

In the
Supreme Court of the United States

KIMBRO STEPHENS INSURANCE TRUST, AND
A.K. TENNESSEE IRREVOCABLE RESIDUARY TRUST,

Petitioners,

v.

JAMES E. SMITH, JR.; KIMBERLY WOODYARD;
AND SMITH AKINS & GLADDEN, P.A.,

Respondents.

**On Petition for a Writ of Certiorari to the
Arkansas Court of Appeals, Division II**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners served as equity holders of a Chapter 11 debtor-in-possession and terminated its counsel of record for cause prior to trial in an adversary proceeding against the debtor. Petitioners had an agreement with Respondents to allow intervention by one of its principals; however, as trial opened, upon motion for intervention, Respondents opposed the motion, and as a result, the bankruptcy court denied intervention. Petitioners immediately terminated Respondents for breaching their agreement, however the court said Petitioners could not terminate their counsel and, instead, allowed Respondents to conduct the trial against the instructions and directions of Petitioners, as the debtor-in-possession. The trial ultimately resulted in judgment against the debtor.

Petitioners sued Respondents in State Court for misrepresentation and malpractice, but the Arkansas Court of Appeals held that Petitioners did not have a right to fire counsel; and therefore, as a matter of law, Petitioners could not detrimentally rely on Respondents' misrepresentations and, thus, did not have standing to sue Respondents.

THE QUESTIONS PRESENTED ARE:

1. Whether a client has a right to discharge a lawyer at any time, whether in Arkansas state court or in Federal Court, with or without cause, subject to liability for payment for the lawyer's services.
2. Whether a Chapter 11 debtor-in-possession has the fundamental right to terminate its appointed counsel, with or without cause, or whether a debtor-in-possession forfeits the right to terminate appointed counsel without bankruptcy approval.

3. Whether Arkansas' denial of Petitioner's right, while in bankruptcy, to terminate Respondents, violates the Petitioners' First and Fourteenth Amendment rights for access to the courts, due process, and equal protection under the law by denying Petitioners standing to sue Respondents in State Court for injuries resulting from counsel's alleged fraud, misrepresentations, and malpractice in bankruptcy.

PARTIES TO THE PROCEEDINGS

Petitioners, the Kimbro Stephens Insurance Trust and the A.K. Tennessee Irrevocable Residuary Trust, were the equity holders of the Chapter 11 debtor, Living Hope Southeast, LLC, and were the controlling members of the debtor-in-possession.

Respondents, James E. Smith, Jr. and his law firm, Smith Akins and Gladden, P.A., were appointed as counsel of record for the debtor-in-possession, Living Hope Southeast, LLC, in the United States Bankruptcy Court for the Eastern District of Arkansas. Respondent, Kimberly Woodyard, represented the debtor-in-possession as “of counsel” for Smith Akins and Gladden, P.A.

CORPORATE DISCLOSURE STATEMENT

Neither of the Petitioners, the Kimbro Stephens Insurance Trust and the A.K. Tennessee Irrevocable Residuary Trust, nor any parent entity, is publicly traded, and no public company owns 10% or more of their stock.

LIST OF PROCEEDINGS

Arkansas Supreme Court

Case No: CV-19-134

Kimbro Stephens Insurance Trust and A.K. Tennessee Irrevocable Residuary Trust v. James E. Smith, Jr., Kimberly Woodyard, and Smith Akins & Gladden, P.A.

Petition for Review denied on May 20, 2021

Arkansas Court of Appeals

Case No: CV-19-134

Kimbro Stephens Insurance Trust and A.K. Tennessee Irrevocable Residuary Trust v. James E. Smith, Jr., Kimberly Woodyard, and Smith Akins & Gladden, P.A.

Affirmed Summary Judgment on March 17, 2021 for lack of standing.

Petition for Rehearing denied on April 7, 2021

Circuit Court of Garland County, Arkansas

Case No: 26CV-16-27

Kimbro Stephens Insurance Trust and A.K. Tennessee Irrevocable Residuary Trust v. James E. Smith, Jr., Kimberly Woodyard, and Smith Akins & Gladden, P.A.

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The Arkansas Supreme Court's denial of the Petition for Review is reported at CV-19-134 and is reproduced at App.1a.

The Arkansas Court of Appeals' opinion is reported at CV-19-134 and is reproduced at App.2a-24a. The Letter Decision of the Circuit Court of Garland County, Arkansas is reported at 26CV-16-27 and is reproduced at App.31a.

The Judgment of the Circuit Court of Garland County, Arkansas is reported at 26CV-16-27 and is reproduced at App.27a.

These opinions have not been designated for publication.



JURISDICTION

The Arkansas Court of Appeals issued its opinion on March 17, 2021 (App.2a) and the Arkansas Supreme Court denied the Petition for Review on May 20, 2021 (App.1a). This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL, STATUTORY AND COURT RULES INVOLVED

U.S. Const. amend. I

The First Amendment to the United States Constitution provides:

Congress shall make no law . . . abridging . . . the right to petition the Government for a redress of grievances.

Therefore, the First Amendment guarantees a right of access to the courts. For this right of access for redress of grievances is the inherent right to have meaningful effective assistance of counsel in civil litigation.

U.S. Const. amend. V

The Fifth Amendment to the United States Constitution provides:

No person . . . shall be . . . deprived of life, liberty, or property, without due process of law.

Again, inherent in the right of due process is the right to have meaningful effective assistance of counsel in civil litigation.

U.S. Const. amend. XIV

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1654**Appearance personally or by counsel**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Ark. R. Prof. Cond. 1.16**Declining or terminating representation**

... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if; ... (3) the lawyer is discharged.

[. . .]

[Comment 4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.

**United States Bankruptcy Court for the
Eastern and Western Districts of Arkansas,
Local Rule 2090-2**

The standard of professional conduct for attorneys practicing in this Court is governed by the Arkansas Rules of Professional Conduct.



STATEMENT OF THE CASE

Respondents were counsel of record of a Chapter 11 debtor-in-possession, Living Hope Southeast, LLC, (hereinafter “Southeast”) hired by Petitioners to represent Southeast in an adversary proceeding (hereinafter the “AP Trial”) to defend against a Chapter 7 Trustee, as plaintiff for a related company, Living Hope Southwest Medical Services, LLC (hereinafter “Southwest”), who was seeking a constructive trust and/or damages for alleged post-petition transfer of assets by Southwest to Southeast under 11 U.S.C. § 549.

Respondents did not want to put on a defense at the insistence of Petitioners, Southeast’s equity holders acting as the principals of Southeast. Petitioners wanted an opportunity to refute the allegations, call fact witness, and address the court regarding the circumstances of the case in order to defend the perception of transfers and to rebut a presumption that assets had in fact been transferred from Southwest to Southeast. Perhaps the single most important fact in defense of the action was the fact the trustee’s complaint was filed outside of the two (2) year statute of limitations, sufficient in itself to win the case. 11 U.S.C. § 549(d). Respondents, on the other hand, wanted to give in and confess judgment to Southwest.

A few weeks before the AP Trial, Respondents telegraphed their conflict with Petitioners. Mr. Smith expressed his intent to not contest or defend the claim of Southwest when the Southwest Trustee was seeking relief from stay in Southeast’s bankruptcy

case to sue Southeast. Respondents had essentially sided with the plaintiff against their client. In the hearing Mr. Smith stated:

Your Honor, it's been a long haul and I feel—
this is the first time I've ever had to chase
down a creditor trying to give them money.
It's an odd situation for debtor counsel to be here. I would urge that the Court approve the Trustee for Southwest's motion in this case. If the Court finds that it should not, I would ask that we expedite the hearing on the Trustee's claim in this proceeding.

Transcript, 4:12-bk-11082, Doc#: 252 at pp. 13-14.
(emphasis added)

Petitioners knew that a perception existed against Southeast that assets had been transferred because it was a related entity to Southwest and, unless a proactive and detailed explanation was presented to the Court, it would likely lose at trial. Respondents flatly refused this approach, taking the plaintiff's position that Southeast took assets from Southwest, so why bother with a defense. Petitioners and Respondents came to an impasse and Respondents resigned several weeks before trial.

Respondents later asked to remain as counsel. The reason for the impasse was because Respondents were not willing to put on a meaningful defense of the matter. A meeting was scheduled to discuss Respondents request to continue as counsel. Respondents held to their position to confess judgment, taking the position of the plaintiff that assets had in fact been transferred from Southwest to Southeast. However, Respondents said they would "stand silent" and not

object to a motion to intervene by D. Kimbro Stephens, an original party to the action and principal of Southeast, if it appeared necessary to Petitioners for Mr. Stephens to intervene to defend the allegations. In reliance on Respondents' statements, Petitioners agreed to allow Respondents to remain as attorney of record in anticipation of the AP Trial with the expectation that at least Mr. Stephens would be allowed to intervene to put on a meaningful defense.

However, on the morning of the AP Trial, Respondents objected to Mr. Stephens' intervention and the bankruptcy judge denied intervention. Petitioners terminated Respondents immediately and requested a continuance until new counsel could be obtained. The judge denied the termination and instead ordered the AP Trial to continue as scheduled with Respondents conducting the trial. Respondents did not raise the statute of limitations, dispositive to the matter, and only gave lip service to a perfunctory defense without the benefit of a full explanation of events corroborated by witness testimony. As a result, the judge rendered judgment against Southeast for One Million One Hundred Ninety Thousand Dollars (\$1,190,000.00) but later denied the request for a constructive trust.

Following judgment, Petitioners directed Respondents to lodge an appeal. Respondents flatly refused, saying it was not in the best interest of the debtor and that they had been terminated. However, this was a violation of the Arkansas Rules of Professional Conduct. Ark. R. Prof. Conduct: "Rule 1.16(d) places an affirmative duty on the attorney, not the client, to protect the client's interests upon termination of representation." *Travis v. Supreme Court Comm on Prof'l Conduct*, 2009 Ark. 188, 306 S.W.3d 3, 8 (2009).

Respondents' reasoning appeared essentially an illogical fallacy and Petitioners believe it was for the sole purpose of avoiding scrutiny of their misrepresentations and malpractice of the case for at least not raising the limitations defense.

Because of Respondents' refusal, no appeal was possible. Southeast could not file the appeal itself except through retained counsel, leaving Southeast and its equity holders without any recourse in bankruptcy court since its counsel of record, Respondents, "sat on their hands," and refused to appeal. On one hand, Petitioners had terminated counsel, but were denied termination by the trial court. On the other hand, Petitioners directed unterminated counsel to lodge an appeal, and when Southeast asked to file the appeal because Respondents refused, the bankruptcy court ruled that Petitioners had terminated Respondents and reasoned that an appeal must be filed by counsel of record. So, no appeal ensued.

Petitioners found themselves in a circumstance from which there was no escape because of mutually conflicting and dependent conditions and, as a result, Southeast could not appeal the judgment. As a result, Petitioners had no recourse for Respondents actions, since Petitioners had no opportunity to challenge Respondents' conflict of interest given the court's denial of Petitioners' termination of Respondents and because Southeast was denied an appeal.

If losing the AP Trial, at the hands of Respondents, with no hope of appeal, weren't bad enough, Respondents sided with the Chapter 7 Trustee for Southwest, the movant, to appoint a trustee for Southeast, and testified for the removal of Petitioners as debtor-in-possession of Southeast in favor of the appointment

of a Chapter 11 Trustee. Respondents' conflict of interest became even more self-evident when they openly sided against Petitioners, siding instead with the movants working side by side to appoint a trustee. In fact, Respondents sat at movant's table during the hearings to appoint a trustee while assisting counsel for the movant. As a result, the motion to appoint a Chapter 11 Trustee was granted in which the Trustee ultimately liquidated Petitioners' ownership interests to settle the judgment.

During the hearings to appoint a trustee, Respondents' conflict of interest was not only on full display, but the Court acknowledged Mr. Smith's lack of preparation in defense of the AP trial. Unfortunately for Petitioners, a trustee was still appointed. Nevertheless, when Mr. Smith was being cross-examined regarding his lack of trial preparation, the Court affirmed the fact that he had not prepared a defense or conducted discovery.

ATTORNEY: Mr. Smith, did you, prior to that hearing, go through what Mr. Kimbro Stephens could provide as evidence contrary to the Chapter 7 Trustee's allegations of on the transfers?

[. . .]

THE COURT: That's uncontested. It was asked probably five times of Mr.—Mr. Stephens, and over and over again, did anybody prepare, do discovery? And without being contested, it was no. Mr. Smith has explained why he didn't do discovery. That was his explanation.

Transcript, 4:12-bk-11082, DOC#: 236-3 at pp. 840-841.

In hindsight, it is clear that Respondents were in conflict with Petitioners. Respondents had no intention of defending Southeast's interests, had no intention of raising the statute of limitations, and by doing so were ultimately sabotaging Petitioners' interests while aiding opposing counsel throughout the course of the bankruptcy proceedings. Respondents' conflict of interest ultimately went unchecked when Petitioners' right to terminate counsel was denied at trial. Then Petitioners had no opportunity to challenge Respondents' conflict of interest, after the fact, once Respondents blocked any hope of appealing the judgment by refusing to lodge an appeal.

Left with no recourse for Respondents' actions in Federal Court, Petitioners sought redress of their grievance in State Court by filing a lawsuit against Respondents, the direct proceedings before the Supreme Court now. In the State Court proceedings, the Circuit Court granted Summary Judgment in favor of Respondents, dismissing the lawsuit with prejudice on the grounds that Petitioners were not in privity with Respondents under Arkansas law. As an exception to the privity requirement, attorneys can be sued for fraud and intentional misrepresentation. However, in this instance, the Circuit Court ruled that "if there was fraud committed, it was committed against [Southeast], not a party here." App.30a. Once again, Petitioners had no opportunity for recourse.

Petitioners then appealed the Summary Judgment to the Arkansas Court of Appeals. For the first time on appeal, Respondents added a new argument that Petitioners did not have the right to discharge Respondents as counsel; and therefore, Petitioners could not rely to their detriment to not discharge the attor-

neys for their intentional misrepresentations. Respondents argued that only the bankruptcy court had the power to discharge Respondents as counsel; therefore, as an exception to the privity requirement, Petitioners could not rely on Respondents' misrepresentation, thus, no detrimental reliance or causation existed on their intentional misrepresentation, as a matter of law. (Appellee's Brief at Arg. 16)

The theory that Petitioners have no right to terminate counsel came from Southeast's Chapter 11 case where Petitioners objected to Respondents' attorney fees following their termination. The bankruptcy court denied the objection stating that Southeast through its representatives, Petitioners, did not have the right to terminate counsel. The Arkansas Court of Appeals adopted this new rule to affirm Summary Judgment citing the bankruptcy court:

Southeast did not have "an unbridled right to . . . fire counsel as it chooses if that decision is based on the personal interests of [Southeast's] principals instead of the best interests of the estate." Therefore, the circuit court did not err by granting the motion for summary judgment because the appellants could not justifiably rely on the appellees' alleged misrepresentation that they would not object to the motion to intervene.

Arkansas Court of Appeals, *Opinion* at App.21a. Again, Petitioners had no opportunity for recourse.

Petitioners next filed a Petition for Rehearing. It was denied. Petitioners then filed a Petition for Review to the Arkansas Supreme Court. It was also

denied. Once again, Petitioners had no opportunity for recourse.

Petitioners now seek their final opportunity for recourse by filing this Petition for Writ of Certiorari to the United States Supreme Court in order that justice may prevail.



REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The denial of the right of a debtor in bankruptcy to terminate counsel, with or without cause, during a bankruptcy proceeding, conflicts with long standing principles inherent in the right of litigants to choose counsel of their choice and to terminate those who neglect their duties. Without the right to terminate counsel, a rogue attorney, can impair a party litigant's constitutional First Amendment rights to meaningful access to the courts and a litigant's constitutional Fifth and Fourteenth Amendment rights to due process and equal protection of the laws.

In this Petition before the Court, under Rule 10(c), the State of Arkansas has decided an important question of federal law that has not been, but should be, settled by this Court, and said decision conflicts with relevant decisions of this Court regarding the propriety of the attorney-client relationship. Essentially, the State of Arkansas ruled that a party litigant forfeits its "fundamental" right to terminate counsel, with or without cause, in federal bankruptcy court by filing a petition for bankruptcy protection. The Arkansas Supreme Court affirmed that rule by denying

review resulting now in a new rule in Arkansas that a bankruptcy litigant loses the right to terminate counsel in bankruptcy and thereby loses the inherit right to control the litigation as a debtor in bankruptcy.

It is the opinion of Petitioners that the proper remedy for bankruptcy courts, if a debtor acts inappropriately to terminate counsel, is the appointment of a trustee over the debtor, not the abridgment of a fundamental right to discharge one's attorney involving the attorney-client relationship.

In this case, not only were Petitioners prohibited from discharging their attorneys, but Respondents were allowed to continue representation of the debtor even after an obvious conflict existed. Once the damage was done in bankruptcy court, Petitioners were denied meaningful access in state court for a regress of their grievances because the State took the same position that Petitioners could not fire their attorneys, and therefore, Petitioners lacked standing to sue Respondents for any intentional misrepresentations.

Arkansas' decision is a denial of Petitioners' First Amendment, Fifth Amendment and Fourteenth Amendment rights: the right of meaningful access to the courts for a redress of grievances, the right to Due Process, and the right to equal protection of the laws. Denying a party litigant in bankruptcy the right to terminate counsel undermines the litigant's constitutional protections for seeking recourse against a rogue attorney. If the decision of the State of Arkansas is allowed to stand, debtors should beware.

At the very least, the questions before this Court are of substantial public interest that should be determined by the United States Supreme Court.

Bankruptcy courts and state courts need a clear decision that forcing a bankruptcy litigant to maintain counsel against its wishes, without the right to terminate, particularly for cause, as this case presented, abridges the litigant's access to meaningful and effective representation as a violation of due process, fundamental fairness, and equal protection under the law.



ARGUMENT

Is it not settled in American Jurisprudence that attorneys serve at the pleasure of their client? Do not masters control the decisions of their agents? At what point do we turn these long-standing principles upside down? When have the courts said that clients cannot terminate their attorneys for cause? When does common sense and fair play get lost in the fight for justice? Have we not lost the forest for the trees by denying a party litigant the right to control its litigation by denying that litigant the right to terminate its counsel, especially for cause? Who serves who?

Can we not take a step back and review a scenario that only affects one litigant but one that ultimately may be the start of the erosion of sacred principles of the attorney-client relation? Petitioners believe the answer to this question is “Yes”! This Court should as well.

Petitioners seek justice not only for themselves, but for the many who may suffer from the precedent being laid down in Arkansas. This precedent could possibly spread to other jurisdictions throughout the

country. This new rule in Arkansas which is under review here might only be the beginning of an erosion of justice nationally if it were to metastasize. This new rule should be surgically removed now before more harm is done.

This new rule has already been adopted by two bankruptcy courts in Arkansas, the Arkansas Court of Appeals, and the Arkansas Supreme Court. Do not let there be others to come before this Court acts. An ounce of prevention, by correcting this precedent now, is worth a pound of cure before more harm is done.

Where does this review begin? It must start with the highest court in the land. This Court has said the following regarding due process of law:

We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony . . .

Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 395 (1925);

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932);

In numerous other cases the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel.

Id. (emphasis added)

In *Ex parte Riggins*, 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that if the state should deprive a person of the benefit of counsel, it would not be due process of law.

Id. 287 U.S. at 70, 53 S.Ct. at 64.

In the context of this Petition, the Supreme Court's comments above reflect settled law that attorney representation is essential to due process when sought by the party litigant. This does not and should not mean that perfunctory representation satisfies this requirement. Meaningful and effective representation must be required or the right to be represented by an attorney rings hollow without substantive effect. When an attorney refuses to represent his client with reasonable diligence, the right to discharge that attorney has never been questioned. Any other rule would require a client to retain an attorney who was neglecting the cause and failing to proceed with proper diligence. This is precisely the matter before this Court.

This court has further said that the "Constitution guarantees a fair trial through the Due Process Clause." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 2562 (2006). Fundamental fairness rests with a party litigant's right to be represented by the counsel that he or she believes to be the best. In reference to right to counsel under the Sixth Amendment, this principle has been explained as follows:

[T]he right to counsel of choice "has been regarded as the root meaning of the consti-

tutional guarantee,” and thus, if such right is wrongly denied, “it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.”

United States v. Perry, 30 F.Supp.3d 514, 532 (E.D. Va. 2014), citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006).

Although this Petition involves a civil matter, every effort should be made to allow litigants the right to choose their counsel and not for the court to choose counsel for them. As *Perry* emphasized:

Moreover, even in a civil case, where Sixth Amendment protections are not implicated, “the disqualification of a party’s chosen counsel is a serious matter which cannot be based on imagined scenarios of conflict.”

Id. at 533, citing *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990).

The flip side to this argument is that prohibiting a party from disqualifying or terminating counsel for an obvious conflict is a very serious matter which cannot promote the ends of justice.

The Fifth Circuit Court of Appeals has weighed in on this subject matter as well, stating in *McCuin* as follows:

Litigants do have a right to be represented by counsel and this ordinarily implies a right to lawyers of their choice. The right to counsel does not, however, entail absolute freedom of choice. Counsel must be a member of the bar and must be admitted to practice before the court in which he appears. He

must not have a conflict of interest with another party. His employment must not entail disclosure of confidential information. The choice is never completely unfettered. Subject to these general limitations, the right to counsel in criminal cases is expressly guaranteed by the sixth amendment; the right to counsel in civil cases is no less fundamental and springs from both statutory authority [28 U.S.C. § 1654] and from the constitutional right to due process of law.

McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1262 (5th Cir. 1983)

In bankruptcy, we add an additional requirement to the foregoing known as the “disinterested” test. This is an administrative function of the court. The function of the bankruptcy court is to determine whether a debtor-in-possession’s choice of representation is a “disinterested person” (11 U.S.C. § 327(a) as defined by 11 U.S.C. § 101(14)) before approving the appointment. Beyond that, there is no corollary in the bankruptcy code requiring the court to approve the discharge of appointed counsel. In fact, the debtor-in-possession, acting in the place of a trustee, may “retain or replace such professional persons if necessary.” 11 U.S.C. § 327(b)). Just because the bankruptcy court is required to approve choice of counsel, the same principles do not necessarily authorize the bankruptcy court to deny termination of that counsel for stated cause. This is precisely what happened in this Petition. The Arkansas bankruptcy courts said that Petitioners could not discharge their attorney, even after stating a reason for cause, and the Arkansas Supreme Court has now adopted that same rule. No other jurisdic-

tion is known to Petitioners that have taken such a position in law.

In addition, the Fifth Circuit has elsewhere concluded:

... there is a constitutional right to retained counsel [of choice] in civil cases, and that this right may not be impinged without compelling reasons.

Texas Catastrophe Property Ins. Ass'n v. Morales, 975 F.2d 1178, 1181 (5th Cir. 1992) (Context added).

Whether by Fifth Amendment or application to the States by the Fourteenth Amendment, due process demands that party litigants have the “fundamental right” to their choice of counsel as described by the Fifth Circuit and to not be deprived of their counsel of choice without “compelling reasons.” *Id.*

Perhaps one of the most informative reviews of a debtors right to counsel of choice, and termination thereof, is found in the United States Bankruptcy Court for the District of Idaho. The bankruptcy court held that a debtor has the absolute right to terminate its attorney, that is with or without cause.

The relationship between client and attorney is a personal one—one of trust, confidence, and mutual cooperation. For this reason, a client has the right to discharge an attorney at any time, with or without cause. *See* Comment [4] to Idaho Rule of Professional Conduct 1.16. This right to freely choose and discharge one’s attorney is a personal right, rather than a property right, and the

Court concludes it is not therefore “property” of the bankruptcy estate.

In re Blackburn, 448 B.R. 28, 36 (Bankr. D. Idaho 2011).

Be it known that Arkansas has adopted the same Rule of Professional Conduct 1.16, but somehow it escaped them when they ruled Petitioners did not have a right to terminate Respondents. The Arkansas Rules of Professional Conduct, Rule 1.16, Comment [4] itself states:

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.

The ABA's Model Rules of Professional Conduct have been adopted in probably every jurisdiction in the country and it has the same reading as Idaho and Arkansas regarding a client's right to terminate counsel, with or without cause.

The question then becomes, why does a debtor in bankruptcy all of the sudden forfeit this right to terminate counsel for cause upon filing a petition for bankruptcy protection? Protection it is not.

Prior to the case at hand, Arkansas, like the Fifth Circuit, has long taken the position that the right of termination is “fundamental.” In *Gentry v. Richardson*, the Arkansas Supreme Court stated:

It is a fundamental characteristic of the attorney-client relation that the client always has the right to control the litigation and the consequent power to discharge the attorney, with or without cause.

Gentry v. Richardson, 309 S.W.2d 721, 723 (Ark. 1958), citing *Johnson v. Missouri Pac. R. Co.*, 149 Ark. 418, 233 S.W. 699 (Ark. 1921)

Even though the above excerpt is by the Arkansas Supreme Court, are these not universal principles as they relate to the sacredness of the attorney-client relationship long held in American Jurisprudence?

What may be even more perplexing in this Petition is the fact that the United States Bankruptcy Courts for the Eastern and Western Districts of Arkansas had adopted the same standard prior to this case. Bankruptcy Local Rule 2090-2 states:

The standard of professional conduct for attorneys practicing in this Court is governed by the Arkansas Rules of Professional Conduct.

There appears to be a very severe disconnect with the bankruptcy and state courts in Arkansas from their very own rules by denying Petitioners the right to terminate Respondents. Because of these rulings, Petitioners have been denied justice by dismissing their grievance, hence, the cause for this Petition.

It is reasoned that the bankruptcy courts in Arkansas should interpret the attorney-client relationship based on the jurisdiction in which it sits, Arkansas. Arkansas says a client can terminate his or her attorney, with or without cause, but the bankruptcy court essentially said in this Petition that a client has to get permission from the court and, furthermore, a debtor does not have that right.

The Eighth Circuit, wherein Arkansas is found, citing the U.S. Supreme Court, has adopted the following comments on the matter:

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Seaver v. Klein-Swanson, No. 12-6054 (8th Cir. 2013), citing *Butner v. United States*, 440 U.S. 48, 55 (1979).

Expanding on *Butner*, the U.S. Supreme Court has further stated:

The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.

Butner at 55.

Equally, is not the right to terminate counsel a protected right under Arkansas law applicable to bankruptcy? Arkansas' Rule 1.16 was adopted by the Arkansas bankruptcy courts in Local Rule 2090-2, yet the bankruptcy court denied this right to the Petitioners, ignoring its own Local Rule while abandoning the federal constitutional protections of due process and equal protection. And then in turn, Arkansas continued this deprivation of constitutional protections by affirming the bankruptcy court and denying Petitioners' their fundamental right to discharge Respondents.

For certain, the application of state law should have been allowed in bankruptcy court to protect

Petitioners' right to terminate counsel, but it was not. But we are not here to seek redress from bankruptcy; we are here to seek redress of the State's application of that rule, where it matters most in this instance, as a deprivation of constitutional rights to the detriment and injury to Petitioners by the State.

Arkansas should not have abandoned its long held fundamental right that party litigants can terminate counsel, with or without cause, even in bankruptcy. Arkansas should have withstood the poor ruling handed down in bankruptcy which was not binding or controlling in state court. Instead, Arkansas simply adopted the rule without considering the consequence to the federal constitutional rights and privileges afforded Petitioners.

Bankruptcy courts are charged with overseeing and administering "estate property" and the right of a bankruptcy court to decide that a client can no longer terminate his or her lawyer is not a "legal and equitable interest of the debtor in property" as defined by 11 U.S.C. § 541(a)(1). In *Blackburn*, the bankruptcy court found:

. . . the right to freely choose and discharge one's attorney is a personal right, rather than a property right, and . . . it is not therefore "property" of the bankruptcy estate.

Blackburn at 36; See also *In re Brand*, 251 B.R. 912-15 (Bankr. S.D. Fla., 2000) (distinguishing between an elective share interest and the right of election, and finding that the right of election, a personal right under Florida law, was not property of the estate).

The specific issue in *Blackburn* was whether the Chapter 7 Trustee could discharge the debtor's attorney.

The Court held that the trustee could not discharge the debtor's counsel as it was a personal right of the debtor not subject to the powers of a trustee since the right itself was not a legal or equitable interest in property.

This brings us to our final constitutional point regarding equal protection. The inherent concepts of equal protection pervade the former arguments of the First Amendment's meaningful access to the courts and the Fifth Amendment's right of due process. By federal statute, 28 U.S.C. § 1654, by Court Rules, Rule 1.16, and by bankruptcy Local Rule 2090-2, each should be applied equally, whether or not a party litigant is in bankruptcy. How is it possible that one can have the right to terminate counsel in federal district court as a matter of due process and then not have that same right in bankruptcy court, a subdivision of the federal district court? How can state law grant the fundamental right to terminate one's attorney, with or without cause, in state court, but then deny that same right if the same circumstance arises in bankruptcy court?

Meaningful access to seek redress of grievances should be applied equally whether in federal court, bankruptcy court, or state court. All are government entities under the First Amendment which is applied to the States under the Fourteenth Amendment. Whether we find that the sacred and fundamental right of a party litigant to choose and terminate his or her attorney is a matter of due process or equal protection of due process, it is still a matter of "fundamental" rights of clients held sacred within the attorney-client relationship.

Equal protection of the law was not upheld by denying Petitioners the right to terminate counsel for cause. This Petition followed.



CONCLUSION

If the erroneous decisions in Arkansas are left to stand, future party litigants will face similar consequences from unscrupulous attorneys desiring to take advantage of their clients in bankruptcy. The integrity of the judicial system in Arkansas is at stake. The decision to deny a debtor the right to terminate counsel is an affront to the attorney-client relationship and an aberration of law. As such, the implications are far greater than this Petitioner.

This is an urgent matter that can't wait the test of time. It requires swift rebuke. Otherwise, courts may go down the slippery slope of eroding long held constitutional protections which afford party litigants the right to choose and to terminate counsel at the discretion and wisdom of the client.

In view of the above arguments, it is respectfully requested that a Writ of Certiorari issue.

Respectfully submitted,

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AUGUST 18, 2021