**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| In re: | ) | In Proceedings Under Chapter 7 |
| | ) | |
| MORRIS LEE TERRY, JR. | ) | CASE NO. 01-63492 |
| | ) | |
| Debtor. | ) | JUDGE RUSS KENDIG |
| ---------- | ) | |
| ERIE INSURANCE COMPANY, et al | ) | ADV. NO. 01-6205 |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | **MEMORANDUM OF DECISION** |
| | ) | |
| MORRIS LEE TERRY | ) | |
| | ) | |
| Defendant. | ) | |

Dated in Canton on this ___ day of October 2002.

This adversary proceeding arises in the chapter 7 proceeding of debtor Morris Lee Terry, Jr. On July 15, 2002, Plaintiffs, Erie Insurance Company (hereafter "Erie") and Richard Getch (hereafter "Getch") filed a complaint seeking a determination that an unsecured debt of $35,942.63 resulting from a car accident caused by defendant-debtor, Morris L. Terry (hereafter "Debtor") is nondischargeable pursuant to 11 U.S.C. §523(a)(6). The accident occurred while Debtor was fleeing police after an armed bank robbery. Debtor answered the complaint and alleged that Plaintiffs cannot prove the accident was a "willful and malicious injury" as required under §523(a)(6) for non-dischargeability. Counsel agreed to submit briefs on this matter in lieu of a trial. Marc A. Melamed represented Plaintiffs Erie and Getch and David E. Busler represented Debtor.

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334 and the general order of reference entered in this district on July 16, 1984. This matter is a core proceeding under 28 U.S.C. §157(b)(2)(I). In accordance with Federal Rule of Bankruptcy Procedure 7052, the court's findings of facts and conclusions of law are set forth in this opinion.

## I. Facts

Counsel stipulated to the facts in this case. The court adopts all of counsel's stipulated facts except fact #2 with regard to the time of the accident. The facts indicate that the accident occurred at 2:56 a.m. but the police reports state that the accident occurred at 2156 military time, that being 9:56 p.m. While the court rejects this fact, it is not material to the outcome of this matter.

On February 16, 2000 Debtor caused an automobile accident with Getch on Interstate 71 in Ohio. At the time of the collision, Debtor was fleeing the scene of an armed bank robbery.[1] During the chase, Debtor was driving at speeds in excess of 100 mph and driving on the right shoulder of the highway at times. The collision occurred when Debtor, in an effort to evade capture by the police, struck Getch's vehicle with his vehicle.

Getch sustained personal injuries in the sum of $21,668.34 and property damage to his vehicle of $14,174.29 due to the collision. Erie paid an uninsured claim to Getch in the sum of $35,342.62 and became subrogated to the rights of Getch. Debtor was convicted of Aiding and Abetting Aggravated Robbery, a violation of O.R.C. §2911-02(A)(1), a first degree felony and Failure to Comply with Orders or Signals of a Police Officer, a violation of O.R.C. §2921.33(1)(B)(2)(3), a forth degree felony. See attached Exhibit A. Debtor was fined $1,500.00 and sentenced to serve three years on the first charge and one year on the second in the Ohio prison system.

On August 20, 2001, Debtor filed a petition under Chapter 7 of the U.S. Bankruptcy Code in this Court, being Case No. 01-63492. Erie is a creditor in the Bankruptcy proceeding in the sum of $35,342.62 and Getch is a creditor in the Bankruptcy proceeding in the sum of $500.00 for unreimbursed losses representing the deductible under his insurance policy.

## II. Discussion

In the complaint, Plaintiffs contend that the debt arising from the accident is non-dischargeable under 11 U.S.C. §523(a)(6) because it was a "willful and malicious injury by the debtor." Debtor denies that Plaintiff meets the "willful and malicious" standard under 11 U.S.C. § 523(a)(6). According to Debtor, the accident was not "willful" because he did not intentionally hit Getch's car, because doing so impeded his evasion of the police.

Section 523(a)(6) provides, in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b),

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[1] Attached as Exhibit A is Debtor's Sentencing Entry from the Court of Common Pleas of Richland County, Ohio. The court assumes from this Sentencing Entry that Debtor was only the "wheel man."

> or 1328(b) 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.

A creditor bears the burden of proving by a preponderance of the evidence that the injury caused by the debtor was both willful and malicious. *See Berger v. Buck (In re Buck)*, 220 B.R. 99, 1004 (B.A.P. 10th Cir. 1998) citing *Grogan v. Garner*, 489 U.S. 279, 111 (1991) (holding that the creditor must meet a preponderance of the evidence standard); and *see In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985); *Allstate Ins. v. Dzuik (In re Dzuik)*, 218 B.R. 485, 487 (Bankr. W.D. Minn. 1998); *American Bank v. McCune (In re McCune)*, 85 B.R. 834, 837 (Bankr. W.D. Mo. 1988) (holding that willful and malicious are separate elements of a §523(a)(6) exception to discharge).

**A. Willful**

Conduct is willful under §523(a)(6) if, "the actor desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it," *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999), citing Restatement (Second) of Torts §8A, at p. 15 (1964).

The United States Supreme Court in *Kawaauhau v. Geiger*, 523 U.S. 57, (1998) held, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6)." *Kawaauhau* 523 U.S. at 64. To meet the willful standard in §523(a)(6), one must intend the injury, not merely the act that caused the injury. *See Id.* at 61. The Court equated a "willful and malicious" injury to an intentional tort. "Intentional torts generally require that the actor intend 'the *consequences* of an act' not simply 'the act itself.'" *Id.* at 61-62, citing Restatement (Second) of Torts § 8A, comment a, p. 15 (1964).

While the Supreme Court in *Kawaauhau* set out the standard for willful, it did not clearly define what constitutes "intent" pursuant to §523(a)(6). The court in *In re Chapman*, 228 BR 899 (Bankr. N.D. Ohio 1998), addressed the three levels of intentional conduct and held, "everything in the Kawaauhau opinion indicates to this Court that the Supreme Court of the United States meant to adopt the most permissive standard for willful conduct for purposes of non-dischargeability proceedings brought pursuant to §523(a)(6)." *Id.* at 908. The court noted the Supreme Court's reference in *Kawaauhau* to Restatement of the Law 2d, Torts §8A and intentional torts, and thereby found "the Supreme Court's language in *Kawaauhau* strongly indicates that the type of intentional conduct justifying a denial of debtor's discharge under §523(a)(6) only requires the same type of intentional conduct that would give rise to liability for an ordinary intentional tort." *Id.* at 907. Intentional torts require that one "commit an act with the intent to injure or with the belief that an injury is substantially certain to occur." *Id.* at 907, citing *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 95, 472 N.E.2d 1046 (1984), citing Restatement of the Law 2d, Torts (1965) §8A. The court further supported its conclusion by noting that the Supreme Court in *Kawaauhau* cited with approval

to *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S. Ct. 38, 61 L. Ed. 205 (1916), which held that, "[a] willful disregard of what one knows to be his duty...and which necessarily causes injury ... may be said to be done willfully." *McIntyre*, 242 U.S. at 141, citing *Tinker v. Colwell* 193 U.S. 473, 485, 487 (1904).

The Sixth Circuit Court of Appeals in *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999), affirmed *Chapman's* interpretation of *Kawaauhau*. *Markowitz*, under the same analysis as *Chapman*, held "unless 'the actor desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it,' Restatement (Second) of Torts §8A, at 15 (1964), 'he has not committed a 'willful and malicious injury' as defined under §523(a)(6).'" *Markowitz*, 190 F.3d at 464.

Applying this "substantially certain" standard to the facts of this case, several of Debtor's actions indicate he was substantially certain an injury was going to occur. After an armed robbery of a bank, Debtor lead authorities on an extended high speed chase onto Interstate 71. Once Debtor got on the highway, there was no place to hide. At that time, Debtor could have surrendered, but instead attempted to outrun the police. That decision required him to do anything to evade capture. In front of Debtor, blocking his escape route, were cars in both lanes of the highway; behind him were the police. Debtor admits to recklessly passing on the shoulder and driving at speeds over 100 mph. The police report of Officer Hill stated that Debtor tried to pass Getch on the right shoulder, but Getch was pulling over in that direction to yield. Debtor then went towards the center of the road, then back to the right hand lane in order to pass Getch, ultimately colliding with Getch's car.

In attempting to illegally pass Getch twice at high rates of speed, Debtor's conduct indicates he was substantially certain he was going to injure Getch. Debtor knew this and intentionally chose to injure Getch instead of being apprehended by the authorities.

This was not a garden variety car accident. Debtor did not negligently cause this collision. The collision did not result from Debtor's failure to pay attention to his actions or the environment around him. Debtor was very aware of his actions and his surroundings. He knew he was in violation of the law and being pursued by police and that Getch was in front of him blocking his escape. This "accident" was also not the result of Debtor's reckless driving. The collision occurred because Debtor made a choice to evade police capture even if that meant harming Mr. Getch. This was a purposeful course of action, not a negligent or reckless accident. Because the injury to Mr. Getch was intentional and Debtor believed it was substantially likely to occur, Debtor's conduct was willful as defined under §523(a)(6).

**B. Malicious**

The second element under §523(a)(6) is that the injury be malicious. "Malicious conduct, for purposes of §523(a)(6), is that conduct which is done without just cause or excuse, or for which there is no justification." *In re Chapman*, 228 B.R. 899, 909 (Bankr. N.D. Ohio 1998), citing *In re Clayburn*, 67 B.R. 522 (Bankr. N.D. Ohio 1986), citing *Wiseman v. Weingarten*, 49 B.R. 881 (Bankr. N.D. Ohio 1985). "It is well established that the

foregoing standard for malice is clearly met when a person knowingly violates the law." *Schmidt v. Schmehl*, 57 B.R. 546, 548 (Bankr. N.D. 1986). Both parties agree to this standard and have stipulated in the facts that at the time of the collision Debtor was fleeing the scene of an armed robbery. Debtor knowingly violated the law. Debtor was convicted of Aiding and Abetting Aggravated Robbery, and Failure to Comply with Orders or Signals of a Police Officer. Therefore, Debtors conduct was malicious as required under §523(a)(6).

**III. Conclusion**

The court finds that Debtor willfully and maliciously injured Getch and is not entitled to discharge this debt pursuant to §523(a)(6). The debt in the amount of $35,342.62 owed to Erie and $500.00 owed to Getch plus any applicable interest and costs is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6).

An order in accordance with this decision will issue forthwith.

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RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| In re: | ) | In Proceedings Under Chapter 7 |
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| Debtor. | ) | JUDGE RUSS KENDIG |
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| ERIE INSURANCE COMPANY, et al | ) | ADV. NO. 01-6205 |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | **JUDGMENT ENTRY** |
| | ) | |
| MORRIS LEE TERRY, JR | ) | |
| | ) | |
| Defendant. | ) | |

Dated in Canton on this ___ day of October 2002.

This matter came before the court by briefs submitted by counsel in lieu of a trial. For the reasons set forth in the accompanying Memorandum of Decision, the court finds that injury caused by defendant-debtor, Morris Lee Terry, Jr. was willful and malicious.

**IT IS ORDERED** that the obligation owing plaintiff is non-dischargeable pursuant to 11 U.S.C. §523(a)(6).

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this Memorandum of Decision and accompanying Judgment Order was mailed, via regular United States Mail, to counsel for plaintiff and counsel for defendant(s) on the _____day of_____, 2002.

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