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

IN RE:	)	CASE NO. 04-51004
	)	
Allen D. Barney,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
	)	
Robert and Phyllis Honaker,	)	**ADVERSARY NO. 04-05104**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
Allen D. Barney,	)	**MEMORANDUM OPINION RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT**
	)	
DEFENDANT(S).	)	

This matter is before the court on the Plaintiffs' Motion for Summary Judgment [docket #19] and Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment [docket #21] and Defendant's Motion for Summary Judgment [docket #18] and Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Judgment [docket #20].

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), therefore this Court has jurisdiction under 28 U.S.C. §1334(b). Upon review of the pleadings filed in this case, the Joint Stipulations [docket # 14] and the attendant exhibits, this Court is prepared to make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not in dispute and are the subject of Joint Stipulations filed by the parties:

1. The plaintiffs, Robert and Phyllis Honaker (the "Plaintiffs"), are the parents of Marian L. Honaker.

2 On or about October 29, 1971, the Defendant, Allen D. Barney (the "Defendant") stabbed Marian L. Honaker ("Ms. Honaker") multiple times, causing her death.

3. On or about October 29, 1971, the Defendant was arrested and charged with Marian L. Honaker's murder.

4. On November 1, 1971, the Defendant was indicted by the Cuyahoga County Grand Jury for Murder, First Degree, based on a finding that he unlawfully, purposely and with deliberate and premeditated malice, killed Ms.Honaker.

5. Ohio's first-degree murder statute at that time stated:

> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kill another. Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life. O.R.C. 2901.01. (repealed and replaced by O.R.C. 2903.01 Aggravated Murder, 1974).

6. A three-judge panel in the Cuyahoga County Common Pleas Court tried the Defendant for the death of Ms. Honaker (See Case No. CR002127) and on March 1, 1972, found him guilty of first-degree murder.

7. Following his first-degree murder conviction, the Defendant was sentenced to life

in prison; the Defendant was later released after serving approximately twenty years of his life sentence.

8. On or about December 20, 1971, the Plaintiffs brought a civil suit in the Cuyahoga County Common Pleas Court (See Case No. CV-71-901797) against the Defendant for the wrongful death of their minor daughter. The Plaintiffs demanded judgment and damages in an amount of $100,000.00 (the "Civil Suit"), but the matter never proceeded to trial.

10. On July 22, 1977, the Plaintiffs and the Defendant, through counsel, submitted an Agreed Journal Entry that concluded the Civil Suit (the "Consent Judgment"), which was signed by counsel for the parties and was entered by the Cuyahoga County Court of Common Pleas.

11. The Consent Judgment reads, in total, as follows: "By agreement of parties, through their respective counsel, a judgment in the favor of the Plaintiffs and against the Defendant is rendered in the amount of $10,000.00. The parties agree that the judgment is based in negligence and Plaintiffs expressly disclaim that the acts of the Defendant were wilful or wanton."

14. Plaintiffs were represented by counsel in instituting, prosecuting and disposing of the Civil Suit.

15. The Defendant filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on June 18, 2004, and listed the Plaintiffs on his Schedule F - Creditors Holding Unsecured Nonpriority Claims as holding a $30,000 claim.

16. The balance claimed by the Plaintiffs to be due and owing under the Consent

Judgment is $17,484.15 plus interest accruing at the statutory rate of 10% per annum from June 17, 2004.

DISCUSSION

Standard of Review

Following a motion for summary judgment, the movant will prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 447 U.S. 317 (1986), FED. R. CIV. P. 56(c), FED. R. BANKR. P. 7056. In evaluating cross-motions for summary judgment, the Court must evaluate each motion on its own merit and view all facts in the light most favorable to the party opposing the summary judgment motion. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994). Here, the parties do not dispute any of the material facts, thus the Court can enter judgment as a matter of law.

Nondischargeability under § 523(a)(6)

The Plaintiffs contest the Defendant's attempt to discharge the Consent Judgment debt based on 11 U.S.C. § 523(a)(6), which provides in relevant part that:

> (a) A discharge under section 727, . . . of this section 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.

In a nondischargeability action, the plaintiffs must prove, by a preponderance of the evidence, that the defendant's conduct was both willful and malicious. *Grogan c. Garner*, 498 U.S. 279

(1991), *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981). In *Geiger v. Kuwaauahau*, 523 U.S. 57 (1998) the Supreme Court specifically addressed the scope of conduct considered under § 523(a)(6) when it held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." 523 U.S. at 61 (emphasis in original).[1]

Given the factual stipulations in this case, the Court does not address the conduct leading to the injury, and ultimately the death, of Ms. Honaker. Because the claim that the Plaintiffs ask to be declared nondischargeable is based upon the civil Consent Judgment, the issue properly framed before the Court in this proceeding is one of issue preclusion. This Court is required to proceed under that principle, notwithstanding the fact that neither party addressed this matter in their pleadings.[2] Under the Full Faith and Credit Clause of the United States Constitution, this Court must look to Ohio law to determine if it would give preclusive effect to the Consent Judgment entered into by the parties. *In re Calvert*, 105 F.3d 315 (6th

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1 The *Geiger* decision expressly overruled the then existing Sixth Circuit standard from *Perkins v. Scharffe*, 817 F.2d 392, (6th Cir. 1987). The *Perkins* standard was much broader in that it recognized that willful and malicious injury could occur when a person intended the act, regardless of whether he intended the consequences. This Circuit has since overruled *Perkins* and adopted the Supreme Court's *Geiger* standard, holding 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)." *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999); *In re Moffitt*, 252 B.R. 916 (6th Cir. BAP 2000).

2 In the interest of judicial economy, a court is empowered to raise the issue of "res judicata and its offspring, collateral estoppel" sua sponte if it is on notice that the issue (in the case of collateral estoppel) has been previously decided. *U.S. v. Sioux Nation of Indians,* 448 U.S. 371, 432-33 (1980); *Holloway Construction Co., v. U.S. Dept. of Labor*, 891 F.2d 1211,1212 (6th Cir. 1989) (rehearing en banc denied). Defendant's counsel made an unsupported and generalized attempt to argue res judicata (more appropriately titled "claim preclusion") as the applicable defense in this case, but claim preclusion does not apply to claims of nondischargeability because no such claim exists until bankruptcy is filed. *Spilman v. Harley*, 656 F.2d 224, 226 (6th Cir. 1981); *In re Sweeney*, 276 B.R. 186, 196 (6th Cir. BAP 2002); *In re Wilcox*, 229 B.R. 411, 415 fn2, (Bankr. N.D.Ohio 1998), .

Cir. 1997) (applying 28 U.S.C. § 1738).

Ohio law recognizes issue preclusion as occurring when a fact or issue (1) was actually and necessarily litigated in the previous action, (2) was determined by a court of competent jurisdiction, and (3) involved the party against whom issue preclusion is presently asserted as a party (or in privity with a party) to the prior action. *In re Fordu*, 201 F.3d 693, 704 (6th Cir. 1998) (*quoting Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1987)). The same parties to this adversary proceeding resolved the previous Civil Suit between them by means of a Consent Judgment entry that was memorialized in the Cuyahoga Court of Common Pleas. An agreed or consent judgment is "a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments." BLACK'S LAW DICTIONARY (8th ed. 2004). Ohio courts have long recognized the preclusive effect of consent judgments and accord them the same force and effect as if they were a judgment entered by the court after a full adversarial proceeding. *In re Gilbraith,* 512 N.E.2d 956, 959 (Ohio 1987) (giving preclusive effect to a dissolution decree and legitimation order); *Horne v. Woolever*, 163 N.E.2d 378, 382 (Ohio 1959) (holding a consent decree operates as judgment on the merits for purposes of res judicata); *Sponseller v. Sponseller*, 144 N.E. 48, 49-50 (Ohio 1924) (holding a consent decree is not subject to collateral attack unless there is irregularity or fraud in its procurement). Ohio joins the majority of states in finding that "it is the general rule that, in the absence of fraud, consent judgments are, as between the parties, to be given preclusive effect with respect to the underlying cause of action." *In re Seibert*, 302 B.R. 265, 266 (Bankr. N.D. Ohio 2003) (holding a consent judgment of nondischargeability in a prior bankruptcy precluded re-litigating the issue in a subsequent bankruptcy)(quoting *Amalgamate Sugar v. NL Industries*, 825 F.2d 634,640 (2nd Cir. 1987)). *See also Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1111 (6th

Cir. 1981) (declining to engage in retrospective analysis of the economic factors that drove the parties to enter into a consent decree and noting that according preclusive effect to consent judgments helps serve the public's interest in achieving finality in litigation).

Because the Plaintiffs have not presented any allegations of fraud or irregularity with respect to the Consent Judgment and because they were represented by counsel when entering into the Consent Judgment, Ohio's law on issue preclusion prevents the parties from re-litigating and this Court from considering the nature of the conduct that gave rise to the Plaintiffs' claim against the Defendant. Unfortunate as it is given the circumstances underlying the Civil Suit, this Court is required to recognize the Consent Judgment therein, which includes a express provision that is inconsistent with the proposition that the Defendant's acts were willful or wanton. Therefore, this Court is obligated to give preclusive effect to that judgment and cannot find consider the debt which arose from the Consent Judgment to be nondischargeable under § 523(a)(6) of the Bankruptcy Code.

CONCLUSION

Based on the foregoing, the Court finds that there are no genuine issues of material fact regarding the dischargeability of the debt at issue and therefore summary judgment for the Defendant is appropriate. Plaintiffs' judgment against the Defendant is dischargeable pursuant to the terms of the Consent Judgment that resolved the Civil Suit between the parties. Furthermore, Plaintiffs' Motion for Summary Judgment is not well taken, and is hereby denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that in the 23rd day of FEBRUARY, 2005, the foregoing was sent via regular U.S. Mail to the following:

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