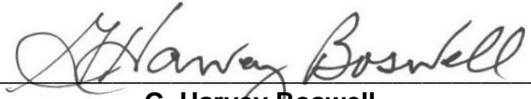




**Dated: November 08, 2005**  
**The following is SO ORDERED.**

  
G. Harvey Boswell  
UNITED STATES BANKRUPTCY JUDGE

---

**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**EASTERN DIVISION**

---

**IN RE:**

**TRACY AND STACEY ADAMS**

**CASE NO. 02-14500**

**Debtors.**

**Chapter 7**

**TRACY AND STACEY ADAMS,**

**Plaintiffs,**

**v.**

**Adv. Pro. No. 05-5152**

**JASON WHITWORTH,**

**Defendant.**

---

**MEMORANDUM OPINION AND ORDER (1) RE: DEFENDANT'S MOTION TO DISMISS and**  
**PLAINTIFFS' OBJECTION THERETO AND (2) REMANDING COMPLAINT TO STATE**  
**COURT**

---

The Court conducted a hearing pursuant to FED. R. BANKR. P. 9014 on the Defendant's "Motion to Dismiss" and the debtors' objection thereto on September 7, 2005. Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the

record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052

### **I. FINDINGS OF FACT**

Prior to filing to their voluntary chapter 7 petition, the debtors commenced a predatory lending suit against F.B. Financial Services, Inc., Jeannie Moore and Citifinancial in state court. The debtors hired Jason Whitworth, ("Whitworth"), as their attorney in the matter. After the debtors filed for bankruptcy relief, Whitworth advised the debtors that by operation of the Bankruptcy Code the lawsuit now belonged to the estate and the trustee had become the plaintiff in the action. Whitworth also contacted the chapter 7 trustee, Michael Tabor, ("Tabor"), and asked Tabor to let him know (1) whether he intended to pursue the action and (2) whether he would hire Whitworth to do so.

On November 21, 2002, Tabor filed an application to employ Whitworth to pursue the state court lawsuit. The debtors did not object to this application. The Court granted the trustee's application on January 2, 2003. Despite this employment, no proof has been presented to the Court that Whitworth took any affirmative steps to cease his individual representation of the debtors in the matter. The debtors received their chapter 7 discharge on January 7, 2003.

The state court lawsuit went to trial and the jury awarded the debtors \$145,321.81 in compensatory damages and \$937,317.00 in punitive damages on June 8, 2004. The trial court reduced the punitive damages to \$100,000.00. Despite the state court award, the trustee entered into a settlement agreement with the state court defendants whereby the defendants agreed to pay the trustee the sum of \$225,322.00. On September 21, 2004, the trustee filed a motion in this Court to approve the proposed settlement and Whitworth's attorney's fees. The debtors signed the settlement agreement and did not object to the settlement terms or the attorney fees. The Court entered an order approving the settlement and fees on October 26, 2004.

On June 6, 2005, the debtors filed a legal malpractice action against Whitworth in state court. According to the complaint, the debtors alleged that Whitworth breached his duty of care to them by failing to timely seek an increase of the punitive damages cap in accordance with their requests. The debtors did not obtain leave of this Court to file the action. Whitworth filed a notice of removal of the malpractice action on June 16, 2005. The debtors objected to the notice of removal on July 11, 2005. The Court denied the debtors' objection on July 29, 2005.

Whitworth filed a motion to dismiss the proceeding on July 14, 2005, in which he alleged dismissal was proper because (1) the debtors violated the Barton Doctrine in failing to seek permission from this Court to file the malpractice action; (2) Whitworth had complete immunity for acts taken

during the course of administering the estate; (3) the debtors lacked standing to sue Whitworth for malpractice; (4) the debtors' malpractice action was barred by the principle of res judicata; and (5) the debtors were judicially estopped from asserting the malpractice claims against Whitworth. The debtors filed an objection to Whitworth's motion to dismiss on August 1, 2005, in which they alleged that, despite his employment as counsel for the trustee, Whitworth never ceased his representation of them in the state court lawsuit. The Court conducted a hearing on the motion and objection on September 7, 2005.

## **II. CONCLUSIONS OF LAW**

The Barton Doctrine dictates that a party must obtain leave from the bankruptcy court before bringing suit against the bankruptcy trustee for acts done in the trustee's official capacity and within the trustee's authority. *Barton v. Barbour*, 104 U.S. 126 (1881). The Sixth Circuit has extended this doctrine to counsel for the trustee "where . . . they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6<sup>th</sup> Cir. 1993). In the case at bar, the debtors have sued Whitworth for acts done during the course of his alleged personal representation of the debtors, not acts he committed as counsel for the trustee. As a result, the Barton Doctrine has no applicability to this matter. The debtors' did not need to obtain leave of the bankruptcy court before filing of the state court malpractice action against Whitworth.

Turning to the malpractice complaint, the Court finds that there is no basis for jurisdiction over the malpractice complaint in this Court. The debtors did not bring the malpractice complaint against Whitworth in his capacity as counsel to the trustee. Instead, the debtors brought the complaint against Whitworth for acts done in his role as their personal representative in the state court matter. Prior to employment by the trustee, Whitworth represented the debtors in the predatory lending suit. Once the bankruptcy case was filed, the chapter 7 trustee employed Whitworth to represent him in the state court case; however, there is no proof in the record that Whitworth ever took any affirmative steps to cease his personal representation of the Adams in the case. The Adams allege that Whitworth breached both his fiduciary duty and his duty of care to them as their attorney, not as attorney for the trustee.

When the predatory lending suit was settled, there was more than enough money to pay the Adams' creditors in full. As a result, the outcome in the state court malpractice action will have no impact on the property of the Adams' estate. Additionally, the malpractice cause of action did not arise until after commencement of the case. As a result, the malpractice claim is not property of the estate and is not related to the bankruptcy case. (*In re Stewart*), 62 Fed. Appx. 610, 614 (6<sup>th</sup> Cir. 2003). The Court has no subject matter jurisdiction to entertain the complaint.

Because there is no basis for jurisdiction in this Court, the malpractice action must be remanded to the state court from which it was removed. This decision is in accordance with the Sixth Circuit's directive in the case of *In re Stewart*, 62 Fed. Appx. 610 (6<sup>th</sup> Cir. 2003). Whether or not Whitworth is liable to the debtors for his actions is not a question this Court can resolve.

**ORDER**

It is therefore **ORDERED** that:

- (1) The malpractice complaint filed by the debtors against Whitworth is hereby **REMANDED** to the state court; and
- (2) Whitworth's Motion to Dismiss as well as the Debtors' objection thereto is **MOOT**.

**IT IS SO ORDERED.**

**Mailing List:**

W. Scott Rose, attorney for debtors  
E. Franklin Childress, attorney for Whitworth  
David M. Cook, attorney for Whitworth  
Lori J. Keen, attorney for Whitworth  
Chapter 7 Trustee