

ORIGINAL

IN THE SUPREME COURT OF OHIO

Gregory D. Adkins and  
Jo Ellen Adkins

Appellants

v.

Honorable Megan Shanahan,  
Hamilton County Municipal Court,

Appellee.

Case # 2012--508

On Appeal from the  
Hamilton County Court  
of Appeals, First  
Appellate District

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REPLY BRIEF OF APPELLANTS  
GREGORY D. ADKINS AND JO ELLEN ADKINS

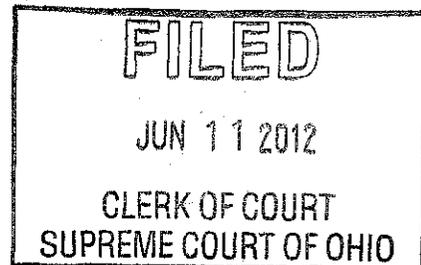
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## **I. REPLY TO APPLLEE'S STATEMENT OF FACTS**

The Appellants Gregory D. and Jo Ellen Adkins reaffirm their Statement of Facts as stated in their Merit Brief. The Statement of Facts set forth in the Appellee's Merit Brief is not a statement of facts, but a confusing series of statements and questions that have no relevance to the materials facts in this case. Appellants will attempt to clarify the confusion presented by the Appellee and show the true perspective of the statements and questions contained in the Appellee's Statement of Facts.

Appellee Shanahan begins her Statement of Facts with a deposition statement that was taken out-of-context and is completely irrelevant to the issue at hand. On December 15, 2010, during his deposition, Greg Adkins provided Smith's attorney with a copy (Exhibit C, attached to Petition) of the Adkins' bankruptcy discharge under 11 U.S.C. §727 (See Exhibit B, page 43 of the December 15, 2010 deposition of Greg Adkins, attached to Petition). At the top of Exhibit C is the ending of a series of questions about documents regarding the payment of a loan made in 2007 that was repaid. The Appellee claims, "There is a substantial issue of fact as to whether the loan occurred in 2007 as Relator testified or before the 2001 bankruptcy." See page 1 of Appellees' Merit Brief. The Adkins have never claimed a discharge of a loan in 2007 that was repaid. Neither did Smith ever allege the Adkins owed him money for a loan made in 2007. The sole issue was the claim of debts created by an oral contract in 1996.

In making the claim that the 2007 loan raises a substantial issue the Appellee has introduced a completely irrelevant issue. In doing so the Appellee ignored the clear facts in the case as follows:

1. The complaint alleged the Adkins co-signed for a Patriot mobile home in 1996 and received unjust enrichment related to the Patriot mobile home. Pursuant to the complaint

all of the circumstances involved took place in 1996. (See Exhibit A, Complaint, attached to Petition). The Patriot mobile home was never owned or titled by either the Smiths or the Adkins. The settlement that Smith made with the bank for \$7,000.00 was not related to the Patriot mobile home as alleged in the complaint, but the subject of the settlement was a Fleetwood mobile home, which was not alleged in the complaint. Moreover, the settlement did not include any parties to a co-signed agreement as alleged in the complaint;

2. Plaintiff Smith filed an affidavit on February 8, 2011, which he subsequently amended on February 25, 2011 (See Exhibits D and E, affidavits of Smith, attached to Petition). Smith's affidavits effectively changed his theory of the case from Adkins being a co-signer for the Patriot mobile home to allegations that the Adkins made an oral agreement to be co-signers for a loan to purchase a Fleetwood mobile home. According to the affidavits, the Adkins were left off the loan agreement because of the supposed inactions of two unnamed parties (See ¶6 in both affidavits, D-2 and E-2 respectively, attached to Petition); and
3. Prior to the trial the parties were required to file pre-trial statements. In his pre-trial statement, filed on January 3, 2012, Smith claimed his claims of breach of contract and unjust enrichment were based on an oral contract made in 1996. See (Exhibit F, Smith's Pre-trial statement at F-1, attached to Petition).

The sole issue from the complaint to the beginning of the trial was Smith's claim that the Adkins owed him money for a debt created in 1996 regarding a mobile home. How a statement regarding the full payment of a 2007 loan can become a substantial issue remains a mystery. This is especially true when the only allegations made by Smith were related to the 1996 purchase of a

mobile home by himself and Smith never raised an issue regarding the nonpayment of a 2007 loan.

The next confusing statement reflects that Appellee Shanahan did not really understand the case before her. On page 2, Shanahan states, "Next, Relator Adkins' claims [*sic*] that the trial is over a mobile home that no one involved with the case ever owned. (T.d. 1, Petition ¶ 7). Again if no party to the case ever owned the subject to the suit, how does the bankruptcy in 2001 affect the non-owned asset?" The true facts answer the question, as explained above, the complaint alleged the co-signing for a Patriot mobile, which neither party ever owned. When this fact was brought to Smith's attention he changed his theory, through his affidavits and the pre-trial statement, to claim that the Adkins orally contracted with him in 1996 to co-sign for a Fleetwood mobile home. Smith and his wife purchased the Fleetwood mobile home in their own names. They owned the Fleetwood mobile home until Smith settled with the bank in 2010 for \$7,000.00. The bankruptcy discharged the 1996 debts allegedly created by the Adkins and claimed in Smith's complaint and pre-trial statement.

Next, Appellee Shanahan claims that she thought the parties had reached an agreement. It is interesting that Judge Shanahan at Exhibit J-3 and J-4 clearly acknowledged there was no agreement. In Exhibit J-4, after explaining there was no agreement, Shanahan states at line 8-9, "And obviously, the two parties cannot agree." It was *because* Judge Shanahan proposed to continue the trial, when the bankruptcy discharge pre-empted her jurisdiction, that the Adkins filed their Petition for a Writ of Prohibition.

Next, Appellee Shanahan asserts that the Adkins did not raise the issue of bankruptcy as an affirmative defense and "wasted a year and a half" of the court's time. The issue of whether the Adkins were required to raise a bankruptcy discharge as an affirmative answer was fully

discussed as being in the Adkins' favor in their Merit Brief at pages 13-17. BUT, the court's time was not wasted by the Adkins, but rather, the time was wasted by Smith. It was Smith that filed a claim alleging a co-signed mobile home that never happened. A co-signature for a mobile home, if it did occur, would have made the Adkins co-owners of the mobile home. If they had owned such an asset, a no-asset, no-time bankruptcy discharge would not have been applicable to them. The real waste of time was caused by Smith falsely claiming the co-signing of a non-existent asset, *i.e.* the Patriot mobile home, and his continuation of the case after he had notice of the bankruptcy given to his attorney in the December 15, 2010 deposition. It was not until the day of the trial on January 10, 2012 that he even acknowledged the bankruptcy. To place the blame on the Adkins is inconsistent with the record at the trial and the Exhibits attached to the petition.

Just before concluding her Statement of Facts, Appellee Shanahan raises several non-sensical questions, which are clearly answered in the Statement of Facts in Appellants' Merit Brief.

1. "Did anyone own the mobile home?" As explained above, no one owned the Patriot mobile home as alleged in the Complaint.
2. "Was there a loan concerning the asset that nobody owned in 2007, six years after the bankruptcy?" There are no facts in the record of the municipal court or in the Petition that indicate that there was a loan made in 2007 regarding any mobile home. Nor were there claims made by Smith in the municipal court that a loan was made in 2007 that was not paid. The only loan made in 2007 was paid as Exhibit B-2 reflects.
3. "While the parties could not agree upon an entry reciting their settlement agreement, will one of the parties to the municipal court case seek to enforce the settlement agreement?" This question is purely speculative and has no relevance to the issue of jurisdiction. In any event, the question was answered on pages 17-18 of the Appellants' Merit Brief.

Because the alleged settlement agreement did not comply with 11 U.S.C. §§524(c) and (d), it is legally unenforceable.

4. “Why after the bankruptcy was disclosed, did the parties had [sic] had apparently reached a settlement.” The question is not germane to the issue of jurisdiction, which is before the Court. In any event, the question was answered in the Adkins Motion to Dismiss, at pages 5-6, which is attached to the Petition as Exhibit H. The whole purpose of the settlement was to avoid the cost of an extensive trial, which could only have two results. One result would be that the Adkins defense would be successful and they would win. The second, result would be that Smith would be able to prove his claims and he would win. If Smith won, the debt was automatically discharged. There would have been no need for a trial. But Smith’s attorney represented that there had to be a debt acknowledged before it could be discharged. The Adkins fully expected the settlement to result in a dismissal, but Smith wanted it to be placed on the record as a judgment. Later research by Adkins’ counsel resulted in discovering that the alleged settlement agreement was illegal.

Appellee Shanahan concluded her Statement of Facts with the Amended Entry of the 1<sup>st</sup> District Court of Appeals. Originally the court of appeals dismissed the Petition. But because the dismissal entry was confusing the Adkins filed for a reconsideration. Instead of granting the request for a reconsideration the court of appeals amended its Entry. The Amended Entry acknowledges that the Adkins did in fact establish “the existence of a no-asset discharge in bankruptcy as a bar to recovery on the loan guarantee.” This “patently and unambiguously” means that the municipal court had no jurisdiction to entertain or assume jurisdiction over the debt related to the Fleetwood mobile home, *i.e.* the \$7,000.00 Smith paid to settle the bank claim on the mobile home. Thus, the only question remaining was whether the municipal court had

jurisdiction over the remaining \$2,600.00 that was also alleged to have been created in 1996. As the discussions below will show, it is only debts created prior to the 2001 bankruptcy discharge that are discharged. "On going activity between the relators and the creditor" has no bearing on whether a debt created in 1996 can be discharged.

## II. REPLY TO APPELLEE'S ARGUMENTS

The Appellants Greg and Jo Ellen Adkins reaffirm and reassert their Propositions of Law as follows:

### **Proposition of Law I**

A municipal court lacks jurisdiction to hear claims by an alleged creditor for an<sup>1</sup> unsecured debt created prior to a discharge in a no-asset bankruptcy case under 11 U.S.C. §727.

### **Proposition of Law II**

An appellate court must grant a Writ of Prohibit when it is shown that a municipal court lacks jurisdiction to consider non-secured debts created prior to a discharge in a no-asset bankruptcy case under 11 U.S.C. §727.

#### **A. Reply to Appellee's First Proposition of Law**

Appellee's First Proposition of Law is:

In order for a writ of prohibition to be issued, the relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator either possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied or the lack of jurisdiction of the lower court is patent and unambiguous.

Appellants note that this proposition of law is essentially the same as the legal support given in their Merit Brief as set forth at pages 8-9 and more fully discussed on pages 9-11. The only difference is the addition of the alternative third criterion, "the lack of jurisdiction of the lower

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<sup>1</sup> Please note that the original Proposition of Law contained in the Merit Brief has a typographical error in which the word "and" was a typed instead of "an."

court is patent and unambiguous.” The addition of the alternative in the third criterion actually supports the Adkins arguments that the municipal court lacked jurisdiction.

In her attempt to carry the claim that the municipal court does have jurisdiction Appellee Shanahan claims that *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶12 supports this statement, “Neither this Court nor the court of appeals is required to address the merits of the Adkins’ jurisdictional claim because its jurisdiction in the writ case was ‘limited to determining whether jurisdiction is patently and unambiguously lacking.’” See page 4 of Appellee’s Merit Brief.

The *Burnside* case does not lend such support. The *Burnside* case was an action, filed by the prosecuting attorney, “for a writ of prohibition to prevent a common pleas court judge from enforcing an order in a capital case requiring the prosecuting attorney to provide all police reports and witness statements to defense counsel.” Id at ¶1. As explained in ¶11 the courts had broad discretion in addressing discovery matters. Thus, the common pleas court had discretion over discovery decision and a writ of prohibition could not be granted to control judicial discretion. The writ of prohibition in the *Burnside* case was denied because the Relator’s merit brief addressed the claim that the court abused her discretion in a discovery matter over which she had jurisdiction. *Burnside* does not even remotely apply in this Petition case because the very issue raised in the Petition was whether the municipal court had jurisdiction over a discharged bankruptcy claim.

Likewise the two cases cited by Shanahan, *State ex rel. Powell v. Markusm*, 115 Ohio St.3d 219, 2007-Ohio-4793, 874 N.E.2d 775, which quoted *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 751 N.E.2d 472 (2001) are also inapplicable. In *Markusm* the retired judge had jurisdiction to try a case by virtue of the Ohio State Constitution which allowed retired judges to

be appointed. In *McMonagle* the judge had jurisdiction through the application of the jurisdictional priority rule. Neither case lends any support to Shanahan's position that the municipal court can exercise jurisdiction over no-asset discharged debts, which are in the exclusive jurisdiction of the bankruptcy court.

In short, the Proposition of Law presented by Appellee is correct, but it supports the Adkins' claim for a writ of prohibition. Furthermore, Appellee Shanahan has failed to cite even one case that permits a municipal court to exercise jurisdiction in violation of the exclusive jurisdiction given the bankruptcy court in 11. U.S.C. §524(a). The phrase "patent and unambiguous" lack of jurisdiction is virtually synonymous with a court's judgment being void *ab initio* as opposed to being merely voidable or an error in judgment and thus correctable through appeal. A void *ab initio* decision is a decision that was void from the beginning. See *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph three of the syllabus. *Cheap Escape Co., Inc. v. Haddox, LLC*, (Ohio 2008) 2008-Ohio-6323, 120 Ohio St.3d 493, 900 N.E.2d 601, ¶7, defined subject matter jurisdiction. "'Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits' and 'defines the competency of a court to render a valid judgment in a particular action.'" Since the discharge injunction under 11 U.S.C. §524(a) prohibits the continuation of an action on a discharged claim and any judgment obtained in violation of the discharge injunction is not valid and/or is void *ab initio*, the Hamilton County Municipal Court and Judge Shanahan patently and unambiguously lacked subject matter jurisdiction over the discharged debt.

#### **B. Reply to Appellee's Second proposition of Law**

Appellee's Second Proposition of Law is:

Where the attachments to a Petition for a Writ of Prohibition demonstrate that the parties to a suit in municipal court had an ongoing business relationship in the decade following a 2001 discharge in bankruptcy, the municipal court does not patently and unambiguously lack jurisdiction in an action regarding a business dispute between the parties.

This proposition of law has no factual or legal support whatsoever.

It should read,

Where the attachments to a Petition for a Writ of Prohibition *do not* demonstrate that the parties to a suit in municipal court *had a debt created between them in the decade following a 2001 discharge in bankruptcy, the municipal court does patently and unambiguously lack jurisdiction in an action regarding a 1996 debt dispute between the parties.*

Appellee Shanahan repeats several alleged issues in her second proposition of law that have been fully address in Adkins' Merit Brief. The argument presented offer no serious rebuttal to the arguments set forth in the Merit Brief. Indeed, the argument now presented have no factual or legal support.

#### **1. Attachments to Petition Must Be Considered in Context**

This issue was fully addressed in Adkins' Merit Brief at pages 12-13. Appellee Shanahan now states, "In this case there is no certainty about the facts surrounding the claims of the parties. Bankruptcies do not immunize an individual for future claims concerning business relationships that occur after the bankruptcy." This statement is true, but it does not reflect the facts in this case. The facts in set forth in the Petition for a Writ of Prohibition and the facts in the record of the municipal court action are identical.

Plaintiff Smith filed a complaint against the Adkins alleging debts created in 1996 involving a co-signing for a Patriot mobile home and funds lent for the initial expenses of insurance, payments and moving of the Patriot mobile home. After the Adkins informed Smith that the Patriot mobile home was never owned by either party, Smith altered his claims to an oral agreement with the Adkins in 1996 to co-sign for a Fleetwood mobile home and the initial expenses. This theory was carried into the trial with the statement in Smith's Pre-trial statement, "Plaintiff, Walker Wayne Smith, has brought this action against Defendants, Gregory D. Adkins and Jo Ellen Adkins, based upon a breach of an oral contract, and for unjust enrichment arising

from the purchase of a [Fleetwood] mobile home in 1996.” See page 1 of Exhibit F attached to the Petition.

Appellee Shanahan concludes this portion of the second proposition of law with this statement, “Obviously if there are ongoing business relationships after the date of discharge, the bankruptcy order has no effect upon disputes concerning the subsequent business relationships. What occurred, and when it occurred is a fact intensive determination.” Nowhere in her Merit Brief does Shanahan show that there is any dispute about a debt created after 2001. Nor did Shanahan point to any claim made by Smith for a dispute of an unpaid debt created after 2001. The facts are very clear. Smith never made a claim of an unpaid debt created after 2001. The alleged business relationship that did occur after 2001 was a loan in 2007 that was fully paid. The quote from the December 15, 2010 deposition (Exhibit B-2 attached to the Petition) was taken out-of context by Appellee Shanahan and incredulously transformed into a substantial issue as to whether there was any debt created after 2001. The statement does not reflect an unpaid debt created after 2001 and Plaintiff Smith never alleged that there was debt created after 2001. The bankruptcy discharged all debts existing at or before the date of the bankruptcy discharge in 2001. The fact that parties may have had ongoing business relationships after the bankruptcy does not negate the discharge of a debt created before the date of the bankruptcy discharge. The Adkins are in total agreement that any debt created after the 2001 discharge is not dischargeable. But, there is no evidence, nor did Smith make any allegations of a post bankruptcy debt, except in the imagination of the Appellee through the out-of context deposition statement.

## 2. Post Bankruptcy Business Arrangements and Ownerless Assets Not Relevant

The heading used by Appellee Shanahan is somewhat misleading. The only two issues addressed by Shanahan under this heading are the failure to raise the affirmative defense of bankruptcy in the Answer and the alleged ownerless asset. The issue of Adkins not raising bankruptcy as an affirmative defense was fully argued in Adkins' Merit Brief at pages 13-17 and the facts stated above. Appellee Shanahan has not offered any further factual or legal support that detracts from the arguments made by the Adkins. Furthermore, the claim that, "The Ohio courts of appeal have found that the failure to raise the bankruptcy as an affirmative defense in an answer, waives that defense," has long been held to be an antiquated argument and contrary to bankruptcy law. See *In Re Braun*, 141 B.R. 133, 138 (Bkrcty. N.D. Ohio 1992). The Shanahan's claim of a waiver of the bankruptcy discharge because the Adkins failed to list it as an affirmative defense has also been unequivocally rejected by the 6<sup>th</sup> Circuit. In *In Re Hamilton*, 540 F.3d 367, 372 (6<sup>th</sup> Cir. 2008), "This provision [§524(a)] was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action,'" (citations omitted).

Appellee Shanahan cites two cases that have already been shown not to have any application to the issue of a municipal court lacking jurisdiction over debts discharged through a no-asset bankruptcy. The first case cited is *Jungkunz v. Fifth Third Bank*, 99 Ohio App.3d 148, 650 N.E.2d 134 (1<sup>st</sup> Dist. 1994). It was not decided on the basis of a discharge in bankruptcy, but the issue was the doctrine *res judicata* being applied to a bankruptcy order. The term "affirmative defense" did not appear in the opinion. It therefore has no legal application to this case.

The second case cited is *Fountain Skin Care v. Hernandez*, 175 Ohio App.3d 93, 2008-Ohio-489, 885 N.E.2d 286 (2<sup>nd</sup> Dist.). ¶21 of *Fountain Skin Care* states that a discharge in bankruptcy is waived under Civil Rule 8(C). As explained in Adkins' Merit Brief Rule 8(C) does not result

in a waiver if the defense is not raised in the Answer. The *Fountain Skin Care* case can be further distinguished based on the facts in that case compared to the facts in this case.

Appellee Shanahan quoted only the first sentence of ¶21 of the *Fountain Skin Care* case. The quote was,

“We note that Carter failed to raise discharge in bankruptcy as an affirmative defense in his answer, as required by Civ.R. 8(C), which waives his right to raise this defense.”

The rest of the paragraph reads:

“Further, Carter inexplicably failed to present any evidence to the trial court that his petition in bankruptcy and subsequent discharge included the debt to Fountain Skin Care. Had he done so, he would have been legally excused from paying the amount owed to Fountain Skin Care. But, Civ.R. 56(E) is clear that a party opposing a motion for summary judgment must set forth specific facts that show there is a genuine issue for trial. Carter failed to do so, and the trial court properly granted Fountain Skin Care's motion for summary judgment with respect to Carter.”

In ¶13 the *Fountain Skin Care* court notes that Carter failed to submit any evidence that his debt was included in the discharge notice that he submitted. Appellee attempts to make it appear that the Adkins fit the same circumstances as Carter. On page 5 of her Merit Brief Appellee states, “The discharge in bankruptcy in this case reads: ‘Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed.’ (T.d. 1, Exhibit C-2).” Exhibit C-2 is the 11 U.S.C. §727 order of discharge. It does not list what debts were in fact discharged. But Appellee ignored the Letter to the Creditors, which is found on Exhibit B attached to the Motion to Dismiss. The Motion to Dismiss is attached to the Petition as Exhibit H. On Exhibit B-2 the creditors are clearly notified that the case is a no-asset, no time bar case. At the heading “Do Not File a proof of Claim at This Time” is the statement,

“There does not appear to be any property available to the trustee to pay creditors. You therefore should not file a proof of claim at this time. If it later appears that assets are available to pay creditors, you will be sent another notice telling you

that you may file a proof of claim, and telling you the deadline for filing your proof of claim.”

Thus, the Adkins, unlike Carter, did provide evidence that the unsecured debt created in 1996 was covered in the no-asset, no time bar discharge.

Furthermore, any impact that *Fountain Skin Care* may have had is rendered moot by Civil Rule 12(H)(3), which states, “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action.” The issue in this case is whether the municipal court had subject matter jurisdiction over an exclusive jurisdiction area of the bankruptcy court, i.e. discharged debts. The case should have been dismissed by Smith shortly after his attorney was presented in the December 15, 2010 deposition with the bankruptcy discharge. It wasn’t. It should have been dismissed by order of the court on January 10, 2012 when the court was notified of the bankruptcy. It wasn’t. The case should have been dismissed by order of the court shortly after the filing of Adkins Motion to Dismiss, which not only included the documentation and evidence of the bankruptcy discharge, but also the legal support showing the municipal court lacked jurisdiction over discharged debts. It wasn’t. When the municipal court continued to exercise jurisdiction, the Adkins filed for a Writ of Prohibition to prevent the improper exercise of jurisdiction.

Furthermore, the argument that an affirmative defense of bankruptcy is waived if not in an answer is contrary to bankruptcy law and regarded as an antiquated and superfluous argument. In a case remarkably similar to the instant case, and which is cited in *In Re Hamilton, supra*, the Bankruptcy Court in the Northern District of Ohio explained the why an affirmative defense was not required.

Mr. Shinaberry admitted that the complaint asked for money damages and also admitted that, upon review of debtor's petition, he could not determine the vehicle to which defendant's lien attached. See Schedule B-4. Mr. Shinaberry repeatedly

stated that the state court action complained of a postpetition conversion, yet, he could point to no allegation in the complaint alleging this action as postpetition. Furthermore, If the collateral no longer existed, as alleged in the state court complaint, and if the relief requested was monetary damages reflective of the outstanding unpaid indebtedness, Mr. Shinaberry, as an attorney with some 19 years of experience, knew that he sought a money judgment against Debtor for nonpayment of a preexisting loan, previously discharged in bankruptcy. Such a knowing and willful violation of one of the fundamental protections afforded by the filing of a bankruptcy petition, causes this court to consider Mr. Shinaberry's actions so seriously. *In re Barbour*, 77 B.R. 530, 17 C.B.C.2d 1277 (Bkrcty.E.D.N.C.1987) (violations of the discharge injunction are not to be treated lightly; intentional violations will not be tolerated by this court).

Mr. Shinaberry asserted that Debtor failed to raise, as an affirmative defense to the state court action, his discharge in bankruptcy. ***Indeed, such an affirmative defense is unnecessary and has been since 1970.***

Prior to 1970, the effect of a discharge was to create an affirmative defense that the Debtor could plead in any action brought on the discharged debt. A primary reason for the amendments was to effectuate the discharge and render needless its assertion as an affirmative defense in a subsequent state court action. In the usual case of discharge abuse or creditor harassment, suit would be brought in a local court after the granting of the discharge, and if the Debtor failed to plead the discharge affirmatively, the defense was deemed waived and an enforceable judgment could then be taken against him. Too often, the defense was in fact waived either through inadvertence, failure to be served or lack of means to obtain counsel. In any event, the former Debtor would find himself and his property subject to a judgment taken by default against him. Section 14f was enacted to prevent creditors from entering the arena of local courts and creating issues of waiver and default, and to restrain creditors holding such discharged debts from forcing the Debtor into any other forum or proceeding.

5 Collier on Bankruptcy ¶ 524.01 at 524-5 (15th ed. 1991).

***In order to further drive home this court's annoyance with such an antiquated argument, it will quote further:***

As stated in the report on this measure by the Senate Judiciary Committee, the major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the Debtor will not appear in that action, relying to his detriment upon the discharge. Often the Debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds,

or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

S. 4247 is meant to correct this abuse.... The creditor asserting nondischargeability will have to file a timely application in the absence of which the debt will be deemed discharged. H.R. 18871 provides that at the same time notice is given to creditors of the date by which objections to discharge must be filed, creditors are also notified of the date by which applications to determine nondischargeability of their debts must be filed. When timely filed, the matter will be heard in the bankruptcy court and final disposition made of it.

\* \* \* \* \*

The reasons behind the enactment of section 524(a), which is certainly comparable to and, in effect, amounts to a continuation of section 14f of the Act, include those which originally prompted the enactment of section 14f itself. With section 524(a)(2), however, congress has gone further and expanded section 14f(2) to encompass the enjoining of any act to collect a discharged debt such as dunning by telephone or letter, or indirectly through friends, relatives, or employees, harassment, threats of repossession and the like....

In essence, section 524(a) declares that any judgment rendered on a discharged debt in any forum other than the bankruptcy court is null and void as it affects the personal liability of the Debtor. Second, and perhaps more importantly, it contains an injunction prohibiting creditors holding discharged debts from (1) commencing an action on such debt....

Accordingly, should a creditor institute suit in a state court postdischarge, and obtain therein a judgment against the Debtor, such judgment is rendered null and void by section 524(a). The purpose of the provision is to make it absolutely unnecessary for the Debtor to do anything at all in the state court action.

Should the provisions of the discharge order be violated by a creditor subject thereto, such creditor will also have violated an injunction. He will thus be subject to citation for contempt in the bankruptcy court upon application of the Debtor.

*Id.* at 524-5-6, 524-7-9 (citations omitted). ***The court need say no more; defendant's argument is superfluous.***

See *In Re Braun, supra*, 141 B.R. at 138-139, (emphasis added).

The second issue raised under Appellee's heading of "Post Bankruptcy Business Arrangements and Ownerless Assets" is the "ownerless assets." According to the Appellee, "The suit, according to the Petition, involves an asset that neither party owned." It is true neither party owned the Patriot mobile home, contrary to the factual allegation Smith made in his complaint that the Adkins were co-signors. Appellee claims, on page 6 of her Brief, that, "These factual issues need to be resolved before relevance and materiality of the bankruptcy can be addressed." These factual issues were unmistakably and obviously resolved. The mobile home that eventually was to be the subject of the trial was a Fleetwood mobile home that Smith and his wife purchased in their own names. Through his affidavits and his pre-trial statement Smith clearly and unequivocally asserted that the debts he was seeking to recover were created from the circumstances surrounding the 1996 purchase of the Fleetwood mobile home. There were no other allegations or assertions made by Smith regarding any debt created after 2001.

### **3. Settlement Agreement Illegal**

Appellee Shanahan next claims that she has jurisdiction to enforce settlements. The Adkins thoroughly addressed this issue on pages 17-18 specifically noting that "Any settlement agreement that fails to adhere to the requirements of §§524(c) and (d) is unenforceable." See also *In Re Cruz*, 254 B.R. 801, 806 (Bkrcty. S.D. N.Y. 2000). Appellee cites numerous cases, but none of them address an illegal settlement. A case that closely parallels the Adkins' argument is *J&B Fleet Industrial Supply, Inc. v. Miller*, 2011-Ohio-3165 (7<sup>th</sup> Dist.). In *J&B* case Miller filed for a Chapter 7 bankruptcy, but continued to perform his obligations under the contract. *Id.* at ¶6. *J&B* filed suit to enforce the contract and Miller did not raise the bankruptcy defense until the amended answer. At ¶49 the court held,

"A discharge in bankruptcy under Section 727(a), Title 11, U.S.Code 'discharges the debtor from all debts that arose before the date of the order of relief.' Section

727(b), Title 11, U.S.Code. When dealing with a contract-based claim, the claim 'arises on the day the agreement is signed by the parties.' *In re May* (Bankr.Ct. S.D.Ohio.1992), 141 B.R. 940, 944. Thus, the 'right to payment, although contingent as to a future breach, arises when the parties enter into the [ ] contract.' *Id.*"

¶57 states in pertinent part,

"The failure to list a debt in a no-asset Chapter 7 bankruptcy petition does not affect its dischargeability. *In re Madaj* (C.A.6, 1998), 149 F.3d 467, 469-470 (holding that unsecured debt owed by Chapter 7 debtors was discharged in no-asset case, even though creditors did not learn of case until after entry of discharge order and noting that the law in this area is 'counter-intuitive.')

Moreover, 'a debt is either fraudulent or not depending on the debtor's actions and intent in incurring the debt in the first instance. An otherwise innocently incurred debt \* \* \* does not suddenly become a fraudulently incurred debt when the debtor fails to list it.' *Id.* at 471(parenthetical example omitted)."

The court further stated in ¶58,

"A party may voluntarily comply with an obligation after a bankruptcy discharge. Section 524(f), Title 11, U.S.Code. Absent a reaffirmation agreement that complies with the requirements of Section 524(c), Title 11, U.S.Code, such voluntary compliance does not create a new enforceable obligation. *In re Whitmer*, (Bankr.Ct.S.D.Ohio.1992), 142 B.R. 811, 815. See, also, *Rogers v. Huntington Natl. Bank*, 12<sup>th</sup> Dist. No. CA2004-03-005, 2004-Ohio-7045, at ¶21, citing *In re Turner* (C.A.7, 1998), 156 F.3d 713, 718 ('A reaffirmation agreement is the only means by which a debtor's dischargeable personal liability on a debt may survive a Chapter 7 discharge.')

There is no reaffirmation agreement between the parties in the record."

Likewise there is no reaffirmation agreement between the parties in the record. The alleged settlement agreement is a nullity and unenforceable. The overwhelming legal authority is that a settlement agreement made after a bankruptcy discharge that does not comply with 11 U.S.C. §524(a). The Appellee has failed to cite any authority to the contrary. Thus, the municipal court has no legal authority or jurisdiction to enforce an illegal settlement.

#### **4. This Court Need Not Determine Jurisdiction**

The sole function of a Petition for a Writ of Prohibition is to prevent the offending court from exercising jurisdiction where it lacks jurisdiction. The claim that neither appellate court nor this

Court is required to determine whether Judge Shanahan actually had jurisdiction is to ignore the issue. As was discussed above, the Appellee's citation of *Burnside, supra*, is inapplicable. The only issue for this Court is whether Judge Shanahan patently and unambiguously lacked jurisdiction. The facts set forth above clearly show that there was a patent and unambiguous lack of jurisdiction. The Amended Entry acknowledged that there a patent and unambiguous lack of jurisdiction regarding any claim involving the \$7,000.00 debt owed on the mobile home. The Amended Entry should have ruled the same for the remaining \$2,600.00 where the record clearly shows that Smith was attempting to enforce a debt created in 1996 and there is no record of any debt created after the 2001 bankruptcy, nor claimed by Smith in his complaint, affidavits or pre-trial statement.

### **III. CONCLUSION**

Appellants Adkins have clearly and unambiguously demonstrated that Judge Shanahan and the Hamilton County Municipal Court lacked jurisdiction to hear the claim of the unsecured debts alleged by Smith against the Adkins, which were created in 1996 and prior to a discharge in a no-asset bankruptcy case under 11 U.S.C. §727 in 2001. The Appellee Judge Shanahan has failed to offer any factual or legal authority to the contrary.

Appellants Adkins have also clearly and unambiguously demonstrated that all of the elements for a Writ of Prohibition have been satisfied in their Petition. They clearly demonstrated Judge Shanahan: 1.) was about to exercise judicial; 2.) that her exercise of such power was unauthorized by law, and 3.) that a denial of the writ of prohibition would cause injury for which no other adequate remedy exists. The Adkins established that the Honorable Judge Shanahan lacked jurisdiction to address a claim advanced by Plaintiff Smith that had been discharged pursuant to the discharge injunction under 11 U.S.C. §524(a). Neither the appellate court's Entry,

Amended entry, nor Judge Shanahan's Merit Brief have shown otherwise. To allow the Entry and the Amended Entry to stand would cause the First District Court of Appeals to be in direct conflict with the decisions of the Ohio Supreme Court, the 6<sup>th</sup> Circuit Court of Appeals and the Bankruptcy Court. It would also result in irreparable emotional, financial stress and damage to the Adkins and unnecessarily over burden an already fragile judicial economy.

WHEREFORE, since neither the February 29, 2012 Entry, nor the March 28, 2012, Amended Entry, have discredited any allegations or legal arguments in the Petition, it is clear neither Judge Shanahan, nor the Hamilton County Municipal Court, have subject matter jurisdiction to render a judgment on a discharged debt. The Adkins respectfully request the Ohio Supreme Court to reverse the February 29<sup>th</sup> Entry and March 28<sup>th</sup> Amended Entry and remand the case to the First District Court of Appeals with instructions to grant the Writ of Prohibition as requested by the Adkins.

Respectfully submitted this 8<sup>th</sup> day of June, 2012.



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#### CERTIFICATE OF SERVICE

The undersigned does hereby certify that the above Reply Brief was served on Christian J. Schaefer, Assistant Prosecuting Attorney, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 by pre-paid 1<sup>st</sup> Class US mail on June 8, 2012.



Charles E. McFarland