

No. 07-5016

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE RUSSELL T. HARPER,
SHANNON C. HARPER,

Debtors.

BAP No. NO-06-076

PATRICK J. MALLOY, III,
TRUSTEE,

Plaintiff – Appellee,

v.

WILSERV CREDIT UNION,

Defendant – Appellant.

Bankr. No. 05-13352-R
Adv. No. 05-01151-R
Chapter 7

REPLY BRIEF OF APPELLANT, WILSERV CREDIT UNION

Appeal from decision of BAP affirming decision of Honorable Dana Rasure,
United States Bankruptcy Judge for the Northern District of Oklahoma.

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ARGUMENT

In the Appellee's Brief, the Trustee argues that the April 2004 amendment to 47 O.S. §1110 is inapplicable in the present case. In support of that statement, the Trustee argues the "general rule" that statutes are to be applied prospectively only, citing Oklahoma Board of Medical Licensure and Supervision v. Oklahoma Board of Examiners in Optometry, 1995 OK 13, 893, P.2d 498.

The Trustee fails to note, however, that the Trustee had no rights that were changed by the 2004 amendment. Attached hereto as Exhibit "A" is a copy of the docket sheet from the underlying bankruptcy of the debtors, establishing that the Chapter 7 proceeding was filed May 27, 2005. The 2004 amendment to §1110 preceded that Chapter 7 filing by over one year. Accordingly, the Trustee had no "vested rights" that were affected by the amendment to the statute. The 2004 version of §1110 was simply the law of the State of Oklahoma at the time that this Chapter 7 proceeding was filed. The Trustee's mythical lien creditor status arose only at the time that the debtors filed their Chapter 7 proceeding.

As stated by the Supreme Court of Oklahoma:

A "vested right" is the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute, or by contract. Once created, it becomes absolute and it protected from legislative invasion by Article IV Secs. 52 and 54 of our Constitution.

First National Bank of Pauls Valley v. Crudup, 1982 OK 132, 656 P.2d 914 (at footnote

8). Further, the unspoken assumption upon which the Trustee's argument is based is that the 2004 amendment was some sort of change under Oklahoma law. WilServ submits

that the amendment was in fact not a change, but rather a clarification of the preceding position of the Oklahoma authorities. Attached hereto as Exhibit “B” is a copy of a letter dated July 1, 1997, to “All Tribal Leaders” from Bob A. Ricks, Commissioner of Public Safety, and Robert Anderson, Chairman of the Oklahoma Tax Commission of the State of Oklahoma. This letter states the following:

Accordingly, a member of a federally-recognized Oklahoma tribe, living in “Indian County” as defined by Federal law and owing a vehicle bearing a valid license plate from the tribe has:

- 1) A valid license plate to be treated the same as an Oklahoma license plate under the provisions of O.S. §1151 as amended by SB 586;
- 2) A valid license plate for purposes of obtaining a motor vehicle inspection; and
- 3) A valid license plate for the purpose of obtaining an Oklahoma driver’s license.

You are authorized to reproduce a copy of this letter and furnish it to any concerned tribal member or other interested party.

See Exhibit “B”, letter dated July 1, 1997.

Based upon the foregoing, it is apparent that the officials of the State of Oklahoma, since 1997 at least, have recognized the validity of Indian titles. It is noted that the balance of the letter (in a paragraph not cited above) references Sac and Fox Nation v. Oklahoma Tax Commission, 113 S.Ct. 1985, as being dispositive of the issue. And, as noted in the Appellant’s Brief, it is WilServ’s position that Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005), stand for the proposition that the states have no choice but to recognize the validity of Indian titles on vehicles. Accordingly, both under the procedure and guidelines established by the letter set forth above, and by 10th Circuit authority, even prior to the 2004 amendment, Oklahoma

recognized these Indian titles as being valid. Indeed, Oklahoma had no choice in the matter.

For these reasons, the Trustee's assertion that the 2004 amendment should not apply is clearly mistaken. The 2004 amendment simply codifies the preexisting law on the issue. Further, the Trustee's rights in the matter did not arise until May, 2005, when this Chapter 7 proceeding was filed. Even if the 2004 amendment constituted a change in the law, the Trustee would have no right to complain as his "vested rights" did not arise until the Chapter 7 proceeding was filed.

Respectfully submitted,

Butler & Wheeler, PLLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was mailed via U.S. mail, postage fully prepaid this 9th day of May, 2007 to:

Patrick J. Malloy III, Trustee
111 W. 5th, Suite 700
Tulsa, OK 74103,

s/David K. Wheeler
David K. Wheeler

CERTIFICATION OF DIGITAL SUBMISSION

The undersigned hereby certifies that a true and correct PDF copy of the above and foregoing instrument was mailed electronically this 9th day of May, 2007 to the Court and to:

Patrick J. Malloy III, Trustee
111 W. 5th, Suite 700
Tulsa, OK 74103,

s/David K. Wheeler
David K. Wheeler

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this Appellant's Reply Brief is proportionally spaced and contains 921 words, as calculated by my word processing software, Microsoft Word. I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/David K. Wheeler

David K. Wheeler

CERTIFICATE OF COUNSEL

In accordance with FRAP Rule 25, WilServ hereby certifies that on the 9th day of May, 2007, this Brief was delivered to Fed-Ex, for subsequent delivery to the Court within three calendar days.

s/David K. Wheeler

David K. Wheeler