Dated: May 06, 2008
The following is ORDERED:

Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JEFFREY F. GOLLADAY,

Debtor.

Case No. 08-22817-L
Chapter 7

ORDER GRANTING EMERGENCY MOTION TO LIFT AUTOMATIC STAY

BEFORE THE COURT is the Emergency Motion to Lift Automatic Stay filed by Edward Lucas, which recites as follows:

> COMES now Edward Lucas, by and through his attorney Duncan E. Ragsdale and co-counsel Edwin C. Lenow and moves the Court to lift the Automatic Stay under 11 U.S.C. § 362 to be allowed to proceed in the Circuit Court of Tennessee for the Thirtieth Judicial District under Docket No. CT-005032-00. The Movant would show that the Debtor, Jeffrey F. Golladay, is charged with gross negligence in the care of his patient, which is non-dischargeable debt under 11 U.S.C. § [523](a)(6) for gross infliction of death upon the Movant's Wife.

Responses were filed by the Debtor and by his wife, Debra H. Golladay. The Debtor states that he has no professional liability insurance and no resources with which to defend the professional

negligence case. He states that he is deaf and is unable to use his right hand as the result of a power saw accident in 2007. He states that he has no assets subject to execution and is unlikely to acquire any unless he recovers his hearing and the use of his hand. He argues that the real issue in this Chapter 7 case will be the dischargeability of any debt owed to Mr. Lucas, an issue which can be decided by this court. He asks that the motion be denied, or that the court not consider the motion without a full hearing.

Mrs. Golladay states that she lent the Debtor substantial sums to pay for his defense of the professional negligence suit and that she has exhausted any funds she has available for that purpose. She states that the Debtor is totally disabled by deafness and that since he began receiving disability payments from the Social Security Administration has also suffered a "painful, incapacitating and apparently permanent" injury to his right hand. She argues that trial of the case will benefit no one; that the Debtor's case is a no-asset case; that it is extremely unlikely that there will be assets subject to administration. She offers to permit the Movant and his counsel to examine the Debtor concerning his financial circumstances to avoid the expense and time necessary to conduct the trial in state court. She joins in the response of the Debtor and asks that the motion be denied.

The court conducted a preliminary hearing on April 10, 2008, at which counsel were present. No testimony was offered. The statements of counsel were consistent with the statements contained in the motion and responses. At the hearing, counsel for Mr. Lucas asked that a Circuit Court jury be permitted to hear the case and return a verdict, indicating that he intended to file a complaint to determine dischargeability if the jury found the Debtor's conduct constituted gross negligence. Counsel for the Debtor and for Mrs. Golladay indicated that liability had been or could be admitted and that the judgment amount did not matter because the Debtor does not have the ability to pay any

amount. Counsel urged that the only issue to be determined by the court is the dischargeability of any obligation owed by the Debtor to Mr. Lucas, a determination that must be made by the bankruptcy court. After hearing arguments of counsel, the Court was of the opinion that the automatic stay should not be terminated pending a final hearing. The court set a final hearing on May 1, 2008, and invited counsel to file briefs. Mrs. Golladay and Mr. Lucas did file supplemental briefs. The Court has carefully reviewed the materials provided by the parties and has determined that the motion should be granted.

FACTS

Mrs. Golladay filed a Memorandum of Fact and Law in Support of her response, but her memorandum is not verified. Attached to her memorandum, however, is a copy of the Amended Complaint for Wrongful Death filed in the Circuit Court of Shelby County, Tennessee, No. CT-005032-00. The amended complaint alleges that, "The conduct of the Defendants was negligent and grossly reckless in violation of the recognized minimal dental standards in this community." Amended Complaint, ¶ 12.

The Movant also filed a Memorandum of Fact and Law and an Amended Memorandum of Fact and Law. These papers are also not verified, but attached to the amended memorandum is a partial transcript of the deposition testimony of Crystal Saliba, transcriptions of two telephone calls with the 911 dispatcher; a copy of the Debtor's answer to the amended complaint; and a copy of an Order of the Board of Dentistry, dated March 29, 2001, pursuant to which the Debtor's dental license was revoked. The order of the Board of Dentistry contains the following findings of fact:

> 1. At all times relevant hereto the Respondent, Jeffrey F. Golladay, herinafter referred to as "Respondent" was licensed to or was required to be licensed to practice dentistry in the State of Tennessee.

2. That on June 22, 2000, Respondent consulted with patient W.L. regarding possible dental implants. Patient W.L. had been referred to Respondent by another dentist. After the consultation, patient W.L. was scheduled for dental implant surgery, which was to begin at 8:30 a.m. on July 5, 2000 in the Respondent's office. The surgery was to consist of two sinus lifts and a premaxillary graft. Patient W.L. was also scheduled for some orthodontic work.

3. The procedure began on the scheduled date and time. Patient W.L. was placed under IV conscious sedation.

4. The Respondent has a current certificate to conduct conscious sedation from the Tennessee Board of Dentistry.

5. The sinus lifts were successfully completed; however, the Respondent did not close the incisions completely until at the hospital.

6. Upon beginning the premaxillary graft, the Respondent cut more bone than was needed for the graft. Upon attempting to separate, loosen and release a portion of said bone, a piece broke out, which perforated the lingual plate connected to the tissue under the patient's tongue. The Respondent then severed the connecting tissue causing the patient to begin bleeding profusely from the severed tissue. The site of the open sinus areas began to bleed soon afterwards.

7. The Respondent began to pack patient W.L.'s oral cavity with gauze in an effort to stop or slow the bleeding. When the bleeding didn't subside, the Respondent gave the patient local anesthetic, which made the patient's blood pressure increase. Patient W.L.'s blood pressure then spiked and her pulse began rising. Dr. Golladay then administered Inderal in an effort to decrease the patient's blood pressure and shortly thereafter, the patient's blood pressure began to drop dramatically. The Respondent placed 4" x 4" gauze around the incisions and in the back of her mouth. In an effort to prevent the patient from choking on her own blood, Dental Assistant Crystal Watts attempted to suction the back of the patient's throat; however, Respondent ordered her to discontinue suction stating that he wanted the patient to breathe through her nose. The patient's blood pressure and pulse continued to drop, and the pulse oximeter to which the patient was connected began to alarm.

8. Dental Assistant Crystal Watts advised Respondent that patient W.L. had no pulse and instructed another office employee, Michelle Johnson, to call 911. A 911 call was made at approximately 2:11 p.m. at which time the Respondent shouted, "No, no, no, no! You don't do anything without me

calling for it!" Michelle Johnson then stated to the 911 operator, "I've just been informed not to call right now, so I apologize," and the call was terminated.

9. After the aborted 911 call, the surgical drapes were removed and the patient's pupils were dilated and her skin color was gray.

10. Subsequent to the aborted 911 call, the pulse oximeter continued to alarm and the Respondent, believing the oximeter was not working properly, instructed Dental Assistant Watts to retrieve an alternate pulse oximeter from another room. Patient W.L. was connected to the alternate pulse oximeter, and a momentary very low pulse was observed; however, that pulse oximeter monitor began alarming as well. At no point in time, did Respondent initiate CPR during his treatment of patient W.L.

11. At approximately 2:18 p.m., 911 was again called, and at approximately 2:28 p.m. an ambulance arrived at Respondent's office. Upon arrival, emergency personnel observed the Respondent ambuing patient W.L., who was supine in the dental chair. It was noted that her body appeared lifeless. The patient was then connected to a cardiac monitor that flat-lined. Emergency personnel initiated CPR, inserted an endotracheal tube, administered Epinephrine, and changed the existing IV because it was too small for the emergency medications. At this point, they had a bradycardia situation. Patient W.L. fell to asystole after high doses of Epinephrine had been administered. She then fell into sinus tachycardia. Dopamine was administered and emergency personnel then palpated a pulse of 60.

12. Respondent advised emergency personnel that he had given patient W.L. injections of Versed, local anesthetic and 2% Lidocaine, one to hundred thousandths. When emergency personnel stated that the patient was in respiratory arrest, Respondent vehemently denied it.

13. Respondent also stated while emergency personnel were working on patient W.L. that he did not have malpractice liability insurance.

14. Emergency personnel observed no cardiac monitor. Respondent had one small pulse oximeter and a blood pressure cuff attached to patient W.L. A second pulse oximeter had been used earlier.

15. Patient W.L. was transported to Methodist Hospital North. Upon arrival, the patient had a pulse and blood pressure; however, medical staff concluded that the patient was most probably hypoxic for some period of time in Respondent's office. They further concluded that the respiratory failure led to cardiopulmonary arrest, which then caused irreversible brain damage. The

patient was admitted to I.C.U. and placed on a ventilator, but the patient never regained consciousness. On July 11, 2000, at the request of the patient's family, patient W.L. was removed from life support and died.

16. The Respondent lost the original anesthesia record and consent forms on the day of the incident, July 5, 2000, and is unable to produce a written record of the procedures performed on patient W.L. on July 5, 2000 that was made at the time of the procedures.

The Board of Dentistry concluded that its findings of fact were sufficient to establish violations of Tennessee Code Annotated §§ 63-5-124(a)(1) – unprofessional, dishonorable, or unethical conduct; and 63-5-124(a)(4) – gross malpractice, or a pattern of continued or repeated malpractice, ignorance, negligence or incompetence in the course of professional practice. The license of the Debtor was revoked and he was ordered to pay a civil penalty of $4,000. The court notes that this amount remains unpaid according to the bankruptcy schedules.

In his Amended Memorandum of Facts and Law, the Movant raises questions about the standing of Mrs. Golladay to object to his motion, and insists that he is entitled to trial by jury. At the hearing on May 1, 2008, trial counsel for the Movant was present and reiterated that his case is ready for trial. Counsel argued that the Movant is entitled to have his claims heard by a jury.

The Court has reviewed the bankruptcy file in this case which reveals the following. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on March 24, 2008. The section 341 meeting of creditors was set for April 30, 2008, and the deadline for filing complaints to determine the dischargeability of certain debts is June 30, 2008. No proof of claim has been filed by the Movant or any other creditor. No complaint to determine the dischargeability of any indebtedness has been filed at this time. The Trustee filed her no-asset report on April 30, 2008.

The Debtor's schedules indicate that he owns no real property, owns personal property in the amount of $7,860, owes $4,000 in priority claims consisting of one claim for "civil penalties"

held by the State of Tennessee, Dept of Health Disciplinary Coord/Health Related Boards, and $155,846.33 in general unsecured claims, exclusive of five claims in "unknown" amounts "stemming from malpractice lawsuit." Among the general unsecured claims is a claim held by the Debtor's wife in the amount of $112,168.33, described as "deficiency on UCC-1 No. 304000924." The Debtor claims as exempt cash on hand of $10.00, Regions Bank checking of $100.00, First Tennessee checking (joint with non-filing spouse) of $890.00, household goods and furnishings (jointly owned with non-filing spouse) of $2,500.00, wearing apparel of $250.00, and a 1989 Buick LeSabre automobile valued at $500.00. The Debtor lists his income at $1,795.00 per month from Social Security disability, his wife's net monthly income at $5,663.67, for combined average monthly income of $7,458.67. The Debtor lists monthly expenses of $8,208.78, which include his wife's expenses. The Debtor's Statement of Financial Affairs lists income for the two years immediately preceding the commencement of the bankruptcy case as follows:

$ 5,385.00	2008 - Social Security Disability
$22,182.00	2007 - Social Security Disability
$21,474.00	2006 - Social Security Disability
$20,312.34	2006 - Closing of Retirement Account

The Statement shows that he surrendered assets valued at $50,000.00 to his wife in December 2007. It lists the lawsuit filed by Mr. Lucas as pending. It indicates that the Debtor operated his business as Memphis Center for Implant and General Dentistry from 1982 until September 2000.

DISCUSSION

A. Standing of Mrs. Golladay

Mrs. Golladay is the spouse of the Debtor and a creditor of the bankruptcy estate. Mr. Lucas questions her standing to object to his motion for relief from the automatic stay. The Bankruptcy Code is silent as to the class of persons that may respond to a motion for relief from the automatic stay. In Chapter 11 cases, a "party in interest" may appear and be heard on any issue in the case. *See* 11 U.S.C. § 1109(b). There is no similar provision for Chapter 7 cases. Standing to make an appeal from a bankruptcy court order is limited:

> In order to appeal from a bankruptcy court's order, however, a litigant must qualify as a "person aggrieved" by the order. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498, 499 (6th Cir. 1990). In order to constitute a "person aggrieved," the appellant must demonstrate that the order "diminishes [his] property, increases his burdens, or impairs his rights." *Fidelity Bank, Nat'l Assn. v. M.M. Group, Inc.*, 77 F.3d 880, 882 (6th Cir. 1996). These requirements are designed to "limit[ ] standing to persons with a financial stake in the bankruptcy court's order." *Id.*

Lyndon Property Ins. Co. vo Katz, 196 Fed. Appx. 383, 2006 WL 2456893 at * 3 (6th Cir. 2006). Similar considerations are appropriate in determining the standing of an individual to object to a motion filed in a bankruptcy case.

As at this time there do not appear to be assets in the bankruptcy estate, so that the entry of judgment against the Debtor will not diminish the estate, it is difficult to discern any pecuniary interest that Mrs. Golladay or any other creditor has in the outcome of the motion. Mrs. Golladay has said that she will not provide additional funds for the defense of the state court litigation. She is nevertheless a pre-petition creditor of the bankruptcy estate as the result of funds that she provided to the Debtor in the past. Pre-petition creditors are within the class of persons generally considered "protected" by the automatic stay. *Metropolitan Life Ins. Co. v. Alside Supply Ctr. (In re Clemmer)*, 178 B.R. 160, 166 (Bankr. E.D. Tenn. 1995). The Movant did not object to counsel for Mrs. Golladay's appearance at the hearings on the motion, and the Court found the comments and papers

filed by counsel for Mrs. Golladay helpful to its consideration of the issues raised by the parties. Accordingly, while the Court makes no ruling concerning the standing of Mrs. Golladay to appeal from this order, it does decide that she may appear and be heard on the issues raised by the motion.

B. Cause for Granting Relief from the Automatic Stay

Mr. Lucas seeks relief from the automatic stay for cause. *See* 11 U.S.C. § 362(d)(1). "Cause" is not defined in the Bankruptcy Code. Thus, whether cause to terminate the automatic stay exists must be determined on a case by case basis. *In re Trident Assoc. Ltd. Partnership*, 52 F.3d 127, 131 (6th Cir. 1995). When the asserted cause for termination of the automatic stay is pending litigation, the bankruptcy court is to consider the following factors in deciding whether to terminate the automatic stay: (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors. *Garzoni v. K-Mart Corp. (In re Garzoni)*, 35 Fed. Appx. 179, 181 (6th Cir. 2002).

Judicial Economy

With respect to the first factor, judicial economy, the Debtor urges that trial of the state court litigation would be a waste of time because unless the Movant is able to establish that any liability owed to him is not dischargeable, there are no assets and no insurance from which an award could be paid. There are a number of decisions in which the automatic stay is terminated to permit litigation to go forward where liability insurance is available to provide a defense and to pay any damages awarded. *See, e.g., Foust v. Munson S.S. Lines*, 299 U.S. 77, 87-88, 57 S. Ct. 90, 81 L. Ed. 49 (1936)(maybe not); Matter *of Fernstrom Storage and Van Co.*, 938 F.2d 731, 736 (7th Cir. 1991); *Matter of Holtcamp*, 669 F.2d 505, 508 (7th Cir. 1982); *In re Robertson*, 244 B.R. 880, 882-83. In

this case, however, no liability insurance is available. Likewise, it appears there will be no assets in the bankruptcy estate from which to provide a defense or to pay any resulting claim. The Debtor will be personally obligated to pay the claim only if the debt is determined to be nondischargeable.

Counsel for Mrs. Golladay urges that the bankruptcy court is the only court that can determine the issue of dischargeability. Counsel for the Movant counters that its action is one for wrongful death for which it is entitled to a jury trial, which the bankruptcy court is statutorily prohibited from hearing. To date, the Movant has neither filed a proof of claim nor a complaint to determine the dischargeability of its debt. While the issue of dischargeability must ultimately be determined by the bankruptcy court, the state court is competent to make factual findings that may be the basis for a determination of dischargeability. *See Grogan v. Garner*, 498 U.S. 279, 285, 111 S. Ct. 654, 658, n. 11 (1991) (collateral estoppel principles apply in nondischargeability proceedings); *McGee v. Marcum*, 184 Fed. Appx. 464, 2006 WL 1478519 at * 2, n.1 (6th Cir. 2006) (although res judicata does not apply to dischargeability proceedings, collateral estoppel does).

Trial by jury is preserved in bankruptcy with regard to personal injury and wrongful death tort claims. Section 1411(a) of United States Code title 28 provides: "Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." The 1987 Advisory Committee Note to Federal Rule of Bankruptcy Procedure 9015, entitled "Jury Trials," explains the history of this section. In pertinent part, it explains:

> Former section 1480 of title 28 preserved a right to jury trial in any case or proceeding under title 11 in which jury trial was provided by statute. Rule 9015 provided the procedure for jury trials in bankruptcy courts. Section 1480 was repealed. Section 1411, added by the 1984 amendments, affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires to be tried by the district court.

Rule 9015 was abrogated from 1987 until 1997, when it was reinstated to supply the procedure for jury trials permitted by the addition of 28 U.S.C. § 157(e), which provides for jury trials by bankruptcy judges under certain limited circumstances. Notwithstanding section 157(e), however, section 157(b)(5) remains and requires that, "The district court . . . order that personal injury tort and wrongful death claims . . . be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending. 28 U.S.C. § 157(b)(5). Bankruptcy judges do not have jurisdiction to try or liquidate personal injury and wrongful death claims. S*ee Leatham v. Volkmar (In re Volkmar)*, 217 B.R. 561, 562 (Bankr. N.D. Ill. 1998); *In re Thomas*, 211 B.R. 838, 840 (Bankr. D.S.C. 1997); *Matter of Barker-Fowler Elec. Co.*, 141 B.R. 929, 939 (Bankr. W.D. Mich. 1992).

Although the Debtor and his wife argue that the only issue to be decided is the question of dischargeability, in fact no complaint to determine the dischargeability of any debt owed by the Debtor to Mr. Lucas has been filed. The only pending issues are those raised in the state court proceeding, which clearly is a suit for wrongful death. The Debtor has not sought the removal of this case to federal court. If he did, the case would be decided in the district court, not the bankruptcy court. A second trial will not be necessary if the case is first tried in the state court provided that the factual findings of the state court are sufficient. Whether or not the facts establish a willful and malicious injury is a legal question that may be decided by the bankruptcy court without the need for additional trial. So long as counsel for Mr. Lucas realizes that any judgment he obtains can only survive discharge if the trial focuses on the facts necessary to establish a willful and malicious injury, there is no reason to think that the burden on the Debtor of a trial in state court

will be any greater than that of a trial in district court. *See In re Fowler*, 259 B.R. 856, 861 (Bankr. E.D. Tex. 2001) ("There is no reason to believe that burden on Debtor would be any more onerous to liquidate this action in state court than to have the reference withdrawn and litigate in Federal District Court.") This factor weighs in favor of terminating the automatic stay.

Trial Readiness

With respect to the second factor, trial readiness, counsel for the Movant asserts that his case is ready for trial. At the initial hearing, counsel informed the court that the case was scheduled for trial on April 14, 2008, the Monday following the hearing. Counsel for the Debtor asserts that he is not ready for trial and cannot prepare for trial as there are no funds available to prepare his defense. The state court case has been pending since September 1, 2000. The Debtor has had more than ample time to prepare for trial. As the factual issues must be tried in order for this court to consider whether any debt owed by the Debtor is dischargeable, this factor weighs in favor of terminating the stay.

Preliminary Bankruptcy Issues

The third factor, the resolution of preliminary bankruptcy issues, is important. As was indicated previously, the key issue in this case, in which no liability insurance is available and the bankruptcy estate appears to have no assets, is the dischargeability of the debt. The amended complaint that was filed in the state court alleges acts by the Debtor that are characterized as negligent and grossly reckless. If this is all that is established by the Movant, the debt will be discharged. Nonetheless, Tennessee Rule of Civil Procedure 15.02 provides that pleadings may be amended at any time to conform to the evidence "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." The motion filed by Mr. Lucas in this case indicates

that he intends to proceed to establish that any debt owed to him resulted from willful and malicious injury. No complaint to determine dischargeability has been filed, but the deadline for filing such complaints has not yet passed. As trial in the state court was postponed upon the filing of the Debtor's bankruptcy case, ample time remains for the Movant to amend his complaint in state court to allege facts necessary to support a finding of willful and malicious injury. The necessity for this was brought about by the filing of the bankruptcy case. The Movant should not be prejudiced as a result.

Counsel for Mrs. Golladay urges that dischargeability is the *only* issue that must be tried, but this is not quite true. Whether or not the debt is dischargeable, it must first be tried and liquidated, and the bankruptcy court is without jurisdiction to do so. A court of competent jurisdiction must determine the facts underlying the death of Mrs. Lucas before the bankruptcy court can determine dischargeability. The amended complaint filed in the state court indicates that a jury trial was demanded, and the Movant is entitled to have the facts in that civil action determined by a jury. *See* Tenn. Const. Art. I, § 6 ("the right of trial by jury shall remain inviolate . . ."); *see also Ricketts v. Carter*, 918 S.W.2d 419, 422 (Tenn. 1996) ("it is well-settled that a party to a civil case also has the right to have the factual issues in the case determined by a fair and unbiased jury") and cases cited therein.

In order to establish that a debt resulted from willful and malicious injury, a plaintiff must show that the debt results from a "deliberate and intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaahau v. Geiger*, 523 U.S. 57, 62, 118 S. Ct. 974, 977 (1998). According to the Supreme Court, section 523(a)(6) encompasses intentional torts, as distinguished from reckless or negligent torts. *Id.* "Intentional torts generally require that the actor

intend 'the *consequences* of an act,' not simply 'the act itself.'" *Id., citing* Restatement (Second) of Torts § 8A, Comment *a*, p. 15 (1964)(emphasis added). In *Geiger*, the court held that a judgment for medical malpractice attributable to negligently or recklessly inflicted injuries was dischargeable under section 523(a)(6).

Subsequent decisions have further clarified the *Geiger* standard. Although intentional torts generally require that the actor intend the consequences of his act, it is enough if the actor believed that injury is "substantially certain to result from [the debtor's conduct]." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999)(quoting Restatement (Second) of Torts § 8A, at 15 (1964)). This is a subjective test. "[T]he mere fact that [the debtor] should have known that his decisions and actions put the creditor at risk is also insufficient to establish a 'willful and malicious injury' [under § 523(a)(6)]. He must will or desire harm, or believe injury is substantially certain to occur as the result of his behavior." *Id.* at 465 n. 10.; *see also Via Christi Regional Medical Center v. Englehart (In re Englehart)*, 229 F.3d 1163 (Table), 2000 WL 1275614 at *3 (10th Cir.2000) (unpublished opinion) ("[T]he 'willful and malicious injury' exception to dischargeability in § 523(a)(6) turns on the state of mind of the debtor, who must have wished to cause injury or at least believed it was substantially certain to occur."); *Blocker v. Patch (In re Patch)*, 356 B.R. 450, 457-58 (B.A.P. 8th Cir. 2006) (Willfulness may be shown upon proof that debtor "acted, or failed to act when she had a duty to do so and . . . knew that it was substantially certain" that injury would follow.); *but see Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 603-04 (5th Cir. 1998)(adopting an objective standard).

In addition to showing that an injury was willful, a plaintiff must also demonstrate that the injury was malicious. "The absence of one [or the other] creates a dischargeable debt." *Markowitz*,

190 F.3d at 463. The Bankruptcy Appellate Panel for the Eighth Circuit has described the requirement for showing malice:

> "Malicious" is defined as conduct "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm." Some courts have described "malicious" as being "in conscious disregard of one's duties or without just cause or excuse." Other courts have said that a debtor's conduct is malicious "if he was substantially certain that his actions or inactions would result in injury to [the plaintiff], but acted or omitted to act in disregard of that knowledge. "A finding of malice does not require a finding of ill will, but rather a lack of just cause or excuse." If the debtor's conduct was inexcusable and resulted in an inevitable injury to the plaintiff, it is malicious.

Patch, 356 B.R. at 459 (internal citations omitted). The Bankruptcy Appellate Panel for the Sixth Circuit is in accord: "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." *In re Moffit*, 252 B.R. 916, 923 (B.A.P. 6th Cir. 2000).

The bankruptcy court must ultimately determine whether any debt owed by the Debtor to Mr. Lucas is dischargeable. This does not mean however, that dischargeability must be determined *before* the underlying facts are decided. Dischargeability is not a preliminary question, but a question which follows upon findings of fact. The facts that must be determined are those that are required to liquidate the wrongful death action. As the bankruptcy court has no jurisdiction to hear a claim for wrongful death, and as there is no action pending before the bankruptcy court, this factor weighs in favor of terminating the automatic stay.

Chance of Success on the Merits

The fourth factor to be weighed in determining whether to lift the automatic stay is the creditor's chance of success on the merits. In this case, there were extensive findings of fact before the Board of Dentistry. Although a finding that the Debtor's actions were intentional was not

necessary to the Board's decision to revoke the Debtor's dental license, the Board nevertheless made specific factual findings that could support a finding of willful and malicious injury. Among other things, the Board found that the Debtor terminated the initial call for emergency assistance and did not administer CPR. Willful and malicious injury may be found where there is a failure to act in the face of a duty to act.

Two cases may be taken to illustrate this principle. The first is *Blocker v. Patch*, 356 B.R. 450 (B.A.P. 8th Cir. 2006). The debtor-defendant in *Patch* was the mother of a three-year-old boy who died as the result of injuries inflicted by the mother's live-in boyfriend. The mother knew that her boyfriend had been abusing her son, yet left the boy in his care. On the night before his death, the mother was called home from work by her boyfriend who told her that the boy had hurt himself in a fall. When she arrived home, the debtor noticed a large bruise on the boy's head and that he was having difficulty speaking and breathing. She did not seek medical attention for him. The next morning she found him dead. The boyfriend was convicted of first-degree felony murder and the debtor pled guilty to second-degree manslaughter. The boy's father, as personal representative of the boy's estate, brought suit for wrongful death against the debtor. While this suit was pending, the debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. The father filed an adversary complaint against the debtor under section 523(a)(6) and the bankruptcy court granted summary judgment in his favor. The debtor appealed, arguing that the evidence showed that she merely acted negligently or recklessly, but did not act with intent to injure. The debtor also argued that the father was collaterally estopped from asserting that the debt to the probate estate resulted from willful and malicious injury where the complaint for wrongful death had only asserted claims for negligence. The bankruptcy appellate panel rejected the debtor's collateral estoppel argument

because the wrongful death action was not concluded to judgment at the time the bankruptcy petition was filed. Thus the issue of whether the debtor's conduct was willful or merely negligent was not actually litigated. *Id*. at 456. With respect to the debtor's first argument, the panel said that it did not agree that her actions were merely acts of omission, but that even if they were, her failure to act in the face of a duty to do so could (and did) amount to an intentional tort. *Id.*

A second case that illustrates the principle that failure to act in the face of a duty to do so may support a determination of willful and malicious injury is *In re Limmer*, 206 WL 1614838 (Bankr. E.D. Mich. 2006), relied upon by the panel in *Patch*. The debtor in *Limmer* was convicted as an accessory after the fact to manslaughter as the result of the death of a young woman who was given GHB, an intoxicating substance, procured by the debtor. Although the debtor procured this substance, he was in another part of his apartment when it was given to the woman and her companions. When he was told that she and another woman had become sick, he told the men responsible to clean up the mess they had made, but refused to allow them to call an ambulance. When the women were eventually transported to a hospital several hours later, the debtor told the other men not to tell the police that they had been in his apartment. The decedent's personal representative filed a complaint for wrongful death, assault, battery, sexual molestation, and intentional infliction of emotional distress against the debtor and the other men involved, which was pending when the debtor filed his Chapter 7 petition. The personal representative filed a complaint to determine dischargeability pursuant to section 523(a)(6) and a motion for summary judgment based upon facts established in the criminal prosecution. The bankruptcy judge granted summary judgment, ruling that the debtor knew that serious injury or death was substantially certain to result from his actions of supplying GHB and failing to seek medical attention for the women after they

became ill. The court further ruled that the debtor's actions were without just cause or excuse. As a consequence, the resulting debt was not dischargeable. *Id.* at *4.

According to the Board of Dentistry, the actions of the Debtor caused injury to Mrs. Lucas and he failed to timely provide medical assistance to her. While the court has not been asked to make a final determination concerning dischargeability, the Movant clearly has a chance of success on the merits of his claim in state court and ultimately on the question of dischargeability. The fourth factor weighs in favor of lifting the automatic stay.

Potential Burden to the Bankruptcy Estate and the Impact of the Litigation on Other Creditors

The fifth factor that must be weighed in determining whether to terminate the automatic stay is the potential burden on the bankruptcy estate and the impact of the litigation on other creditors. As previously stated, the trustee in this case has recently filed a no-asset report. No cost will be borne by the estate in defending the complaint filed by Mr. Lucas and thus no impact is expected with respect to other creditors. No reorganization is contemplated, so the Debtor's time devoted to the defense of the litigation will not interfere with the administration of the estate. Counsel for Mr. Lucas has indicated an intention to ask the trustee to pursue certain transfers of assets in the event he is successful in establishing his claim. Although the trustee has indicated that she does not intend to pursue any avoidance actions at this time, any recovery of assets would benefit all creditors. The only creditor that has objected to the motion for relief is Mrs. Golladay, who has her own reasons for not wanting the litigation to proceed. The Debtor understandably would like to avoid a trial in any forum, but Mr. Lucas is entitled to his day in court. As there is no greater burden to the Debtor in defending the case in state court versus federal court, and as there is no action currently pending in federal court, the fifth factor weighs in favor of terminating the automatic stay.

CONCLUSION

For the foregoing reasons, the motion for relief from the automatic stay is **GRANTED**. The Movant is granted leave to resume prosecution of his civil action, *Lucas v. Memphis Center for Implant and General Dentistry,* No. CT-005032-00, Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, and to litigate that action to final judgment. The Movant may file a complaint in this court to determine the dischargeability of any judgment that is rendered against the Debtor, which proceeding, if timely filed, will be stayed pending the outcome of the Circuit Court action. In all other respects, the automatic stay shall remain in effect.

cc: Debtor
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