No. 12-3448

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re ABDULLAH ABDUL-RAHIM and STEPHANIE ABDUL-RAHIM,
Debtors.

ABDULLAH ABDUL-RAHIM and STEPHANIE ABDUL-RAHIM
Debtors-Appellants
— v. —
JOHN V. LABARGE, JR.,
Trustee-Appellee

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT COURT OF APPEALS No. 12-6037

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS AND SEEKING REVERSAL OF THE BANKRUPTCY APPELLATE PANEL'S DECISION

/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS,
AMICUS CURIAE
By its attorney Tara Twomey, Esq.
National Consumer Bankruptcy Rights Center
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

April 1, 2013

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Abdul-Rahim v. LaBarge (In re Abdul-Rahim), No. 12-3448

Pursuant to FRAP 26.1 and Eighth Circuit Local Rule 26.1A, *Amicus Curiae,* the National Association of Consumer Bankruptcy Attorneys , makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Is the party a trade association? **NOT APPLICABLE**

6) Does this case arise out of a bankruptcy proceeding? **YES**
If yes, identify any trustee and the members of any creditors' committee.

CHAPTER 7 TRUSTEE, John v. LaBarge
THERE IS NO CREDITORS' COMMITTEE

_s/Tara Twomey Dated: April 1, 2013
Tara Twomey, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,800 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367 (2010); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007); *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006).

Bankruptcy has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. Exemptions allow debtors to keep those items of property deemed essential to daily life and are therefore a key important component of the debtor's fresh start. In tort law, monetary damages are intended to redress a wrong done to a person; the compensation is intended to make the victim whole.

Here the policy of giving the debtor a fresh start and allowing debtors to exempt personal injury actions go hand in hand. Missouri law has long favored restoration of injured victims over the collection rights of unsecured creditors, and its courts have consistently applied these restorative principles equally inside and outside of bankruptcy.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

No party's counsel authored this Amicus Curiae Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amicus curiae, it members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Whether the Debtors in this case may exempt an unliquidated personal injury claim in their bankruptcy case is fundamentally a question of Missouri state law. Under Missouri law, courts have repeatedly held that such a claim is exempt in bankruptcy. Allowing debtors to exempt personal injury claims is consistent with policies underlying both bankruptcy and tort law. The fact that the exemption at issue here is based in common law is irrelevant. Nothing in section 522(b)(3) or the history of the 1978 Bankruptcy Code suggests that only "statutory" exemption

are permitted in states that have opted-out of the federal exemption scheme. This Court's dicta in *In re Benn*, 491 F.3d 811 (8th Cir. 2007), which suggests all state exemptions must be statutory, is not consistent with the law of Missouri or the plain language of section 522(b)(3).

ARGUMENT

I. *Benn* is not controlling in this case because the questions presented and answered in *Benn* are not in dispute here.

In 2007, this Court decided *In re Benn*, 491 F.3d 811 (8th Cir. 2007). The only two questions presented in that case were (1) whether a portion of the debtor's anticipated tax refunds were property of the bankruptcy estate and (2) whether Missouri's opt-out statute created an exemption for tax refunds. In answering these questions, the Court first held that tax refunds attributable to pre-petition event were property of the estate. Second, the Court held that Missouri's opt-out statute, Mo. Rev. Stat. § 513.427, did not create independent exemption rights not otherwise available under federal non-bankruptcy law or state law.

The issues in *Benn* are not in dispute in this case. On appeal the debtors do not argue that their personal injury claim is not property of the estate. Nor do they argue that section 513.427 creates an independent exemption for their personal injury claim.

The question here is whether Missouri common law can serve as the basis for exemption of the debtors' personal injury claim. The *Benn* court was not called upon to decide whether an exemption could be grounded in Missouri common law as opposed to Missouri statutory law. Nevertheless, the *Benn* court stated that: "where another Missouri ***statute*** specifies that certain property is exempt from attachment and execution then the debtor may exempt that property from the bankruptcy estate." *Benn*, 491 F.3d at 814 (emphasis added). The *Benn* court could have easily reached the same conclusion by adhering more closely to the language of the statute and concluding that section 513.427 is an opt-out statute, and that the statute's reference to property "exempt from attachment and execution" means property that has been declared "exempt" under Missouri law. *See id*. at 815. There was no need for the *Benn* court to conclude that exemptions were only valid if declared by the legislature. The reference to statutory exemptions was not essential in answering the questions presented in *Benn* as there was no specific common law exemption for tax refunds under Missouri law. Therefore, the *Benn* court's statements concerning a "statutory requirement" for an exemption to exist are non-binding *dicta*. *See John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 550 (8th Cir. 1990) (court not required to follow dicta of another panel). Despite the non-binding nature of these statements, bankruptcy courts, like the court below, have

subsequently held that the language in *Benn* precludes the use of common law as a basis for exemption.

II. Missouri courts have consistently and repeatedly held that personal injury claims may be exempted from the bankruptcy estate under Missouri law.

In 1978, Congress gave states the explicit right to opt-out of the federal exemption scheme. 11 U.S.C. 522(b)(3). In enacting the opt-out provision Congress recognized the "impossibility of enacting federal legislation that could take into account the various circumstances and conditions that exist from state to state…" In re *Butcher*, 189 B.R. 357, 371 (Bankr. D. Md. 1995). The provision allows states to determine the exemptions available to debtors within its borders. Nowhere, however, is there any indication that Congress intended section 522(b)(3) to act as a limitation of exemptions available under state law (*e.g.*, restricting exemptions only to statutory exemptions). Missouri has opted-out of the federal exemption scheme and as a result the Debtors in this case may only exempt property that is exempt under non-bankruptcy federal law, state law, or local law. 11 U.S.C. § 522(b)(3). Here the debtors argue that their personal injury claim is exempt under state law (*i.e.*, state common law).

Whether Missouri law exempt personal injury claims is fundamentally a state law question. As such, the law declared by the state's highest court is binding on this Court. *Washington v. Countrywide Home Loans, Inc.,* 655 F.3d 869, 873

(8th Cir. 2011) (*citing Erie v. Tompkins*, 304 U.S. 64, 78 (1938)). The Missouri Supreme Court has not addressed the issue presented. As a result, this Court may consider "relevant state precedent, analogous decisions, considered dicta,…and any other reliable data," including intermediate appellate court decisions if they are the "best evidence" of state law, to predict how the highest court of the state would resolve the issue. *Gage v. HSM Electronic Protection Servs., Inc*., 655 F.3d 821, 825 (8th Cir. 2011) (citations omitted). If the state law is ambiguous, this Court must predict how the Missouri Supreme Court would resolve the issue. *Amco Ins. Co. v. Inspired Technologies Inc.,* 648 F.3d 875 (8th Cir. 2011).

Here there is no ambiguity. The Missouri courts have consistently and repeatedly held that unliquidated personal injury claims are ***exempt*** property for purposes of bankruptcy. As noted in *Russell v. Healthmont of Missouri, LLC*, 348 S.W.3d 784, 787 (Mo. App. W.D. 2011), the dicta in *Benn* requiring exemptions to be statutory disregards "extensive Missouri case law interpreting 513.427." *See* In re *Mitchell*, 73 B.R. 93, 95 (Bankr. E.D. Mo. 1987), *aff'd* 855 F.2d 859 (8th Cir. 1988); *see also Scarlett v. Barnes*, 121 B.R. 578, 580 (W.D. Mo. 1990); In re *Williams*, 293 B.R. 769 (Bankr. W.D. Mo. 2003).

III. The exemption of personal injury claims is entirely consistent with the policies animating both bankruptcy law and tort law.

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974); *In re Sanchez*, 372 B.R. 289, 296-98 (Bankr. S.D. Tex. 2007). To achieve the dual goals of bankruptcy, the Code first creates the bankruptcy estate upon commencement of a case. 11 U.S.C. § 8. Some property, such as that described in section 541(b), is specifically excluded from becoming property of the estate. *See, e.g.*, 11 U.S.C. § 541(b)(5) (excluding certain funds placed in an education savings accounts). Other property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. 11 U.S.C. § 522(b)(l). Historically, the purpose of exemption law has always been to allow debtors to keep those items of property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start by maintaining essential property necessary to build a new life. *See* H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."); *Rousey v. Jacoway*, 544 U.S. 320, 322, 325 (2005).

One of the primary purposes of tort law is to redress a wrong done to a person, usually by awarding them monetary damages as compensation. *See Extended Stay, Inc. v. American Auto. Inc. Co.,* 2012 WL 2317545 (Mo. App. 2012); *see also, e.g., Hoyal v. Pioneer Sand Co., Inc*. 188 P.3d 716 (Colo. 2008); *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098 (Fla. 2008); *Steigman v. Outrigger Enterprises, Inc.,* 267 P.3d 1238 (Haw. 2011); *Alejandre v. Bull*, 153 P.3d 864 (Wash. 2007); *Merten v. Merten*, 321 N.W.2d 173 (Wis. 1982). Costs of injuries include actual physical loss, lost earnings, medical expenses and mental suffering. Financial compensation to injured victims is intended to replace their losses. That is, personal injury awards are intended to place the tort victim back in a position to that prior to the tort.

Here the policy of giving the debtor a fresh start and allowing debtors to exempt personal injury actions go hand in hand. This is so because such an exemption "deals not so much with the debtor's property, but with the debtor's human capital." *Medill v. State*, 477 N.W. 2d 703, 708 (Minn. 1991). It is not unreasonable that Missouri law protects and individual's human capital by putting it beyond the reach of creditors. *Id*., *citing* The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393, 1397 (1985). Further "[o]f the various forms of wealth, human capital is not only the least diversifiable, but also has the most direct bearing on the future well-being of the individual and the people who

depend on him . . . The debtor who suffers serious personal injury is deprived of using his or her human capital in getting a fresh start." *Id.*

Missouri law has long favored restoration of injured victims over the collection rights of unsecured creditors, and its courts have consistently applied these restorative principles equally inside and outside of bankruptcy.

CONCLUSION

For the reasons stated above, *amicus curiae* asks this court to reverse the decision of the Bankruptcy Appellate Panel below.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains approximately 1,857 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: April 1, 2013.

_s/Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on April 1, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
By its attorney Tara Twomey, Esq.
National Consumer Bankruptcy Rights Center
1501 The Alameda
San Jose, CA 95126
(831) 229-0256