IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

A. KARIM KATRIB, M.D.,

Petitioner,

v. **No. 21-0843**

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, and THOMAS HEALTH SYSTEM, INC.

Respondents.

BRIEF ON BEHALF OF THE PETITIONER

John J. Polak (WVSB No. 2929)
Mark A. Atkinson (WVSB No. 0184)
ATKINSON & POLAK, PLLC
1300 Summers Street, Suite 1300
P.O. Box 549
Charleston, WV 25322
(304) 346-5100
jjpolak@amplaw.com

Counsel for Petitioner

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BRIEF ON BEHALF OF PETITIONER

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II. STATEMENT OF THE CASE

Because this appeal involves the granting of a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the focus of the Court must be on the allegations of the Petitioner's complaint. Under the applicable law, the complaint is construed in the light most favorable to the Petitioner, and its allegations are taken to be true.

As the complaint asserts, Petitioner is a Board-Certified Otolaryngology (Ear, Nose & Throat) specialist who is self-employed in his medical practice in South Charleston, Kanawha County, West Virginia. Petitioner had clinical privileges and medical staff membership with

Respondent Herbert J. Thomas Memorial Hospital Association ("Thomas Memorial Hospital") [1] for approximately 34 years. *A.R. at 3, Complaint at ¶¶ 4,5,6.*

Thomas Memorial Hospital has "Medical Staff Bylaws" ("the Bylaws") in place which govern the right of physicians, including Petitioner to practice medicine at the Hospital. *A.R. at 3, Complaint at ¶7.* On December 17, 2018, Petitioner was informed by the Respondents of the Thomas Memorial Hospital Peer Review Committee's concerns about "a standard of care issue" with regard to a patient who had been treated by the Petitioner in September 2018. Petitioner was asked to address his treatment of the patient in writing and he did so by letter dated January 21, 2019. *A.R. at 3-4, Complaint at ¶11.*

On May 16, 2019, eight months after Petitioner had cared for the patient at issue and five months after he had been informed that his care for the patient was under review, Petitioner was sent a letter from Respondents informing him that "effective immediately, a precautionary suspension of all [of the Petitioner's] clinical privileges at Thomas Memorial Hospital has been ordered." *A.R. at 4, Complaint at ¶14.* Pursuant to the Bylaws, a precautionary suspension is warranted only when the "failure to take such action may result in imminent danger to the health and/or safety of any individual or to the orderly operations of the Hospital." *A.R. at 6, Complaint at ¶26.*

The May 16, 2019 letter further stated that "the medical staff peer review and investigation process" would be completed "within 30 days of this notice." *A.R. at 4, Complaint at ¶14.* As a result of the suspension of his privileges, Petitioner was unable to treat his patients at Thomas Memorial Hospital, which substantially limited his ability to provide medical services to his existing and prospective patients. *A.R. at 4, Complaint at ¶15.*

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[1] Thomas Health System, Inc. is also a Respondent herein. Thomas Memorial Hospital is a subsidiary of Thomas Health System, Inc. *A.R. at 2-3, Complaint at ¶3.*

The Bylaws required the Respondents to complete their investigation within 30 days of the May 16, 2019 "precautionary suspension" of the Petitioner. Pursuant to the Bylaws, the investigation of the Petitioner should have been completed no later than June 15, 2019. *A.R. at 7, Complaint at ¶¶ 30,31.* The Petitioner heard nothing from Respondents about his privileges between May 17, 2019 and June 15, 2019. *A.R. at 4, Complaint at ¶17.*

By letter dated August 14, 2019, Petitioner's counsel provided the Respondents with the opinion of Dr. Jeremy Tiu, a physician who is board certified in Otolaryngology. Dr. Tiu addressed the Petitioner's treatment of the patient in question and opined that the patient received "excellent care" and that the Petitioner had "saved [the patient's] life." Counsel's letter further stated that the Petitioner was willing to meet with those reviewing the suspension and discuss any issues regarding the treatment of the patient. *A.R. at 5, Complaint at ¶18.*

By letter dated August 22, 2019 to the Petitioner's counsel, Respondents acknowledged receipt of the Dr. Tiu opinion and asked "that Dr. Katrib continue his voluntary agreement to not admit patients or schedule patient procedures at Thomas until we come to a final resolution." *A.R. at 170, Response Exhibit A.* Petitioner's counsel quickly responded to this erroneous assertion by letter dated August 28, 2019, stating:

> Dr. Katrib would like to clarify that there was never a voluntary agreement regarding his privileges at Thomas Memorial Hospital. On May 16, 2019, Dr. Katrib was suspended by the hospital for a period of 30 days. At the end of the 30-day period, Dr. Katrib was supposed to be advised of the Peer Review Committee's investigation and the Medical Evaluation Committee's recommendations and never received any information or update regarding the status of his privileges. Therefore, for clarification purposes, there was no voluntary agreement regarding Dr. Katrib's privileges.

A.R. at 171, Response Exhibit B.

Respondents did not allow the Petitioner to meet with any of the members of the Medical Evaluation Committee. Instead, by letter dated September 19, 2019, Respondents informed the Petitioner that "a recommendation for revocation of [the Petitioner's] medical staff membership and all clinical privileges" had been made by the Medical Evaluation Committee for submission to the Thomas Memorial Hospital Board of Trustees. Respondents' letter further stated that the recommendation "implement[ed] suspension of all clinical privileges and medical staff membership pending the Board's review and decision on the recommended action." The letter also informed the Petitioner that he had thirty days in which to invoke his right under the Bylaws to "request a hearing on the matter at hand." *A.R. at 5, Complaint at ¶19.*

By letter dated October 2, 2019, the Petitioner's counsel formally requested a hearing regarding the Thomas Memorial Hospital Medical Executive Committee's recommendation. *A.R. at 5, Complaint at ¶20.* This was in accordance with the Bylaws which provide that, upon request, the Petitioner was entitled to a hearing before the recommendation of the revocation of his medical staff membership and clinical privileges became final. *A.R. at 8, Complaint at ¶38.* The Bylaws require that the hearing "shall begin as soon as practicable" and that it was necessary to "conduct a hearing as soon as reasonable." *A.R. at 8, Complaint at ¶40.* As of the date of the filing of the complaint, the Petitioner had not been given a hearing by Respondents to contest the Committee's recommendation. *A.R. at 8, Complaint at ¶41.* The suspension of the Petitioner's clinical privileges and medical staff membership at Thomas Memorial Hospital has been continuous from May 16, 2019 to the present. *A.R. at 5, Complaint at ¶22.*[2]

On January 10, 2020, Respondent Thomas Heath System, Inc. and its subsidiaries,

[2] As of the date of the filing of this brief, the Petitioner still has not been given a hearing by the Respondents to contest the Committee's recommendation. As such, the suspension of the Petitioner's clinical privileges and medical staff membership at Thomas Memorial Hospital remains in full force and effect.

including Respondent Thomas Memorial Hospital, filed voluntary petitions for Chapter 11 relief under the United States Bankruptcy Code. The Respondents' Chapter 11 cases were jointly administered under the lead case, In re Thomas Health System, Inc. et al., Case No. 2:20-bk-20007 (U.S. Bank. Ct. S. D. W.Va.). *A.R. at 146, Respondents' Memorandum at 1.* The Petitioner was not listed by Respondents as a creditor and was not provided with actual written notice by the Respondents of the debtors' bankruptcy filing and claims bar date. *A.R. at 161, Petitioner's Response at 6.* On August 19, 2020, the Bankruptcy Court entered an order confirming the Respondents' "Joint Chapter 11 Plan of Reorganization." The order made the debtors' plan of reorganization effective on September 30, 2020. *A.R. at 38, Notice of Bankruptcy, Exhibit A at 21.*

Petitioner instituted this action against Respondents in the Circuit Court of Kanawha County, West Virginia on May 14, 2021. In his complaint, the Petitioner asserted claims arising from multiple violations of the Bylaws, as well as tort claims arising from the Respondents' course of conduct surrounding the continuing suspension of his medical staff membership and clinical privileges. *A.R. at 6-12, Complaint ¶¶ 24-69.*

On June 4, 2021, Respondents filed a "Notice of Bankruptcy and Discharge of Proceedings" with the Circuit Court, asserting that Petitioner's complaint could not proceed because it was in violation of the "Discharge Injunction" of the Bankruptcy Court's August 19, 2020 Order. *A.R. at 15, Notice of Bankruptcy at 2.* On June 10, 2021, Respondents filed a Motion to Dismiss "under Rule 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure" along with an accompanying memorandum, arguing that all of the Petitioners claims against the Respondents had been discharged by the Bankruptcy Court Order. *A.R. at 72-73, 146-153.* The Petitioner filed a Response in opposition to the Motion on August 19, 2021 and

Respondents filed a Reply on September 2, 2021. Thereafter, the Circuit Court heard argument on the motion to dismiss on September 13, 2021.

On September 24, 2021, the Circuit Court granted the Respondents' motion to dismiss by entering the proposed order that had been submitted to the Court by the Respondents' counsel. *A.R. at 182-194.* The Circuit Court's Order concluded that all of the Petitioner's claims were discharged by the bankruptcy Order and that Petitioner's complaint failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure because the Court lacked subject matter jurisdiction under Rule 12(b)(1) of the West Virginia Rules of Civil Procedure to hear the complaint. *A.R. at 190-191, Dismissal Order at ¶32.* It is from this Order that the Petitioner appeals.

III. SUMMARY OF ARGUMENT

The Respondents sought to dismiss all of the Petitioner's claims as being discharged in bankruptcy. Before a court can deem pre-petition claims to have been discharged, the court must determine that the claimant received adequate notice of the bankruptcy proceedings and the claims bar date. Respondents relied upon the fact that the Petitioner received constructive notice of the bankruptcy by publication. The Circuit Court misapplied the controlling federal bankruptcy law on the definitions of the terms "known creditor" and "unknown creditor" by failing to find that the record demonstrated that the Petitioner was a known creditor of Respondents who was entitled to actual written notice of the Respondents' bankruptcy as opposed to constructive notice.

In addition to misapplying the law governing the relevant terms, the Circuit Court misapplied both the West Virginia Rules of Civil Procedure and the controlling federal

bankruptcy law by effectively shifting the burden of proof from the Respondents to the Petitioner. The Circuit Court's ruling failed to recognize that the Petitioner's status as a known or unknown creditor was inherently an issue of fact which, at a minimum, required pre-trial factual development and precluded a ruling on the Respondents' affirmative defense of discharge in bankruptcy on a motion to dismiss.

The Circuit Court also failed to construe the complaint in the light most favorable to the Petitioner as required by the governing caselaw and erroneously concluded that the Petitioner's complaint did not seek relief for conduct that the Respondent committed after the effective date of the Discharge Order. The Petitioner's complaint alleged actionable conduct on the part of Respondents that occurred after the effective date of the Discharge Order and the federal bankruptcy caselaw makes clear that any claims based on such conduct would not have been discharged under any circumstance. The Circuit Court was required to liberally construe the Petitioner's complaint so as to do substantial justice, but it failed to do so in reaching this conclusion.

The controlling federal caselaw recognizes that the operation of the Bankruptcy Code, including its discharge provisions, is subject to due process constraints. In dismissing all of the Petitioner's claims against Respondents, the Circuit Court failed to recognize and acknowledge that a trial court should not defer to a bankruptcy court confirmation order if doing so would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the Circuit Court's order erred in the application of settled law (albeit settled law from the federal courts) and, as such, this matter is appropriate to be scheduled for oral argument and consideration under Rule 19 of the West Virginia Rules of Appellate Procedure. However, to the extent that this Court determines that it may be necessary to clarify this State's law on these issues, then this case would raise an issue of first impression in West Virginia. In that event, Petitioner submits that this matter is appropriate to be scheduled for oral argument and consideration under Rule 20 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. The Circuit Court erred in finding that Petitioner's claims were discharged because he was an "unknown creditor" of the Respondents who was not entitled to actual written notice of the Respondents' bankruptcy filing and claims bar date.

This appeal challenges the granting of a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

In dismissing this case, the Circuit Court erred when it concluded that the Petitioner's "pre-petition Claims were discharged on September 30, 2021, [*sic*] by [Respondents'] confirmed Plan." *A.R. at 190, Dismissal Order at ¶28.* Petitioner submits that his claims against Respondents were not discharged by the bankruptcy order because the Petitioner was a "known creditor" of Respondents who was entitled to actual notice of the Respondents' bankruptcy filing and claims bar date. Respondents did not list the Petitioner as a creditor in their bankruptcy

filing[3] and, because he was clearly a "known creditor" of Respondents, their failure to provide actual notice to the Petitioner was fatal to their assertion that the Petitioner's claims were discharged.

As a threshold matter, it should be noted that "[t]he bankruptcy courts and state courts have concurrent jurisdiction to determine the dischargeability of unscheduled debts." In re Palumbo, 556 B.R. 546, 551 (Bankr. W.D.N.Y. 2016) (*citing cases*). *See also* In re Toussaint, 259 B.R. 96, 100 (Bankr. E.D.N.C. 2000) ("bankruptcy courts and state courts generally have concurrent jurisdiction for deciding dischargeability issues arising from a debtor's failure to list a creditor."). As the court stated in In re Stucker, 153 B.R. 219 (Bankr. N.D. Ill. 1993), one of the "ways to litigate dischargeability after a [bankruptcy] case is closed [is], if a creditor pursues a lawsuit on the claim, the debtor can assert the bankruptcy discharge as an affirmative defense and the court with jurisdiction over that lawsuit can determine the issue of dischargeability under section [11 U.S.C. § 523(a)(3)]." Id. at 222. That is what the Respondents chose to do in this case. As such, both the Circuit Court and this Court have the ability to address this issue.

Turning to the application of the federal bankruptcy law that governs this dispute, the Eighth Circuit has stated:

> "[B]efore a pre-petition or pre-confirmation claim can be discharged under the applicable provisions of the Bankruptcy Code, a debtor's creditors must be afforded notice of the debtor's bankruptcy case, as well as the deadline for asserting any pre-petition claims against the debtor." [In re J.A. Jones, Inc.], 492 F.3d 242, 249 (4th Cir.2007). Absent such notice, creditors lack "the opportunity to participate in a meaningful way in the course of bankruptcy proceedings." In re Hairopoulos, 118 F.3d 1240, 1244 (8th Cir.1997). According to a landmark Supreme Court case, "[a]n elementary and fundamental requirement of due process in

[3] "Bankruptcy debtors are required to prepare and submit a list or schedule of creditors with an initial bankruptcy petition so that appropriate notice can be provided to those creditors. 11 U.S.C. § 521." In re J.A. Jones, Inc., 492 F.3d 242, 252 n. 11. (4th Cir. 2007).

> any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Sanchez v. NW. Airlines, Inc., 659 F.3d 671, 675 (8th Cir. 2011).

A pre-existing debt can only be discharged through bankruptcy if the creditor was on notice of a debtor's bankruptcy filing and the claims bar date. Bosiger v. U.S.Airways, 510 F.3d 442, 451 (4th Cir. 2007). Inadequate notice is a defect which precludes discharge of a claim in bankruptcy. Dahlin v. Lyondell Chem. Co., 881 F.3d 599, 604 (8th Cir. 2018). Thus, the Petitioner's pre-petition claims against the Respondents can only deemed to be discharged if the Petitioner received the requisite adequate notice of the Respondents' bankruptcy. As the Fourth Circuit has stated, "a claim asserted by a creditor against a debtor's estate cannot constitutionally be discharged in accordance with the Bankruptcy Code unless the debtor provides constitutionally adequate notice to the creditor of the debtor's bankruptcy proceeding, as well as the applicable filing deadlines and hearing dates." In re J.A. Jones, Inc., 492 F.3d 242, 249 (4th Cir. 2007).[4]

For notice purposes, bankruptcy law divides claimants into two types, "known" and "unknown." Known creditors must be provided with actual written notice of a debtor's bankruptcy filing and claims bar date. For unknown creditors, notification by publication will generally suffice. Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995). For known

[4] The Bankruptcy Code defines a "claim" as "a right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5). The term "claim" is broadly construed under the Bankruptcy Code. Nobelman v. American Savings Bank, 508 U.S. 324, 331 (1993).

creditors, general knowledge of the bankruptcy proceedings will not suffice. In re Pick & Save, Inc., 478 B.R. 110 (Bankr. D.P.R. 2012). Because Respondents rely solely on notice of the bankruptcy to the Petitioner by publication, such notice can only be constitutionally adequate if the Petitioner qualified as an unknown creditor of the Respondents.

A known creditor is one whose identity is either known or reasonably ascertainable by the debtor. An unknown creditor is one whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the debtor. A creditor's identity is reasonably ascertainable if that creditor can be identified through reasonably diligent efforts. In re Peabody Energy Corp., 579 B.R. 208, 215 (Bankr. E.D. Mo. 2017). *See also* Chemetron, 72 F.3d at 346 ("a 'known' creditor is one whose identity is either known or 'reasonably ascertainable by the debtor,'" *citing* Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 490 (1988).).

The Fourth Circuit's statement about the definition of a known creditor in J.A. Jones, *supra*, is instructive:

> [S]tated succinctly, a known creditor or claim arises from facts that would alert a reasonable debtor, based on a careful examination *of its own books and records*, to *the possibility* that a claim might reasonably be filed against it *by a particular individual* or entity.

492 F.3d at 251, *emphasis added. See also* In re Motors Liquidation Co., 585 B.R. 708, 725 (Bankr. S.D.N.Y. 2018) ("A known claim arises from facts that would alert the reasonable debtor to the possibility that a claim might reasonably be filed against it."). Significantly, "the term 'creditor' in bankruptcy law is sufficiently broad to include a potential creditor." Matter of Chicago, Rock Island & Pac. R. Co., 788 F.2d 1280, 1283 (7th Cir. 1986).

In this case, the Circuit Court's own findings indicate that the Petitioner was a known creditor of the Respondents under these standards. More specifically, the findings contained in

paragraph 9 of the Circuit Court's Order establish that, prior to the January 10, 2020 bankruptcy filing, the Respondents had informed Petitioner on December 17, 2018 about "a standard of care issue" with regard to a patient who had been treated by the Petitioner; that the Petitioner addressed that issue *by letter to the Respondents* dated January 21, 2019; that the *Respondents sent a letter to Petitioner* on May 19, 2019 informing him of a "precautionary suspension" of his clinical privileges as a result of concerns over the treatment of the patient in question; that, as a result of the suspension of his privileges, Petitioner was unable to treat his patients at Thomas Memorial Hospital, which substantially limited his ability to provide medical services to his existing and prospective patients; that Petitioner's counsel communicated with Respondents about the issues which gave rise to the suspension *by letter* dated August 14, 2019; that *Respondents informed Petitioner by letter* dated September 19, 2019 of the recommendation for revocation of his medical staff membership and all clinical privileges made by the Respondents' Medical Evaluation Committee; that, *by letter* dated October 2, 2019, Petitioner's counsel formally requested a hearing regarding the September 19, 2019 recommendation as permitted by the By-Laws; and that the Petitioner has not been given a hearing by Respondents to contest the Committee's recommendation. *A.R. at 185-186, Dismissal Order at ¶9.* Respondents also conceded that they "were aware of a dispute over clinical privileges and ... were in negotiations with [Petitioner]" *A.R. at 178, Respondents' Reply at 6 and at 6, n.1.*

Inarguably, based on their own books and records, Respondents knew the Petitioner's identity and his address on January 10, 2020, the date of the bankruptcy filing. On that date, Respondents were also aware of Petitioner's personal and economic interest in protecting his clinical privileges. Likewise, Respondents were aware that the Petitioner had specifically exercised his right under the By-Laws to an administrative hearing to challenge Respondents'

actions. Indeed, by their own admission, the Respondents were "aware of a dispute over clinical privileges" between the Petitioner and Thomas Hospital and were "in negotiations" with him.

Nor can the Respondents legitimately contend that a potential damage claim by the Petitioner was not reasonably ascertainable under the circumstances that existed in January 2020. While those engaging in peer review proceedings such as the privilege dispute here are generally immune from civil liability under the governing law, such immunity is not absolute. W. Va. Code § 30-3C-2(b) provides that:

> A review organization or any member, agent or employee thereof who, *in the absence of malice and gross negligence,* acts upon or furnishes counsel, services or information to a review organization shall be immune from liability for loss or injury to the person whose activities are being reviewed.

Emphasis added. Malicious or grossly negligent conduct in the proceeding can result in the loss of immunity from damage claims asserted by the person whose activities are being reviewed. Respondents are certainly aware of this principle because of this Court's opinion in Garrison v. Herbert J. Thomas Mem'l Hosp. Ass'n, 190 W. Va. 214, 438 S.E.2d 6 (1993), where the Court held that "individuals conducting health care peer review must act in good faith in order to be statutorily immunized from civil liability under *W. Va. Code,* 30–3C–2." Id. at 218, 438 S.E.2d at 10.

Federal law likewise provides immunity from damage claims, but that immunity is also subject to certain exceptions. As the Fourth Circuit stated in Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205 (4th Cir. 2002), the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.* "limits liability in damages for those who participate in professional peer review. For HCQIA immunity to attach, however, the peer review action must comport with due process." Id. at 211.

Moreover, Respondents were aware that this Court recognized in 2017 that: "Although courts have limited jurisdiction to review purely administrative decisions of private hospitals, the courts of this state do have jurisdiction to hear cases alleging torts, breach of contract, violation of hospital bylaws or other actions that contravene public policy." Syllabus Point 2, Camden-Clark Mem'l Hosp. Corp. v. Nguyen, 240 W. Va. 76, 807 S.E.2d 747 (2017). These authorities establish that, by January 2020, the *possibility* that a claim for damages might reasonably be filed by the Petitioner against the Respondents arising from the privilege dispute was clear.

The Circuit Court's Order concluded that Respondents would be required to engage in an "unlimited investigation" to discover that the Petitioner was a potential creditor. *A.R. at 192-193, Dismissal Order at ¶40.* The Circuit Court's own findings belie this notion. In fact, no investigation by the Respondents was necessary. All of the information necessary to conclude that the Petitioner was a potential creditor was in the possession of the Respondents on January 10, 2020. The Respondents would have been required to expend no effort at all to recognize the Petitioner's potential claims.[5]

The case of In re Talon Automotive Group, Inc., 284 B.R. 622 (Bankr. E.D. Mich. 2002), is analogous to this case. In Talon, an employee was suspended by her employer pending discharge. On November 20, 2000, the employee filed a pre-petition grievance challenging her

[5] The cases cited by the Circuit Court in paragraph 40 of its Order are all readily distinguishable from this case. *See* In re Provident Hosp., Inc., 122 B.R. 683 (D. Md. 1990), *aff'd,* 943 F.2d 49 (4th Cir. 1991) (Claimant was the brother of a patient of the debtor hospital who had never been treated by the hospital himself); Matter of GAC Corp., 681 F.2d 1295 (11th Cir. 1982) (Claimants were persons who had purchased but no longer held debentures at issue); In re Charter Co., 113 B.R. 725 (M.D. Fla. 1990) (Claim was for wrongful death of person allegedly exposed to benzene); In re Texaco Inc., 182 B.R. 937 (Bankr. S.D.N.Y. 1995) (Claimants were adjacent landowners with no contractual relationship to debtor); In re New York Trap Rock Corp., 153 B.R. 642 (Bankr. S.D.N.Y. 1993) (Claimant was government agency that failed to file claim for environmental cleanup); In re AMF Bowling Worldwide, Inc., 520 B.R. 185 (Bankr. E.D. Va. 2014), *aff'd sub nom.* Bd. v. AMF Bowling Worldwide, Inc., 533 B.R. 144 (E.D. Va. 2015) (Claimant was accident victim struck by minor allegedly served alcohol by debtor); In re Hunt, 146 B.R. 178 (Bankr. N.D. Tex. 1992) (Claimants never notified debtor of the existence of any claim). *A.R. at 192-193, Dismissal Order at ¶40.*

suspension that was still pending when the employer filed for bankruptcy on June 12, 2001. Id. at 623-24. The employee did not receive actual written notice of the bankruptcy. She was terminated on October 12, 2001. The employer's reorganization plan was approved by the bankruptcy court effective November 14, 2001. On December 27, 2001, the employee sued alleging wrongful discharge. Id. at 624. The employer contended that the employee's claims had been discharged by the bankruptcy court order. The employee contended that she was a known creditor entitled to actual notice because the employer knew that she had a claim against it as early as November of 2000, when she filed the grievance with her union steward challenging her suspension. Id. at 626.

The court agreed with the employee, finding that she was a known creditor of the employer because her grievance was still pending at the time of the bankruptcy filing. This was so even though the relief sought in the grievance was not the same as the relief sought in the wrongful discharge lawsuit Yet, the employee's claims for wrongful termination were not discharged because she had not been provided with actual written notice of the bankruptcy. Id.

In this case, the Petitioner's privileges had also been suspended by Respondents pending a final determination of his status, and he had also exercised his right to a hearing to challenge the suspension at the time of the bankruptcy filing. Like the employee in Talon, these facts made the Petitioner a known creditor of the Respondents.[6]

Finally, it is telling that, in the one year and four months that have passed since the September 30, 2020 effective date of the Respondents' reorganization plan, the Respondents still have not provided the Petitioner with the hearing mandated by the By-Laws. This can only be

[6] It does not matter that the Respondents may believe that they have no liability to the Petitioner. The mere fact that a claim is disputed by a debtor does not mean that creditor holding the claim is not a known creditor who is entitled to actual notice of debtor's bankruptcy filing. In re J.A. Jones, Inc., 492 F.3d 242, 252 (4th Cir. 2007).

because the Respondents consider their obligation to provide the Petitioner with the hearing to have been discharged. But the Respondents cannot have it both ways. It is beyond dispute that the Respondents were aware of this obligation when they filed their bankruptcy petitions. If the obligation to provide the hearing is subject to the bankruptcy court's discharge order, then there can be no question that the Petitioner qualified as a known creditor who was entitled to actual notice.

The Circuit Court should have reached this conclusion as a matter of law and found that the Petitioner's claims in this lawsuit were not discharged because he was a known creditor of the Respondents who had not been provided with actual written notice of the Respondents' bankruptcy. The Circuit Court's conclusion that the Petitioner was an unknown creditor of the Respondents was clearly wrong.

B. The Circuit Court erred in failing to find that the issue of whether Respondent qualified as an "unknown creditor" was an issue of fact upon which the Respondents bore the burden of proof and upon which the Petitioner was entitled to discovery.

As stated above in Section V.A., the Petitioner believes that he qualified as a known creditor of the Respondents as a matter of law. At a minimum, however, the question of whether the Petitioner qualified as a known creditor of the Respondents was inherently an issue of fact, with the Respondents bearing the burden to prove that he was not. In addition to misapplying the law governing the relevant terms, the Circuit Court misapplied both the West Virginia Rules of Civil Procedure and the controlling federal bankruptcy law by effectively shifting the burden of proof on this issue from the Respondents to the Petitioner. Respondents' claim of discharge in bankruptcy was a fact-driven affirmative defense that precluded a ruling on the Respondents' defense on a motion to dismiss.

As noted above, Respondents' motion to dismiss contended that all of the Petitioner's claims should be summarily dismissed because the August 19, 2020 Order of the Bankruptcy Court "discharges the allegations made in Plaintiff's Complaint." *A.R. at 147, Respondents' Memorandum at 2.* However, "discharge in bankruptcy" is an affirmative defense in the state courts of West Virginia under Rule 8(c) of the West Virginia Rules of Civil Procedure.

The Circuit Court's Order concluded that it could "resolve affirmative defenses on motions to dismiss where facts sufficient to rule are alleged in the complaint." *A.R. at 188, Dismissal Order at ¶18.* The Order also stated that "a motion to dismiss based upon an affirmative defense may be granted where all facts necessary to the affirmative defense clearly appear on the face of the complaint," *citing* Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993). *A.R. at 188, Id.* While these general propositions may be true, they are clearly not applicable to this affirmative defense in this case.

To establish that all of the Petitioner's claims have been discharged in bankruptcy, it was not enough for the Respondents to simply put forth the bankruptcy court's order and claim victory. Respondents had to specifically establish that the discharge order governed the Petitioner's claims in this lawsuit and, to do so, Respondents had to prove that the Petitioner was an unknown creditor who was not entitled to actual notice of the bankruptcy filing and the claims bar date. None of the facts necessary to resolve that issue are apparent "on the face of the complaint." The Circuit Court erred in concluding otherwise.

Because discharge in bankruptcy is an affirmative defense, Respondents bore the burden to establish that that the bankruptcy discharge applied to the Petitioner's claims asserted herein. In Grim v. Eastern. Electric, LLC, 234 W. Va. 557, 767 S.E.2d 267 (2014), this Court observed that:

> "As a general matter, our cases have permitted the burden of persuasion to shift to the defendant when the defendant alleges an affirmative defense." Mayhew v. Mayhew, 205 W.Va. 490, 498 n. 18, 519 S.E.2d 188, 196 n. 18 (1999). *See, e.g.*, Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996) (undue hardship is affirmative defense upon which defendant bears burden of persuasion); Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981) (burden of proof shifts to defendant on issue of contributory negligence).

Id. at 567, 767 S.E.2d at 277. *See also* Williams v. Precision Coil, Inc., 194 W. Va. 52, 62 n. 17, 459 S.E.2d 329, 339 n. 17 (1995) ("*Except as to affirmative defenses*, a defendant does not bear the burden of proof." *Emphasis added.*).

Courts in other states which treat discharge in bankruptcy as an affirmative defense have concurred. In Com. & Exch. Bank v. McDaniel, 147 Ga. App. 378, 379, 249 S.E.2d 97, 98 (1978), for example, the court stated that: "Discharge in bankruptcy is an affirmative defense ... so appellee had the burden of proving the discharge." *See also* Liberty Nat. Bank & Tr. Co. v. Payton, 602 N.E.2d 530, 532 (Ind. Ct. App. 1992) ("The party asserting the affirmative defense of discharge in bankruptcy has the burden of proving that a discharge was granted.").

The Circuit Court's Order justified its dismissal of the Petitioner's complaint because the complaint "does not allege that [Petitioner] was a 'known creditor' nor does it allege he made a claim for damages against the [Respondents] prior to this case." *A.R. at 192, Dismissal Order at ¶36.* Additionally, the Order noted that the Petitioner "did not provide an affidavit or other evidence to establish that he was a 'known' creditor." *A.R. at 192, Id.* These holdings turned the actual burden of proof on its head.

The Petitioner was not required to address a potential affirmative defense of the Respondents in his complaint. This Court recently addressed this issue in Gable v. Gable, 245 W. Va. 213, 858 S.E.2d 838 (2021), where the Court stated:

> Put simply, "[c]omplaints need not contain any information about defenses and may not be dismissed for that omission." Elizabeth M. Bosek, *et al.*, 4 Cyclopedia of Federal Procedure § 14:187 (3d ed. 2021). As one federal court said, "[o]rders under Rule 12(b)(6) are not appropriate responses to the invocation of defenses, for plaintiffs need not anticipate and attempt to plead around all potential defenses."

Id. at 223, 858 S.E.2d at 848. This Court went on to conclude in Gable that, "the circuit court violated this cardinal rule of pleading [when] it dismissed the complaint because the plaintiff failed to anticipate and plead facts to rebut potential defenses available to the defendant." Id. at 225, 858 S.E.2d at 850.

Moreover, in Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia, 244 W. Va. 508, 854 S.E.2d 870 (2020), this Court stated:

> When a Rule 12(b)(6) motion is made, *the pleading party has no burden of proof.* Rather, the burden is upon the moving party to prove that no legally cognizable claim for relief exists. *See* 5B Charles A. Wright, Arthur R. Miller, Federal Practice and Procedure § 1357 (3rd ed. 2020) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists.").

Id. at 520, 854 S.E.2d at 882, *emphasis added.* Quite simply, the Circuit Court wrongly placed the burden on the Petitioner when the applicable procedural rules squarely place the burden on the Respondents.

The controlling federal bankruptcy law also firmly establishes that "[t]he burden of establishing that a creditor has received appropriate notice rests with the debtor." In re Hairopoulos, 118 F.3d 1240, 1244 (8th Cir. 1997); Stockton v. NW. Airlines, Inc., 804 F. Supp. 2d 938, 946 (D. Minn. 2011). *See also* In re Bodrick, 509 B.R. 843, 854 (Bankr. S.D. Ohio 2014) ("the question of whether a creditor is a 'known' or 'unknown' creditor does not turn on the *creditor's* knowledge of its claim but rather on the *debtor's* knowledge." *Emphasis in*

original.) Because Respondents conceded that the Petitioner did not receive actual notice of the bankruptcy, it was incumbent on the Respondents to establish that the Petitioner was an unknown creditor who would not be entitled to actual notice.

The federal caselaw indicates that whether a claimant qualifies as a known or unknown creditor is often a question of fact. As the Fourth Circuit observed in J.A. Jones, "there is no bright-line rule to be applied in determining whether a particular creditor is known or unknown to a debtor for constitutional notice purposes. Rather, the known creditor analysis must properly focus on the totality of the circumstances in each case" 492 F.3d at 250. *See also* In re Motors Liquidation Co., 585 B.R. 708, 725 (Bankr. S.D.N.Y. 2018) ("What is reasonable [with regard to a debtor's search for potential creditors] depends on the particular facts of each case."); In re Drexel Burnham Lambert Grp. Inc., 151 B.R. 674, 681 (Bankr. S.D.N.Y.), *aff'd sub nom.* In re Drexel Burnham Lambert Grp., Inc., 157 B.R. 532 (S.D.N.Y. 1993) ("What is reasonable depends on the particular facts of each case."); George & Co., Inc. v. Arch Coal, Inc., No. CV 6:19-178-KKC, 2021 WL 832636, at *4 (E.D. Ky. Mar. 4, 2021) ("the fact-bound determination of whether Plaintiff received adequate notice of the bankruptcy proceedings such that the Confirmation Plan binds Plaintiff is inappropriate at the motion to dismiss stage.").

As a fact-driven affirmative defense, the question of whether Respondents are entitled to bankruptcy protection from the claims of Petitioner that are asserted in this action was not appropriate for a motion to dismiss. By asserting that the Petitioner was an unknown creditor, the Respondents necessarily contend that they were unaware of the Petitioner's claims when they filed their bankruptcy petitions. But the Petitioner must be given the opportunity to challenge through discovery any claims by the Respondents of ignorance of the Petitioner's claims.

If the Court does not conclude that the Petitioner qualified as a known creditor of the Respondents as a matter of law, Respondents can assert this affirmative defense in a summary judgment motion at the appropriate time after both sides have had the opportunity for discovery. If, upon consideration of a summary judgment motion, the Circuit Court determines that factual issues exist as to this affirmative defense, then those issues should be resolved by a jury.[7]

C. The Circuit Court erred in finding that Petitioner's complaint did not seek relief for actionable non-dischargeable conduct that the Respondents committed or continued after the Bankruptcy Discharge.

Even if this Court were to determine that the Petitioner received notice of the Respondents' bankruptcy sufficient to comport with due process, the Bankruptcy Court's discharge order would not preclude all of the Petitioner's claims. It is a fundamental principle of bankruptcy law that, "[a] bankruptcy discharge cannot discharge liabilities for acts that the debtor committed or continued post-petition, or at least post-discharge." Partners for Health & Home, L.P. v. Seung Wee Yang, 488 B.R. 109, 119 (C.D. Cal. 2012).

The bankruptcy laws do not permit a debtor to use pre-discharge actions to insulate itself from liability for post-discharge actions, even if the pre-discharge and post-discharge actions were part of the same course of conduct. O'Loghlin v. County. of Orange, 229 F.3d 871 (9th Cir. 2000). In O'Loghlin, the plaintiff sued her employer for alleged violations of the Americans with Disabilities Act ("ADA"). The plaintiff alleged three separate episodes in which the County failed to accommodate her disability resulting from an injured arm, one in June 1994, a second in

[7] The Fourth Circuit's opinion in Forst, (one of the cases cited by the Circuit Court) observed that: "A motion under Rule 12(b)(6) is intended to test the legal adequacy of the complaint, and not to address the merits of any affirmative defenses. .... Because neither of the asserted defenses appears on the face of the complaint, it is inappropriate to address them in the current posture of the case. These defenses are more properly reserved for consideration on a motion for summary judgment." 4 F.3d at 250.

February 1996, and a third in October 1996. Id. at 873. The County filed for bankruptcy on December 6, 1994, and its discharge plan was confirmed in June 1996, discharging its pre-confirmation debts. Id. The plaintiff brought suit after receiving a "Right to Sue" letter from the EEOC in 1997 and the County moved to dismiss as a result of the bankruptcy discharge order.

The district court dismissed the plaintiff's complaint with prejudice. It held that the first claim arose under the ADA in June 1994, prior to the bankruptcy, and was therefore discharged. The district court also held that the second and third denials of accommodation were the "inevitable consequence" of the first denial and were also discharged. Id. at 874. The plaintiff appealed.

The County argued that, because its alleged failures to accommodate the plaintiff were part of a continuing course of conduct that took place both before and after the bankruptcy discharge, it was not liable for its post-discharge conduct. Id. The Ninth Circuit disagreed.

The Court of Appeals observed that the district court's holding would allow a defendant to use pre-discharge actions to insulate itself from liability for post-discharge actions, so long as the pre-discharge and post-discharge actions were part of the same course of conduct. Id. at 875. In rejecting this notion, the Ninth Circuit stated:

> The bankruptcy laws provide no justification for such a result. Their purpose is to provide a "fresh start" to a discharged debtor. ... A suit for illegal conduct occurring after discharge threatens neither the letter nor the spirit of the bankruptcy laws. A "fresh start" means only that; it does not mean a continuing license to violate the law.

Id. *See also* Holcombe v. US Airways, Inc., 369 F. App'x 424, 429 (4th Cir. 2010) ("any claims arising from allegedly discriminatory acts and omissions occurring after the Confirmation Date have not been discharged; any such claim remains open for full adjudication on remand.").

For purposes of consideration of a motion to dismiss, the Circuit Court in this case was required to construe the complaint in the light most favorable to the Petitioner. John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). The complaint asserted that the Respondents had not given the Petitioner the required hearing as of the date that the complaint was filed. *A.R. at 5,8, Complaint at ¶¶ 21, 41.* The complaint asserted that the suspension of the Petitioner's clinical privileges and medical staff membership had been continuous from May 16, 2019 to the date of the complaint. *A.R. at 5, Complaint at ¶ 22.* Likewise, the denial due process alleged in the complaint was also continuous. *A.R. at 8, Complaint at ¶ 45.*

This Court has stated that "[a] trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." Cantley v. Lincoln Cty. Comm'n, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). A liberal construction mandates the conclusion that the complaint asserts claims resulting from the Respondents' post-confirmation conduct. The complaint sufficiently challenges the Respondents' continued failure to comply with the Bylaws even after the effective date of the Discharge Order. Indeed, Respondents have yet to comply with the Bylaws with regard to the suspension of Petitioner's medical staff membership and clinical privileges and remain in violation of those mandates of the Bylaws with each passing day. Petitioner continues to be harmed by the Respondents' dereliction of duty.

To the extent that the Circuit Court concluded that that all of the allegations of the complaint "relate to actions by the [Respondents] in 2018 and 2019" (*A.R. at 186, Dismissal Order at ¶12)*, it was simply wrong. The Petitioner's pre-discharge claims are not barred but, even if they were, Respondents cannot use pre-discharge actions to insulate themselves from

liability for post-discharge actions simply by contending that the pre-discharge and post-discharge actions were part of the same course of conduct. The Circuit Court's failure to recognize this was error.

D. The Circuit Court erred in finding that summary dismissal of the Petitioner's claims would not result in a denial of Due Process to the Petitioner.

In Sanchez v. NW. Airlines, Inc., 659 F.3d 671, 675 (8th Cir. 2011), the Eighth Circuit stated, "[t]he operation of the Bankruptcy Code, including its discharge provisions, is subject to due process constraints." *See also* Broomall Indus., Inc. v. Data Design Logic Sys., Inc., 786 F.2d 401, 403 (Fed.Cir.1986) ("Fifth Amendment due process considerations take precedence over the discharge provisions of section 1141 of the Bankruptcy Code"); In re Banks, 299 F.3d 296, 302 (4th Cir. 2002), *abrogated on other grounds by* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010) ("We agree a bankruptcy court confirmation order generally is afforded a preclusive effect. But we cannot defer to such an order if it would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution.").

Adequate notice of a bankruptcy and its effect to a potential creditor rises to the level of a constitutional right. As the Tenth Circuit has held, "the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution." Reliable Elec. Co. v. Olson Const. Co., 726 F.2d 620, 623 (10th Cir. 1984.).

Whether a bankruptcy notice satisfies due process is a mixed question of law and fact. Dahlin v. Lyondell Chem. Co., 881 F.3d 599, 603 (8th Cir. 2018). *See also* Stauch v. City of Columbia Heights, 212 F.3d 425, 431 (8th Cir. 2000) (In a non-bankruptcy context, the court stated: "Although, the question of whether the procedural safeguards provided for in the [City]

Code are adequate to satisfy due process is a question of law for the court to determine, whether the City indeed provided the Stauches with such procedure is a question of fact for the jury.").

"A court considering whether a claim has been discharged by the confirmation of a bankruptcy plan should engage in a two-step inquiry, determining (1) whether the claim falls within the Bankruptcy Code's definition of a dischargeable claim; and, if so, (2) whether the discharge would comport with due process." DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 871 F. Supp. 2d 143, 154 (E.D.N.Y. 2012), *remanded*, 747 F.3d 145 (2d Cir. 2014). There is no dispute that, at least to the extent that it alleges pre-petition conduct, the Petitioner's complaint would constitute a potentially dischargeable claim. However, the discharge of the Petitioner's claims under the circumstances herein would not comport with due process.

In dismissing all of the Petitioner's claims against Respondents, the Circuit Court failed to recognize and acknowledge that a trial court should not defer to a bankruptcy court confirmation order if doing so would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. The Circuit Court's Order failed to address the Petitioner's right to due process at all. The Circuit Court erred by simply accepting Respondents' argument that the bankruptcy discharge order barred the Petitioner's claims, without assuring that the Petitioner's constitutional right to due process was protected.

VI. CONCLUSION

For the reasons set forth herein it is apparent that the Circuit Court committed error in granting the Respondents' Motion to Dismiss. Therefore, this Court should reverse and vacate the Order of the Circuit Court of Kanawha County, direct the Circuit Court to deny the

Respondents' Motion to Dismiss, allow the Petitioner's case to proceed to resolution on the merits, and grant the Petitioner such other and further relief as the Court deems appropriate.

A. KARIM KATRIB, M.D.
Petitioner
By Counsel

John J. Polak (WV Bar No. 2929)
Mark A. Atkinson (WV Bar No. 0184)
ATKINSON & POLAK, PLLC
300 Summers Street, Suite 1300
P.O. Box 549
Charleston, WV 25322
(304) 346-5100

CERTIFICATE OF SERVICE

I, John J. Polak, counsel for Petitioner, do hereby certify that service of the **"BRIEF ON BEHALF OF PETITIONER"** was made upon the parties listed below by emailing a true and exact copy thereof to:

Thomas J. Hurney, Jr.
Jackson Kelly PLLC
P.O. Box 553
Charleston, WV 25322

Counsel for Respondents

on the 24th day of January, 2022.

John J. Polak
(WV State Bar No. 2929)