

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

In re:

LARRY JOSEPH WATERS,

Debtor.

Case No. 98-34649-L
Chapter 7

BILLIE J. METCALFE,
JULIA M. METCALFE, and
JOHNNY D. METCALFE,

Plaintiffs,

v.

Adv. Proc. No. 99-0042

LARRY JOSEPH WATERS,

Defendant.

OPINION

In this adversary proceeding, the plaintiffs seek a determination that the debtor/defendant may not discharge a judgment awarded to them for punitive damages arising out of a legal malpractice case. Having carefully reviewed the written record in this case and considered the testimony of Mr. Waters, for the reasons set forth more fully below, the court finds that the plaintiffs have failed to establish that the debt owed to them by Mr. Waters is a debt for an intentional and malicious injury to person or property. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I).

I.

In its previous opinion, dated October 15, 2000¹, the court denied the plaintiffs' motion for judgment on the pleadings or in the alternative for summary judgment, and entered judgment for the defendant on each of the plaintiffs' theories. On appeal, the United States District Court for the Western District of Tennessee affirmed this court's judgment under sections 523(a)(2) and (4), but reversed as to the plaintiffs' claim that the debt was not dischargeable pursuant to section 523(a)(6) because it is a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." The district court remanded the case for trial on the issue of whether "Waters' conduct, which the Tennessee Supreme Court characterized as at least reckless, was 'willful and malicious' according to the Markowitz² standard."³ After the case was remanded, this court set a pre-trial conference for September 25, 2000. At that time, the plaintiffs indicated their desire to file a second motion for summary judgment. The court requested that any such motion be accompanied by a transcript of the trial in the state court and set a schedule for the filing of the motion and responses. The plaintiffs filed their second motion for summary judgment on October 25, 2000, but did not file the requested transcript. Instead the plaintiffs filed a memorandum of law in support of their motion which included a statement of facts. The defendant filed a responsive memorandum and later filed a stipulation of facts in which he stipulated that the facts set out in the plaintiffs'

¹ *Metcalfe v. Waters (In re Waters)*, 239 B.R. 893 (Bankr. W.D. Tenn 1999).

² *Markowitz v. Campbell (In re Markowitz)*, 190 F. 3d 455 (6th Cir. 1999).

³ *Metcalfe v. Waters (In re Waters)*, No. 99-3044 G/A, slip op. at 13 (W.D. Tenn. 2000).

memorandum were true. On December 14, 2000, this court denied the plaintiffs' second motion for summary judgment because the stipulation of facts did not address material issues raised by the complaint and answer. Specifically, the court could not resolve the issue of Mr. Waters' intent and motivation based upon the written record. The court set the case for trial on February 28, 2000.

The case came on for trial as scheduled. At trial, the plaintiffs introduced the testimony of Mr. Waters as well as paper exhibits. The defendant introduced no evidence other than the testimony of Mr. Waters.

II.

The facts underlying this dispute are fully set out in the prior opinions of this court and the district court. At trial, Mr. Waters testified that he is presently employed by the United States Postal Service. He further testified that he had previously been employed by the plaintiffs as an attorney in connection with a personal injury lawsuit filed on behalf of plaintiff Billie Metcalfe. Mr. Waters testified that in December 1992, he lied to the plaintiffs about the status of their case by telling them that it had been dismissed despite the fact that he knew that the dismissal related to only some, but not all of the defendants. Mr. Waters stated that he told the plaintiffs he did not feel the case was worth an appeal. Mr. Waters further testified that he knew that the plaintiffs' case against the remaining defendant was set for trial on March 5, 1993, but that he failed to inform the plaintiffs of this fact and failed to appear for trial even though he knew that his failure to appear would probably result in the dismissal of the case against the remaining defendant.

Mr. Waters' explanations for this conduct were of particular interest to the court. Mr. Waters testified that he had no experience with jury trials in his practice and had handled fewer than 5-10 personal injury lawsuits. Mr. Waters explained that at the time he lied to the plaintiffs, he wanted to buy time to decide how to get the plaintiffs' case back on track. He stated that he thought it would be possible to refile an amended complaint or that the plaintiffs would seek other counsel concerning the feasibility of an appeal. He also stated that in his opinion, there were serious flaws in the plaintiffs' case in the area of contributory negligence.⁴ He explained that the driver of the automobile in which Billie Metcalfe was a passenger was a 15-year old driving pursuant to a learner's permit; that Billie Metcalfe was only 16 years old herself at the time of the accident; that Billie Metcalfe either procured alcohol for the driver or knew that he had consumed alcohol; and that the driver was driving under the influence of alcohol with Billie Metcalfe's consent. Mr. Waters stated that at the time he lied to the Metcalfes, he was experiencing severe marital problems. He stated that he had known Mr. Metcalfe prior to his handling of this lawsuit, and that he bore the Metcalfes no ill will.

This court had the opportunity, of course, to observe the demeanor and credibility of Mr. Waters. The court found Mr. Waters to be subdued, anxious, and often confused. At times, Mr. Waters' responses were difficult to hear because of the low volume of his speech and his tendency

⁴ The Tennessee Supreme Court adopted a modified comparative fault system to be applied to all cases tried or retried after the date of its opinion in *McIntyre v. Ballentine*, decided June 1, 1992. *McIntyre v. Ballentine*, 833 S.W.2d 52 (Tenn. 1992). Thus, Mr. Waters clearly was mistaken in thinking that contributory negligence would be a complete bar to recovery by Billie Metcalfe.

to mumble toward the end of his responses. Despite intense questioning by plaintiffs' counsel, Mr. Waters did not become defensive, but genuinely appeared to attempt to answer counsel's questions to the best of his ability. Mr. Waters' responses were not always logically consistent or legally correct, but he did not appear to be evasive. Plaintiffs' counsel, Mr. Sadler Bailey, insisted that the hearing was the first time Mr. Waters had offered any excuse for his actions despite repeated opportunities to do so. Remarkably, however, counsel offered no evidence tending to impeach Mr. Waters' testimony. No deposition testimony or prior trial transcript was introduced into the record despite this court's specific requests.

The court finds that Mr. Waters' admitted malpractice resulted from incompetence, inexperience, and his attempts to evade responsibility for his incompetence and inexperience. Mr. Waters' marital difficulties may have contributed to his repeated failures to take appropriate actions on behalf of his clients, but the court heard no specific proof concerning this. The court notes that one of the lies Mr. Waters admittedly told occurred in a social setting, a New Year's Eve party on December 31, 1992, at which it would be expected that Mr. Waters would want to avoid an unpleasant exchange with the Metcalfes. This is not to say that the court condones Mr. Waters' behavior. The court is particularly concerned, for example, about Mr. Waters' failure to explain why he took no remedial steps on behalf of the Metcalfes after the New Year's Eve Party and why he failed to advise them to seek other counsel. The Tennessee Supreme Court found that Mr. Waters' actions were, at a minimum, reckless, but reckless conduct does not satisfy the requirements of section 523(a)(6).

This case is unusual because on January 11, 1999, after appeals to the Tennessee Court of Appeals and Tennessee Supreme Court, the state trial court entered an Order of Non-Suit as to Mr. Waters' liability for compensatory damages in the underlying malpractice action. This occurred after Mr. Waters' voluntary petition for Chapter 7 relief was filed on October 21, 1998. Upon questioning by the court at trial, Mr. Bailey admitted that the non-suit was related to his belief that the compensatory damages award was dischargeable in bankruptcy, or at least that he could not prevail in demonstrating that it was not dischargeable. It was clear from Mr. Bailey's statements to the court that he believes that the bankruptcy system itself is unfair.⁵ Indeed, many of Mr. Bailey's comments were not those that the court would expect of a legal advocate, but those of a layman with little knowledge of bankruptcy law or policy. The court made repeated efforts to have Mr. Bailey focus his questioning and argument upon the legal issues raised by section 523(a)(6) but without success.

If the court had before it the question of both the compensatory damages award and the punitive damages award, the analysis in this case would certainly be different. There are a number of reported decisions that support the proposition that once it is determined that a debt arises from a willful and malicious injury, all damages flowing from that injury, including punitive damages,

⁵ Mr Bailey stated: "What I'm conceding is a basic exasperation with the philosophy of bankruptcy and how easy it is Bankruptcy, as I read the law, the philosophy of bankruptcy is to provide relief to the honest but unfortunate debtor. As I watch these people coming into this court, I think maybe 1% of them meet that standard." Despite this assertion, Mr. Bailey conceded that he spends very little time in bankruptcy court.

are not dischargeable.⁶ Rather than agreeing with the Court of Appeals that the compensatory damages award was premised on mere negligence, the Tennessee Supreme Court found “there was overwhelming evidence from which the jury could find, at a minimum, reckless conduct, that is conduct constituting a gross deviation from the applicable standard of care.” *Metcalf v. Waters*, 970 S.W.2d 448, 452 (Tenn. 1998). Yet the plaintiffs chose not to present the question of the dischargeability of the compensatory damages award to this court for determination. As it is, the court is left with a bare punitive damages award premised upon a compensatory damages award that the plaintiffs apparently admit would be dischargeable in bankruptcy. The necessary inference from the plaintiffs’ non-suit is an admission that the conduct giving rise to the compensatory damages award would not rise to the level of willful and malicious. If all of the acts leading to the compensatory damages award, taken together, do not rise to the level of willful and malicious, one of two results must follow: either these same acts and no others supported the punitive damages award, and therefore it is dischargeable, or, some additional acts supported the punitive damages award, and the court must determine whether these additional acts were willful and malicious.

The plaintiffs’ proof at trial focused on acts that occurred from December 1992 forward, that is, from the time that Mr. Waters’ told the plaintiffs at the New Year’s Eve party that their case had been dismissed and was not worthy of appeal. There was no proof of any additional conversations between Mr. Waters and the Metcalfes after that date. There was proof that Mr. Waters failed to

⁶ See, e.g., *Fischer v. Scarborough (In re Scarborough)*, 171 F.3d 638, 645 (8th Cir. 1999); *Abbo v. Rossi, McCreery & Assocs., Inc. (In re Abbo)*, 168 F.3d 930, 931-32 (6th Cir. 1999); *Hgan v. McNallen (In re McNallen)*, 62 F.3d 619, 626-27 (4th Cir. 1995); *Moraes v. Adams (In re Adams)*, 761 F.2d 1422, 1428 (9th Cir. 1985).

take any remedial action, failed to file a notice of appeal, failed to inform the Metcalfes of the impending trial date as to the remaining defendant, and failed to appear at trial. As Mr. Bailey repeatedly argued, these acts are consistent with an attempt by Mr. Waters to conceal his wrongdoing. The Tennessee Supreme Court also points to the element of concealment. That court stated,

In sum, the harm resulting from the original wrongdoing, as in the present case, may be exacerbated by intentional, fraudulent, malicious, or reckless efforts that prevent the plaintiff from taking immediate corrective action.

Metcalf v. Waters, 970 S.W.2d at 452. These acts are also consistent with Mr. Waters' assertion that he did not believe the plaintiffs' case had merit.⁷ The question before this court, therefore, is whether these acts of concealment by Mr. Waters were willful and malicious.

III.

The plaintiffs carry the burden of proving by a preponderance of the evidence that Mr. Waters' debt to them is excepted from discharge. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991). Section 523(a)(6) requires that a debt arise from acts that are both willful and malicious before it may be excepted from discharge. The United States Supreme Court has

⁷ Mr. Bailey questioned Mr. Waters about his knowledge of settlements reached on behalf of other plaintiffs. Mr. Waters stated that he knew that the other cases had been settled, but that he did not know whether the plaintiffs had received any money.

made clear that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998). Debts arising from negligently or recklessly inflicted injuries do not fall within the scope of section 523(a)(6). *Id.* at 63, 118 S. Ct. at 978. Because the Court in *Geiger* concluded that under the facts before it there was no intentional injury,⁸ the Court had no occasion to consider the requirement that an intentional injury also be “malicious.”

The leading decision of the United States Court of Appeals for the Sixth Circuit, following *Geiger*, makes clear that “the judgment must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt.” *Markowitz v. Campbell (In re Markowitz)*, 190 F. 3d 455, 463 (6th Cir. 1999). Taking a cue from the Supreme Court’s decision in *Geiger*, the court in *Markowitz* incorporated the definition of intentional torts from the Restatement (Second) of Torts into its definition of intentional injury for purposes of section 523(a)(6). The court held, “unless ‘the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it,’ ... he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” *Id.* at 464. In *Markowitz*, as in *Geiger*, the court concluded based on the record before it that there were insufficient facts to show that the defendant intended injury. *Id.* at 465. The court remanded the case for further factual findings, however, because “neither the

⁸ *Geiger* concerned the dischargeability of a debt arising from a judgment for medical malpractice. Dr. Geiger was found to have negligently or recklessly treated an infection in Ms. Kawaauhau’s leg, ultimately resulting in amputation of the leg below the knee.

parties, nor the bankruptcy or district court were aware of the proper standard or proofs required under *Geiger*.” *Id.* The court offered no definition of malice, nor guidance on the application of this second prong of section 523(a)(6).

The plaintiffs have argued, persuasively, that Mr. Waters knew that the consequences of his acts of concealment were substantially certain to follow; that is, the plaintiffs have demonstrated that Mr. Waters knew that if he failed to inform the plaintiffs of their trial date, they would not appear at trial and thus would not discover that their case had been dismissed as to the other defendants because of Mr. Waters’ acts and omissions. Mr. Waters further knew that if he failed to take remedial action, such as the filing of an amended complaint or the filing of a notice of appeal, the plaintiffs’ right of action could be lost. It is not at all clear, however, that Mr. Waters intended to injure the plaintiffs. *See Salem Bend Condominium Assoc. v Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345, 347 (6th Cir. B.A.P. 1998) (Creditor must demonstrate that debtor intended to cause harm). Mr. Waters testified that he believed that dismissal of the case would not cause injury because the contributory negligence of Billie Metcalfe would prevent any recovery. Mr. Waters was wrong about this, but the plaintiffs have failed to rebut his testimony that that was indeed his belief at the time.

It is helpful to compare these facts to the facts in *Geiger*. Dr. Geiger believed that oral penicillin would be as effective as intravenous penicillin in treating Mrs. Kawaauhau’s infection, and later believed that the infection had subsided when in fact it had not. Dr. Geiger was wrong, and Mrs. Kawaauhau lost her leg, but Dr. Geiger did not intend that Mrs. Kawaauhau lose her leg. He

did not intend her any injury. Mr. Waters likewise did not intend his clients any injury. He believed that they would not suffer injury because he believed their case did not have merit. He was reckless in not ascertaining the status of the law in Tennessee, and he was reckless in not keeping his clients accurately informed about the status of their case, and he was reckless in not appearing for trial, but he did not intend to injure the plaintiffs.

Plaintiffs' counsel argues that he need only prove that Mr. Waters intended the consequences of his act, that is, the dismissal of the plaintiffs' lawsuit, but that he cannot be expected to prove that the injury was malicious. Mr. Bailey would read section 523(a)(6) as if all intentional acts that result in injury are willful and malicious. Indeed, he argued that, "intentional conduct that results in harm" is enough. This position was overruled in *Geiger*. It is further inconsistent with the plain meaning of the statute itself, which requires that a debt arise from an injury that was both willful and malicious.

Ironically, the Tennessee Supreme Court defined malice in *Metcalf v. Waters*: "A person acts maliciously when the person is motivated by ill will, hatred, or personal spite." *Metcalf v. Waters*, 970 S.W.2d at 450-51 (quoting *Hodges v. S.C. Toof & Co.*, 883 S.W.2d 896 (Tenn. 1992)). Prior to the Supreme Court's decision in *Geiger*, the Sixth Circuit had defined malice as acting "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *Wheeler v. Laudini*, 783 F.2d 610, 615 (6th Cir. 1986); see *Perkins v. Sharffe*, 817 F.2d 392, 394 (6th Cir. 1987), *cert. denied* 484 U.S. 853, 108 S. Ct. 156, 98 L. Ed. 2d 112 (1987). *Perkins* was within the list of cases identified by the Supreme Court in *Geiger* as being

contrary to its formulation. Under *Geiger*, what is required is an intentional injury. The Supreme Court did not specifically address the malice requirement, but one might conclude from its discussion that an intent to injure is malicious. It is difficult to conceive that an intent to injure would be motivated by anything other than ill-will, hatred, or personal spite.

This court finds that Mr. Waters acted recklessly, but that he did not intend to injure the plaintiffs. His actions were the result of incompetence, lack of experience, embarrassment and distraction, but not ill-will or personal spite. The court will enter judgment for the defendant.

BY THE COURT

JENNIE D. LATTA
United States Bankruptcy Judge

Date: April 3, 2001

cc: Plaintiffs
Attorney for Plaintiffs
Defendant
Attorney for Defendant