Not intended for publication

**Dated: July 07, 2005**
**The following is SO ORDERED.**

**G. Harvey Boswell**
**UNITED STATES BANKRUPTCY JUDGE**

---

**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF TENNESSEE**
**EASTERN DIVISION**

**IN RE:**

**TIMOTHY & DANNA ELROD** — **CASE NO. 04-15164**

**Debtors.** — **Chapter 7**

**THORNTON'S FURNITURE,**

**Plaintiff,**

**v.** — **Adv. Pro. No. 05-5012**

**TIMOTHY & DANNA ELROD,**

**Defendants.**

**MEMORANDUM OPINION AND ORDER RE:**
**COMPLAINT OBJECTING TO DISCHARGE**

The Court conducted a trial on the Plaintiff's "Complaint Objecting to Discharge" on May 23, 2005. FED. R. BANKR. P. 7001. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony and exhibits from the trial as well as the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

## I. FINDINGS OF FACT

At issue in this case are several pieces of furniture Timothy and Danna Elrod ("Elrods" or "Debtors") purchased from Thornton's Furniture ("Thornton's") between 2001 and 2004. In making these purchases, the debtors executed nine separate retail installment contracts and security agreements in favor of Thornton's.[1] Each time a new installment contract and security agreement was entered into, the total amount due under the previous contract was refinanced into the amount due under the new contract. The annual percentage rate for each contract varied from 20.79% to 21.14%.[2]

The debtors filed their chapter 7 petition on November 17, 2004, and indicated on their "Statement of Intention" their desire to surrender the furniture to Thornton's. Despite this stated intention, Thornton's alleges that the debtors went to great efforts to avoid surrendering the furniture. Timothy Elrod did not appear at the trial in this matter, but Danna Elrod testified that neither she nor her husband attempted to thwart Thornton's collection efforts. Mickey and Kevin Thornton testified on behalf of Thornton's.

With the exception of a living room suit, Thornton's has now regained possession of all of their collateral. Thornton's has been able to re-sell some of this furniture; however, there are eight pieces which were allegedly damaged or destroyed. Thornton's asserts that the debtors willfully and maliciously caused the damage to this furniture in violation of 11 U.S.C. § 523(a)(6). Had the furniture come back in reasonable used condition, Mickey Thornton testified that he would have been able to re-sell it for between 60 and 75% of the new retail value. Danna Elrod testified that the damage was the result of normal wear and tear for a family of four with two small children. For ease, the Court will address each item of collateral on a piece-by-piece basis in chronological order.

**1. Dishwasher.** On August 28, 2001, the debtors purchased a General Electric dishwasher from Thornton's for $499.99. In so doing, they executed a retail installment contract and security agreement in

[1]One of the installment contracts and security agreements was for the purchase of a refrigerator in September 2003; however, neither party mentioned this collateral during the trial. The Court presumes that the refrigerator was either fully paid for or not damaged in any way and that Thornton's was able to sell it for the normal resale price.

[2]Each of the security agreements in this case contained the following language: "DEFAULT: Declaring Entire Balance Due: If you fail to make any payment on time or default in complying with any of the terms in this contract, the Seller can require the entire amount remaining unpaid to be due and payable at once. However, if the seller does this, the amount due is subject to a rebate of unearned finance charges. You agree to pay all reasonable collection cost to the extent permitted by law. If this contract is referred to an attorney who is not a salaried employee of the Seller, you agree to pay such reasonable attorney's fees as may be permitted by law."

favor of Thornton's. The debtors financed the cost of the dishwasher plus a $99.00 five-year warranty for a period of twelve months at 21.02%.

According to the testimony of Kevin Thornton, the warehouse and delivery manager for Thornton's Furniture, the dishwasher had standing water and chunks of food in it when it was picked up from the Elrods' house. Danna Elrod did not testify about the standing water, but did state that it was normal for chunks of food to be in the dishwasher before it was run. After picking the dishwasher up, Kevin Thornton took it to a car wash and power-washed it in order to clean out the water and the chunks of food. Thornton's has not attempted to re-sell the dishwasher. There was no testimony or proof presented at the trial that the dishwasher had been damaged in any way that would diminish the resale value. As a result, the Court presumes that it could be sold for the normal re-sale amount.

**2. Entertainment Center.** On September 19, 2001, the debtors purchased an entertainment center from Thornton's for $799.99 and financed the purchase for a period of eighteen months at 21.21%.[3] The center had two piers that sat on either side of a big screen television set. Each of these piers had pre-cut holes in the back panels for wires and electrical plugs. When Thornton's picked the center up from the Elrods, one of the back panels had been cut away in what appears to have been a very haphazard fashion. Danna Elrod testified that her husband made the cut in order to fit his stereo in the pier. She did not know why the cut appeared to be splintered.

Thornton's was able to order a new back panel for the center and replace the damaged one. Mickey Thornton testified that the repair to the center cost approximately $100.00. After fixing the panel, Thornton's was able to re-sell the entertainment center for the normal re-sale value. Mickey Thornton did inform the Court that Thornton's was unable to re-coup the $100.00 it paid to repair the damaged back panel.

**3. Dryer.** On October 1, 2001, the Elrods purchased a GE extra-large capacity dryer from Thornton's for $338.00 along with a five-year full warranty on the dryer for $89.99. The Elrods financed this purchase for twenty-four months at 21.14%. When the Elrods surrendered the dryer to Thornton's, there was a stain on top of the dryer which Thornton's has been unable to remove. The dryer also had some rust and small dents on it when Thornton's got it back.

[3]As with all of the subsequent contracts, the remaining amount due under the previous contract was rolled into the new contract and financed along with the purchase price of the new collateral so that the total amount due under the last contract at issue was $15,681.96. This amount included $470.47 for credit life insurance, $675.33 for accident and sickness disability insurance, and a $39.00 processing fee.

When questioned by debtor's counsel about whether or not the stain, rust and dents indicated intentional damage to the dryer, Mickey Thornton answered "not necessarily." Danna Elrod testified that she did not know what had caused the stain on top of the dryer, but that she had noticed it prior to surrendering it.

As of the trial date, Thornton's had not resold the dryer. Mickey Thornton testified that because the dryer still had two years of the extended warranty left on it when it was surrendered, he should have been able to sell the dryer for $300.00. Neither Mickey Thornton nor Kevin Thornton testified as to why the dryer has not been sold.

The plaintiff did not present any proof of the expected re-sale value of the dryer in light of the stain, rust and dents nor did it present any proof regarding how much impact this damage would have on the re-sale value.

**4. Living Room Suit #1.** On November 30, 2001, the Elrods purchased a sofa, loveseat, chair and ottoman from Thornton's for $1,998.00. The Elrods financed this purchase for thirty-six months at 20.79%. According to Mickey Thornton, the furniture was fully warranted. The frame and springs had a lifetime warranty. The foam and cushion cores had a ten-year warranty. The fabric itself had a one or two-year warranty which would only cover the stitching. The fabric protection had a five-year warranty.

At some point after purchasing the suit, the fabric on the furniture got torn and the frames on some of the pieces broke. Although the furniture was covered by a warranty, the Elrods elected to dispose of the furniture rather than having it repaired. The Elrods gave the sofa to one of Timothy Elrod's employees and threw the loveseat away.[4]

When asked why they disposed of the furniture in this manner, Danna Elrod testified: "I thought I could do what I wanted to with it because it was mine." Danna Elrod further testified that she informed Mickey Thornton of her disposal of the furniture. Approximately ten days after disposing of the sofa and loveseat, the Elrods purchased a new living room suit from Thornton's.[5] Mickey Thornton testified that had the living room suit been returned in normal, reasonable condition, it would have had a resale value of approximately $1,500.00.

**5. Rocker Recliner.** On March 20, 2002, the Elrods purchased a recliner from Thornton's for $629.99 plus $35.00 for a fabric treatment. The Elrods financed this purchase at 20.79% for thirty-six

[4]No testimony or proof was introduced about what the Elrods did with the chair and ottoman.

[5]See section number 7 for details on the second living room suit purchase.

months. When the Elrods finally surrendered possession of the recliner after filing bankruptcy, the recliner was in extremely bad condition. The photo introduced into evidence shows an enormous amount of some sort of dark substance on the arms and seat of the chair. Mickey Thornton testified that the substance appeared to be dirt. The photo also shows a huge sink hole in the backrest where the springs were broken or have come loose. Danna Elrod testified that the broken springs and the dirt were the result of normal wear and tear for an "old recliner." According to Mickey Thornton's testimony, had the recliner come back in "normal" condition, it would have had a resale value of between $300.00 and $500.00; however, given its current condition, it is worthless and will have to be thrown away.

**6. Twin beds.** On August 2, 2002, the Elrods purchased two twin metal headboards, two twin mattresses and foundations, and two twin bed frames for $367.94. The Elrods financed this purchase at 20.79% for thirty-six months. One of the headboards was white and one was bright red.

Although Thornton's had extreme difficulty obtaining these beds from the Elrods, it eventually found out the beds were at Timothy Elrod's mother's house in a different county. The beds were in a storage shed behind the elder Mrs. Elrod's house. When asked why the beds were at her mother-in-law's house, Danna Elrod testified that they gave the beds to her because they did not need them anymore and her mother-in-law did. Danna Elrod further testified that Timothy Elrod took the beds to his mother's house by himself and she did not know how her mother-in-law was using them. Danna Elrod did admit on direct examination that her mother-in-law had recently told her that the beds were in her shed.

When Thornton's got the beds out of the shed, they were in deplorable condition to say the least. The headboards were very rusted and the red one had faded to pink. Thornton's only found one of the bed frames in the shed and it was very rusted as well. Judging from the photos introduced into evidence, it appears that both headboards and the one frame that was recovered by Thornton's were exposed to the weather for a substantial period of time. The amount of rust and fading is beyond the limits of what would happen to a piece of metal that was being stored in an enclosed shed. Not surprisingly, neither the headboards nor the frames have any re-sale value at all.

Although the headboards and frame were in poor shape, they were nothing compared to the mattresses and foundations. A large number of cats had been using the beds as litter boxes for some time. The cats had torn the fabric on the foundations in numerous places and had been climbing in and out of the wood frames. There were also chunks of wood missing from the frames. According to Mickey Thornton, Thornton's had no choice but to immediately throw the mattresses and foundations away. The smell of the

cat urine was so strong, Mickey Thornton was afraid to bring the beds into the warehouse for fear of the smell spreading to any other furniture.

**7a. Living Room Suit # 2.** On April 9, 2004, the Elrods financed the purchase of several pieces of furniture under one security agreement. The first items listed were a sofa and loveseat. The Elrods paid $1,199.99 for these two pieces. They financed the purchase over thirty-six months at 20.79%. When the sofa and loveseat were surrendered to Thornton's, they did not have any major damage and were resold for what the Court presumes was the normal resale price.[6]

**7b. Dresser.** The third item listed on the April 9, 2004, security agreement was a dresser/mirror. The price of these pieces was $449.99. When the dresser was surrendered to Thornton's, it had some knobs missing and had some scratches; however, Mickey Thornton admitted that this type of damage was the result of normal wear and tear. He also admitted that the dresser can be resold. He did not make any statement that indicated the resale value of the dresser would be below normal.

**7c. Loft Bed.** The fourth item listed on the April 9, 2004, security agreement was a loft bed with twin mattress. The purchase price of this furniture was $699.99 which included the bed, mattress, bookcase and dresser base. The bed, bookcase and dresser base were constructed of chip core/particle board and had a Formica-type finish on the outside. It was assembled by putting the pieces together and then locking them in place with cam locks. The only way to disassemble the bed without damaging it was to unlock the cam locks and pull the pieces apart.

According to Mickey Thornton's testimony, Timothy Elrod took the bed apart and put it on his front porch. Danna Elrod did not dispute this fact, but did point out that the Elrods' front porch is covered. Timothy Elrod then called Thornton's and told them they could come pick the bed up. At the time this was done, it was raining outside.

The plaintiffs introduced photographs of the bed into evidence at the trial. It is clear from these pictures that the bed was severely damaged and is now essentially worthless. Everywhere there was a cam lock on the bed, there is a large chunk of material missing. It appears that when the bed was disassembled, the cam locks were left in place and the pieces literally ripped apart with a great deal of force. Had the cam locks been unlocked, the pieces would have come apart unharmed. Although Danna Elrod does not dispute the fact that her husband disassembled the bed, she testified that the damage in the pictures was not caused

[6]Mickey Thornton did not testify as to the resale price of the sofa and loveseat nor did he testify that he was unable to sell it for the normal resale price. As a result, the Court is presuming that it was resold for the normal price.

by him. As mentioned earlier, Timothy Elrod was not present at the trial. The large chunks of missing material cannot be fixed or replaced.

In addition to the damage caused to the loft bed, the photographs introduced into evidence show that the mattress had a significant amount of dirt and water damage to it. Danna Elrod did not dispute the fact that her husband put the mattress on the front porch nor did she dispute the fact that it was raining when that was done; however, she claimed that the mattress was not like that when Thornton's picked it up. Due to the damage to the mattress, Thornton's disposed of it immediately upon returning to the warehouse. Mickey Thornton claimed on direct examination that had the bed and mattress been returned in reasonable condition, he would have been able to resell it for $600.00.

**8. Grill.** On September 3, 2004, the Elrods purchased a gas grill from Thornton's for $948.99. The Elrods financed this purchase at 20.79% for thirty-six months. According to Mickey Thornton, this was the most expensive grill in the store and was made mostly from stainless steel.

When the Elrods finally surrendered the grill to Thornton's, it had a massive amount of grease all over the outside of it. Mickey Thornton testified that it appeared to him as if someone had taken a bucket of grease and dumped it over the top of the grill. Danna Elrod claimed that she was not aware of the grease on the outside of the grill, but if there was some it was the result of normal use.

Thornton's was able to clean all of the grease off of the grill. Thornton's has not been able to sell the grill yet; however, Mickey Thornton admitted on cross examination that there was nothing wrong with the grill aside from the grease that was on it when they regained possession of it. Mickey Thornton alleged that if the grill had come back in normal condition, he would have been able to re-sell it for between $900.00 and $1,000.00. Thornton's did not offer any proof as to why the grill has not been resold yet or that the resale value has been diminished in any way.

## II. CONCLUSIONS OF LAW

Section 523(a)(6) of the Bankruptcy Code states:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6). A creditor seeking to have a debt declared non-dischargeable under this section must prove § 523(a)(6)'s elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279,

291 (1991). Once a creditor establishes a prima facie case, the burden shifts to the debtor to present credible evidence that a defense to the liability exists. *Sears Roebuck & Co., v. Miller (In re Miller),* 70 B.R. 55, 56 (Bankr. S.D. Ohio 1987). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor "with the benefit of any doubt going to the debtor." *Manufacturer's Hanover Trust Co. v. Ward (In re Ward),* 857 F.2d 1082, 1083 (6th Cir. 1988).

Until recently, the Sixth Circuit's standard for § 523(a)(6)'s "willful" requirement was rather lenient. As long as a debtor could be shown to have intentionally committed an act which led to an injury, he would be found to have acted "willfully" under § 523(a)(6), regardless of whether or not he actually intended the injury. *Perkins v. Scharffe*, 817 F.2d 392, 394. *Perkins* was overruled in 1998 by the U.S. Supreme Court case of *Kawaauha v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). In *Geiger*, the Supreme Court held that only acts done with the intent to cause the actual injury will rise to the level of a "willful and malicious injury" as used in § 523(a)(6). *Id.* In light of the Supreme Court's ruling in *Geiger*, the Sixth Circuit amended its definition of "willful" as used in § 523(a)(6):

> [W]e now hold that unless "the actor desires to cause 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).

*Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455, 464 (6th Cir. 1999).

In addition to requiring a creditor to prove that a debtor acted willfully, § 523(a)(6) also requires the creditor to show that the debtor acted maliciously. 11 U.S.C. § 523(a)(6). "Under § 523(a)(6), a person is deemed to have acted maliciously when that person acts in conscious disregard of his duties or without just cause or excuse." *Gonzalez v. Moffitt (In re Moffitt),* 252 B.R. 916, 923 (B.A.P. 6th Cir. 2000) (citations omitted); *River View Land Co., Inc., v. Bucak (In re Bucak),* 278 B.R. 488, 493 (Bankr. W.D. Tenn. 2002) (citations omitted) ("The definition of 'malicious,' for section 523(a)(6) purposes, is proven when a creditor shows that a debtor acted in conscious disregard of the rights of others, without just cause or excuse.").

As with § 523(a)(2)(A)'s requirement of establishing fraudulent intent, proving that a debtor acted willfully and maliciously under § 523(a)(6) can be difficult. Debtors will rarely, if ever, admit to acting in a willful or malicious manner. As a result, a creditor may establish that a debtor acted "willfully" by presenting circumstantial evidence. *J & A Brelage, Inc., v. Jones (In re Jones),* 276 B.R. 797, 802 (Bankr. N.D. Ohio 2001):

> . . . the "willful" requirement of § 523(a)(6) may be indirectly established by the creditor demonstrating the existence of two facts: (1) the debtor knew of the creditor's lien rights; and (2) the debtor knew that his conduct would cause injury to those rights.
>
> . . .
>
> It therefore follows that, for purposes of determining whether a debtor knew his actions would injure the creditor's lien rights, a rebuttable presumption will arise when the debtor, despite having knowledge as to the implications of the security agreement, took no action to protect the creditor's interest therein.

*Jones*, 276 B.R. at 802 (citations omitted); *see also, O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 831 (Bankr. N.D. Ohio 2000); *Rizzo v. Passialis (In re Passialis)*, 292 B.R. 346, 353 (Bankr. N.D. Ill. 2003).

In the case at bar, there are ten items[7] at issue. Thornton's claims that the debtors willfully and maliciously damaged each of these items in a manner sufficient to have the debt declared non-dischargeable. Danna Elrod, on the other hand, claims that the damage to the furniture was caused by normal wear and tear and not by any intentional act on her or her husband's part. After reviewing the testimony and the exhibits presented at the trial, the Court finds that the Elrods did willfully and maliciously injure Thornton's security interest in some of the items of collateral. As with the "Findings of Fact" section, the Court will discuss its conclusions on an item-by-item basis.

Before turning to the damage discussion, the Court would like to address Thornton's allegations that the Elrods' delay in surrendering the furniture is further proof of their willful and malicious intent. While the Court is greatly distressed by the Elrods' failure to turn the furniture over promptly, Thornton's did not present any proof that this delay caused them any injury above and beyond the damage to the furniture itself. There was no testimony that the holdup resulted in the resale value of the furniture being diminished at all, let alone in any significant amount. As a result, the Court finds that the Elrods failure to surrender the furniture in a timely manner did not cause any additional injury to Thornton's.

**1. Dishwasher.** Aside from the fact that it had standing water and chunks of food inside of it when Kevin Thornton picked it up, the Court finds that there was no proof of any damage to the dishwasher that willfully or maliciously injured Thornton's security interest therein. It is true that it has not been resold, but Kevin Thornton testified that they were waiting to re-sell it until the conclusion of this adversary proceeding. The plaintiffs did not present any proof that it could not be sold for the normal

[7]For purposes of this section, the Court is counting each living room suit as one item each and the loft bed, mattress, dresser base, and book case as one item.

resale value. As a result, the Court finds that the Elrods did not cause any injury, let alone a willful or malicious one, to Thornton's interest in the dishwasher. The amount owing to Thornton's for this item is hereby declared dischargeable.

**2. Entertainment Center.** Because Thornton's has sold the entertainment center for the normal resale value, the only figure at issue for purposes of this opinion is the $100.00 Thornton's paid to repair the damaged back panel. Danna Elrod testified that her husband cut away that section of the entertainment pier because his stereo was too deep for the space. Although it was not done in the most professional manner, the Court does not find that there was any evidence introduced that Timothy Elrod willfully or maliciously caused this damage. Apart from the back panel, there did not appear to be any other damage to the pier. Had the Elrods wanted to intentionally injure Thornton's security interest in the center, they presumably could have caused other more serious damage. The Court also finds that Thornton's failed to present any proof that it is not within the usual business practices of a furniture store to incur costs in preparing a piece of furniture for resale. As a result of these findings, the Court concludes that the amount of money owing to Thornton's for the entertainment center is dischargeable.

**3. Dryer.** While it is true that there was a stain on top of the dryer, Thornton's did not present any proof that the debtors intentionally caused this stain. In fact, Mickey Thornton admitted on cross examination that the stain, rust and dents were "not necessarily" indicative of any intentional damage. At most, it appears that the Elrods negligently or recklessly spilled something on top of the dryer which over the course of time stained it.

Even assuming that the Court found the stain to be a willful and malicious injury to the dryer, Thornton's claim would fail because they did not present any proof of an injury to their security interest in it. Thornton's did not present any proof that it cannot resell the dryer. Mickey Thornton did allege that had the dryer come back in normal condition, he could have resold it for $300.00; however, he did not present any testimony or proof about the actual resale value of this dryer in light of the stain. Based on these facts, the Court concludes that the debtors did not willfully or maliciously injure Thornton's security interest in the dryer. The amount the Elrods owe to Thornton's for this piece of collateral is discharged.

**4. Living Room Suit #1.** Thornton's alleged that the debtor disposed of the first living room suit in an attempt to thwart its security interest. Danna Elrod testified that they gave the sofa to one of her husband's employees and threw the loveseat away because both pieces were damaged. Thornton's asserts that if the suit were truly damaged, the Elrods could have made a claim under the warranty. Their failure to

do so is allegedly proof that they disposed of the collateral with the sole intention of depriving Thornton's of repossessing it.

Despite the existence of the warranty, the Court finds that Thornton's failed to carry their burden of proof with respect to the living room suit. Danna Elrod testified that she disposed of the furniture because "[she] thought [she] could do what [she] wanted to with it because it was [theirs]." Ten days after getting rid of the first set of living room furniture, the Elrods went back to Thornton's and bought a new living room suit. Although it may have been economically unwise to purchase new furniture instead of getting the old furniture repaired under the warranty, the Court finds that this fact alone does not prove the debtors acted with the intentional motive of damaging Thornton's security interest. Had the Elrods wanted to willfully and maliciously injure Thornton's by disposing of the first set of furniture, they surely would not have gone back to Thornton's and bought the new set. As a result of these conclusions, the Court finds that the debt owing to Thornton's from the Elrods for the living room suit purchased on November 30, 2001, is dischargeable.

**5. Rocker Recliner.** Judging from the photos introduced at the trial, it is clear that the recliner the Elrods purchased in March 2002 was damaged beyond normal wear and tear. It is hard for the Court to imagine any set of circumstances under which a two-year old recliner would end up in the condition this one did without some intentional action on the part of the debtors to damage the collateral. At the very least, it is clear that this is an instance where the Elrods took no action to protect Thornton's security interest in the furniture. In accordance with the holding in *J & A Brelage, Inc., v. Jones (In re Jones)*, 276 B.R. 797, 802 (Bankr. N.D. Ohio 2001), such behavior gives rise to a rebuttable presumption that the debtors caused a willful and malicious injury to the collateral. Danna Elrod's claims that the recliner's condition was the result of normal wear and tear did not adequately rebut this presumption.

Mickey Thornton testified that had the recliner come back in normal used condition, he could have sold it for between $300.00 and $500.00. It is clear that, given its current condition, Thornton's has no choice but to throw the recliner away. Based on these conclusions, the Court finds that Thornton's is entitled to a non-dischargeable judgment for the recliner in the amount of $400.00.

**6. Twin beds.** As with the recliner, the condition the beds were in when Thornton's eventually recovered them was deplorable. The photographs clearly show that the headboards and the one bed frame were exposed to the weather for a substantial period of time. The rust on all three pieces as well as the substantial fading of the red headboard are proof of that. As for the mattresses, they were utterly destroyed by the cats and presumably by exposure to the weather as well.

During the course of her testimony, Danna Elrod claimed that they gave the beds to Timothy Elrod's mother because she needed the beds. Danna Elrod further testified that only recently did she discover that her mother-in-law was storing the beds in her shed. These assertions fail for two reasons. First, if the elder Mrs. Elrod had truly needed the beds, surely they would not have been propped up against a wall in a shed behind her house. Secondly, even if the Elrods innocently gave the beds to Timothy Elrod's mother and she then put them out in her shed, this does not explain the weather damage to the furniture. At some point these beds were exposed to the elements. The amount of fading and rust that was found on these items does not occur in an enclosed shed.

At a minimum, it is clear that the Elrods took no action to protect Thornton's security interest in the beds. The furniture was exposed to the weather for a substantial period of time before ever being moved into Timothy Elrod's mother's shed. Danna Elrod did not make any claim that her mother-in-law ever left the furniture outside. The only conclusion to draw from this omission is that the Elrods were the ones who left the beds exposed to the weather. As with the recliner, the Elrods did not rebut the presumption that they caused a willful and malicious injury to the collateral by failing to protect it from damage.

The Elrods paid $23.99 for each headboard, $24.99 for each frame and $134.99 for each mattress. Mickey Thornton testified that if the furniture was returned in normal condition, he could get between 60% and 75% of the new retail value. Because the Elrods willfully and maliciously caused damage to the beds, the Court finds that Thornton's is entitled to a non-dischargeable judgment against the debtors for $248.37 which is 67.5% of the new retail price of the beds.

**7a. Living Room Suit # 2.** Mickey Thornton testified that the living room suit purchased by the Elrods in April 2004 came back in dirtier-than-normal condition, but did not have any major damage. As with the entertainment center, Thornton's had already resold the entire suit prior to the trial in this matter. Mickey Thornton did not testify as to the resale price of the sofa and loveseat; however, because he did not mention that the resale value had been diminished at all, the Court presumes that he was able to sell it for the normal price. As a result, the debtors did not cause any injury to Thornton's security interest in the second living room suit. The entire amount owing for that furniture is dischargeable.

**7b. Dresser.** Although some of the knobs were missing and there were some scratches on it when the Elrods surrendered the dresser to Thornton's, Mickey Thornton admitted that the dresser came back in normal used condition and that it could be resold. Because Mickey Thornton consented to the fact that the slight damage to the dresser was the result of normal wear and tear, the Court concludes that Thornton's

suffered no injury to their security interest and the entire debt owing to Thornton's for the dresser is dischargeable.

**7c. Loft Bed.** Both Mickey Thornton and Danna Elrod testified that Timothy Elrod took the loft bed apart and put it on the porch along with the mattress. Mickey Thornton further testified that it was raining when Timothy Elrod put the bed on the porch. Danna Elrod did not dispute this fact, but said their porch is covered.

It is clear from looking at the photographs of the loft bed that it was taken apart with the sole intention of damaging it. Cam locks are relatively easy to operate and widely used on modern furniture. The manner in which the bed was disassembled essentially resulted in the destruction of the furniture. During the course of her testimony, Danna Elrod claimed that her husband did not commit the damage shown in the pictures. Instead she intimated that Thornton's caused the damage. The Court finds this intimation without merit. It would have served no purpose for Thornton to destroy this piece of furniture. When they regained possession of the bed from the Elrods, they had already filed their bankruptcy petition.

The Court finds that Timothy Elrod intentionally ripped the loft bed apart without unlocking the cam locks. The Court also finds that this intentional damage was done with the sole purpose of destroying Thornton's security interest in the bed. Had Timothy Elrod elected to be present at the trial in this matter, he might have been able to rebut this conclusion. As mentioned earlier, however, Timothy Elrod did not show up to testify.

In addition to the damage caused to the actual bed frame, the Court finds that the water damage to the mattress was done with the sole purpose of damaging the mattress. Mickey Thornton testified that Timothy Elrod put the bed and mattress on the porch while it was raining. Danna Elrod did not dispute this fact, but said the porch is covered. The mere fact that the porch is somewhat protected from the weather, does not eliminate the fact that furniture placed outside while it is raining is bound to suffer water damage.

As a result of this conclusion that the Elrods willfully and maliciously damaged the loft bed and mattress, the Court finds that Thornton's is entitled to a non-dischargeable judgment against the debtors. Mickey Thornton claimed that had the bed been returned in normal condition, he could have resold it for $600.00 which is 85% of the price the Elrods paid for the bed when it was new; however, he also testified earlier in the trial that he could get between 60% and 75% of the new value for used furniture. The Court finds that, in the absence of proof which demonstrates otherwise, the lower percentages are a more realistic value for the used bed. Thornton's will be awarded a non-dischargeable judgment for the bed for 67.5% of the new retail value or $472.49.

**8. Grill.** Although the evidence suggests that Timothy Elrod did pour grease over the top of the grill in anticipation of it being picked up by Thornton's, Mickey Thornton testified that they were able to clean all of the grease off of the grill and that there was no other damage to it. As with the dresser, it does not appear that the debtors caused any injury to Thornton's security interest in the grill. Mickey Thornton did say that Thornton's had not resold the grill, but there was no evidence presented that the grill could not be sold for the normal resale value. Based on these facts, the Court concludes that the entire amount the Elrods owe to Thornton's for the grill is dischargeable.

## III. ORDER

It is therefore **ORDERED** that Thornton's Furniture is awarded a non-dischargeable judgment against the debtors in the amount of $1,120.86.

It is further **ORDERED** that Thornton's Furniture is awarded an attorney's fee of $500.00 plus the costs of filing this adversary proceeding.

**IT IS SO ORDERED.**

**Mailing List:**

R. Bradley Sigler, Attorney for Plaintiff

Louis Ringger, Attorney for Debtors/Defendants