Case No. 22-13642-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeal from the United State District Court
for the Southern District of Florida

District Court Case No. 21-civ-61099-Smith
Bankruptcy Court Adv. Proc. No. 20-1255-SMG

George P. Wagner, III,

Appellant,

vs.

OHI Asset (VA) Martinsville SNF, LLC, *et al.,*

Appellees.

REPLY BRIEF OF APPELLANT

Patrick S. Scott
GRAYROBINSON, P.A.
401 E. Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301
Ph. (954) 761-8111
Fla. Bar No. 290025
patrick.scott@gray-robinson.com

Michael S. Hoffman
HOFFMAN, LARIN & AGNETTI, P.A.
909 North Miami Beach Blvd., Suite 201
North Miami, FL 33162
Ph. (305) 653-5555
Fla. Bar No. 41164
mshoffman@hlalaw.com

Counsel for Appellant George P. Wagner, III

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellant George P. Wagner, III notifies the Court that the following individuals and corporations have an interest in the outcome of this appeal:

1. Aiken, Leighton (Counsel for Appellee)
2. BlackRock Fund Advisors (Shareholder in Omega)
3. Ferguson Braswell Fraser Kubasta PC (Counsel for Appellee)
4. Gray Robinson, P.A. (Counsel for Appellant)
5. Hildreth, Mark D. (Counsel for Appellee)
6. Hoffman, Larin & Agnetti, P.A. (Counsel for Appellant)
7. Hoffman, Michael S. (Counsel for Appellant)
8. OHI Asset (FL) Sebring, LLC (Appellee)
9. OHI Asset (NC) Warsaw, LP (Appellee)
10. OHI Asset (VA) Martinsville ALF, LLC (Appellee)
11. OHI Asset (VA) Martinsville SNF, LLC (Appellee)
12. Omega Healthcare Investors, Inc. (Principal of Appellees)
13. Scott, Patrick S. (Counsel for Appellant)
14. Shumaker, Loop & Kendrick, LLP (Counsel for Appellee)

15. Smith, Rodney (United States District Court Judge)
16. The Vanguard Group, Inc. (Shareholder in Omega)
17. Wagner, George P., III (Appellant)

CORPORATE DISCLOSURE STATEMENT

Appellee OHI Asset (FL) Sebring, LLC is a foreign limited liability corporation. Appellee OHI Asset (NC) Warsaw, LP is a foreign limited partnership. Appellee OHI Asset (VA) Martinsville ALF, LLC is a foreign limited liability corporation. Appellee OHI Asset (VA) Martinsville SNF, LLC is a foreign limited liability corporation.

The appellees have advised us from previous filings that their parent company is *Omega Healthcare Investors, Inc.*

The appellees have advised us from previous filings that publicly held companies *The Vanguard Group, Inc*. and *BlackRock Fund Advisors* each own 10% or more interest in their parent Omega Healthcare Investors. We hereby certify that, except as noted, no publicly traded company or corporation has an interest in the outcome in the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

The appellant desires oral argument, because the court may have questions about any cases where a court acting in its appellate capacity has found clear error in a lower court's decision on a state-of-mind issue.

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I. JURISDICTIONAL ISSUE

The jurisdictional question posed by this court was fully briefed by both sides in April. A motions panel made the determination that the Notice of Appeal was not filed too soon or too late and that this court has jurisdiction under 28 U.S.C. §158(d)(1) to consider the merits of the appeal. Order Denying Motion to Dismiss, Doc. 20. That is not to say that this panel hearing the arguments on the merits cannot come to a different conclusion as to its own jurisdiction. See 11th Cir. R. 27-1(g) (merits panel is not bound by motions panel's ruling on court's jurisdiction). However, no further briefing should have been necessary.

In the event that the new panel wishes to reconsider the motion panel's ruling, this is the appellant's ("Mr. Wagner's") response: Under Appellate Rule 6(b)(A) all post-judgment motions other than Bankruptcy Rule 8022 motions are non-tolling, and if Mr. Wagner's motion had been a Rule 8022 tolling motion his notice of appeal would have become effective when the tolling ended.

The Committee on Appellate Rules created a procedural system which differentiates between what kind of post-judgment motions tolls the time for *bankruptcy* appeals, Appellate Rule 6(b)(2)(A), and what kind of post-judgment motions tolls the time for *other civil* appeals, Appellate Rule 4(a)(4). Rule 4(a)(4) is specifically inapplicable to bankruptcy appeals. See Rule 6(a)(1)(A).

Only one kind of post-judgment motion tolls a bankruptcy appeal from a district court: a "motion for rehearing under Bankruptcy Rule 8022":

> If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion.

Fed. R. App. P. 6(b)(2)(A)(i).

The appellant (collectively, "OHI") has never contested that Mr. Wagner's Motion for Clarification of the district court's decision was *not* a Rule 8022 motion. [see Appellees' Brief, Doc. 30, p. 5]. OHI's jurisdictional argument actually *depends on* the motion for clarification *not* being a Rule 8022 motion, because it wants to avoid the effect of Appellate Rule 6(b)(2)(A)(i)'s savings clause that makes a premature notice of appeal effective only after the district court disposes of the Rule 8022 motion.[1] Its reasoning is deceptively simple, and goes like this: If there is a kind of post-judgment motion that is not a Rule 8022 motion, then another rule of tolling must apply, one unlike Rule 6's tolling provision and without Rule 6's corollary clause protecting premature notices of appeal.

The flaw in the reasoning is that there is no gap in the rule through which Mr. Wagner's motion for clarification could fall. Rule 8022 motions toll the time for

[1] "A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered." Fed. R. App. P. 6(b)(2)(A)(i).

appeal. Any other post-judgment motion does not toll the time for appeal. For example, until 1993 the rules (appellate and bankruptcy) did not provide for *any* tolling in appeals from decisions of district courts sitting in their bankruptcy appellate capacity. See *Matter of Sundale Associates, Ltd.,* 786 F. 2d 1456, 1457 (11th Cir. 1986) (interpreting the rules of the time).

OHI's suggestion that tolling occurs when a non-Rule 8022 motion is filed, is supposedly grounded in a "general rule established by the *Healy-Dieter-Ibarra* line of cases." *Appellee's Brief* at 5, citing *U.S. v. Dieter,* 429 U.S. 6 (1976) and *U.S. v. Ibarra,* 502 U.S. 1 (1991), and referencing *U.S. v. Healy,* 376 U.S. 75, 84 S.Ct. 553, 11 L.Ed.2d 527 (1964). If OHI is correct, this supposed "general rule," not found in the Appellate Rules themselves, would apply in bankruptcy and nonbankruptcy appeals and would turn all post-judgment motions—even Rule 60(b) motions filed months after the district court decision—into tolling motions. This notion finds no support in the case law. There was a time, especially prior to the 1993 amendments to Rule 4, that courts debated the extent to which a Rule 60 or other motion could by the wording of its contents move into the category of Rule 59 and thereby be treated as a tolling motion. This court had held that a motion for clarification will not be treated as a Rule 59 motion for reconsideration if it "neither sought reconsideration of matters encompassed in the merits of the order nor called into question the correctness of the order." *Order Denying Motion to Dismiss,* Doc. 20,

citing *Finch v. City of Vernon,* 845 F. 2d 256, 258 (11th Cir. 1988). The 1993 amendment to Appellate Rule 4(a)(4) to add subdivision (vi) largely resolved this character-of-the-motion issue in non-bankruptcy civil appeals by stating that all Rule 60 motions filed by the deadline for appeal would be treated as tolling. The principle in *Finch* now governs a much-smaller category of motions that are misdenominated as falling within the tolling motions list in Rule 4(a)(4)(A) or Rule 6(b)(2)(A)(i).

Rule 4(a)(4)'s listing of particular motions as tolling motions is clearly intended to exclude all others from tolling, though the *Finch* principle may still be applied to catch those motions that seek to sneak onto the tolling list by misnaming the motion. The wording of Rule 6(b)(2)(A)(i), read in the context of its adoption as a variant of Rule 4(a)(4), is also clear from its structure that it excludes any other post-judgment motion from tolling. But Rule 6's tolling provision, in apparent recognition of the expedited nature of bankruptcy proceedings, is much narrower than Rule 4's provision, for Rule 6 provides tolling *only for those motions of the character described in Bankruptcy Rule 8022*, using words to describe the permissible basis ("the motion must state with particularity each point of law or fact that the [movant] believes the [district court] has overlooked or misapprehended") that are identical to the limited basis for a petition for panel rehearing under Appellate Rule 40(a)(2). See Advisory Committee Note, Rule 8022 ("This rule is derived from former Rule 8015 and Fed.R. App. P. 40.").

Under Rule 6(B)(2)(A)(i)—the only tolling provision for district court bankruptcy appeals—there is no gap for non-Rule 8022 motions of the type that would toll non-bankruptcy appeals under Rule 4(a)(4), for example, motions for attorney's fees and motions for additional findings.

OHI's *Healy, Dieter,* and *Ibarra* cases—the Supreme Court's trilogy of criminal appeal cases explaining how to distinguish tolling from non-tolling motions based on the character of the relief they seek rather than their labels—*do not* support OHI's proposition that all post-judgment motions are broadly rendered into tolling motions. In the last of the cases cited—*Ibarra*—the Court recited the development of the principle by *Healy* and *Dieter* to explain that tolling in criminal appeals under Appellate Rule 4(b) is limited to the "category of motions for reconsideration [that] sought to 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.'" *United States v. Ibarra*, 502 U.S. 1, 7, 112 S. Ct. 4, 7, 116 L. Ed. 2d 1 (1991). This was the Court's attempt to clarify—as this court in *Finch* clarified for non-bankruptcy civil appeals—how Rule 4's tolling provisions were governed by the character of the post-conviction motion's attack on the district court ruling and not by the Criminal Procedure Rule cited in the title of the post-conviction motion. The Supreme Court has never suggested that there is a category of tolling for post-judgment motions outside those described in Rule 4(a)(4)—or Rule 4(b)(3) for criminal cases), but rather only that a motion which by its title is

not listed in Rule 4 may by its content in fact be a tolling motion of the sort listed in Rule 4.

In bankruptcy appeals, while the character-of-the-motion issue remains, it becomes a purely academic issue if a notice of appeal is timely filed, as in this case, since (a) if a motion *is* a Rule 8022 motion then the second sentence of Appellate Rule 6(b)(2)(A)(i) makes a premature notice of appeal effective upon the district court's disposition of that motion, and (b) if a motion is *not* a Rule 8022 then there is no tolling at all.

II. THE MERITS OF THE APPEAL

1. Summary of argument

The merits of this appeal involve a single narrow provision of the Bankruptcy Code, Section 727(a)(4)(A)—whether the debtor "knowingly and fraudulently, in or in connection with the case—(a) made a false oath or account."[2] And particularly, whether Mr. Wagner knowingly and fraudulently omitted a horse named Clover and Clover's six months of rental income from Wagner's bankruptcy schedules and statement of financial affairs.[3]

OHI's brief responds to Mr. Wagner's argument in his initial brief that the district judge has substituted his own *de novo* assessment of the trial evidence for

[2] While there are three other subdivisions of Section 727(a)(4), none are involved in this case.
[3] While there was another alleged omission from the bankruptcy schedules, the district court found no error in the bankruptcy court's finding and it is not involved in this appeal.

the bankruptcy judge's assessment of the evidence, rather than identifying clear error. Both sides agree that the controlling authority is the Supreme Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (rejecting authorities which had held that there is a place for *de novo* review as to some kinds of facts, but acknowledging that clear error could possibly be found even in the trial court's reliance on the credibility of witness testimony). Applying the *Anderson* standards, the bankruptcy judge's finding of "no fraudulent intent" cannot have been outside the range of permissible findings, and therefore cannot properly have been found clearly erroneous by the district court.

2. An appellate court's conclusion that a lower court made a clearly erroneous finding of fact at trial (a) cannot be based on an independent reassessment of the evidence and (b) must instead be based upon an error in the trial judge's finding that removes the finding from the range of plausible findings.

The Court in *Anderson* isolated two legal conclusions from past Supreme Court cases about the meaning of "clearly erroneous" in Civil Rule 52(a)(6), and adopted "plausible" as describing the range of trial court findings that a court sitting in appellate review may not disturb. The first, from a 1948 decision, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson* at 573 (citing *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). In

United States Gypsum, the Court concluded that the trial judge had applied an incorrect legal standard by requiring the government to prove that the defendant exceeded the scope of its patent grant in order to establish a restraint of trade clam under the Sherman Act. The trial court had also accepted the defendants' parade of witnesses' testimony that they had neither an agreement or a business plan to increase their monopoly, but the Supreme Court noted that the documents showed incontrovertibly that they did have such a plan and knew its effect was monopolistic. This mixed issue of fact and law led the Court to more freely discredit witness testimony because the trial court had been looking for facts that were unnecessary to prove the Sherman Act violation.

United Gypsum's definition, though often used, is not very satisfactory, and the Supreme Court restated it a year later in the *Yellow Cab* case. *Anderson's* second restatement of "clearly erroneous" derives from that 1949 decision:

> If the [trial court's] account of the evidence is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573–74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949)). The *Yellow Cab* decision gave an expanded explanation:

> There is no exception [in Rule 52] which permits [the government], even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'

United States v. Yellow Cab Co., 338 U.S. 338, 341–42, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949). In *Yellow Cab,* the Court noted that the government/appellee complained that the trial court "ignored…substantially all of the facts which the government deemed significant." As appellee, its specifications of error fundamental to its case—in the view of the Supreme Court—asked the Court "to reweigh the evidence and review findings that are almost entirely concerned with imponderables," such as "intent…, what was the design and purpose, and…motives…." *Yellow Cab* at 340.

> Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

Id. at 341. The Court found no clear error and so affirmed the trial judge's judgment dismissing the government's claims. Two justices dissented, but only because they believed the trial judge had applied too high a legal standard by the trial judge's

conclusion that the government's conspiracy case under the Sherman Act depended on proving the defendant's specific intent to restrain trade.

The Court in *Anderson* chose to describe the range of permissible findings as those which are "plausible." That it didn't choose "probable" is apt. "Plausible" means merely "having an appearance of truth or reason" or "seemingly worthy of approval or acceptance." *The RandomHouse College Dictionary (Rev. Ed.).* To require that a trier of fact's essential findings be "probably" correct rather than plausible would turn the appellate judge into the decider of correctness by employing an impermissible *de novo* standard of review.

3. OHI's suggestion that precedent holds that any contradictory evidence renders a finding of fact clearly erroneous is unsupported by authorities.

OHI's most succinct summary of how to show clear error, in cases involving conflicting evidence, is this:

> Appellant's Opening Brief ignores Supreme Court and Eleventh Circuit precedent holding that a lower court's (in this case, the Bankruptcy Court) finding that witness testimony was credible *is clear error where*, as in this case, such testimony (i) was contradicted by documentary evidence, and/or (ii) is inconsistent or implausible in light of such documentary evidence."

Reply Brief, at 15-16 (emphasis added). This was a miswording of the actual dictum from *Anderson*, which OHI quotes correctly later in its brief:

> "Documents or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it…[in which event] the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Reply Brief, at 17-18, quoting *Anderson* at 575. The Court was actually explaining, in dictum, that it found *no* clear error because there was *no* contradictory evidence. It was not stating that contradictory evidence always trumps testimony. And *Anderson* provides no support for OHI's premise that any evidence that may contradict Mr. Wagner's testimony that he didn't own the horse necessarily also contradicts Mr. Wagner's testimony as to *why* he didn't believe he was omitting his horse.

There is no legal issue on appeal in the present case, and no mixed question of law and fact as in *U.S. Gypsum*. There is just a fact issue here. Giving "due regard to the trial court's opportunity to judge the witnesses' credibility," Rule 52(a)(6), and applying the *Anderson* principles, the district court should have reversed the bankruptcy court only if the bankruptcy judge's finding of no fraudulent intent fell outside the range of permissible, that is, plausible, findings.

4. OHI has failed to cite any reported case where a finding of no fraudulent intent has been set aside as clearly erroneous, its *Waugh* case notwithstanding.

Mr. Wagner has never argued that it is impossible to think of a situation where an appeals court could properly find plain error in a trial judge's finding on a state-of-mind fact like fraudulent intent. For example, a trial judge ignoring an explicit admission by the debtor of his fraudulent intent would be such a situation of clear error. But this is not that situation, and we have been unable to find *any* reported

decision—before this district court's unreported ruling—where a bankruptcy judge's trial finding of no *fraudulent intent* has been found plainly erroneous.

Mr. Wagner's initial brief challenged OHI to find any case where an appellate court has reversed a finding of no fraudulent intent. OHI's response is that the Eighth Circuit's decision in *In re Waugh,* 95 F. 3d 706 (8th Cir. 1996) is such a case, but it's not. *Waugh* turned on reckless disregard of a creditor's injury in a case, under Section 523(a)(6) which *excepts* from discharge prepetition debts for willful and malicious injury. There was much more room in a Section 523(a)(6) cause of action—than in any Section 727(a)(4) action—for the district judge in *Waugh* to find for the plaintiff based solely on evidence of *intentional conduct* and *knowledge* alone, rather than intent to defraud.[4] Indeed, the Eighth Circuit panel in *Waugh* approved the district court's reversal of the bankruptcy judge because it found the trial record was replete with clear evidence of an intentional act and of the debtor's contemporaneous knowledge of the harmful effect on the plaintiff-creditor despite the debtor's denial. *Waugh,* 95 F. 3d at 711. These were, and are, the only findings necessary under Section 523(a)(6).[5]

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[4] It happens that the harmful act in *Waugh* was the debtor's stripping of his company's assets to defeat the company's creditor, but neither fraud nor fraudulent intent is discussed in the case, which turned solely on whether the debtor intentionally performed an act and whether that act knowingly resulted in injury.

[5] In the Eleventh Circuit as well, a Section 523(a)(6) "willful and malicious injury" can mean as little as the debtor's "intentional act…which is substantially certain to

By comparison, forfeiture of an entire discharge under Section 727(a)(4) must be based on the debtor's false statement (or omission) that the debtor made with fraudulent intent. *Matter of Beaubouef,* 966 F.2d 174, 178 (5th Cir. 1992). The fraudulent intent required by Section 727(a)(4) is subjective, and no court to our knowledge has ever held a bankruptcy judge's decision on this subjective issue to be erroneous.

While the Eighth Circuit in *Waugh* did hold that the district court properly found clear error in the bankruptcy court's decision on willful and malicious injury, its holding—even in Section 523(a)(6) proceedings—is of very limited value because *Waugh's* Section 523(a)(6) standard was repudiated by the full Eighth Circuit in another case the next year, and the United States Supreme Court put an end to the practice of equating "reckless disregard" with willful or intentional conduct in its affirmance of the Eighth Circuit. *In re Geiger*, 113 F.3d 848, 859 (8th Cir. 1997), *aff'd sub nom. Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998). Even before *Geiger,* the Eleventh Circuit had rejected "reckless disregard," which is based on what the debtor knew rather than what he intended, as a basis for finding willful and malicious injury under Section 523(a)(6). *In re*

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cause injury." *In re Walker,* 48 F.3d 1161, 1165 (11th Cir. 1995). Note that such a finding can be based solely on *objective* facts, because *Walker* confirmed that "willful and malicious injury" does not mean "intentional harm" but rather intentional act + objectively certain harm.

Jennings, 670 F.3d 1329, 1334 (11th Cir. 2012) (citing *In re Walker*, 48 F.3d 1161, 1163 (11th Cir.1995) and *In re Ikner*, 883 F.2d 986, 991 (11th Cir.1989)).

All that said, *Waugh* stands for no more than that, during the days before the Supreme Court eliminated "reckless disregard" as a basis for nondischargeability of a debt, a bankruptcy judge made a clearly erroneous fact finding on a debtor's disregard of objectively-certain harm that would befall his creditor from his acts. It was never a fraudulent intent case.

5. OHI's "badges of fraud" argument has no application to Section 727(a)(4) cases.

OHI cites a series of cases at pages 31-32 of its brief for the proposition that the "fraudulent intent" required by Section 727(a)(4) can be established by one or more "badges of fraud." However, those cases are all interpreting Section 727(a)(2), by which a discharge may be denied for the debtor's having made a transfer with intent to defraud creditors within a year prior to the bankruptcy. In (a)(2) cases, intent to defraud creditors is often proven by considering the factors in Section 5 of the Uniform Fraudulent Transfers Act, Fla. Stat. §726.105(2), factors which creditors often tout as "badges of fraud." OHI has not cited any authorities applying these factors to Section 724(a)(4) cases. It is worth noting that the Section 727(a)(2) count in this case was tried, the bankruptcy judge ruled in favor of the debtor on that count, and OHI did not cross-appeal that ruling to the district court.

6. OHI's argument that a debtor's sworn explanation of why he had no fraudulent intent cannot, absent corroborating evidence, overcome the inference created by proof of the falsity of his statement or omission is not supported by the case law.

OHI cites four cases for the proposition that Mr. Wagner had to present corroborating evidence to support any testimony from his three witnesses vitiating fraudulent intent: "To overcome the inference of fraudulent intent, [a] debtor must present a credible explanation through corroborating evidence." Appellee's Brief, p. 32. If this were true the bankruptcy judge would not be able to credit the testimony, and all false statements on schedules would necessarily be fraudulent regardless of how little the debtor appreciated the falsity. In fact, none of the cited cases stand for such a proposition. Two of the cases simply involve a bankruptcy judge determining that he or she didn't believe a particular debtor's oral testimony on facts *where corroborating evidence should have been available but was not produced*. *In re Ross,* 217 B.R. 319 (Bankr. M.D. Fla. 1998) (supposed payment of taxes); *In re Robert,* 2003 WL 24027476 (Bankr. W.D. La. 2003) (supposed payments made in lieu of rent). The third actually stands for the opposite proposition. See *In re Chadwick,* 335 B.R. 694 (W.D. Wis. 2005) (district court found no clear error in bankruptcy court findings despite lack of evidence corroborating debtor's otherwise clear testimony). And the fourth case isn't relevant to the proposition. See *Stephens v. Caruthers,* 97 F. Supp. 2d 698 (E.D. Va. 2000)

(under Virginia's Dead Man Statute, interested witnesses' testimony as to another's intent to make a will must be corroborated by other evidence).

7. How the bankruptcy court's and the district court's approach to the facts differed.

The following uncontested facts are from the Stipulation of Facts (App. vol. 1, pp. 33-37), and Mr. Wagner's daughter's age and college status are from Mrs. Wagner's testimony. App. vol. 2, p. 281, line 4, and p. 282, line 11.[6] A riding horse named Clover was purchased for $180,000 from a joint husband-and-wife account, years before Mr. Wagner's financial default and while the horse rider, his daughter Anderson, was in high school (App. vol. 1, pp. 45-46, ¶¶14, 21). While the bill of sale named Mr. Wagner as the buyer (App. vol. 2, p. 282, line 23 to p. 283, line 9), the horse was registered immediately into the name of his daughter as owner in the national registry of competition-riding horses, the United States Equestrian Federation (App. vol. 1, p. 46, ¶27, and App. vol. 1, pp. 185-186). When the daughter was a minor, Mr. Wagner carried the insurance in his name as "insured" (App. vol. 1, p. 45, ¶23). And he and his wife paid from their joint account the cost of maintaining the horse which the daughter rode, except when it was leased (App.

[6] Citations to the record are to the 581-page Appendix filed in this case as Doc. 24, and to the volume number (e.g., vol. 3), and to the page number in the bookmarked electronic version. Because the paper copies supplied to the court do not include bookmarking, Bates-numbered sets of the three volumes of Appendix are being supplied to the court.

vol. 1, p. 45, ¶22). Wagner signed the lease of the horse to another person for six months while Anderson was a freshman in college (App. vol. 1, p. 46, ¶24, and App. vol. 1, 282, line 11, App. vol. 2, p. 391, lines 14-24). In Anderson's sophomore year, she leased out the horse seasonally, deposited the rents, and paid its expenses herself, while continuing her college studies out-of-state and her riding competitions in-state (App. vol. 2, p. 413, lines 17-25, and p. 413, lines 9-25, and p. 415, lines 12-18).

While OHI does claim that the trial testimony was *inconsistent* with certain documentary evidence, none of the documents, individually or cumulatively, were *irreconcilable* to the bankruptcy judge's plausible finding of no fraudulent intent.[7] Judge Grossman, a longtime bankruptcy practitioner, took the trouble to examine in his decision every piece of evidence claimed by OHI to be inconsistent with Mr. Wagner's, his ex-wife's, and his daughter's testimony, as well as other evidence Wagner presented, and the judge explained how each piece of evidence contributed to his overall conclusion of "no fraudulent intent." He explained why each of OHI's cited documents was not inconsistent with the testimony considering all the

[7] OHI cited a horse lease (App. vol. 3, pp. 563-564), prepared by the horse trainer (App. vol. 3, p. 300, line 2-6), which Mr. Wagner signed while his daughter was away at college, and a personal financial statement form (App. vol. 1, pp. 200-205) given to OHI in connection with a mediation some months before the bankruptcy which lists "Horse $0" in the section on miscellaneous property. Wagner testified that he didn't read the lease provision stating that the lessor held clear title, or the wording of the financial statement, before signing them. App. vol. 2, p. 395, line 23 to p. 396, line 23. OHI also emphasized two emails—one from Wagner to his insurance agent and one to his estranged wife—as somehow implying a belated effort to transfer the horse to Anderson. They are discussed separately in this brief.

evidence, or—in the two or three instances where there was inconsistency—why the inconsistency did not impute fraudulent intent in the omission of Clover and the six months of horse rental income from the bankruptcy schedules. App. vol. 3, Doc. 9, pp. 66-74.

On the other hand, the district judge—and OHI in its appellee's brief—selected only particular documents, completely ignored the role of the Wagners' pending divorce, and took no account of the explanations given by the witnesses and found credible by Judge Grossman. In doing this, the district court re-weighed the evidence as if *de novo.*

8. OHI has identified so-called contradictory evidence without justifying how the bankruptcy judge's explanations and reconciliation of that evidence falls short.

OHI has mischaracterized, Bankruptcy Judge Grossman's ruling as being based solely on the testimony of Mr. Wagner, his ex-wife, and their daughter. Judge Grossman also relied on the U.S. Equestrian Federation registration in the daughter's name as owner from immediately after the horse was purchased,[8] and Mr. Wagner's general conduct of forthrightness in exposing his assets, and the fact that much of the conduct OHI characterized as fraudulent could be explained through the prism of George and Melissa' failing marriage and impending divorce. It is well worth

[8] Miss Anderson Walker couldn't have ridden the horse in USEF competition without being the owner of the horse after her 18th birthday in 2018. App. vol. 2, pp. 419, lines 2-14.

reading the nine-page ruling which Judge Grossman read upon the conclusion of the trial. App. vol. 3, p. 544-553. Judge Grossman's positive inference from the fact that Wagner listed on the schedules his daughter's car and his mother's wine as other assets in his name was rejected by the district court, which imputed a negative inference instead; this choice between two plausible inferences in not the role of a judge sitting in appellate review of fact findings.[9] Judge Grossman found credible the testimony that the eventual change in insurance and in the recipient of the funds for the Clover lease was at Melissa's insistence since she was no longer controlling George's bank account. App. vol. 3, p. pp. 492, line 14 to 493, line 22, and p. 546, line 17 to p. 547, line 18. OHI did not address why this is an implausible finding.

The divorce was at the center of the trial, but it was ignored in OHI's brief. OHI has quoted an email between the Wagners about maximizing what Melissa Wagner would receive in the divorce and minimizing what he or his bankruptcy estate would receive, but Judge Grossman found that, in the context of a marital

[9] Judge Grossman found Wagner's schedules— he disclosed valuable assets and potentially avoidable transfers on his Schedules—in combination with other evidence, created an inference of no fraudulent intent. After discussing the two inferences that can be drawn from the otherwise-completeness of schedules, he summarized: "If Mr. Wagner had any thought or concern that he had some interest in the horse, given how extensive and thorough his schedules were otherwise, I'm convinced he certainly would have listed it on his schedules." App. vol. 3, p. 551. This is precisely the scenario that calls for deference to the trier of fact since [w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74.

settlement, the email didn't point to a fraudulent intent to conceal anythin from Mr. Wagner's bankruptcy. OHI did not address why this is an implausible finding, and did not point to any transfer in furtherance of what OHI calls the plan to minimize the bankruptcy estate.

OHI's brief says Mr. Wagner "represented to OHI that he owned a horse" in a financial statement his lawyer gave OHI during settlement talks a few months before filing bankruptcy. That's not exactly true. The financial statement says "Horse $0" in the miscellaneous section of the form called "Other Property" but did not carry it over to "Assets" on page 1 of the form. App. vol. 1 pp. 200-205. Mr. Wagner explained at trial that he had not prepared, reviewed, or signed the financial statement, and could not explain why his daughter's car and his daughter's horse, neither of which properly belonged to him, appeared in that manner. App. vol. 2, p. 396.

OHI also has focused in the appeals on a particular email to Mr. Wagner from his bankruptcy counsel, as if it were evidence that Wagner owned the horse. Reply Brief, p. 13 ("On July 1, 2019, in connection with the preparation of his bankruptcy petition, Appellant's bankruptcy counsel sent an email to Appellant requesting information from Appellant as to Clover and the Clover Lease"). But OHI has omitted the beginning of the sentence, which shows that his own lawyer's

understanding was that Clover was not Wagner's property: "For the horse owned by your daughter:…" App. vol. 3, p. 298, lines 19-25.

III. CONCLUSION

OHI, like Wagner, has been unable to find any reported decision where a trial court's finding that the debtor did not have fraudulent intent was held clearly erroneous. And while such a finding conceivably could be clearly erroneous in another case, such as one involving an irreconcilable admission or other irreconcilable evidence to the contrary, this case involves no evidence that the bankruptcy judge did not reconcile to a non-fraudulent purpose for the omissions. The district court decision reevaluated the trial evidence and came to a different finding, and both court's findings were permissible, that is plausible. The district court decision must be reversed and the bankruptcy decision reinstated because it was not clearly erroneous.

The appellant respectfully requests that this Court reverse the district court order and reinstate the bankruptcy court's judgment.

Respectfully submitted,

GRAYROBINSON, P.A.
Counsel for Appellant
401 E. Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301
Email: patrick.scott@gray-robinson.com

s/Patrick S. Scott

Patrick S. Scott
Fla. Bar No. 290025
Ph. 954/761-8111

and

Michael S. Hoffman
HOFFMAN, LARIN & AGNETTI, P.A.
Counsel for Appellant
909 North Miami Beach Blvd., Suite 201
North Miami, FL 33162
Email: mshoffman@hlalaw.com
Ph. 305/653-5555

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/s/ Patrick S. Scott
Attorney for Appellant
Dated: June 30, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was served by email upon Michael S. Hoffman, Hoffman Larin & Agnetti, P.A., mshoffman@hlalaw.com, Mark D. Hildreth, Shumaker Loop & Kendrick, LLP, mhildreth@shumaker.com, and Leighton Aiken, Ferguson Braswell Fraser Kubasta P.C., laiken@fbfk.law, this 30th day of June, 2023.

s/ Patrick Scott