IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

FERRELL BENJAMIN, BK #88-23910-WHB
Chapter 7

Debtor.

IN RE:

JOE BENJAMIN, BK #88-23908-B
Chapter 7

Debtor.

JOHN POTTS, ET. AL.,

Plaintiffs,

v. Adversary Proceeding No. 88-0179

FERRELL BENJAMIN,

Defendant.

JOHN POTTS, ET AL.,

Plaintiffs,

v. Adversary Proceeding No. 88-0180

JOE BENJAMIN,

Defendant.

CONSOLIDATED MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFFS' COMPLAINTS TO DENY DISCHARGEABILITY OF DEBT

These core proceedings[1] are before the Court on the plaintiffs' complaints to deny the debtors'

[1] 28 U.S.C. §157(b)(2)(I).

discharge of judgment debts pursuant to 11 U.S.C. §523(a)(6). As the above style reflects, the debtors, who are father and son, filed separate, individual Chapter 7 petitions with this Court. Thereafter, the plaintiffs filed complaints in each case against each debtor. However, because these complaints seek to except from the debtors' general discharges their asserted liability pursuant to judgment debts arising out of the same facts and circumstances and involving the same issues, the Court has consolidated the issues for resolution in this memorandum opinion.

At issue is whether the judgments on which the debts are based may be given collateral estoppel effect so as to except the debts from the debtors' general discharges. The following constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

HISTORY OF THE CASE

The record reflects that the debtors filed their respective Chapter 7 petitions for relief on June 6, 1988, approximately one month after the judgments at issue were rendered against them in the United States District Court for the Eastern District of Arkansas. The judgments, arising out of a vehicle accident and entered on a jury verdict, were appealed by the debtors to the Court of Appeals for the Eighth Circuit where they were affirmed without modification on August 21, 1989. Thus, as finally liquidated, the judgments are in the amount of $1,165,000.00 against the debtors and Ramiro Murrillo Inturralde jointly and severally for wrongful death and compensatory damages and $400,000.00 against each debtor for punitive damages. The parties have stipulated that the underlying District Court trial record would be the only evidentiary offering. The traffic accident which gives rise to the judgments is succinctly described by the Eighth Circuit in its appellate opinion as follows:

> On Thanksgiving Eve 1985, Karen Potts and her three young children, Brandon, Jeffrey and Kimberly were passengers in a station wagon driven by Mrs. Potts' sister Vickie Williams; Mrs. Williams, her children and the Pottses were en route to the sisters' parents' home for the holiday. As they neared the Intersection of Interstate 30 and 630 in Little Rock, heavy congestion brought traffic to a standstill. While they were waiting for the traffic to begin moving again, a tractor truck driven by Ramiro Murillo Inturralde, onto which two other tractor trucks had been decked or "piggy-

> backed" earlier that day in Memphis by Joe and Ferrell Benjamin (doing business as Fleet Service), collided with the cars stopped on the roadway, setting off a chain reaction of collisions among a number of cars including Mrs. Williams' station wagon. Ultimately the station wagon was also struck by Inturralde's vehicle. In the collision Mrs. Potts, Jeffrey and Kimberly were injured. The force of the collision hurled Brandon, age two, onto the roadway, where he was run over by Inturralde's vehicle. Brandon died a few minutes later in his mother's arms.

Potts v. Benjamin, 882 F. 2d 1320, 1321 (8th Cir. 1989).

Following the accident, the plaintiffs here commenced a District Court lawsuit which resulted in a hung jury. A second trial resulted in a jury determination that the proximate cause of the accident and the plaintiffs' injuries was the failure of the braking system on the tractor truck driven by Mr. Inturralde. The jury found that the truck and its cargo, i.e., two other tractor trucks, had been sold to Mr. Inturralde by the Benjamins, d/b/a Fleet Service, a joint venture, "in a defective condition," i.e., with inadequate brakes. See, Jury Interrogatories Nos. 2, 3, and 5. The jury further found that the plaintiffs were entitled to cumulative damages of $1,055,000.00 for the wrongful death claim resulting from Brandon Potts' fatal injury; $20,000.00 for medical expenses; and $90,000.00 for personal injury claims. The jury assessed 40% of the responsibility for the accident against Mr. Inturralde and 60% against the Benjamins. (Trial Transcript pp. 465-467) The judgment entered on these findings is joint and several as to the three defendants. (Ex. A. to complaints)

Finally, the jury awarded punitive damages against each debtor of $400,000.00 or $100,000.00 in favor of each plaintiff. The jury based its award of punitive damages on its finding by a preponderance of the evidence that the debtors, doing business as Fleet Service, "knew or reasonably should have known in the light of surrounding circumstances that their conduct would naturally or probably result in injury and/or damage and continued such conduct in reckless disregard of the consequences from which malice might be inferred." (Trial Transcript, pp. 419-420; jury instruction; see also Jury Interrogatory No. 10, Trial Transcript pp. 467-468.)

It is this finding specifically that the plaintiffs claim warrants denial of the debtors' discharge of these judgment debts pursuant to §523(a)(6) of the Bankruptcy Code. Section 523(a)(6) excepts from discharge a

debt which arises from "willful or malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6)

It is well settled that "the federal courts have exclusive jurisdiction to determine the dischargeability of debts under [sections 523(a)(2), (a)(4), and (a)(6) of the Bankruptcy Code]." In re Hall, 95 B.R. 553, 554 (Bankr. E.D. Tenn. 1989); 11 U.S.C. §523(c). For this reason, res judicata or claim preclusion, which bars relitigation of claims or defenses which were or should have been litigated in the previous adjudication, is inapplicable in these dischargeability proceedings. Brown v. Felsen, 442 U.S. 127, 138-139, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979); In re McQueen, 102 B.R. 120, 122 (Bankr. S.D. Ohio 1989).

However, collateral estoppel or issue preclusion, which bars relitigation of issues actually litigated in a previous adjudication, may be applied in such proceedings if the following tests are met:

> First, the issue sought to be precluded must be identical to the one in the prior action. Second, the issue must have been actually litigated . . . Third, the prior determination must have resulted in a valid and final judgment. Lastly, the determination of the facts for which preclusion is sought must be necessary to the outcome.

In re McQueen, 102 B.R. at 123; Spilman v. Harley, 656 F. 2d 224, 228 (6th Cir. 1981). In addition, it has been held that collateral estoppel may only be invoked where the evidentiary standard applied to litigation of the issues in the prior proceeding equals or exceeds the applicable standard in the bankruptcy context. In re McQueen, 102 B.R. at 123.

From these directives, it is clear that the Court must first determine whether the issue of "willful and malicious injury" within the meaning of §523(a)(6) is identical to the issue required for the jury's finding of punitive damages in the prior adjudication.

In order to except a debt from discharge pursuant to §523(a)(6) in this Circuit,[2] it must be shown that the debtor engaged in a "wrongful act done intentionally, which necessarily produces harm and is without just

[2] Counsel for the parties raised a question during oral arguments in this proceeding regarding whether the law of this Circuit, i.e., the Sixth, or of the Eighth Circuit, is applicable here as the accident and tort lawsuit occurred in the Eighth Circuit. The Court concludes that because this is

cause or excuse." Perkins v. Scharffe, 817 F. 2d 392, (6th Cir. 1987), cert. den., 484 U.S. 853, 108 S. Ct. 156, 98 L. Ed. 2d 112. In other words, the specific intent to bring about the resulting harm need not be shown, if the debtor's knowledge that the act will necessarily result in harm can be inferred from the nature and circumstances of the act. In re Woolner, 109 B.R. 250, 254 (Bankr. E.D. Mich. 1990).

In Perkins, the Court of Appeals was faced with the issue of whether the facts giving rise to a medical malpractice consent judgment rendered the judgment nondischargeable pursuant to §523(a)(6). The Court determined that the following conduct by the debtor supported a finding that the debt was nondischargeable:

> . . . [the debtor] unnecessarily injected [the plaintiff's] left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent. [The debtor] then ignored the results of belated tests that identified the offending bacteria and disclosed appropriate drugs and drug strengths to combat them. Finally, [the debtor] failed to hospitalize [the plaintiff] when hospitalization was urgently needed.

Perkins v. Scharffe, 817 F. 2d at 393.

In reaching its determination, the Court opined that these factors were analogous to those of a Tenth Circuit Court of Appeals' case involving a medical malpractice claim. In re Franklin, 726 F. 2d 606 (10th Cir. 1984). And, as the Tenth Circuit had concluded in Franklin, the Sixth Circuit concluded that a finding of willful and malicious conduct within the meaning of §523(a)(6), i.e., an intentional act with necessarily produced harm, was warranted because the debtor's actions "amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice." Perkins v. Scharffe, 817 F. 2d at 394. It should

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the situs of the debtors' bankruptcy cases and the plaintiffs here have submitted to this Court's jurisdiction, the law of the Sixth Circuit is applicable. This choice should make little difference in the outcome as the test for §523(a)(6) is substantially similar in both Circuits as an intentional act which necessarily produces harm is required by both. See, In re Hartley, 100 B.R. 477 (W.D. Mo. 1988); aff'd 874 F. 2d 1254 (8th Cir. 1989).

be noted that the Franklin opinion was decided under the Bankruptcy Act, and the Tenth Circuit now requires a "deliberate or intentional injury." Farmers Insurance Group v. Compos, 768 F. 2d 1155, 1157 (10th Cir. 1985); In re Thurman, 901 F. 2d 839, 841 (10th Cir. 1990).

In the case at bar, with respect to whether the debtors engaged in an intentional, wrongful act, the jury specifically found that these debtors sold to the plaintiffs a defective vehicle which was the proximate cause of the accident and the plaintiffs' injuries. Moreover, the jury specifically found that in allowing this vehicle on the road, without inspection, the debtors "knew or reasonably should have known . . . that their conduct would naturally or probably result in injury . . . and continued such conduct in reckless disregard of the consequences." Although conduct which would "naturally or probably result in injury" is not the same as the Sixth Circuit's interpretation of §523(a)(6) as requiring conduct which would "necessarily result in injury," the trial record is replete with evidence which supports a finding that the debtors' placement of the defective vehicles on the highway would necessarily result in injury if the vehicle was called upon to stop suddenly. This conclusion is supported by the Eighth Circuit's observations in its decision affirming the District Court's submission of punitive damages to the jury as well as the jury's verdict with respect thereto:

> . . . [I]n the case at bar plaintiffs presented evidence from which the jury could find that defendants never inspected the brakes on any of the trucks they sold and that they did not care whether the brakes on the two "piggy-backed" trucks they sold Inturralde were operative or inoperative. [10.] There was also evidence from which the jury could find that defendants knowingly rendered the brakes on the two "piggy-backed" trucks inoperative. The jury was entitled to find that in these circumstances defendants knew or ought to have known that their placing the three-truck unit onto an interstate freeway system is conduct that will naturally and probably result in injury when, as happened here, the driver requires maximum braking power in the face of a hazard of the road, and that they nevertheless did so with reckless disregard for the consequences.
>
> [10.] There was also evidence from which the jury could find that defendants were indifferent to the issue of public safety. "[Counsel]: The questions was: Do you feel that you have any responsibility toward the public when you put a vehicle out on the road? * * * [Ferrell Benjamin]: I don't myself." Trial Transcript at 397-98.

Potts v. Benjamin, 882 F. 2d at 1327. (Emphasis added)

The above described evidence, as observed by the Eighth Circuit and this Court, supports a finding the debtors' conduct rises to the level of "willful and malicious" within the meaning of §523(a)(6) as interpreted and applied by the Sixth Circuit Court of Appeals. In addition, it is clear that this issue was actually litigated and as "a necessary prerequisite of the punitive damages award, [the jury's] determination was necessary to the resulting final judgment." In re Horowitz, 103 B.R. 786, 790 (Bankr. N.D. Ms. 1989). No issue has been presented as to the validity and finality of the judgment.

Given these conclusions, the only possible question remaining is whether the evidentiary standard applied in the prior adjudication is sufficient to support a finding of non-dischargeability pursuant to 11 U.S.C. §523(a)(6). The District Court record establishes that the jury based its conclusions on a preponderance of the evidence presented. There is a split of authority among the bankruptcy and Circuit courts as to whether preponderance of the evidence is sufficient for a finding of nondischargeability pursuant to §523(a)(6) or whether a higher standard is called for. See, In re Watkins, 90 B.R. 848 (Bankr. E.D. Mich. 1988). Of the Circuit Courts considering the issue, two have ruled that the preponderance of the evidence standard is sufficient for purposes of §523(a)(6). Combs v. Richardson, 838 F. 2d 112 (4th Cir. 1989); In re Braen, 900 F. 2d 621 (3rd Cir. 1990). One has observed in dicta that the standard should be clear and convincing. Chrysler Credit Corp. v. Rebhan, 842 F. 2d 1257 (11th Cir. 1988). A fourth has ruled that the standard is clear and convincing. In re Posta, 866 F. 2d 364 (10th Cir. 1989).

In the absence of an established standard for this Circuit and until a different one is mandated, this Court adopts the well reasoned conclusions of the Watkins Court and holds that a preponderance of the evidence standard is sufficient to establish a finding of nondischargeability pursuant to §523(a)(6). See also, In re Doe, 93 B.R. 608 (Bankr. W.D. Tenn. 1988); In re Wellever, 103 B.R. 856 (Bankr. W.D. Mich. 1989); In re Hall, 98 B.R. 777 (Bankr. S. D. Ohio 1989); In re Schleppi, 103 B.R. 901 (Bankr. S.D. Ohio 1989).

From the foregoing, the Court holds that the tests enumerated for application of collateral estoppel in this context have been met. Moreover, the Court reviewed the record from the District and Circuit Courts, containing the only evidence before this Court. This is not a normal negligence case, as is made clear by the

jury's findings and verdict. Given that both the compensatory and punitive damages which comprise the debt at issue arise from a finding of wilfulness and malice, neither damages are dischargeable. In re Horowitz, 103 B.R. at 790; In re Adams, 761 F. 2d 1422, 1427 (9th Cir. 1985).

From the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that the plaintiffs' complaints to deny the debtors' discharge of their judgment debts is **GRANTED**. Accordingly, the plaintiffs' judgments against these debtors in the amount of $1,165,000.00 jointly and severally plus $400,000.00 individually are excepted from discharge as to each debtor.

SO ORDERED this 13th day of August, 1990.

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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