

1995

# Earnest G. Clark and Verda Clark v. Morris Meyers and Royal K. Hunt : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO. 950526

Earnest G. Clark and Verda  
Clark,

Plaintiffs and Appellants,

John Harr, Sr.,

Case No. 950526-CA

Plaintiff in Substitution  
and Appellant,

V.

Morris Myers and Royal K. Hunt,

Defendants and Appellees.

PETITION FOR REHEARING

Appeal from a final order of the Third District Court  
Salt Lake County, State of Utah  
The Honorable Anne M. Stirba, Presiding

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LED

MAR 20 1996

UTAH COURT OF APPEALS

ERNEST G. CLARK and VERDA CLARK,  
Plaintiffs and Appellants,

JOHN HARR, SR.,

No.950526-CA

Plaintiff in Substitution  
and Appellant

V.

MORRIS MYERS and ROYAL K. HUNT,

Defendants and Appellees.

PETITION FOR REHEARING

Defendants and appellees, Myers and Hunt, herewith make and file their petition for rehearing in reference to the MEMORANDUM DECISION (Not For Official Publication) of the Court and with particularity state the points of law or fact overlooked or misapprehended by the Court, as follows:

Argument

Facts relevant to this petition: On February 26, 1990, plaintiffs-appellants Clark obtained a judgment against Hunt and Myers for \$74,739.00 (r. 272-75). Appellee Hunt filed chapter 7 bankruptcy in 1992 and scheduled several judgments, including the Clark judgment for \$74,739.00, in Schedule F as unsecured nonpriority claims (r. 315). Hunt

also scheduled the real property at 8171 South Marion View Circle in Sandy, Utah, as a real property asset.

Hunt was discharged in the bankruptcy on October 19, 1992 (r. 314) and his personal liability on the Clark judgment was thereby discharged; see 11 USC 524(a)

On October 11, 1994, a general execution was issued at Harr's instance to which was attached Harr's attorney's praecipe to the sheriff "to levy upon the real property of Royal K. Hunt 8177 South Marion View Circle, \* \* \*"; the sheriff then filed his notice of levy (r. 374-75). Hunt's motion for an order vacating the execution and levy was granted on February 27, 1995 (r. 513-14).

Harr's appeal resulted in the Court's Memorandum Decision (Not For Publication) reversing the lower court's order vacating the execution and levy.

In its decision the Court mentions Dewsnap v. Timm 502 U.S. 410 (1992) to support its conclusion; Dewsnap involves a Deed of Trust, not a judgment, which precludes the application of 11 USC Sec. 524(a) which specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to the prepetition debt, and operates as an injunction against the commencement of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, \* \* \* The injunction is to give complete effect to the discharge. The Court also mentions Cox Corp. v. Vertin, 754 P.2d 938 (Utah 1988) which does involve a judgment. In that case, as in this case, the bankruptcy discharged the debtor's personal liability on the judgment and the Utah Court

was not disposed to continue the "lien independent of the judgment on which it is based." Cox Corp., 754 P.2d, at 939. This is the position appellees' took in their answering brief in the appeal. See In re Duncan, 60 B.R. 345 (Bkrtcy. M.D. Ala. 1986) which is in accord with Utah's Cox Corporation case.

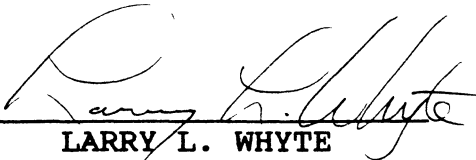
"Applying the basic law of judgments, the discharge in this case released the debtor[] from the debt \* \* \* represented by the judgment. 11 USC Sec. 727(b). Section 727(b) is the heart of the fresh start provisions of bankruptcy law. The effect of release from the judgment debt is to extinguish the judgment. The judgment itself is void. 11 USC Sec. 524(a). **Since a judgment lien cannot exist independently of the judgment, such lien is discharged by the satisfaction and extinguishment of the judgment.** 47 Am.Jur. 2d, Judgments, Sec. 995." In re Duncan, 60 B.R. 345, 348.

#### Conclusion

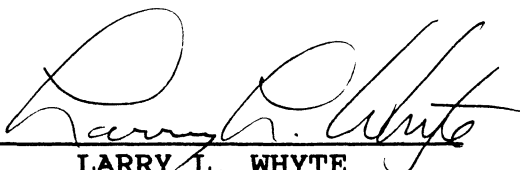
In its decision the Court states "Plaintiff's [sic] are entitled to satisfy any deficiencies remaining on their judgment

through their security interest in Defendants' property owned on the date of Plaintiff's original judgment against Defendants." This is an open invitation to violate the injunctive provisions of Sec. 524(a) and of course any such efforts in that regard could rightfully be met with contempt citations from the federal district court. And it is apparent that any such efforts will be futile. In addition, the Court's decision amounts to a deprivation of rights and benefits secured by Sec. 524(a) in violation of 28 USC Sec. 1343(3), and 42 USC Sec. 1983 and is therefore unconstitutional and void.

WHEREFORE, appellants move the Court to grant rehearing and to vacate the memorandum decision of March 7, 1996, and thereafter to affirm the orders of the lower court. The undersigned certifies that this petition is presented in good faith and not for delay.

  
LARRY L. WHYTE

On March 20, 1996, two copies of the  
foregoing mailed to Randy M. Lish, McCullough,  
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LARRY L. WHYTE