COURT OF APPEALS DECISION DATED AND FILED

March 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP1216

Cir. Ct. No. 2011CV4957

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

KEVIN KLEIN AND PENNY KLEIN,

PLAINTIFFS-APPELLANTS,

V.

DUREN LAW OFFICES, LLC, CHRISTOPHER DUREN AND WILMIC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Kevin and Penny Klein appeal the circuit court's judgment dismissing their legal malpractice action against their former bankruptcy

counsel, Attorney Christopher Duren, his law firm, and the firm's malpractice insurer.[1] The Kleins' arguments relate to the enforceability of a reaffirmation agreement between the Kleins and one of their creditors, Associated Bank. A reaffirmation agreement is a contract between a debtor and a creditor that allows a debt that is otherwise dischargeable in a Chapter 7 bankruptcy to survive the bankruptcy. ***In re Golladay***, 391 B.R. 417, 421 (Bankr. C.D. Ill. 2008).

¶2 Attorney Duren represented the Kleins in their Chapter 7 bankruptcy and allegedly advised the Kleins that they needed to sign a reaffirmation agreement with Associated Bank in order to keep their house. After the Kleins received their discharge in bankruptcy, Associated Bank sued to recover a debt that, the bank asserted, survived the bankruptcy because of the reaffirmation agreement. The basis of the malpractice suit here is the proposition that entering into the reaffirmation agreement ran contrary to the Kleins' interests. Attorney Duren's primary defense to the Kleins' suit is his assertion that the agreement is unenforceable.

¶3 The circuit court concluded that the reaffirmation agreement is unenforceable as a matter of law. The court further concluded that, if the Kleins' claims were tried, the jury would be instructed that the agreement is unenforceable.

¶4 Faced with the court's conclusions that the agreement is unenforceable and that a jury would be told the agreement is unenforceable, the Kleins stipulated that they could not show that Duren's alleged negligence caused

[1] We refer from now on to "Attorney Duren" or just "Duren" regardless whether we mean Christopher Duren individually or the respondents collectively.

them compensable damages. The Kleins now challenge the circuit court's conclusions, making two main arguments that we quote verbatim:

> (1) "The reaffirmation agreement met all the requirements for enforcement, making it an error to hold it invalid as a matter of law."
>
> (2) "The Kleins could prove damages to a jury, regardless of the enforceability of the reaffirmation agreement, if a jury is not told that it was unenforceable."

We reject the Kleins' arguments, and affirm.

Background

¶5 We summarize the pertinent allegations in the Kleins' complaint in order to provide additional context for their claims against Attorney Duren. The Kleins alleged that:

- The Kleins intended to use the bankruptcy to help them keep their house.
- The Kleins planned to negotiate for a modification of a first mortgage on their house.
- Associated Bank held a second mortgage on the Kleins' house.
- Duren was aware that the Kleins had not yet arranged to modify the first mortgage but advised them that they needed to sign a reaffirmation agreement with Associated Bank in order to keep their house. Duren did not, however, advise the Kleins on the "specifics" of the reaffirmation agreement.
- The Kleins relied on Duren's advice (or lack thereof) in signing the reaffirmation agreement with Associated Bank.
- The Kleins were not able to obtain a modification of the first mortgage.
- After the Kleins received their bankruptcy discharge, the first mortgage holder foreclosed on their house.

- Associated Bank then sued the Kleins, seeking to hold the Kleins personally liable for a money judgment based on the reaffirmation agreement.

Shortly before the Kleins filed their action against Duren, they settled the suit with Associated Bank.

¶6 The Kleins' complaint and the parties' briefing lead us to make two assumptions that supply further context but are not necessary to our decision. First, we assume that the first mortgage holder was able to foreclose on the Kleins' house despite the bankruptcy discharge. *See* ***Johnson v. Home State Bank***, 501 U.S. 78, 83 (1991) ("[The Bankruptcy] Code provides that a creditor's right to foreclose on the mortgage survives or passes through the [Chapter 7] bankruptcy."). Second, we assume that Associated Bank was unable to fully recover in the foreclosure action because the foreclosure sale proceeds were insufficient to cover the full amount the Kleins owed Associated Bank.

¶7 Attorney Duren asserted as a defense to the Kleins' malpractice action that the reaffirmation agreement was unenforceable. Duren argued that, if the agreement is unenforceable, his alleged negligence could not reasonably be viewed as a substantial factor in causing the Kleins to settle with Associated Bank. In other words, Duren's theory of defense was that the Kleins could not show that Duren caused them any harm because Associated Bank's suit against the Kleins was based on an unenforceable agreement and, therefore, was meritless.

¶8 The circuit court concluded that the reaffirmation agreement is unenforceable because the Kleins failed to complete a required section of the agreement, the "Part D" debtor's statement. As already indicated, the court also concluded that, if the Kleins' claims were tried, the jury would be instructed that the agreement is unenforceable. The Kleins then stipulated that they could not

prove that Attorney Duren's alleged negligence caused them compensable damages, effectively agreeing to the dismissal of their malpractice claim but retaining the right to challenge on appeal the circuit court's ruling that the reaffirmation agreement is unenforceable and that the jury should be instructed that it is unenforceable. The circuit court entered judgment based on its conclusions and the Kleins' stipulation.

Discussion

A. The Kleins' First Argument—Enforceability Of The Reaffirmation Agreement

¶9 The Kleins argue that "[t]he reaffirmation agreement met all the requirements for enforcement, making it an error to hold it invalid as a matter of law." The enforceability of the agreement presents a question of statutory interpretation under 11 U.S.C. § 524 of the Bankruptcy Code ("§ 524"). This is a question of law that we review de novo. *See* ***State v. Johnson***, 2009 WI 57, ¶22, 318 Wis. 2d 21, 767 N.W.2d 207.

¶10 In their principal brief, the Kleins fail to develop arguments explaining why the circuit court was wrong to conclude that the reaffirmation agreement is unenforceable based on the Kleins' failure to complete the Part D debtor's statement. Rather, the Kleins focus on whether § 524 requires a "civil cover sheet." The Kleins appear to believe the circuit court concluded that the agreement is unenforceable because the Kleins did not sign the cover sheet or timely file it. The Kleins' apparent assumption that the circuit court relied on a problem with the cover sheet is incorrect. The circuit court referenced the cover sheet, but only in explaining why the cover sheet—which contained information that was missing from Part D—was not a substitute for the incomplete Part D.

¶11 The issue before us is whether the circuit court correctly concluded that the reaffirmation agreement is unenforceable under § 524 because the Kleins failed to complete Part D. We agree with Duren that the circuit court got this right. Although the statute is lengthy and complex, when we focus on the pertinent provisions we see that those provisions clearly support the circuit court's conclusion.

¶12 Section 524 provides:

> (c) [A reaffirmation agreement] … is enforceable … only if ….
>
> ….
>
> (2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement[.]
>
> ….
>
> (k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3) [below], *completed as required in that paragraph*, together with [other items] ....
>
> ….
>
> (3) The disclosure statement required under this paragraph shall consist of the following:
>
> ….
>
> … The following additional statements:
>
> "Reaffirming a debt is a serious financial decision. *The law requires you to* take certain steps to make sure the decision is in your best interest. If these steps are not completed, *the reaffirmation agreement is not effective, even though you have signed it.*
>
> "1. Read the disclosures ….
>
> "2. *Complete and sign Part D* ….

(Emphasis added.) Stripped down to the most pertinent language, § 524 directs: "The law requires you to ... [c]omplete and sign Part D," and the failure to do so means that "the reaffirmation agreement is not effective, even though you have signed it."

¶13 Section 524 also provides the required content for Part D. Specifically, the statute states, in relevant part:

> (6)(A) The statement in support of [the] agreement … shall consist of the following:
>
> "Part D: Debtor's Statement in Support of Reaffirmation Agreement.
>
> "1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $________, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $________, leaving $________ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ________.

Section 524(k)(6)(A).

¶14 To summarize, § 524 provides that:

- The reaffirmation agreement is enforceable only if the debtor receives certain "disclosures."
- The disclosures must include the Part D debtor's statement.
- The Part D debtor's statement must inform the debtor that "the reaffirmation agreement is not effective" unless the debtor "complete[s] and sign[s] Part D."

- The debtor must complete and sign Part D.

- Part D must contain certain representations pertaining to the debtor's income and expenses.

Reading the § 524 provisions together, we see no other way to interpret § 524 other than as conditioning the enforceability of a reaffirmation agreement on a completed and signed Part D.

¶15 The Part D in the Kleins' reaffirmation agreement is on a form that appears to track the statute. And, as the circuit court found, the Kleins failed to complete Part D. Specifically, the Kleins failed to fill in any of the blanks pertaining to their income and expenses. Rather, they signed Part D without filling in the blanks. Therefore, because the Kleins did not complete *and* sign Part D, the reaffirmation agreement is not enforceable.

¶16 Bankruptcy cases that Attorney Duren cites further support the circuit court's conclusion. *See* ***In re Grisham***, 436 B.R. 896, 907 (Bankr. N.D. Tex. 2010) ("[T]here are lengthy disclosures and other requirements in Section 524 that must be adhered to for a reaffirmation agreement to be enforceable."); ***Golladay***, 391 B.R. at 421 ("In order for a reaffirmation agreement to be valid and enforceable, it must strictly comply with all of the requirements set forth in § 524(c)."); *see also* **Lumby v. Lumby**, 116 Wis. 2d 347, 351, 341 N.W.2d 725 (Ct. App. 1983) (concluding that a "reaffirmation … not performed in accordance with 11 U.S.C.S. secs. 524 and 727(a)(10) … is invalid").

¶17 The Kleins belatedly raise Part-D-related arguments in their reply brief. We will address those arguments, although we could choose not to. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285

(Ct. App. 1998) (we generally do not address arguments raised for the first time in a reply brief).

¶18 The Kleins argue that they "substantially" complied with Part D because the information that would have gone in the Part D blanks was on the civil cover sheet that accompanied the reaffirmation agreement. We reject this argument for two reasons.

¶19 First, we are not persuaded that the Kleins substantially complied. As the circuit court recognized, the Kleins did not sign the cover sheet, so it is not apparent how the cover sheet could serve as a substitute for the incomplete Part D. So far as we can tell from the Kleins' briefing, the Kleins did not make the required Part D affirmations under their signature. If there is a persuasive reason why the unsigned cover sheet combined with the signed, but incomplete, Part D could constitute substantial compliance, the Kleins have not provided it.

¶20 Second, we are not persuaded that substantial compliance would be sufficient. More persuasive is language in bankruptcy case law explaining why Congress would intend strict adherence to the requirements. *See, e.g.*, ***Golladay***, 391 B.R. at 421 ("Because reaffirmation agreements are effectively waivers of discharge with respect to a particular creditor, they are exceptions to the 'fresh start' objective of the bankruptcy process and, as such, they are strictly construed and the requirements imposed for their validity are enforced rigidly.").

¶21 The Kleins cite ***In re Minardi***, 399 B.R. 841 (Bankr. N.D. Okla. 2009), as supporting the proposition that "[a reaffirmation] agreement that does not strictly comport with the bankruptcy rules still may be approved by the Court." ***Minardi*** does not state or support this proposition. Instead, ***Minardi*** recognizes the strict compliance rule: "[C]ourts generally have insisted that reaffirmation

agreements strictly comply with the conditions enumerated in the statute." ***Id.*** at 849 (quoting ***In re Jamo***, 283 F.3d 392, 398 (1st Cir. 2002)). It is true that the court in ***Minardi*** noted in passing that the agreement there was not on a standard court form. *See* ***id.*** at 844. However, the non-form nature of the agreement was not at issue in ***Minardi***.

¶22 The Kleins cite ***In re White***, No. 10-12804, 2012 WL 404927 (Bankr. D. Kan. Feb. 7, 2012), as supporting the proposition that "[l]egal errors in approving a reaffirmation agreement do not void out or invalidate that agreement." ***White*** does not state or support this proposition. As pertinent here, ***White*** instead stands for the proposition that, under the Federal Rules of Civil Procedure, a court is not required to (but may) set aside a final bankruptcy order when it is later shown that a reaffirmation agreement was noncompliant. *See* ***id.*** at *1-6. The court was addressing the voidness of the *order* for purposes of the Federal Rules, not the voidness of the agreement. *See* ***id.***

¶23 The Kleins cite ***In re Hart***, 402 B.R. 78 (Bankr. D. Del. 2009), for the proposition that "[a] reaffirmation agreement for consumer debt secured by real property need not even be approved by the Court to be enforceable." ***Hart*** supports this proposition, but we fail to see how that proposition helps the Kleins. The *absence* of court approval seemingly says nothing about enforceability of the agreement.

¶24 Finally, the Kleins argue that in their case the bankruptcy court "accepted" the reaffirmation agreement for filing and later refused to reopen the bankruptcy in order to consider the agreement's validity. This argument goes nowhere without more explanation. If the Kleins mean to argue that the bankruptcy court's "accept[ance]" of the agreement or its refusal to reopen the

bankruptcy is somehow preclusive on the issue of the agreement's enforceability, the Kleins fail to explain or support that argument with authority. Moreover, the Kleins do not tell us why the bankruptcy court declined to reopen the bankruptcy.

B. The Kleins' Second Argument—Jury Instruction That Reaffirmation Agreement Is Unenforceable

¶25 The Kleins argue that they "could prove damages to a jury, regardless of the enforceability of the reaffirmation agreement, if a jury is not told that it was unenforceable." As we understand the Kleins' supporting arguments, they assert that, even if the circuit court correctly concluded that the agreement is unenforceable, the court was wrong to conclude that a jury should be instructed that the agreement is unenforceable. In the Kleins' view, instructing the jury that the agreement is unenforceable would wrongly take the question of causation and damages from the jury. We are not persuaded.

¶26 In support of their argument, the Kleins assert that Attorney Duren's negligence caused them damages because the reaffirmation agreement's "mere existence" forced the Kleins to litigate with Associated Bank, regardless of the agreement's enforceability. The Kleins cite a case suggesting that a malpractice plaintiff may recover damages for being "forced … to engage in litigation they otherwise would not have had to engage in." *See* ***Gustavson v. O'Brien***, 87 Wis. 2d 193, 203, 274 N.W.2d 627 (1979); *see also* ***id.*** at 201-02. The Kleins assert:

> The bottom line is, even if the Associated Bank case was 100% frivolous, it only existed because Duren told the Kleins to sign the reaffirmation agreement, and Duren then filed it with the Bankruptcy Court. It was inappropriate for the circuit court to rule that the jury should be told that Duren's malpractice resulted in an invalid agreement when the validity of the agreement was of no practical or legal effect.

In other words, we understand the Kleins to be arguing that, regardless whether the agreement is legally enforceable, Duren's role in prompting its formation was a cause of the litigation between the Kleins and Associated Bank, and that litigation caused the Kleins compensable damages.

¶27 Assuming the Kleins' caused-litigation-regardless-of-merit theory of damages is viable, we fail to see why instructing a jury that the agreement is unenforceable negatively impacts the Kleins. Stated differently, we see nothing inconsistent between the Kleins' explanation of their caused-litigation theory and a jury instruction that the reaffirmation agreement is unenforceable. Indeed, so far as we can tell, such an instruction would clarify the malpractice and damages issues in the type of trial the Kleins contemplate. Let us explain.

¶28 Under the Kleins' theory, the mere existence of the reaffirmation agreement was the reason they were sued by Associated Bank. At trial, if a jury bought the Kleins' theory, the jury would still need to determine what portion of the litigation and its expenses and related damages was attributable to the existence of the reaffirmation agreement. Knowing that the agreement is unenforceable would assist the jury in determining whether the litigation and resulting damages were solely attributable to Attorney Duren or, instead, attributable to both Duren and the Kleins' new counsel in the Associated Bank litigation. For example, the record discloses that the Kleins paid money to Associated Bank as part of a settlement agreement. Knowing that the reaffirmation agreement is unenforceable would seemingly shed light on whether Duren should be responsible, based on the agreement's mere existence, for any portion of the settlement money paid to Associated Bank.

¶29 In sum, the Kleins have not demonstrated that the circuit court erred when the court concluded that it would be proper to instruct a jury that the reaffirmation agreement is unenforceable. Contrary to what the Kleins suggest, the circuit court's ruling on this topic did not prevent them from advancing their caused-litigation theory, at least not as they explain that theory now.

¶30 Alternatively, the Kleins appear to be asserting that, regardless of the agreement's enforceability, a jury should not have been instructed on the issue of enforceability because the jury should have been allowed to consider whether a different judge—and, in particular, the judge in the Associated Bank litigation—might have ruled that the agreement is enforceable. If that is their argument, we disagree.

¶31 As Attorney Duren argues, the jury's role is to decide questions of fact, not questions of law. *See* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 107, 362 N.W.2d 118 (1985) (citing with approval to a case explaining that, "in a legal malpractice action, the trial judge should decide disputed issues of law, and the jury should decide disputed issues of fact"). Here, whether the reaffirmation agreement is unenforceable under § 524 is a question of law that we have now concluded the circuit court correctly decided. Moreover, the inquiry is objective, not subjective as the Kleins seem to think. In other words, the question is what a judge correctly interpreting the law would have concluded in the underlying case, here the Associated Bank litigation, not what the particular judge in that case

might have actually concluded. *See* ***id.*** at 104-05. The correct interpretation is that the reaffirmation agreement is unenforceable.[2]

Conclusion

¶32 In sum, for all of the reasons stated we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[2] In what seems like yet another alternative formulation of their argument relating to instructing the jury, the Kleins assert the following: "What the Kleins *really* had to prove here was that it was *more likely than not* that *because of the reaffirmation agreement*, they would have lost the [Associated Bank litigation] ...." We do not see how this adds to the Kleins' arguments, and do not consider this assertion further.