FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 13, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WILLIAM DANIEL THOMAS BERRIEN, also known as William Thomas Berrien, also known as W.D. Thomas Berrien, also known as William T. Berrien, also known as Tom Berrien, Officer, Director, Shareholder of Centaur Mountain Farms, Inc., Debtor.	BAP No. CO-06-107
LIZELLE J. VAN VUUREN, CEDRIC G. TYLER, and VERONICA VAN VUUREN TYLER, Plaintiffs – Appellees, v. WILLIAM DANIEL THOMAS BERRIEN, Defendant – Appellant.	Bankr. No. 04-35731-SBB Adv. No. 05-01216-SBB Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before CLARK, McNIFF, and THURMAN, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

Debtor appeals a bankruptcy court judgment awarding plaintiffs/appellees non-dischargeable monetary damages for Debtor's "willful and malicious injury" caused to them. We affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. PROCEDURAL BACKGROUND

Tom Berrien ("Debtor") filed a voluntary Chapter 7 petition on November 24, 2004. At the time of filing, Debtor was a defendant in a Colorado state court action initiated by plaintiff/appellees, Lizelle Van Vuuren ("Lizelle"), her mother Veronica Van Vuuren, and her step-father Cedric Tyler (jointly, "the Tylers"), seeking damages for Debtor's alleged intentional and malicious misconduct. The state court matter was stayed by the filing of Debtor's petition, and the previously scheduled trial date was vacated. Pursuant to 11 U.S.C. § 523(a)(6), Appellees then filed an adversary proceeding against Debtor in the bankruptcy court, alleging non-dischargeable damages resulting from "willful and malicious injury."[1]

A trial on plaintiffs' claims took place in January and February 2006, after which, the bankruptcy court awarded plaintiffs approximately $96,000 in non-dischargeable damages. The award consists of legal fees and expenses incurred in the successful defense of criminal charges against Lizelle, which arose from Debtor's false accusations, all of which were paid by the Tylers. Debtor appealed.

II. APPELLATE JURISDICTION

Formal judgment was entered, fully and finally resolving the parties' claims, on April 7, 2006. Debtor timely filed a motion to amend the judgment, which was denied by the bankruptcy court on September 19, 2006.[2] On September 29, 2006, Debtor timely filed a request for extension of time to appeal, which was granted. In accordance with the extension order, Debtor timely filed a

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[1] Plaintiffs initially relied on 11 U.S.C. § 523(a)(2) as well, but ceded that basis for their claims during trial.

[2] Plaintiffs' specific entitlement to the damages awarded is most directly addressed in connection with the post-judgment motion. *See* July 13, 2006, Tr. of Oral Ruling at 1-10, *in* Appellant's Appendix ("Appx.") Vol. III at 1064-73.

notice of appeal on October 17, 2006. Neither party has elected to have the appeal heard by the district court. Therefore, this Court has appellate jurisdiction.[3]

III. ISSUES AND STANDARD OF REVIEW

The bulk of the parties' dispute was resolved in plaintiffs' favor by the bankruptcy court based on credibility of trial witnesses. Because these findings are not clearly erroneous, the basic premise of plaintiffs' case, that Debtor conspired to fabricate an accident for financial gain, is established.[4] The remaining issues relate exclusively to the damages award.[5]

A. Does the evidence support the bankruptcy court's determination that Debtor's conduct satisfied the "willful and malicious" standard of § 523(a)(6) with respect to the Tylers?

Debtor's appeal is based largely on the premise that there is no evidence that he intended the Tylers' injury. Sufficiency of the evidence to satisfy a legal standard is a mixed question of law and fact. While legal issues are reviewed *de novo*, to the extent that fact findings underlie a legal conclusion, they are reviewed under the clearly erroneous standard.[6] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate

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[3] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. As part of our exercise of jurisdiction over this appeal, Appellant's Unopposed Motion to Strike Appellees' Appendix, filed January 18, 2007, is HEREBY GRANTED.

[4] Though vigorously contesting plaintiffs' version of events at trial, Debtor admits on appeal that "[w]ith the dismissal of the criminal charges filed against her, Lizelle J. Van Vuuren clearly possessed a claim against [Debtor] and Joanne Berrien for false reporting and malicious prosecution and there is support in the record to sustain such claims by Lizelle[,]" as well as that Lizelle would have been entitled to recover any damages that she suffered as a result of that conduct. Appelant's [sic] Opening Brief at 8 (footnote omitted).

[5] Although the parties did not raise the issue in this appeal, we note that this Court has previously held that, pursuant to 28 U.S.C. § 157, bankruptcy courts have authority to award money damages in a § 523 proceeding. *See Lang v. Lang (In re Lang)*, 293 B.R. 501, 517 (10th Cir. BAP 2003).

[6] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[7]

B. Did the Tylers have standing to recover monies spent in defense of the criminal proceedings against Lizelle?

Debtor contends that the Tylers lack standing to assert a claim for their damages because they had no legal obligation to pay them and, as such, were essentially "volunteers." This issue, which relates to plaintiffs' state law tort claim,[8] is governed by Colorado law and is reviewed by this Court *de novo*, without deference to the bankruptcy court's interpretation of state law.[9]

C. Did the bankruptcy court properly award damages to Lizelle?

Debtor asserts that the bankruptcy court improperly awarded damages to Lizelle that she did not personally incur. Whether or not Lizelle may assert a tort claim for those costs as damages is a purely legal issue, which is governed by Colorado law. This Court reviews state law legal issues *de novo*.[10]

IV. FACTUAL BACKGROUND

On April 3, 2000, Lizelle was an 18-year old South African citizen, living in Conifer, Colorado with her parents, the Tylers, and attending high school. She had returned to Conifer that day after having spent three days at Vail on a ski vacation with her family. At about 2:00 p.m., Lizelle drove her mother's Jeep

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[7] *Id. (*quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[8] This appeal was somewhat complicated by the parties' failure to distinguish between the right to recover damages, which is a state law issue, and the non-dischargeability of such damages in bankruptcy. Essentially no effort was made by either party to present Colorado law, as it relates to malicious prosecution, damages, or standing, to the bankruptcy court. Instead, virtually all of the evidence and argument related to whether or not Debtor's conduct fell within the non-dischargeability standard of § 523(a)(6).

[9] *Kelaidis v. Cmty. First Nat'l Bank (In re Kelaidis)*, 276 B.R. 266, 270 n.1 (10th Cir. BAP 2002).

[10] *Id.*

Cherokee to the Safeway Shopping Center in Conifer. Lizelle testified that she was not involved in any incidents or accidents at the shopping center. In addition, the Tylers testified that the Jeep was not damaged and there was no indication that it had sustained any impact. On the other hand, Debtor and another witness testified that Lizelle was driving fast around the parking lot and hit Debtor's wife, Joanne Berrien, causing her to twist and fall.[11] These witnesses also testified that, rather than stopping, Lizelle proceeded directly out of the shopping center. Not long afterwards, Debtor and his wife gave statements regarding the alleged hit-and-run to both employees of Safeway and to the police, which resulted in the filing of felony criminal charges against Lizelle.[12]

The testimony at trial was highly conflicting as to whether the accident had actually occurred or whether it was entirely fabricated by Debtor and his wife to allow them to fraudulently claim damages. For example, there was conflicting testimony about whether Debtor had even been at the shopping center when Lizelle allegedly hit his wife, as well as whether the only "eyewitness" to the impact, Sean DePauw (who claimed to have witnessed some 400 accidents in his lifetime), had actually been at the scene or had been enlisted to participate in a fraud. A number of witnesses testified that Debtor knew DePauw prior to the alleged accident, though Debtor and DePauw both denied knowing each other before then. Debtor's mother, who lived with him at that time, claimed to have overheard Debtor and his wife planning both how they would make money on the "accident" and the need to enlist DePauw as a "witness." Yet another witness testified that Debtor admitted to her that the accident was "a farce."

After carefully considering all of the evidence and testimony at trial, the

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[11] At trial, Joanne Berrien recalled having been hit by a car, but virtually nothing else about the incident.

[12] All criminal charges against Lizelle were eventually dismissed by the prosecutors.

bankruptcy court concluded that "credibility is largely decisive in the ruling" and that "when the credibility and reliability of the plaintiffs and their witnesses is compared to the credibility and reliability of the debtor and his witnesses, then the Court concludes that the plaintiffs win by a reasonably wide and deep margin."[13]

V. DISCUSSION

A. Section 523(a)(6)

It is well established that a plaintiff alleging willful and malicious injury by a debtor, as a reason for non-dischargeability under § 523(a)(6), has the burden to establish that the debtor intended both his conduct and the resulting injury.[14] In this case, that standard was applied by the bankruptcy court, which nonetheless found that Debtor intended the injuries suffered by all three plaintiffs.[15] Moreover, § 523(a)(6) does not require that a debtor's intent to injure be specifically directed at a known plaintiff in order to satisfy the "willful and malicious" element of § 523(a)(6).[16]

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[13] February 6, 2006, Tr. of Oral Ruling at 3, 9, *in* Appx. Vol. III at 1027, 1033.

[14] *See, e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) and *Grogan v. Garner*, 498 U.S. 279 (1991); *Panalis v. Moore (In re Moore)*, 357 F.3d 1125 (10th Cir. 2004).

[15] February 6, 2006, Tr. of Oral Ruling at 20-22, *in* Appx. Vol. III at 1044-46.

[16] Debtor relies heavily upon *Panalis v. Moore (In re Moore)*, 357 F.3d 1125 (10th Cir. 2004), in which the Tenth Circuit Court of Appeals held that an award of damages for injuries plaintiff suffered in an oilfield accident failed to qualify as non-dischargeable under § 523(a)(6). In that case, plaintiff's showing that debtor intentionally misled him regarding his insurance coverage, which was the basis for a state court judgment awarding plaintiff damages, was insufficient to support a finding that debtor intended the physical injuries suffered by plaintiff. In rejecting plaintiff's § 523(a)(6) claim, the Tenth Circuit noted that, although an intentional tortfeasor is liable for the consequences of his acts, "it does not follow that everything that happens to the victim following the commission of the tort was *intended* by the tortfeasor." 357 F.3d at 1128. However, the *Panalis* court also reaffirmed the concept that § 523(a)(6) may be satisfied by debtor's belief that the conduct is *substantially certain* to cause the injury. *Id.* at 1129; *see also*

(continued...)

As already noted, Debtor does not challenge the bankruptcy court's determination that he intended to injure Lizelle. Instead, Debtor asserts that since he directed all of his conduct exclusively at Lizelle, the bankruptcy court could not properly have determined that any resulting injury of the Tylers was "willful and malicious." Debtor also contends that since Lizelle did not personally incur any monetary damages, the bankruptcy court erred in awarding them to her.[17] In sum, although Debtor intended to cause financial harm to Lizelle, he did not intend to harm her parents, both because he neither knew who they were nor that they would pay Lizelle's defense costs, and because he was not a party to the civil actions against them.[18]

Thus, Debtor now admits his participation in a fraud to the extent that, seeking financial gain, he made false statements about Lizelle. Nonetheless, he contends that the damages awards were inappropriate because 1) Lizelle relied on her parents to pay the cost of defending Debtor's false allegations, and 2) the

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[16] (...continued)
Mitsubishi Motors Credit of Am. v. Longley (In re Longley), 235 B.R. 651, 657 (10th Cir. BAP 1999). Debtor's conduct in this case easily satisfies such a standard, since he clearly did know that his false accusations were substantially certain to result in financial harm.

[17] Debtor apparently does not contest the bankruptcy court's award of $1 in general, or emotional distress, damages to all three plaintiffs. It should be noted that this nominal award was not based on a finding that plaintiffs had not suffered such injuries, but rather, on the court's determination that plaintiffs had failed adequately to quantify such damages. *See* February 6, 2006, Tr. of Oral Ruling at 23-24, *in* Appx. Vol. III at 1047-48; July 13, 2006 Tr. of Oral Ruling at 8-9, *in* Appx. at 1071-72.

[18] The civil actions against plaintiffs were: 1) a subrogation action by Joanne Berrien's insurer; and 2) Joanne Berrien's claim for damages, which was apparently filed after she and Debtor divorced. Though Debtor's statements provided the basis for both the criminal prosecution and the civil claims, he denied having personally pursued any litigation, and asserts on appeal that there was no evidence that he benefitted from it. Nonetheless, there is ample evidence that he "intended" to benefit from litigation when making the false claims.

Tylers were not legally obligated to do so.[19] However, because Lizelle was driving a vehicle belonging to her mother, a criminal conviction against her would be adverse to the Tylers in a related civil suit.

Metaphorically, Debtor argues that he has no accountability to Lizelle because, despite having tossed a hand grenade at her, he missed and she suffered no injury. Moreover, Debtor is not accountable to the Tylers because, although they were injured by the grenade, he did not intend to hit them when he threw it. Finally, the Tylers cannot recover for any injuries they may have suffered while trying to protect Lizelle, since they had no legal obligation to do so.

From this Court's review of the record, we cannot conclude that the bankruptcy court's finding that Debtor intended the injuries suffered by the family as a whole is clearly erroneous. Rather, that finding is supported by substantial evidence, including: 1) that Debtor concocted a false account of an accident in hopes of finding a "deep pocket" from which to collect damages; 2) that Debtor did not know Lizelle, nor whether she was an adult, a licensed driver, owned the car she was driving, or had it insured; 3) that Lizelle was "chosen," at least in part, because of the vehicle she was driving, which somehow suggested a degree of affluence to Debtor; and 4) that Debtor's statements to Safeway, the police, and investigators were clearly intended to support a claim for damages, in which Debtor believed he would share.

It thus appears that Debtor falsely reported an accident in order to fraudulently obtain money from whatever source he could find. In so doing, he

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[19] Apparently, all of the litigation costs awarded relate exclusively to the criminal prosecution of Lizelle. It is unclear from the record why the costs incurred defending the civil actions were not awarded. In his oral ruling, the bankruptcy judge indicated that plaintiffs were awarded all of their litigation expenses for the entire 6-year period, but the award of $96,000 represents only one category of those expenses, defense of the criminal proceeding. *See* Plaintiffs' Ex. 28, *in* Appx. Vol. II at 659-60; February 6, 2006, Tr. of Oral Ruling at 23-24, *in* Appx. Vol. III at 1047-48. We do not reach this issue, however, since appellees did not raise it on appeal.

caused the Tylers to incur the expense of defending Lizelle against his false allegations.[20] The fact that Debtor neither knew nor cared who ultimately became the "victim" of his fraud does not insulate his conduct from applicability of § 523(a)(6).[21]

B. Standing

As noted by the bankruptcy court, although Debtor listed standing as a defense in his answer to plaintiffs' complaint, he did not pursue that issue until after trial, in his motion to amend the judgment.[22] Nonetheless, the bankruptcy court considered the standing issue and ruled that:

> Veronica Van Vuuren and Cedric Tyler had interests which were impacted and intended by the Defendant's [sic] to be impacted by the false accusations. I conclude that they were within a zone of interests that were damaged by the purposeful and wrongful conduct of the Defendant, Mr. Berrien and his wife - - his former wife. I conclude that they were as much a target of the conduct of the Debtor as was Lizelle. They are indeed real parties in interest.[23]

Debtor misinterprets this statement as application of a recklessness standard to § 523(a)(6) claims, in violation of *Geiger*. Here again, Debtor confuses the

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[20] Arguably, the only injury that Debtor specifically intended was the one the Tylers successfully avoided, *i.e.*, payment of damages for falsely claimed injuries. However, to deny plaintiffs relief because they successfully avoided a more serious injury by incurring a lesser one would effectively nullify § 523(a)(6) in some of the most egregious cases. This, we decline to do.

[21] Interestingly, Joanne Berrien's insurer provided coverage to her for the injuries she claimed to have suffered as a result of having been struck. That insurer then sought subrogation from Lizelle and the Tylers in a civil action that was later voluntarily dismissed. As such, the insurer is yet another theoretically "unknown" victim of Debtor's false statements, and its injury also supports rejection of Debtor's assertion that he is not accountable to unknown plaintiffs for conduct that, while both willful and malicious, was not specifically directed at them. The fact that Debtor did know, and intended, that payments would be made by the vehicle's driver, owner, or insurer, whoever those entities turned out to be, sufficiently established that he intended any monetary injury that directly resulted from his false claims, whether or not he knew the specific parties or the specific legal bases upon which they would be required to pay.

[22] July 13, 2006, Tr. of Oral Ruling at 7, *in* Appx. Vol. III at 1070.

[23] *Id.*

plaintiffs' right to recover under state law with their claim of non-dischargeability under the Bankruptcy Code. As already noted, the bankruptcy court properly found that Debtor intended the Tylers' injuries, thereby satisfying the § 523(a)(6) willful and malicious standard, and making any damages recoverable by them non-dischargeable in Debtor's bankruptcy. On the other hand, the bankruptcy court's "zone of interests" statement related to whether or not the Tylers had standing to assert their claim for attorney's fees and costs. Absent a legitimate state law claim for damages, dischargeability is irrelevant.

In *Vanderbeek v. Vernon Corp.*, 50 P.3d 866 (Colo. 2002), the Colorado Supreme Court held that tort damages are measured by "the natural and probable result of the injury sustained by virtue of the tortious act."[24] Similarly, *Elijah v. Fender*, 674 P.2d 946 (Colo. 1984) holds that "[w]hen the natural and probable consequence of a wrongful act has been to involve plaintiff in litigation with others, the general rule is that the reasonable expenses of the litigation may be recovered from the wrongdoer."[25]

Debtor does not argue that payments made in defense of criminal or civil proceedings that were based on his false allegations do not constitute tort damages. Instead, Debtor contends that the Tylers may not recover such damages unless they were "legally obligated" to pay them and, since Lizelle was an adult at the time of the alleged events, the Tylers' paid her defense costs as "volunteers" and are without standing to assert a claim. Debtor's support for this position is minimal, consisting almost entirely of the Colorado statute that sets 18 as the age of adulthood. Significantly, Debtor produced no Colorado case, nor any cases from other jurisdictions, specifically addressing standing in the context

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[24] *Id.* at 872 (en banc) (internal quotation marks omitted).

[25] *Id.* at 951 (en banc) (internal quotation marks omitted); *see also Hewitt v. Rice*, 119 P.3d 541 (Colo. Ct. App. 2004), *aff'd*, 154 P.3d 408 (Colo. 2007).

of a parent's payment of the cost of successfully defeating a malicious prosecution of their adult child, or of any other adult authorized driver of their vehicle.

In any event, in *State Board for Community Colleges and Occupational Education v. Olson*, 687 P.2d 429 (Colo. 1984), the Colorado Supreme Court held, with respect to claims of constitutional violations, that "standing" depends upon two considerations: 1) whether there is an actual injury; and 2) whether that injury is to a "legally protected or cognizable interest."[26] Thus, at least in the context of a constitutional violation, the court noted that a plaintiff may sometimes assert a claim on behalf of another, stating:

> Although as a general rule a plaintiff must assert an infringement to her own legal interest in challenging the constitutionality of governmental action, a plaintiff who demonstrates an actual injury sufficient to guarantee concrete adverseness may be permitted to assert the rights of third parties not before the court when *at least one of the following factors* is present: *the presence of a substantial relationship between the plaintiff and the third party*; the difficulty or improbability of these third parties in asserting an alleged deprivation of their own rights; *or* the existence of some need to avoid dilution of third party rights in the event standing is not permitted.[27]

Under this standard, the Tylers' "substantial relationship" with Lizelle arguably would have been sufficient to confer standing on them to assert claims on her behalf. However, the facts that: 1) Lizelle was a high school student who had a familial and dependent relationship to the Tylers; 2) the Tylers not only owned the car she was driving, but had allowed her to use it; 3) Lizelle was insured (if at all) by the Tylers' insurance policy;[28] and 4) the Tylers were named defendants in

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[26] *Id.* at 434.

[27] *Id.* at 435 (emphasis added) (citations omitted).

[28] The Tylers owned a number of vehicles that were generally kept garaged and uninsured. When one of those vehicles was to be driven, the Tylers' practice was to call their insurer and reinstate the policy on that vehicle for some period of time. The Tylers testified that Veronica made just such a call with respect to the

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both civil actions arising out of the alleged accident, establish that they were in fact protecting their own interests by opposing the criminal charges. Their potential personal liability belies Debtor's assertion that they were mere "volunteers" in the criminal proceedings, and the bankruptcy court properly found that they had standing.

C. Lizelle's Damages

Finally, Debtor argues that any award of damages to Lizelle was improper because she testified that she did not personally pay the costs of her defense. However, any error in this respect was harmless, given that the bankruptcy court awarded one sum of $96,049.41 to all three plaintiffs, jointly.[29] Rule 61 of the Federal Rules of Civil Procedure (made applicable by Federal Rule of Bankruptcy Procedure 9005), requires an appellate court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Where Debtor caused the injuries for which he is ordered to pay, his rights are not substantially affected by to whom those damages are payable. Plaintiffs may decide among themselves how the award is divided since, however they choose to do so, Debtor will still only pay once for the injuries he caused. Therefore, we deem any error in the award of damages to Lizelle along with the Tylers to be harmless.

VI. CONCLUSION

The bankruptcy court properly found that the injuries suffered by plaintiffs resulted from Debtor's willful and malicious conduct. Damages awarded for such injuries were therefore properly treated as non-dischargeable, pursuant to 11

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[28] (...continued)
Jeep, prior to the trip to Vail. However, coverage apparently did not take effect until sometime after the family returned. Therefore, plaintiffs were uninsured for purposes of any claims arising out of the alleged accident on April 3.

[29] Judgment, *in* Appx. Vol. III at 1021.

U.S.C. § 523(a)(6), and each of the plaintiffs had standing to pursue the claims asserted against Debtor. We therefore affirm the bankruptcy court's judgment in its entirety.