILBERT
Chief Judge