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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 28, 2001
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JESSE DOYLE BLAGG and LEASA DAWN BLAGG, Debtors.	BAP No. NO-01-006
JESSE DOYLE BLAGG; LEASA DAWN BLAGG; and TY H. STITES, Appellants, v. GERALD R. MILLER, Trustee, Appellee.	Bankr. No. 97-03510 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before BOULDEN, ROBINSON, and KRIEGER, Bankruptcy Judges.

PER CURIAM.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

This appeal marks the second time that these parties have been before this Court. In the first appeal, *Blagg v. Miller (In re Blagg)*, 223 B.R. 795 (10th Cir. BAP 1998), *appeal dismissed without published opinion,* 198 F.3d 257 (10th Cir.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

1999) (*"Blagg I"*), this Court affirmed the order of the bankruptcy court dismissing the case for improper venue and imposing sanctions against Debtors' counsel, Ty Stites ("Stites"), for improperly commencing the case in an improper venue and misrepresenting the law to the court.[1] However, because Stites had not had the opportunity to respond to the fees and expenses submitted by the Trustee, the order allowing such fees and costs as a sanction was remanded to the court for further proceedings. Upon remand, the bankruptcy court provided Debtors' counsel the opportunity to file a written response addressing the issue of the reasonableness of the Trustee's requested fees and expenses and, once again, ordered that Stites pay to the Trustee the sum of $777.40 as sanctions. Within ten days, Debtors and Stites filed a motion for reconsideration of the order awarding fees. While the motion for reconsideration was pending, Debtors and Stites filed a motion for relief from judgment under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b)(6), seeking relief from the bankruptcy court's order entered three years previously dismissing Debtors' case. Both motions were denied in separate orders entered on January 30, 2001, and this appeal followed. We affirm.

I. Jurisdiction and Standard of Review.

A bankruptcy appellate panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As none of the parties have opted to have this appeal heard by the District Court for the District of Oklahoma, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

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[1] Appellants appealed from the bankruptcy court's order granting the motion to dismiss and imposing sanctions, then subsequently filed an amended notice of appeal to include the order awarding Trustee's fees and expenses and the order denying in part the motion for stay pending appeal. The amended notice of appeal was deemed a separate appeal, and an order was entered consolidating the appeals for procedural purposes.

The Bankruptcy Appellate Panel may affirm, modify or reverse a bankruptcy court's judgment, order or decree, or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; *see First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir. 1985). Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The issues raised in this appeal are subject to review under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (across the board abuse of discretion in Rule 11 cases); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (Rule 60(b) motion subject to abuse of discretion review standard).

II. Background.

The facts pertinent to this appeal were set out in *Blagg I:*

> On July 30, 1997, Jesse and Leasa Blagg filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. Their petition identified their residence as the Eastern District of Oklahoma, but they filed their case in the Northern District of Oklahoma. Debtors asserted venue in the Northern District as their "principal place of employment." Mr. Blagg worked for a company in Tulsa, which is in the Northern District.
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> After conducting the meeting of creditors, the interim Bankruptcy Trustee, Gerald R. Miller ("the Trustee"), filed a motion to transfer on the basis that the case was filed in an improper district. After the Debtors responded to the motion and requested a hearing, the Trustee amended his motion to request transfer or dismissal of the case, as well as sanctions pursuant to Fed. R. Bankr. P. 9011 and 28 U.S.C. § 1927.
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> A hearing was held on October 30, 1997. At the hearing, Debtors' counsel, Ty Stites, represented to the court that the Advisory Committee Notes to Fed. R. Bankr. P. 1014(a) indicated that the court had the power to retain an improperly venued case. After the hearing, Debtors filed a supplemental response to the Trustee's motion, further addressing the issue of venue and again citing the Advisory Committee Note to Rule 1014(a).
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> On November 10, 1997, the bankruptcy court issued an order to show cause why Ty Stites should not be sanctioned pursuant to Bankruptcy Rule 9011. The order stated that the court found Stites' misrepresentation of law regarding retention of an improperly venued

bankruptcy case violated Bankruptcy Rule 9011. The order gave Stites until November 13 to file a response, and set the hearing on November 14. Stites was in Mexico on vacation and did not return to his office until November 13, at which time he prepared and filed a written response. Stites also appeared at the hearing the next day.

On December 1, 1997, the court issued an order granting the Trustee's motion to dismiss for improper venue and granting the motion for sanctions. The court also imposed sanctions sua sponte under Bankruptcy Rule 9011. The court rejected Debtors' argument that the Trustee's motion was not timely. The motion was filed nineteen days after the meeting of creditors, where the Trustee had learned that the Debtors had no basis for venue in the Northern District. The court found that neither party would be prejudiced by the timing of the motion since nothing had happened in those nineteen days. The court further found that Debtors presented no authority that venue lies in the district where a debtor is employed, and that it is well settled that a debtor's place of employment is not relevant to the question of venue. The court found that it is equally clear that if a debtor files in the wrong district, the court may do one of two things: dismiss or transfer the case. The court may not, as Debtors urged, retain the case. The court then dismissed the case without prejudice to filing in the proper district. The court found dismissal more appropriate than transfer. Dismissal and refiling would result in the case "starting over" and would afford creditors in the Eastern District an opportunity to attend the meeting of creditors and fully participate in the case in the proper and more convenient venue.

The court further held that Stites committed sanctionable offenses pursuant to Bankruptcy Rule 9011. The court found that Stites signed not only the petition for relief, but also signed the response to motion to transfer, alleging venue on the basis of place of employment without any authority or good faith argument for modification of the existing law on venue. Further, Stites signed and submitted the supplemental response, and orally argued at hearing, that the Advisory Committee Notes to Bankruptcy Rule 1014 indicated that the court had the power to retain the case. This misrepresented the law. In fact, the Advisory Committee Notes advise that Rule 1014 was amended in 1987 to specifically delete the option of retaining a case filed in an improper venue.

As a sanction for knowingly and deliberately filing this case in the improper district, the court ordered Stites to refrain from charging Debtors any additional fees or expenses, including the new filing fee, for any additional work in filing the petition and representing the Debtors in the proper district. The court also ordered Stites to pay the fees and expenses incurred by the Trustee. Lastly, Stites was ordered to pay a monetary sanction of $500.00 for misrepresenting the state of the law to the court by quoting and citing superseded comments based upon repealed statutes. The court found it necessary to impose such a sanction to deter future misrepresentation to the court and to encourage a more careful approach in advising the court of the state of the law. The Trustee

> filed an affidavit itemizing his fees and expenses in the amount of $831.40. The court reduced this amount to $777.40 and ordered Stites to pay. Stites was not given the opportunity to respond or object to the Trustee's itemization.

Blagg I, 223 B.R. at 800-01. (footnote omitted).

In *Blagg I*, this Court affirmed the order granting the Trustee's motion to dismiss for improper venue and imposing sanctions incident thereto. *Id.* at 802-04. However, in order to allow Debtors' counsel the opportunity "to respond in writing to the reasonableness of the requested fees," this Court remanded to the bankruptcy court for further proceedings the order requiring Stites to pay the Trustee's attorney's fees and expenses. *Id.* at 807. The Court also concluded that there was no basis to find that the bankruptcy court abused its discretion in imposing the $500 sanction for misrepresenting the state of the law. *Id.* at 808. Debtors and Stites filed a motion for rehearing, which was denied. *Id.* at 797-99. Debtors and Stites sought to appeal *Blagg I* to the United States Court of Appeals for the Tenth Circuit. However, that court dismissed the appeal for lack of jurisdiction on the ground that this Court's order was interlocutory. 1999 WL 909885 at *2.

On January 5, 2000, the bankruptcy court entered an order providing Debtors' counsel the opportunity to file a written response addressing the reasonableness of the Trustee's requested fees and expenses. Stites filed a response contesting the reasonableness of the fees as well as the propriety of awarding fees because the Trustee's retention as a professional was not approved by the court, because no distributions had been made in the case, and because the Trustee's services were of no benefit to anyone.

On September 15, 2000, the bankruptcy court entered its order awarding attorney's fees and expenses as sanctions. After reviewing the itemized fees attached to the Trustee's affidavit, the court found that each task performed by the Trustee "is attributable to the fact that Debtors' Counsel knowingly and

deliberately filed this case in the improper district." Order Awarding Attorney's Fees and Expenses as Sanctions at 4, in Appellant's Appendix at 323. The court further found that the actions taken by the Trustee "were of a type that required the services of an attorney, as opposed to services that the Trustee should have performed in his capacity as a trustee of the estate, and that the Trustee's hourly rate is reasonable." *Id*. The court recognized that the primary purpose of sanctions is to deter attorney misconduct, not to compensate the opposing party, and that the amount of sanctions should be limited to the amount reasonably necessary to deter the wrongdoer, citing *White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). The court found that a sanction in the amount of $777.40 did not exceed the amount reasonably necessary to deter Debtors' counsel from future misconduct.

The bankruptcy court also rejected the arguments unrelated to the reasonableness of the Trustee's fees. The court held that the Trustee's entitlement to a trustee's fee under 11 U.S.C. § 726[2] is not relevant to a determination of appropriate sanctions to be imposed upon a Rule 9011 violator. The court further found to be of no consequence the fact that the Trustee did not obtain court approval of the Trustee as an attorney under § 327, stressing that the court was not awarding the Trustee compensation under § 330 and that court approval of the Trustee's employment as an attorney was not a prerequisite for the imposition of sanctions under Rule 9011. Finally, the court held that, although it is required to consider whether the services of a professional were of benefit to the estate in the context of a request for compensation under § 330, no such mandate is included in Rule 9011, under which inquiry is limited to the reasonableness of the fees of expenses.

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[2] Future references are to Title 11 of the United States Code unless otherwise indicated.

Stites filed a motion to reconsider the order awarding attorney's fees and expenses as sanctions. While this motion was pending, Debtors and Stites filed a motion for relief under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b)(6) from the order or judgment dismissing Debtors' case. Debtors and Stites contended that both before and after the bankruptcy court dismissed the case, comparable conduct had been permitted other debtors in other cases, and that Debtors have been delayed and punished for their attorney's conduct. On January 30, 2001, the court denied Stites' motion to reconsider after finding no manifest error, "newly discovered evidence," or "any other reason" justifying a new trial or relief from the operation of the judgment. Order Denying Stites' Motion to Reconsider "Order Awarding Attorney's Fees and Expenses as Sanctions" at 2, in Appellant's Appendix at 376.

The same date, in a separate order, the court denied Debtors' motion for relief under Rule 9024. In a strongly worded opinion, the court held that it was bound by the "law of the case" doctrine and had no discretion to vacate the dismissal, retain the matter, and grant Debtors a discharge as requested. The court expressed its distress that Debtors' case was not filed in the proper jurisdiction immediately following dismissal without prejudice, as well as "dismay[] that Debtors and counsel have chosen to engage in what appears to be scorched-earth tactics and have resorted to attacking the judgment and integrity of the Trustee and of various courts rather than simply arguing the applicable law." Order Denying Debtor's Motion for Relief Under Rule 9024 at 8, in Appellant's Appendix at 372. The court joined the Trustee in questioning the motivation of Stites and his counsel, Notzen, in failing to refile the case in the correct district, and mailed a copy of its order directly to the Debtors so that they would be informed of the concerns of the court and the Trustee "regarding the quality of representation and the motivation of their counsel." *Id.* at 9, in Appellant's

Appendix at 373.

This appeal followed.

III. Discussion.

A. Jurisdiction.

As a threshold issue, the Court addresses two issues categorized by Appellants as jurisdictional: the Trustee's standing to object to venue and the bankruptcy court's jurisdiction to require Debtors to refile in the proper district.

In *Blagg I,* this Court declined to address the issue of standing as Appellants conceded it had not been raised before the bankruptcy court, but rather, for the first time on appeal. *Blagg I*, 223 B.R. at 804. Because the issue of standing is jurisdictional, however, it may be raised at any time and will be addressed by this Court. *See Board of County Com'rs v. W.H.I., Inc.,* 992 F.2d 1061, 1063 (10th Cir. 1993) (standing is a threshold issue that must be resolved before the federal court acquires jurisdiction, and, therefore, standing may be raised at any time); *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993) (the appellate court is required to examine not only the parties' standing before this court, but also the parties' standing before the district court).

Citing no direct authority, Appellants argue that the Trustee lacks standing to object to venue under Fed. R. Bankr. P. 1014(a)(2). That rule provides that "[i]f a petition is filed in an improper district, on timely motion of a party in interest . . . the case may be dismissed or transferred to any other district . . . ." Fed. R. Bankr. P. 1014(a)(2). The Code does not define the phrase "party in interest." Appellants argue that the Trustee is not a party in interest because he is not injured by Debtors' choice of forum, is not asserting his own legal interests, and has no pecuniary interest in the outcome of the venue objection. We

disagree. Section 1109(b)[3], although not applicable in Chapter 7, provides guidance in determining who is a party in interest. The phrase specifically includes the trustee as a party in interest. We extend this definition to include a trustee in a Chapter 7 case. The Trustee clearly had an interest in where the case was to be administered and is a party in interest with standing to object to venue. We will not overturn the bankruptcy court's order on this ground. *See generally Nintendo Co. v. Patten (In re Alpex Computer Corp.)*, 71 F.3d 353, 356 (10th Cir. 1995) (standing under section 1109(b) confined to debtors, creditors, or trustees in motion to reopen case); *In re Wilde*, 160 B.R. 625, 626 (Bankr. W.D. Mo. 1993) (chapter 7 trustee has standing to object to dismissal and protect best interest of all creditors).

Appellants also argue for the first time on appeal that the bankruptcy court lacked jurisdiction to order this case, or any dismissed case, to be refiled in another district, and to do so constitutes a "judicially ordered involuntary bankruptcy." This argument is without merit.

After finding the Debtors' case had been filed in an improper district, the bankruptcy court dismissed the case without prejudice to refile in the proper district and sanctioned Stites for knowingly and deliberately filing the case in the improper district. The order states:

> It is therefore ordered that the Trustee's Motion to Dismiss is granted; that this case is dismissed without prejudice to filing in the proper district; that as a sanction, Debtors' counsel is enjoined from charging Debtors any fees or expenses for additional work that will be necessary to file the case in the proper district and represent the Debtors to the extent originally agreed between the parties as set forth in the Attorney's Disclosure filed herein; that counsel for Debtors shall pay the filing fee required to file in the Eastern District of Oklahoma; . . . .

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[3] Section 1109(b) provides: "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b).

Order Granting Trustee's Motion to Dismiss at 8, in Appellant's Appendix at 100.

In *Blagg I*, this Court rejected Appellants' argument:

> The bankruptcy court did not order the Debtors to refile their proceedings but rather dismissed the case without prejudice to refile. Assuming the Debtors wish to obtain a discharge, they have the option of refiling in the proper district. The only party ordered to do anything was Stites, whom the court ordered to refrain from charging the Debtors twice in the event they opted to refile their case.

223 B.R. at 798.

Because Appellants persist in contesting the bankruptcy court's jurisdiction, this Court is compelled, once again, to reject Appellants' argument. This Court did not attempt to "side-step" the jurisdictional issue in *Blagg I.* Review of the bankruptcy court's order shows there was no order requiring Debtors to refile in the proper district. Certainly, if Debtors wish to obtain a discharge, the bankruptcy court made it clear that they must refile in the Eastern District of Oklahoma; however, the choice to refile is theirs. The bankruptcy court acted within its discretion by dismissing the case without prejudice to refiling.

B. Law of the Case.

Stites asks this Court to overrule *Blagg I*.[4] The Trustee responds by arguing that *Blagg I* constitutes the "law of the case" with respect to all issues affirmed by the Court, save the attorney's fee issue remanded to the bankruptcy court, and is binding upon this Court.

The law of the case doctrine has been considered by the Tenth Circuit Court of Appeals on several occasions. That court's most recent decision on the issue offers the following definition:

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[4] Appellants raised eighteen discrete issues in their initial appeal relative to venue, dismissal and sanctions. Appellants raised nine issues in the motion for rehearing, many for the first time. In *Blagg I,* this Court affirmed the bankruptcy court in all respects except in connection with the imposition of attorney's fees and expenses against Stites.

> "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Alvarez,* 142 F.3d 1243, 1247 (10th Cir. 1998) (quoting *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L.Ed.2d 318 (1983))). "Accordingly, 'when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.'" *Id.* (quoting *Rohrbaugh v. Celotex Corp*., 53 F.3d 1181, 1183 (10th Cir. 1995)). "This doctrine is 'based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.'" *Id.* (quoting *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (citations omitted)). The rule "also serves the purposes of discouraging panel shopping at the court of appeals level." *Monsisvais*, 946 F.2d at 116.
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> This court has recognized, however, that the law of the case doctrine is not an "inexorable command." *Alvarez*, 142 F.3d at 1247 (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967)). This court will depart from the law of the case doctrine in three exceptionally narrow circumstances:
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> (1) when the evidence in a subsequent trial is substantially different;
> (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or
> (3) when the decision was clearly erroneous and would work a manifest injustice.
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> *See Alvarez*, 142 F.3d at 1247 (citing *Monsisvais*, 946 F.2d at 117).

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1241-1242 (10th Cir. 2000). This Court is bound by *Greene* and has also previously recognized the applicability of the law of the case doctrine to appeals before it. *See Farmers Home Admin. v. Buckner (In re Buckner)*, 218 B.R. 137, 141-143 (10th Cir. BAP 1998). Under the rationale contained in *Greene*, the decision in *Blagg I* is binding upon this Court unless one of the three exceptions to the rule is present.

The first exception, substantially differing evidence, is not present. The evidence before this Court is identical to what was before the court in *Blagg I*.

The second exception, a change in controlling authority, is not present. Appellants cite no controlling authority subsequent to *Blagg I*, but instead, mistakenly insist that prior unpublished orders of the bankruptcy court relating to

venue are somehow binding in this case. Appellants also continue to argue that a bankruptcy court may retain a wrongly venued case and that the decision of the Court in *In re Sorrells*, 218 B.R. 580 (10th Cir. BAP 1998), is in error and unpersuasive. In *Sorrells*, the Bankruptcy Appellate Panel of the Tenth Circuit joined the majority view that a bankruptcy court does not have discretion to retain jurisdiction over an improperly venued case. *Sorrels* remains controlling.

Finally, Debtors and Stites argue that the decision in *Blagg I* is manifestly unjust because dismissal of the underlying bankruptcy case denies Debtors a "just, speedy and inexpensive" determination of their case as directed by Fed. R. Bankr. P. 1001. Debtors contend that *Blagg I* resulted in a "legal morass of no benefit to anyone." While Appellants are correct that this case has taken up an inordinate amount of time, they fail to demonstrate the unfairness of *Blagg I* or present any authority in support of their position. Although reasonable minds may differ with respect to the result reached by the court in *Blagg I*, the decision can hardly be categorized as clearly erroneous, an abuse of discretion, or one that works a manifest injustice. As the bankruptcy court noted in its order denying motion for relief from judgment, there is nothing that "prevents Debtors from refiling their case in the proper venue and receiving a discharge, if one is appropriate, from that Court. The power to obtain a discharge is in their hands." Order Denying Debtors' Motion for Relief Under Rule 9024 at 9, in Appellant's Appendix at 373. This Court notes that the bankruptcy court's orders with respect to sanctions were well researched, thoroughly analyzed, and, under the circumstances, restrained.

Blagg I constitutes the law of the case with respect to the issues raised by the Debtors and Stites.[5] If the decision of *Blagg I* is to be altered or reversed, that

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[5] In the motion for rehearing of *Blagg I*, Appellants argued for the first time that § 727 absolutely requires the bankruptcy court to grant a discharge upon

(continued...)

is a matter left to the Court of Appeals. The Court is thus left to consider the only issue remaining, the reasonableness of the Trustee's attorney fees awarded as a sanction against Stites.

C. Attorney Fees/Sanctions.

As a preliminary matter, we note again that our review is limited. *Blagg I* constitutes the law of the case with respect to the issue of imposition of sanctions; our inquiry is limited to the reasonableness of the amount of sanctions awarded. *Blagg I*, 223 B.R. at 805-08. The bankruptcy court's decision must be affirmed unless it constitutes an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405-06. Reversal is appropriate only if the court "'based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Hughes v. City of Fort Collins*, 926 F.2d 986, 988 (10th Cir. 1991) (quoting *Cooter & Gell*, 496 U.S. at 405). It is with this standard in mind that we review Stites' arguments.

In *Blagg I*, this Court held that this matter is governed by the version of Rule 9011 that existed prior to the amended version of the rule that took effect on December 12, 1997. *Blagg I*, 223 B.R. at 804-05. The pre-amendment version of Rule 9011 provides in pertinent part:

> If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

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[5] (...continued)
expiration of the deadline set forth in Fed. R. Bankr. P. 4004(c), and by dismissing the case, the court deprived the Debtors of an accrued substantive right. Appellants characterized this issue as jurisdictional and thus one that could be raised at any time. This Court rejected Appellants' claim that the issue was jurisdictional and declined to consider the argument for the first time on appeal. *Blagg I*, 223 B.R. at 797. Appellants raise the issue again, seeking review and reversal of the bankruptcy court's order as an error of law and abuse of discretion; it does not appear Appellants are claiming the issue is jurisdictional. Once again, this Court rejects any argument that the issue is jurisdictional and declines to address the issue for the first time on appeal in accord with the decision in *Blagg I*.

Fed. R. Bankr. P. 9011 (amended 1997). The Court posed several questions in remanding to the bankruptcy court:

> The plain language of Rule 9011 requires that the court independently analyze the reasonableness of the requested fees and expenses. We note that the Trustee never requested or obtained approval of his employment as attorney for the Trustee as required by 11 U.S.C. § 327(a). We further question whether the actions taken by the Trustee in filing the motions to transfer and dismiss required the services of an attorney, or whether they could have been performed in his capacity as trustee to the estate. Finally, we note that Stites was not given the opportunity to respond to the attorney fee request prior to the court's approval. Because Debtors [sic] did not have the opportunity to address these issues, we find it appropriate to remand the matter and direct the bankruptcy court to reexamine the Trustee's fee request after permitting Stites to respond in writing to the reasonableness of the requested fees.

Blagg I, 223 B.R. at 807-808 (citation omitted).

Upon remand, the bankruptcy court complied with this Court's directive in two respects: by giving Stites the opportunity to examine the Trustee's requested fees and respond in writing and by addressing the concerns relative to the Trustee's lack of court approval as attorney. This Court agrees with the bankruptcy court's analysis and finds no abuse of discretion with respect to the award of attorney's fees as a sanction under Rule 9011.

Stites maintains that the bankruptcy court ignored the directive of the Court in *Blagg I* because the language in *Blagg I* relative to the Trustee's lack of court approval as an attorney constitutes the law of the case. This argument is without merit. The comments at issue are dicta, which is defined as "'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (quoting *Black's Law Dictionary* 454 (6th ed. 1990)). Dicta is not subject to the law of the case doctrine. *In re Meridian Reserve, Inc.*, 87 F.3d 406, 410 (10th Cir. 1996) (citing *United States v. Rice*, 76 F.3d 394, 1996 WL 44452 at *4 (10th Cir.) (unpublished disposition), *cert. denied* 518 U.S. 1011 (1996)).

The comments relative to whether the Trustee had court approval of his employment as an attorney and whether an attorney was needed to object to venue were made in the context of the Court's discussion of the reasonableness of the award of fees as sanctions against Stites and whether he had an adequate opportunity to respond to the attorney fee request. The comments were intended to provide background for the Court's holding with respect to the reasonableness issue; they were neither "necessary" nor "essential" to the determination of the case and were simply intended to guide the bankruptcy court's determination on remand. *See Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1202 (10th Cir. 1999). This is reinforced by the fact that the Court remanded the reasonableness issue to the bankruptcy court, directing the court to reexamine the reasonableness of the Trustee's fees after providing Stites with the opportunity to respond in writing.

Upon remand, the bankruptcy court satisfactorily addressed the Court's comments posed in *Blagg I.* The court correctly concluded that approval of the Trustee's employment as an attorney under § 327 is not a prerequisite for imposition of sanctions against violators of Rule 9011, distinguishing this case from an award of compensation under § 330, where court approval is mandated. The court held, "a trustee should not be required to have the foresight to know that a Rule 9011 violation will occur, nor should the trustee be required to expend professional time seeking employment by the estate in order to advise the Court of an intentional assertion of improper venue or of a Rule 9011 violation." Order Awarding Attorney's Fees and Expenses as Sanctions at 5-6, in Appellant's Appendix at 324-25. The inquiry under Rule 9011 is limited to the reasonableness of the fees and expenses. *See White v. General Motors Corp.*, 908 F.2d at 684.

Stites also argues that the amount of fees and expenses awarded exceeds

the amount adequate to deter future conduct and that "mere publication" of the sanctions order would have sufficed. Stites points to the $500 sanction against him for misrepresenting the law to the court as evidence that the $777.40 in attorneys fees was excessive. A court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed: 1) reasonableness (lodestar) calculation; 2) minimum to deter; 3) ability to pay; and 4) other factors, such as history, experience, severity of violation. *Id.* at 683-85.

In this case, the bankruptcy court properly employed the standards in fixing the amount of $777.40 as monetary sanction against Stites. We conclude there was no abuse of discretion.

D. Rule 60(b)(6) motion.

Debtors also appeal the bankruptcy court order denying their motion for relief from order or judgment dismissing Debtors' case under Rule 9024 and 60(b)(6). In order to be afforded relief under Rule 60(b)(6), a party "must plead and prove" that there is a reason justifying relief from the operation of the judgment. *Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp., Inc.,* 837 F.2d 423, 426 (10th Cir. 1988). "Rule 60(b) is an extraordinary procedure permitting the court that entered judgment to grant relief therefrom upon a showing of good cause within the rule. It is not a substitute for appeal, and must be considered with the need for finality of judgment." *Cessna Finance Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). Courts reserve Rule 60(b)(6) for extraordinary cases. *Klein v. United States,* 880 F.2d 250, 259 (10th Cir. 1989). The Tenth Circuit has referred to this provision as a "'grand reservoir of equitable power to do justice in a particular case.'" *Pierce v. Cook & Co.,* 518 F.2d 720, 722 (10th Cir. 1975) (en banc) (quoting *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir.

1963) (quoting 7 James Wm. Moore et al., *Moore's Federal Practice* 308 (1950 ed.))).

This Court is unable to find a specific argument in Appellants' briefs addressing the propriety of the bankruptcy court's order denying the Rule 60(b)(6) motion. An issue listed, but not argued in the opening brief, is waived. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1231 (10th Cir. 1990). Given the contentious history of this case, however, we will address the issue. We have reviewed the briefs, pleadings, motions and entire voluminous record before us. We agree with the bankruptcy court that the Rule 60(b)(6) motion is an attempt to relitigate the issues and that law of the case applies to all issues surrounding dismissal of the Debtors' case, and we find no abuse of discretion in the denial of Debtors' Rule 60(b)(6) motion.

IV. Conclusion.

Appellants' motion for leave to file brief in excess of fifty pages is GRANTED. For the reasons set forth above, the orders of the bankruptcy court are AFFIRMED.