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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                  |   |                              |
|------------------|---|------------------------------|
| IN RE:           | ) | CASE NO. 99-52710            |
|                  | ) |                              |
| EARL JOHNSON,    | ) | CHAPTER 7                    |
|                  | ) |                              |
| DEBTOR(S)        | ) |                              |
|                  | ) |                              |
| CHARLES OLLISON, | ) | <b>ADVERSARY NO. 00-5085</b> |
|                  | ) |                              |
| PLAINTIFF(S),    | ) | JUDGE MARILYN SHEA-STONUM    |
|                  | ) |                              |
| vs.              | ) |                              |
|                  | ) |                              |
| EARL JOHNSON     | ) |                              |
|                  | ) |                              |
| DEFENDANT(S).    | ) | <b>MEMORANDUM DECISION</b>   |

This matter comes before the Court on plaintiff's complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(6). The Court held a trial in this matter on November 6, 2000. Appearing at the trial were Christopher Niekamp and John Scanlon, co-counsel for plaintiff, and Sandra Robinson, counsel for defendant-debtor. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from the following: (1) defendant-debtor, Earl Johnson; (2) plaintiff, Charles Ollison; (3) Akron Police Officer, Sandra Ridgeway-Williams; (4) C.J. Jackson, retired Akron Police Officer and former member of the Six Corners Deli softball team; (5) Christopher Martin, former member of the Six Corners Deli softball team; (6) Patricia Eichelberger, former scorekeeper for the Six Corners Deli softball team; (7) Myra Ollison,

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plaintiff's wife; (8) Rogers Clark, Sr., former member of the Six Corners Deli softball team; and (8) Ernie Vandiver, former member of the Six Corners Deli softball team. At the conclusion of the trial, the Court took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and defendant-debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

The following facts are not disputed by plaintiff and defendant-debtor and are the subject of stipulations filed in this case on October 17, 2000 [**docket #12**]:

1. In the spring of 1994, plaintiff was the coach of the Six Corners Deli softball team. Defendant-debtor played softball on this team and his position was generally third base.
2. On May 31, 1994, a dispute arose between plaintiff and defendant-debtor when plaintiff requested that defendant-debtor play first base. (This dispute shall hereinafter be referred to as the "Altercation"). As a result of the Altercation, plaintiff was injured.
3. As a further result of the Altercation, defendant-debtor pled no contest and was found guilty of criminal assault in the Akron Municipal Court, Case Number 94-CRB-6789 (the "Criminal Case"). As a part of the Criminal Case, defendant-debtor agreed to make restitution by paying plaintiff's medical bills.
4. Thereafter, plaintiff filed a complaint in the Summit County Court of Common Pleas, Case Number CV 95-04-1413, seeking damages against defendant-debtor as a result of the Altercation (the "Civil Case"). Plaintiff obtained a default judgment against defendant-debtor in the Civil Case and was awarded damages in the total amount of \$40,000 (\$15,000 for

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compensatory damages and \$25,000 for punitive damages).

In addition to the foregoing undisputed facts, the Court makes the following findings of fact:

5. Plaintiff is married and has seven children and, as a hobby, plaintiff has coached softball for the approximately 20 years.

6. Defendant-debtor made all restitution payments due pursuant to the Criminal Case.

7. At the time of the Altercation, plaintiff was recovering from knee surgery and required the assistance of two crutches to walk.

8. During the Altercation, defendant-debtor punched plaintiff in the left jaw and kicked him in the left shin. As a result of the punch, plaintiff suffered a broken jaw which, despite recommendations from two physicians, plaintiff chose not to have wired shut. The only medication that plaintiff took to ease the pain from his broken jaw was aspirin and Tylenol. As a result of being kicked in the left shin, plaintiff suffered a minor bruise.

9. At the trial, plaintiff appeared to have no long term effects from the Altercation and from his testimony did not claim to have any continuing problems from the Altercation.

10. In support of his motion for default judgment in the Civil Case plaintiff filed a "Damages Package" which set forth, *inter alia*, the following:

II. Injuries Sustained

A. Plaintiff suffered a fracture of the left mandible requiring care and treatment at Akron General Medical Center . . . .

B. Plaintiff was seen by Dr. John N. Santin, DDS to determine course of treatment and was prescribed Procardia, Vasotec, Losar, Tylenol #4 and 800 mg Motrin for pain and swelling . . . .

C. Plaintiff was required to endure the pain and implement a liquid to soft diet . . . .

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D. Plaintiff was required to have his jaw wired shut with ridged fixation and an arch bar replacement under general anesthetic.

*See* Plaintiff's Trial Exhibit D. The latter portion of item B and all of item D are inaccurate.

11. Plaintiff did not testify regarding the extent of his injuries during the Civil Case. From the evidence of the pleadings filed in that matter, it appears that plaintiff never informed the court in the Civil Case of the restitution requirement resulting from the Criminal Case and sought damages for costs that had already been paid because of defendant-debtor's satisfaction of the restitution payments in the Criminal Case. *See* Plaintiff's Trial Exhibits C, D, L and Q.

12. Defendant-debtor filed a voluntary chapter 7 bankruptcy case on September 3, 1999. Listed on defendant-debtor's Schedule F - Creditors Holding Unsecured Nonpriority Claims was the \$40,000 default judgment rendered in plaintiff's favor in the Civil Case.

## **DISCUSSION**

Through his complaint, plaintiff contends that the amount awarded to him by the default judgment entered in the Civil Case should be excepted from defendant-debtor's discharge pursuant to 11 U.S.C. §523(a)(6). That section of the Bankruptcy Code provides that a discharge under §727 does not discharge an individual debtor from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." It is plaintiff's burden to prove all necessary elements of §523(a)(6) by a preponderance of the evidence, *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661 (1991); *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6<sup>th</sup> Cir. 1994), and exceptions to discharge are to be strictly construed in defendant-debtor's favor. *Mfr. Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6<sup>th</sup> Cir. 1988), *citing Gleason v. Thaw*, 236 U.S. 558, 562 (1915). In determining whether

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plaintiff has proved the necessary elements of his case, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6<sup>th</sup> Cir. 1993); Fed. R. Bankr. P. 8013.

It is undisputed in this case that defendant-debtor acted deliberately when he struck plaintiff during the Altercation. However, pursuant to the United States Supreme Court's decision in *Kawaauhau v. Geiger*, a debtor's conduct is "willful" for purposes of §523(a)(6) of the Bankruptcy Code only when the debtor intended his conduct and the resulting consequences of that conduct. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998). See also *In re Markowitz*, 190 F.3d 455, 464 (6<sup>th</sup> Cir. 1999) (interpreting the Supreme Court's *Geiger* decision). A debtor is deemed to have acted "maliciously" for purposes of §523(a)(6) of the Bankruptcy Code when his action is taken in conscious disregard of his duties or without just cause or excuse however there need not be a showing of personal hatred, spite or ill-will. *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (B.A.P. 6<sup>th</sup> Cir. 2000); *Garcia v. Amaranto (In re Amaranto)*, 252 B.R. 595, 599 (Bankr. D. Conn. 2000); *McNichols v. Shala (In re Shala)*, 251 B.R. 710, 713 (Bankr. N.D. Ill. 2000).

Defendant-debtor contends that his actions were not "willful and malicious" because they were taken in self-defense and not with the intent to cause the resulting harm to plaintiff. In Ohio, the elements of self-defense are: (1) that the defendant was not at fault in creating the violent situation; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Thomas*, 673 N.E.2d 1339, 1342, 77 Ohio St.3d 323, 326 (Ohio 1997).

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During the trial, defendant-debtor testified that immediately prior to punching plaintiff, plaintiff threatened to hit him with a bat. Not surprisingly, plaintiff testified that he never threatened defendant-debtor in any way prior to being punched and kicked. Testimony of the other witnesses at trial regarding this matter was conflicting and ranged from Mr. Jackson's and Ms. Eichelberger's testimony that there were no bats near where plaintiff was standing to Mr. Clark's and Mr. Vandiver's testimony that plaintiff was wielding a bat prior to or shortly after being hit by defendant-debtor.

Based upon such discrepant testimony, it is not entirely clear who was at fault in the moments immediately prior to the Altercation. However, the testimony at trial from every witness other than defendant-debtor was that, at the time of the Altercation, plaintiff was barely mobile and required the assistance of two crutches to walk. Thus, even if defendant-debtor had a bona fide belief that he was in imminent danger of being struck with a bat, he had some means of escape (such as by moving out of plaintiff's reach) other than by using raw force.

In addition to the fact that defendant-debtor had means other than force to escape the alleged harm posed by plaintiff, Officer Ridgeway-Williams testified that because of growing tension between the two men, she and her partner had requested that defendant-debtor leave the softball field prior to the Altercation. The police officers' report of the Altercation, which was completed by Officer Ridgeway-Williams shortly after she and her partner arrested defendant-debtor, set forth, in part, that: "The . . . suspect had been advised by the arresting officers to leave the area and not talk to the victim. The suspect disregarded our warning and approached the victim. After a short verbal altercation, the suspect punched the victim in his left jaw." *See Plaintiff's Trial Exhibit A.* Officer Ridgeway-Williams further testified during trial that, in her opinion,

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defendant-debtor was not defending himself when he struck plaintiff.

Based upon the foregoing, the Court finds that defendant-debtor was not acting in necessary self-defense when he punched plaintiff in the jaw and kicked him in the shin. The Court further finds that in punching and kicking plaintiff, defendant-debtor intended to and in fact did, cause plaintiff's resulting injuries. Accordingly, because debtor's conduct in the Altercation was "willful and malicious" pursuant to §523(a)(6) of the Bankruptcy Code, the damage caused to plaintiff from the Altercation should not be discharged in debtor's chapter 7 bankruptcy case.

Plaintiff contends that this Court should defer to the state court's determination of damages and find that the entire \$40,000 default judgment award in the Civil Case should be excepted from defendant-debtor's discharge. In fact, in his proposed findings of fact and conclusions of law, plaintiff contends that this Court is bound by that damages award:

F. Plaintiff's claim has been liquidated in the state court action in the amount of \$40,000.00 plus interest and cost [sic] which claim is supported by the evidence as to the amount owed Plaintiff is res judicata in this proceeding . . . .

*See* Plaintiff's Findings of Facts and Conclusions of Law at unnumbered page 4 [**docket #14**].

"[U]nder the doctrine of res judicata a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based *on the same cause of action*. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1955) (emphasis added). Because this adversary proceeding deals with the dischargeability of a debt in

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bankruptcy and not (as in the Civil Case) assault and battery, the same cause of action is not at issue and res judicata does not apply.

The doctrine of collateral estoppel would also not apply to the state court's finding of damages because plaintiff never invoked its application to this case. The doctrine was not referenced in the complaint, was not raised through the filing of a dispositive motion and was, essentially, rendered moot by plaintiff taking this case through to a trial on the merits. *Cf. Super Van Inc. v. City of San Antonio*, 92 F.3d 366, 370 (5th Cir.1996) (concluding that res judicata did not apply because defendant acquiesced in the splitting of the claim); *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 328 (9th Cir.1995) (concluding that claim preclusion is an affirmative defense that is deemed waived if not raised in the pleadings and also noting that a failure to object to prosecution of dual proceedings while both are pending waives a collateral estoppel argument); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir.1995) (noting that collateral estoppel must be plead and, unlike jurisdictional issues, is waived if not properly raised); Fed. R. Bankr. P. 7008(a) and Fed. R. Civ. P. 8(c) (setting forth that collateral estoppel is an affirmative defense which, if not plead, is considered waived). *See also Goins v. Day (In re Day)*, 137 B.R. 335, 338 (Bankr. W.D. Mo. 1992) (noting that the party seeking to apply collateral estoppel has the burden of proving that all necessary elements of that doctrine are present).

During closing argument, plaintiff's counsel also argued that this Court should defer to the state court's determination of damages because that award was "reasonable." For this Court to accept such an argument it would be forced to disregard obvious and



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troubling contradictions between plaintiff's testimony and the documentary evidence presented at trial. For instance, in support of his motion for default judgment in the Civil Case plaintiff filed a "Damages Package" which indicated that he was prescribed Procardia, Vasotec, Losar, Tylenol #4 and 800 mg Motrin for pain and swelling due to injuries sustained in the Altercation. *See* Plaintiff's Trial Exhibit D. However, during the trial of this matter, plaintiff testified that the only medication he took to relieve his pain was Tylenol and aspirin. Plaintiff's "Damages Package" also sets forth that plaintiff "was required to have his jaw wired shut with ridged fixation and an arch bar replacement under general anesthetic" yet plaintiff's testimony at trial was that he chose not to have his jaw wired shut and had no surgery under either local or general anesthetic. *See* Plaintiff's Trial Exhibit D. Finally, in at least two pleadings filed in the Civil Case regarding damages, plaintiff sets forth that he incurred \$646.00 in medical expenses but did not also qualify that information with an explanation that, pursuant to the Criminal Case, defendant-debtor was required to, and in fact did, make restitution payments for those expenses. *See* Plaintiff's Trial Exhibits D and L.

This Court was not provided with any transcript from a damages hearing but counsel for plaintiff did not indicate that such a hearing took place<sup>1</sup> and plaintiff indicated that he never testified before the state court regarding his injuries. Therefore, this Court can only assume that the state court's determination of damages was made solely upon the pleadings filed in the Civil Case which, as discussed above, contain inaccurate and misleading information.

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<sup>1</sup> Counsel representing plaintiff at the trial of this adversary proceeding were not the same as and are not affiliated with counsel who represented plaintiff in the Civil Case.

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During the trial, both parties focused primarily on the issue of whether or not defendant-debtor intended to cause plaintiff's injuries. The evidence regarding the damage that plaintiff sustained was sparse. Such evidence included plaintiff's testimony that, due to the Altercation, he was in pain for approximately six weeks and was only able to ingest liquids and soft food during that time. The evidence also included testimony from Mr. Jackson and Mrs. Ollison indicating that during the time he was recovering from his injuries, plaintiff could not coach softball because he had difficulty speaking and could not dine out in restaurants because of his limited diet. Despite plaintiff's contention in the pleadings,<sup>2</sup> he presented no evidence that he suffered lost wages due to his injuries from the Altercation. Nor did the "Damages Package" in the Civil Case include a claim for lost wages.

Plaintiff bears the burden of proving each element of a claim of non-dischargeability including damages. Based upon the record (or lack thereof) developed by plaintiff during the trial of this matter, the Court finds that, although plaintiff clearly suffered some damage as a result of the Altercation for which he should be compensated, those damages do not rise to the amount awarded by the default judgment in the Civil Case.

In Ohio, compensatory damages are defined as damages which measure actual loss and are awarded in an effort to make a plaintiff whole for the wrong done to him or her by the defendant. *See, e.g., Lake Shore & Michigan S. Ry. Co. v. Hutchins*, 37 Ohio St. 282, 294 (Ohio 1881). Because defendant-debtor paid plaintiff's \$646.00 in medical bills

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<sup>2</sup> In his proposed findings of fact and conclusions of law plaintiff set forth, *inter alia*, that "due to the injuries caused by Defendant, Plaintiff incurred medical and hospital expenses, experienced severe pain and suffering, and lost wages." *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law" at paragraph C on unnumbered page 2 [**docket #14**].

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pursuant to restitution payments in the Criminal Case, compensatory damages for those expenses are not warranted. As to the compensation due plaintiff for the six weeks in which he was in pain, was forced to eat only liquids or soft foods and could not coach softball, in the absence of any particular evidence on this matter, the Court determines that an award of \$1,500.00 would be appropriate.

As for an award of punitive damages, the Ohio Supreme Court has held that to recover punitive damages, a plaintiff must prove that the defendant acted with "actual malice." *Preston v. Murty*, 512 N.E.2d 1174, 1175, 32 Ohio St.3d 334, 335 (Ohio 1987). In order to prove "actual malice," plaintiff must demonstrate that defendant-debtor acted with either (1) a state of mind under which defendant's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Id.*, at the syllabus. Thus, a proof of "malice" for purposes of §523(a)(6) of the Bankruptcy Code does not automatically equate to a proof of "malice" for purposes of an award of punitive damages.

In this case, plaintiff presented no evidence to prove that defendant-debtor's conduct during the Altercation was characterized by "hatred," "ill will," or a "spirit of revenge." Although defendant-debtor clearly lost his temper when he struck plaintiff, the only evidence regarding why he struck plaintiff showed that he did so out of anger and frustration at not being able to play his customary third base position. If, for instance, defendant also harbored some hatred for or long standing indignation toward plaintiff, that was not borne out by the evidence presented. The evidence also did not show that defendant acted with a "conscious disregard" for the rights and safety of other persons that had a great probability of causing substantial harm. This was simply a situation in which a disagreement between two individuals who did not see eye to eye on how a softball game

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should be played came to blows. It is not one in which punitive damages should or will be awarded. *See Digital & Analog Design Corp. v. N. Supply Co.*, 590 N.E.2d 737, 740-741, 63 Ohio St.3d 657, 660 (Ohio 1992) (noting that punitive damages are awarded for the purpose of punishing the defendant for wrongful conduct and deterring such conduct in the future). *See also Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (B.A.P. 6<sup>th</sup> Cir. 2000) (noting that under Ohio law, while punitive damages are awarded only upon a finding of actual malice, the existence of actual malice may not always result in the award of punitive damages).<sup>3</sup>

Further, the award of punitive damages by the state court was plainly based upon material, misleading information as to the severity of medical treatment received by plaintiff. Based upon the evidence adduced at the trial before this Court, finding such a tainted award of punitive damages to be nondischargeable is not appropriate.

## CONCLUSION

Based upon the foregoing the Court finds that, due to the Altercation, plaintiff should be compensated in the amount of \$1,500.00 and that such compensation should not be discharged in defendant-debtor's chapter 7 bankruptcy case pursuant to 11 U.S.C. §523(a)(6). A final judgment consistent with this Memorandum Opinion will be entered separately.

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<sup>3</sup> Even if this Court were to determine that punitive damages should be awarded in this case, the evidence presented by plaintiff during the trial was insufficient to allow the Court to determine the appropriate amount of such an award. In Ohio, the factors a Court should consider to determine an award of punitive damages include, but are not limited to, the financial condition of the defendant, the amount necessary to deter future similar conduct, and prior or similar acts by the defendant. *See, e.g., Wightman v. Consol. Rail Corp.*, 640 N.E.2d 1160, 1172, 94 Ohio App.3d 389, 408 (Ohio Ct. App. 1994). No argument of any of the foregoing factors was presented at trial.

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 1/19/01**