2/25/19

No. 18-1130

In the Supreme Court of the United States

DAVID W. CHARRON, Petitioner

v.

GLENN S. MORRIS; and
GLENN S. MORRIS TRUST, Respondents

On Petition For A Writ of Certiorari To The United States
Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

David W. Charron
5020 East Beltline, NE
Suite 201B
Grand Rapids, MI 49525
(616) 363-0300

Petitioner, in pro per

QUESTION PRESENTED

Whether contempt sanctions are *per se* non-dischargeable debts under 11 U.S.C. 523(a)(6)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding include only those listed on the cover.

No parties are publically traded companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David W. Charron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Supreme Court Rules 10(a) and 10(c) support the issuance of the writ.

OPINIONS AND ORDERS BELOW

The order denying panel rehearing in the Sixth Circuit Court of Appeals (App-1) is unreported. The order affirming the district court's judgment (App-2) is unreported. The opinion and order of the District Court affirming bankruptcy court (App-3) is reported at 277 F. Supp. 3d 810, 2017 W.L. 6629161 (W.D. Mich. 2017). The Bankruptcy Court opinion denying defendant's motion for summary judgment and granting plaintiff's cross motion for summary judgment (App-4) is reported at 541 B.R. 656 (Bank. W.D. Mich 2015). The order denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Cross Motion for Summary Judgment is unreported (App-5) The memorandum opinion denying debtor-defendant's motion to amend the court's findings under Rule 52, Amend the Judgment Under Rule 59, and for Reconsideration under Rule 60 (App-6) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered the order the petitioner seeks to be reviewed on November 26, 2018. The Court of Appeals entered its order denying a panel rehearing on November 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 523(a)(6) and (7) of Chapter 11 of the United States Code (the "Bankruptcy Code") provide, in relevant part:

> "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss,....."""

INTRODUCTION

This case involves the application of §523(a)(6) of the Bankruptcy Code to contempt sanctions. §523(a)(6) exempts from discharge debts for "willful and malicious injury by the debtor to another entity or to the property of another entity". A debt is non-dischargeable under §523(a)(6) if it arises from conduct equating to an "intentional tort" where "the actor generally intends "the *consequences* of an act," not simply "the act itself." *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 61, 118 S.Ct. 974 (1998).

The lower courts in this action have created a new basis for liability under §523(a)(6) which is not only separate and distinct from an "intentional tort", but untethered to any requirement that the debtor do anything more than intend "the act itself". The act — *disobedience of a court order* — results in debts which are non-dischargeable *per se*.

This decision conflicts with the decisions in other United State Courts of Appeal which have held that Section 523(a) does not make contempt sanctions non-dischargeable *per se*, it disregards the statutory scheme of §523(a) of the Bankruptcy Code, and it works a significant and detrimental change in the law of bankruptcy discharge eligibility that will cause confusion, encourage venue shopping, deny citizens access to statutory relief afforded Congress, and waste judicial and party resources.

This Court should grant review, correct the error, and reaffirm that dischargeability claims arising under Section 523(a)(6) of the Bankruptcy Code require not only an intentional act but also a deliberate or intentional injury.

STATEMENT OF THE CASE

A. Legal Background

This case involves a state court decision awarding attorneys fees and costs as a fine, payable to a private party, after a contempt hearing. In Michigan, courts may order coercive and punitive sanctions for civil and criminal contempt, and/or indemnification of those persons who have sustained losses as a result of contemptuous conduct. *In re Bradley Estates*, 494 Mich 367, 560, 835 N.W.2d 545 (2013); MCL 600.1701 (App-7); MCL 600.1721 (App-7).

The lower federal courts held there is no difference between punitive or compensatory fines under §523(a) of the Bankruptcy Code. They held that all violations of a court order cause legal injury – an invasion of the rights of the party protected by the order. They

employed "res ipsa loquitur" reasoning from *Siemer v. Nangle (In re Nangle)*, 274 F. 3d 481, 484 (8th Cir. 2001) and *Williams v. Int'l Brotherhood of Elec. Workers Local 520 (In re Williams)*, 337 F. 3d 504, 511-12 (5th Cir. 2003), to conclude that all sanctions arising from contempt are *per se* non-dischargeable without any of the limiting conditions of such cases, Finally, they deemed a claim for contempt sanctions to be separate and distinct from a claim for tort injuries arising from the same transaction or occurrence and consequently, not barred or affected under *res judicata* by prior adjudications involving the same parties.

B. Material Facts

The petitioner is an attorney. An injunction arose by consent between the petitioner's client and respondents. It prohibited the petitioner's client from selling the assets of a corporation he owned without the prior approval of the court, other than in the ordinary course of business. The petitioner's client never sold the assets subject to the restraint. He did however, consider selling some or all of the assets to a "friendly purchaser" business entity owned by respondents and another man as a way of satisfying his personal debt to respondents and the corporation's debts to its creditors.

The petitioner communicated with his client about the proposed forms of the transaction and opined whether the transaction with respondents' company qualified as being within the "ordinary course of business" exemption of the restraint. Petitioner did not believe respondent would be impaired by his communications with his client because respondents stood to benefit from the transaction. If necessary, he expected respondents to consent to lift the restraint. When the negotiations did not prove fruitful, the petitioner's client withdrew his interest in any transfer and left control of corporation to his 24 year old son. He subsequently prepared for and filed a bankruptcy petition.

The petitioner's law firm had a security interest against the same corporate assets and the interest predated the injunction. It notified the corporation of its default and sold the corporation's assets at an Article 9 sale under the UCC to satisfy its uncontested debt before the company went out of business, at the pinnacle of the Great Recession. None of the proceeds were shared with the petitioner's client or the bankruptcy trustee who administered his estate.

At the time of the sale, respondents were not creditors of the corporation nor the holder of any interest in the corporation's assets. They held a security interest against half of the stock of the corporation to secure the personal debt which the petitioner's client owed to them. The petitioner believed respondents' stock interest in the corporation was worthless due to the company's insolvency and its widespread default in the payment to creditors, including the law firm. Unpaid corporate liabilities approached $2 million.

The respondents sued the petitioner and his law firm in state court for various torts, intentional and otherwise, in reaction to the sale and lost. The outcome was affirmed on appeal.

As soon as the petitioner was dismissed from the tort action on summary judgment, the respondents initiated a contempt of court proceeding against the petitioner before the same judge who adjudicated the tort action. The creditor was awarded his attorneys fees and costs of the contempt proceeding as a prevailing party.

The trial court determined the petitioner's communications with respondents' business associate were contemptuous because they occurred during the pendency of the injunction. The court also found petitioner in contempt because the court deemed the law firm bound as a principal by the restraint in the same manner as its client, and thereby prohibited from exercising its security interest to transfer the assets without court approval. Petitioner challenged this reasoning in state court on the basis that there was no evidence that its client directed the sale or received a benefit greater than the other 40 employees whose jobs were saved. The law firm just wanted to get paid in order to survive the Great Recession. This reasoning was unsuccessful.

Petitioner also challenged the trial court's characterization of his intent to disobey the injunction. The court of appeals ruled that petitioner's subjective intent to violate the order was immaterial to the finding of contempt and it refused to modify the trial court's findings. The issue of whether he intended to injure respondents was never tried.

The contempt judgment was carefully crafted to distinguish the petitioner from the treatment of others and thereby avoid any consequences of *res judicata* from the earlier dismissal of the tort action.

The state courts (trial and appellate) held the contempt sanction did not represent compensation to respondents for injury to the creditor or their property. The state courts denied the petitioner the right to allocate the contempt sanction against other responsible parties as a tort award because it did not represent compensation for injuries to persons or property. The state courts characterized the award as an exercise of the court's inherent power to punish contempt, rather than as compensation for harm done. Respondents were awarded their fees and costs for winning the case as a contempt penalty.

The federal courts deemed the contempt sanction to be a debt for injury to persons or property under §523(a)(6) notwithstanding the state court's characterization that the debt did not represent compensation for harm. The federal courts deemed all contempt sanctions to be *per se* non-dischargeable.

C. Proceedings Below

1. This case was commenced by respondents in the Bankruptcy Court for the Western District of Michigan, Southern Division, for the purpose of challenging the dischargeability of the debt. The basis for federal jurisdiction in the court of first instance

was 28 U.S.C. §1334. The bankruptcy case and all related proceedings were referred to the Bankruptcy Court for a decision under 28 U.S.C. §157(a); L. Civ. R. 83.2(a) (W.D. Mich.).

The Bankruptcy Court disposed of the case by summary judgment before the petitioner filed an answer to the creditor's complaint, merely on the basis of the creditor's complaint and the content of the state court contempt judgment. The creditor's complaint alleged the debt represented compensatory damages for property damage he suffered to a stock interest in a closely held corporation. Respondents claimed the petitioner intentionally committed contempt for the purpose of forcing the creditors to spend money on attorneys fees and court costs to prove the petitioner acted. The judgment stated the petitioner was aware of the injunction and intentionally violated it due to communications he had about the possible sale of assets to a company owned by respondents and a business associate.

The petitioner filed for summary judgment on the basis that *res judicata* barred the complaint due to the dismissal of the prior tort action between the same parties. The petitioner also offered testimony and documentary materials to contest the respondents claims that he acted with knowledge, belief or probability that his actions would harm the creditor- respondent, or force the respondent to spend money on attorneys fees and court costs to prove petitioner acted contemptuously.

At summary judgment, the Bankruptcy Court dismissed the petitioner's motion and granted the creditor's motion, declaring willful and malicious injury to be the inevitable result of noncompliance with the court order. None of the petitioner's materials filed in opposition to the motion were considered under Fed. R. Civ. P. 56(a), let alone considered in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-50, 106 S. Ct. 2505 (1986), The Bankruptcy Court ruled that *res judicata* did not bar the creditor's dischargeability claim because contempt provided a separate and distinct basis of liability which was unaffected by the prior adjudication and dismissal of respondents' tort claims.

2. On appeal, the Federal District Court affirmed the Bankruptcy Court's decision.

3. The Sixth Circuit affirmed the District Court's decision.

D. The Claims at Issue

The lower courts affirmed the bankruptcy court ruling which held that willful and malicious injury is *"ipso facto"* — the inevitable result — of noncompliance with a court order, thus making all resulting debts a *per se* violation of §523(a)(6) of the Bankruptcy Code.

The courts used the "*ipso facto*" ruling to deem the creditor's case conclusively proven without other evidence that the petitioner intended to injure persons or property by his conduct. This allowed the action to be adjudicated by the Bankruptcy Court before the petitioner filed an answer to the complaint contesting the dischargeability of the debt. Under

the lower courts' *per se* approach, a reviewing court only examines the judgment of the court issuing the contempt sanction and any appellant decisions related to it. No justification or evidence is allowed to rebut the presumption that the petitioner acted for purposes other than to cause harm to the creditor.

Prior to this holding, the "willful and malicious injury" elements of a §523(a)(6) claim needed to be proved by a creditor. *Grogan v. Garner*, 498 U.S. 279, 296, 111 S. Ct. 654 (1991). A contempt judgment was relevant evidence of a debtor's intent to injure, but not conclusive evidence. Prior to this case, the entire record of the contempt proceeding was examined for evidence that a debtor's conduct caused harm to a creditor in a manner which approximated an intentional tort. *Spilman v. Harley*, 656 F. 2d 224, 226 (6th Cir. 1981). Prior to this case, contempt sanctions were only non-dischargeable under §523(a)(6) if they resulted from disobedience with a court order which restrained conduct that approximated an intentional tort.

This case diverges from precedent and the decisions of other Circuits by conclusively establishing willful and malicious injury merely from an act to disobey a court order.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with Longstanding Precedent, Distorts Congress's Framework for Processing Debts Involving Contempt Sanctions, And Warrants Review By This Court.

A. A Creditor Must Prove Both An Intentional Act and A Deliberate or Intentional Injury under §523(a)(6).

The lower federal courts erroneously employed an "*ipso facto*" approach to conclusively presume all of the elements of a §523(a)(6) claim from the fact the debt was a contempt sanction. In doing so, the lower federal courts did exactly what this Court forbid in the case of *In re Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998). They elevated and equated an "intentional act" ---- disobedience with a court order ------ to "a deliberate or intentional *injury*", merely from the intentional act.

This Court has defined the statutory text of §523(a)(6) on several occasions. "The phrase "debt — for", used throughout 11 U.S.C.§523, means a 'debt as a result of', a 'debt with respect to', and 'debt by reason of', and the like." *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212 (1998). The operative element in any §523(a)(6) analysis is "injury". *Id.* The "debt" must be a "debt as a result of", a "debt with respect to", or a "debt by reason of" — a willful and malicious "injury" to the creditor." *Id.* "The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." *In re Geiger*, 523 U.S. at 61. Conduct considered an "intentional tort"

is likely to satisfy the requirements of a §523(a)(6) claim because "the actor generally intends "the *consequences* of an act," not simply "the act itself." Restatement (Second) of Torts § 8A, Comment *a,* p. 15 (1964)" *Id.*

The unsuccessful tort action brought by respondents should have barred the new action in bankruptcy court because it involved the same transaction or occurrence between the same parties. *Young v. Twp. of Green Oak,* 471 F. 3d 674, 680 (6th Cir. 2006), relying upon *Adair v. Michigan,* 470 Mich. 105 , 680 NW2d 386, 397 (2004). "Res judicata serves to bar 'every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.' " *Id.* The text of MCL 600.1721, the statute which authorizes courts to issue sanctions for indemnification damages, expressly provides that awards under it bar tort recoveries for the same claims.
The opposite is also true.

The purpose of attorney fee awards in a contempt setting must be determined from the record of the case, including a review of the transcript, because a fee award can be compensatory or a punishment or both. The only claim which would not barred by *res judicata* in Michigan from the dismissal of the tort action is a claim which did not compensate for harm to persons or property. If a debt does not represent compensation for injury, it does not qualify under §523(a)(6) because §523(a)(6) requires "injury".

B. Contempt's Primary Goal is to Protect the Court, Not to Compensate for Harm

Justice Scalia referred to contempt as the "power of self-defense" ---- an act intended to sanction "those who interfere with the orderly conduct of [court] business or disobey orders necessary to the conduct of that business." *Young v. United State ex rel Vuiton et Fils S.A.,* 481 U.S. 787, 820-821, 107 S. Ct. 2124 (1987) (Scalia, J., concurring). Contempt fines can be payable to the court, to another governmental unit or if state law allows, to a person. Michigan courts possess the inherent power to punish contempt, subject the state legislature's right to limit the penalties imposed on citizens. *In re Bradley Estates,* 494 Mich 367, 835 N.W.2d 545 (2013). In addition to any penalty imposed on a debtor, Michigan courts are also empowered and directed to order a debtor to pay compensation to the injured party for his loss or injury. MCL 600.1721. Contempt sanctions can be punitive, compensatory or a combination of both.

C. Congress Distinguishes Between Different Types of Contempt in a Manner That the Lower Federal Courts Failed to Acknowledge.

The lower federal courts erred in treating all contempt sanctions the same without first reviewing the entirety of §523(a) and determining whether any contrary legislative scheme was evident. Congress was fully aware of the differences in the dual nature of contempt and it drafted the Bankruptcy Code in a manner which preserved these differences, not eliminated them. §523(a)7 contains a "broad exception" to the dischargeability of "all penal sanctions, whether they are denominated as fines, penalties or forfeitures". *Kelly v. Robinson,* 479 U.S.

36, 51, 107 S. Ct. 353 (1986). Congress, however, drafted §523(a)(7) to exclude sanctions which are payable to a creditor who is not a "governmental unit", as well as those which constitute compensation for an "actual pecuniary loss". This methodology is consistent with how Michigan courts differentiate contempt.

The *per se* rule adopted by the lower courts has the effect of doing exactly what Congress consciously chose not to do: making all contempt sanctions non-dischargeable. Because it utilizes §523(a)(6) to do so, the *per se* rule also erroneously converts every contempt sanction into a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity". This is erroneous because some of these contempt sanctions are purely punitive and represent an exercise of the inherent power of the court. Sometimes a fine is simply a penalty which is imposed to reward a successful litigant for the costs of an action and to punish a contemnor, like the present case.

D. The *Per Se* Rule Has Serious Defects.

1. The *Per Se* Rule is Based Upon a False Premise.

The logic behind the per se rule is flawed. A decision to disobey a court order is not necessarily a decision to deliberately or intentionally injure another person or his property. Whether it is malicious act depends upon the facts. If the restrained conduct approximates an intentional tort, then the answer is usually "yes" because something akin to an intentional tort results when the injunction is disobeyed. If the restrained conduct involves other types of conduct, such as the performance of a contract or lesser tort, the answer is usually "no", depending upon where one lives in this nation. For example, some courts allow contract breaches to violate §523(a)(6), most courts do not, With the *per se* rule, there is no opportunity to examine the facts ----all conduct giving rise to a contempt sanction is deemed by operation of law to be "willful and malicious."

The *per se* rule is also counter-intuitive to the American experience. We may be a nation of laws but we are also a nation of peaceful civil disobedience. Our founding mothers and fathers, as well as religious and civil rights leaders of every generation, have resisted laws and orders they deemed unjust, morally repugnant or incompatible with their values or religious beliefs. Most of these citizens were motivated by the goal of improving the lives of themselves and other citizens, and not for the purpose of deliberately or intentionally injuring others. Their portraits and sculptures are in our museums and chambers, and on our currency. Very few Americans would characterize their conduct as malicious merely because a court order was disobeyed.

Ordinary citizens also disobey arbitrary restraints in response to situational emergencies, Acts of God or other reasons, such as observations of facts, which were reasonably not within the contemplation of the restraint, confident that they will be judged reasonably upon the circumstances of the situation. The *per se* rule operates in a mercurial manner to eliminate "reason" as a defense to these situations. It is a rule crafted for tyrants

and it is repugnant to our shared values as Americans. No justification for conduct is considered once a debt is shown to result from a contempt sanction.

2. The *Per Se* Rule Is Missing A Necessary Evidentiary Link.

Proving contempt is easy. Proving §523(a)6 is difficult because messy factual situations are involved. Using contempt to prove §523(a)(6) claims conclusively should cause federal courts concern.

The biggest reason for concern is there is no scienter requirement for contempt. The mere act of disobeying a lawful order, decree, or process of the court is the only threshold; negligence of the contemnor is sufficient to trigger a contempt sanction. See, *e.g., Walker v. Henderson (In re Contempt of United Stationers Supply Co.)*, 239 Mich. 496, 499-500 (2000). Justice Douglas in *McComb v. Jacksonville Paper Co*, 336 U.S. 187, 191 (1949) explained the simple reason why scienter is irrelevant:

> "The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them the duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently." *Id.*

For the *per se* rule to work and create efficiencies to justify its existence, it must create a situation where another court is doing the hard work for the federal court. Collateral estoppel must be used to attribute the work product from one court to another. The difficulty with collateral estoppel, however, is that it requires that the issue of fact or law determined in the earlier proceeding "must be necessary to the judgment" in almost all states, including Michigan. *In re Markowitz*, 190 F.3d 455, 461 (6th Cir. 1999), quoting *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). Statements about a debtor's intent to disobey a court order are *dicta*. They are <u>never</u> necessary to the judgment. "A finding of willful disobedience of a court order is not necessary for a finding of civil contempt" *Davis v. City of Detroit Financial Review Team*, 296 Mich. App. 568, 625, 821 NW 2d 896 (2012) citing *In re Contempt of United Stationers Supply Co*, 239 Mich. App. 496, 501; 608 NW2d 105 (2000). The *per se* rule should never be used.

The lower courts erred by ignoring all relevant Michigan law on this subject in their quest to deem the trial court's finding of intent "necessary" to the respondents' contempt judgment. The courts refused to review the record of the state court proceeding even after Petitioner notified the courts that it had appealed the trial court's fact finding concerning his intent to violate the order, and evidence of this appeal was present in the court of appeals decision. The court of appeals refused to modify the fact findings because the petitioner's intent to violate the restraint was immaterial to the judgment.

3. Federal Courts Should Judge Contempt Sanctions for §523(a)(6) Purposes Rather than State Courts.

The *per se* rule unwisely surrenders control of dischargeability determination to state court judges who draft the bulk of contempt orders. State court contempt decisions are reviewed on appeal under the very low abuse of discretion standard. *In re Contempt of Dudzinski*, 257 Mich. App. 96, 99; 667 N.W.2d 68 (2003). A civil contempt proceeding only requires rudimentary due process, i.e., notice and opportunity to present a defense." *In re Moroun*, 295 Mich App 312, 331-332; 814 N.W. 2d 319 (2012). Contempt decisions are often made on the fly during angry and stressful situations and without the benefit of complete reasoning, in order to keep order in a court room. As a general rule, these are not "high quality" decisions for a reviewing court to rely upon. They are effective in keeping the lights on.

The priorities of state court judges are not the same as those on the federal bench, especially when federal issues are involved. The lack of review of these decisions creates opportunities for contempt sanctions to be used for political or retaliatory purposes, especially when unpopular parties or disfavored civil rights issues are involved. When deliberation is possible on these decisions, the *per se* approach may have the effect of encouraging judges to add dicta to their opinions for the purpose of steering cases to a desired bankruptcy outcome. Making these decisions non-reviewable in federal court under the *per se* approach is a recipe for disaster.

State courts can also differ substantially in their view of conduct which gives rise to the exercise of contempt sanctions, as exemplified by the current case. Most courts would probably not deem an injunction which prohibited transfers to be violated if the restrained individual never undertook the transfers or directed anyone else to undertake them on his behalf, as in the present case. Talking and thinking about the desirability of undertaking conduct are usually not actionable, especially when the communications are between an attorney and a client seeking advice.

Finally, the way courts view impermissible conduct can differ dramatically, reducing the desirability of any "one shoe fits all" approach. The sanctions in the present case arose from the holding of *Davis v. City of Detroit Financial Review Team,* 296 Mich. App. 568 (2012), *the only* reported decision in the nation that authorizes sanctions for the violation of an *invalid* injunction. *Davis* justified its decision on the basis that this practice of exercising the court's inherent power encourages respect for the judiciary. The rest of the nation's judiciary disagrees and views this position as detrimental to the public's respect in the judiciary. Under the *per se* approach, all contempt sanctions are automatically non-dischargeable under the Code, including those arising under *Davis*.

It is evident from §523(a)(7) that Congress did not intend for the courts to give contempt cases a free pass. It distinguished between the types of debts arising from contempt

to make the judiciary to look at facts and develop federal common law so that discharges are denied only when truly malicious in fact behavior is involved.

E. This Decision Conflicts With Other Circuits.

This decision conflicts with the traditional approach to §523(a)(6) taken by the 9th Circuit Court of Appeals and reflected in *In re Suarez,* 400 B.R. 732, 61 Collier Bankr. Cas. 2d 641 (B.A.P. 9th Cir. 2009), *aff'd* 529 F. App'x 823 (9th Cir. 2015). "Section 523(a) does not make 'contempt sanctions nondischargeable *per se*, and neither does any other subpart of Section 523(a)." *Id.* "Whether contempt sanctions are nondischargeable accordingly depends not on whether they are labeled as "contempt" but on whether the conduct leading to them was 'willful and malicious'." *Id.* The traditional approach differs substantially from the hybrid approach taken in *Siemer v. Nangle (In re Nangle)*, 274 F. 3d 481, 484 (8th Cir. 2001) and *Williams v. Int'l Brotherhood of Elec. Workers Local 520 (In re Williams)*, 337 F. 3d 504, 511-12 (5th Cir. 2003), which relies upon the reasoning of *In re Behn,* 242 B.R. 229 (Bankr. W.D.N.Y. 1999):

> "Firstly, the injunction or other protective order would, by law, have been issued in a judicial proceeding in which the debtor was a party who received at least the protections of Rule 65 F.R. Civ. P., if not more. Secondly, the violation was shown to have been intentional. And lastly, the elements of and size of the award were determined in accordance with well-settled standards applying to contempts," *citing In re Behn,* 242 B.R. at 238.

The protections under Rule 65 include "telling a specific individual what actions will cross the line into injury to others". *Id* The debtor is also given the opportunity to justify his conduct under this reasoning.

The debt in this action would never have qualified under the *In re Behn* standard as the petitioner was not a party to the action where the order arose, he received no Rule 65 protections, he had no right to appeal the entry of the injunction or its erroneous extension, there was no judicial determination that respondents were likely to be injured if the prohibited conduct arose, and no one instructed petitioner that any action would cause injury to the respondents, including but not limited to attorney-client conversations with his client about the propriety of proposed conduct.

In re Peckham, 442 B. R. 62, 78 (Bankr D. Mass 2010) provides a helpful summary of the unsettled nature of the law as the issue of contempt sanction dischargeability has percolated across the country. Florida follows a different rule than Pennsylvania and Massachusetts. On the West Coast, there is no *per se* rule. In parts of the East Coast, there is a hybrid *per se* rule which only applies to restraints which are adjudicated on the merits with certain minimal due process requirements and rebut table presumptions. In Michigan, Ohio and Kentucky, a new *per se* approach --- without any limiting qualifiers and with harsh

conclusive presumptions --- is about to launch into full swing and deny citizens rights enjoyed elsewhere.

This Court's intervention is urgently needed.

II. This Case is an Appropriate Vehicle

This case provides an appropriate and valuable vehicle for this Court to resolve the question. The dischargeability of this debt was fully briefed to and addressed by the lower courts. There are no additional legal or factual issues to complicate this Court's analysis of these important issues and the opinions do not reflect any other vehicle issues. Percolation has revealed a deep split on the issue. These holdings will not get better with time.

This Court's review is warranted now. Correction can only come from this Court. Further injury to other citizens can be averted if this Court acts quickly to prune this new seedling before it turns into a thicket.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David W. Charron
5020 East Beltline, NE, Suite 201B
Grand Rapids, MI 49525
(616) 363-0300