Dated: August 28 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 02-33385
	)	
Doris Patricia Kirby,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 02-3297
	)	
State of Ohio, Environmental Protection Agency,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Doris Patricia Kirby,	)	
	)	
Defendant.		

MEMORANDUM OF DECISION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

Plaintiff State of Ohio ("State") is before the court on its Motion for Summary Judgment on Nondischargeability of Kirby Debt ("Motion"). The Motion asserts that a $20 million civil penalty imposed against Defendant Doris Patricia Kirby ("Kirby") arising out of violation of state environmental laws relating to scrap tires should be excepted from her discharge under 11 U.S.C.

§ 523(a)(7) and that an award of $6,156,729.56 plus future fire abatement costs should be excepted from her discharge under 11 U.S.C. § 523(a)(6).[1]

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine dischargeability of debts are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. After reviewing the Motion and supporting brief, the response thereto filed by Kirby, the State's reply, and the state court Judgment Entry setting forth the damages in issue, the court will grant the Motion as to the $20 million civil penalty and deny the Motion as to the fire abatement costs.

MATERIAL FACTS

In 1997 the State commenced a civil enforcement action in the Wyandot County, Ohio Court of Common Pleas against Kirby and others alleging violation of state environmental laws in connection with operation of a scrap tire facility in Sycamore, Ohio known as Kirby's Tire Recycling. The Ohio Revised Code and Ohio Administrative Code contain laws and regulations specifically governing the storage and disposal of scrap tires in this state. *See* Ohio Rev. Code §§ 3734.70 to 3734.87; Ohio Admin. Code Chapter 3745-27. After the civil enforcement action relating to violation of those laws and regulations was commenced by the Ohio Attorney General under Ohio Revised Code § 3734.13, a massive fire occurred at the Kirby's Tire Recycling facility in August 1999.

Kirby filed her Chapter 7 bankruptcy petition in this court on May 20, 2002, while the civil enforcement action was still pending in state court. She obtained her discharge under 11 U.S.C. §

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[1] Kirby's underlying Chapter 7 bankruptcy Case No. 02-33385 was filed on May 20, 2002, before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") went into effect on October 17, 2005. All citations to the bankruptcy code in this opinion are therefore to the pre-BAPCPA version of the code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, Sec. 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

727 on September 20, 2002. The State commenced this adversary proceeding on September 3, 2002. Pursuant to an Entry Regarding Automatic Stay, the parties stipulated and this court permitted the state court enforcement action to proceed against Kirby up to the point of collection of any damages or penalty awarded to the State. In the meantime this action was held in abeyance pending the outcome of the state court enforcement action.

After an evidentiary hearing the state court entered its Judgment Entry on October 21, 2005. The state court assessed a joint and several civil penalty of $20 million against Kirby and Kirby's Tire Recycling, Inc. The paragraph in the Judgment Entry awarding the civil penalty states as follows:

> In determining the appropriate amount of civil penalty assessed, this Court considered the evidence presented as to the recalcitrance of the Defendants, the economic benefit obtained from Defendants' years of violating Ohio's environmental laws, the gravity of harm from the unlawful operation of Kirby's Tire Recycling, Inc., and the extraordinary enforcement costs that were incurred by the State in enforcing Ohio's environmental laws and regulation at the Kirby's Tire Recycling site. Therefore, Defendants are hereby ordered to pay the State of Ohio a $20,000,000.00 civil penalty. The imposition of the penalty is joint and several as to all of the Defendants.

In addition to the civil penalty, damages were assessed against the defendants, including $11,700,944.98 against Kirby's Tire Recycling, Inc. for the costs of tire removal and an additional $1.4 million for future tire removal costs. The state court assessed joint and several damages against Kirby and Kirby Tire Recycling, Inc for fire abatement costs due to the August 1999 blaze in the total amount of $6,156,729.56., with $4,404,278.25 for pre-petition fire abatement damages and $1,754,451.31 for post-petition fire abatement damages.[2] Kirby was also determined to be jointly and severally liable for up to $7 million in future fire abatement costs.

The State moves for summary judgment on its complaint based on the state court Judgment Entry.

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[2] The division between pre-petition damages and post-petition damages is of no relevance in this adversary proceeding, but was important in liquidating the State's claim in the Chapter 7 case.

LAW AND ANALYSIS

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [it] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

The burden of proof in this adversary proceeding and the instant Motion is on the State by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 11 S.Ct. 654, 661, 112 L.Ed.2d 755(1991). The only evidence the State has submitted in support of the Motion is the October 21, 2005, Judgment Entry from the Wyandot County, Ohio Court of Common Pleas awarding the civil penalty and damages against Kirby in the State's favor. Kirby opposes the motion but has not submitted any other evidentiary materials in response. The issue before the court is thus whether the Judgment Entry establishes sufficient undisputed material facts from which the court can determine as a matter of law that the amounts awarded the State are excepted from Kirby's discharge.

Section 523(a)(7) Claim

The State contends that the $20 million civil penalty is excepted from Kirby's discharge under § 523(a)(7). Section 523(a)(7) provides in relevant part that a debt is excepted from discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty..." 11 U.S.C. § 523(a)(7). Thus, the three requirements for a nondischargeable debt under this provision are: (1) a "fine, penalty, or forfeiture"; (2) "payable to and for the benefit of a governmental unit":

and (3) that is "not compensation for actual pecuniary loss." *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 362, 93 L.Ed. 2d 216 (1986); *State of Tennessee v. Hollis*, 810 F.2d 106, 108 (6th Cir. 1987). Section 523(a)(7) does not distinguish between and applies both to civil and criminal penalties. *U.S. Dep't of Hous. and Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64F.3d 920, 927-28 (4th Cir. 1995); *Whitehouse v. LaRoche*, 277 F.3d 568, 573 (1st Cir. 2002).

Kirby does not contest that the first two elements are met in this case. The third element is at issue. The dispute is whether the civil penalty imposed in the Judgment Entry and payable to the State as a governmental unit, *see* 11 U.S.C. § 101(27)(definition of governmental unit to include States) is actually compensation for actual pecuniary loss. In determining whether a civil penalty is compensation for actual pecuniary loss, courts generally consider: (1) whether calculation of the penalty bears any relationship to the costs incurred by the government; (2) whether the penalty collected must be used to mitigate the particular damage cause by the violation; and (3) whether the government suffered any actual pecuniary loss. *E.g.*, *Arizona v. Ott (In re Ott)*, 218 B.R. 118, 122-23 (Bankr. W.D. Wash. 1998). This framework is useful for analysis of the pecuniary loss issue in this case.

As to whether the penalty calculation bears any relationship to the costs incurred by the governmental unit, Kirby points only to the similarity between the $20 million amount denominated as a civil penalty and the $19,257,673 total of the other damages awarded ($11,700,944.98 for tire removal costs, $1.4 million for future tire removal costs and $6,156,729.56 in fire abatement costs). However, these two amounts are different enough (more than $700,000 different) that the court does not find the similarity sufficiently close to enable it to infer that penalty was simply calculated based on the State's remediation costs. Kirby's argument also ignores that the state court assessed up to another $7 million in future fire abatement costs against Kirby beyond the three components of cost adding up to $19,257,673. Moreover, while "the extraordinary enforcement costs that were incurred by the State in enforcing Ohio's environmental laws and regulations at the Kirby's Tire Recycling site" is mentioned as a factor in the calculation of the penalty, it is just one of four factors expressly identified by the state court; the others are the recalcitrance of Defendants, their economic benefit from years of unlawful operation of the scrap tire site and the gravity of the harm arising from unlawful operation of the site. Even if a penalty is based in part on measurable pecuniary loss, it will not be deemed compensation for such loss under 523(a)(7) if its primary purpose is other than

compensatory. *Kish v. Farmer (In re Kish)*, 238 B.R. 271, 285 (Bankr. D.N.J. 1999). Ohio courts have described civil penalties imposed for violations of state environmental laws as primarily deterrent in nature, being "designed to deter conduct which is contrary to a regulatory scheme." *State ex rel. Montgomery v. Maginn*, 147 Ohio App. 3d 420, 426)(Ohio Ct. App. 2002)(citing *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 157 (1982) and quoting *State ex rel. Celebrezze v. Thermal Tron, Inc*., 71 Ohio App.3d 11, 19 (1992)). As such, the the penalty imposed "must be large enough to hurt the offender" taking into consideration the good or bad faith of the defendant, the financial gain to the defendant and the environmental harm done. *Thermal Tron,* 71 Ohio App. 3d at 19. In light of the differences in the numbers, the state court's description of the considerations comprising the exercise of its discretion and the views of Ohio courts as to the purpose of civil penalties under the state environmental laws, the court finds that there is only a *de minimus* relationship between the amount of the penalty and the costs incurred by the State.

As to whether the penalty amount must be used to mitigate the particular damage caused by the violation, nothing in the Judgment Entry or state law requires the $20 million to be used to mitigate the damage at the Kirby Tire Recycling site. Indeed Ohio Revised Code § 3734.13(E) requires money from civil penalties imposed for violation of the laws or regulations governing scrap tires to be credited to a separate scrap tire management fund created by § 3734.82 of the Ohio Revised Code. The statutorily permitted uses of the scrap tire management fund are broad and general, not directed at the Kirby site.[3] Ohio Rev. Code § 3734.82(G).

As to the third element of whether the governmental unit incurred actual pecuniary loss, there is no doubt that the State incurred substantial costs in cleaning up the Kirby site and abating the massive fire that started in 1999. However, the state court separately determined and awarded damages related to these pecuniary costs in addition to the civil penalty. Thus, in this case the penalty is not merely a proxy for recovery of the State's costs at the Kirby Tire Recycling site.

Applying the three-pronged framework described above to the Judgment Entry and relevant provisions of Ohio law, the court finds that there are no genuine disputes of material fact and that

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[3] It is significant to note that at least 65% of the moneys collected and deposited in another state fund established by a fee assessed on every tire sold in the State of Ohio is directed specifically to clean-up and removal at the Kirby tire site. Ohio Rev. Code § 3734.821; *see* Ohio Rev. Code § 3734.901.

the $20 million civil penalty awarded against Kirby is not compensation for actual pecuniary loss sustained by the State. The court concludes that the Judgment Entry establishes the facts necessary to find in favor of the State on its claim under § 523(a)(7) and that it is entitled to judgment as a matter of law on this claim.

Section 523(a)(6) Claim

The State contends that the fire abatement costs of $6,156,729.56, plus up to $7 million in future fire abatement costs, should be excepted from Kirby's discharge under § 523(a)(6). Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. § 523(a)(6). In its initial brief, the State misstated the standard necessary to prevail under § 523(a)(6), acknowledging as much in its reply brief. In order to be entitled to a judgment that the debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). In *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998), the Supreme Court held that finding nondischargeability of a debt under § 523(a)(6) "takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Geiger,* 523 U.S. at 61. The Supreme Court further stated that

> the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences of an act," not simply, "the act itself*."

Geiger, 523 U.S. at 61-62 (alteration in original)(citing Restatement (Second) of Torts §8A cmt.a (1964)). A willful injury occurs when "(i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (citing *Markowitz*, 190 F.3d at 464). Under § 523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)).

The only evidence presented to this court in support of the Motion is the Judgment Entry. There is nothing in the Judgment Entry from which the court can conclude that Kirby intended the

injury that incurred, such that the court could find a willful injury, and that she acted or failed to act in conscious disregard of her duties or without just cause, such that the court could find a malicious injury. There is no evidence in the record about the fire, how it started and Kirby's involvement in the fire, beyond the state court's statement in the Judgment Entry that there was a "massive tire fire in August of 1999." No evidence has been presented to this court as to Kirby's personal knowledge and understanding of the State of Ohio's scrap tire laws and regulations and the nature and extent of her participation in the operations of the site. Nor does the statute authorizing the imposition of the civil penalty and damages for the costs incurred by the State require any standard of knowledge such that it can be determined that the state court necessarily concluded that Kirby's actions were willful and malicious as an incident to assessing either the $20 million civil penalty or the damages. *See* Ohio Rev. Code § 3734.13. The State has failed to present sufficient admissible evidence in support of the Motion from which this court can find that Kirby's liability for fire abatement costs at the Kirby Tire Recycling site is a debt for a willful and malicious injury.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the State of Ohio's Motion for Summary Judgment on Nondischargeability of Kirby Debt [Doc. #53] is GRANTED in part and DENIED in part; and

IT IS FURTHER ORDERED that Plaintiff State of Ohio is entitled to summary judgment in its favor and against Defendant Doris Patricia Kirby on its claim under 11 U.S.C. § 523(a)(7) relating to the $20 million civil penalty; and

IT IS FURTHER ORDERED that Plaintiff State of Ohio is not entitled to summary judgment in its favor on its claim under 11 U.S.C. § 523(a)(6); and

IT IS FINALLY ORDERED that Plaintiff shall decide whether it intends to pursue its claim under 11 U.S.C. § 523(a)(6) to trial. If it does, it must request a further pretrial conference, at which a trial schedule can be set, in a separate written request to be electronically filed with this court on or before **September 28, 2007.** If Plaintiff does not file a request for a further pretrial conference as provided in this order, a final judgment will be entered on the complaint granting Plaintiff judgment in its favor on its claim under 11 U.S.C. § 523(a)(7) and dismissing this action as to Plaintiff's claim under § 523(a)(6).