

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

Cite as: [unpublished]

**Naly Phaboriboune, Plaintiff v.
Samrit Sasopa, Defendant**
(In re Samrit Sasopa, Debtor)
Bankruptcy Case No. 98-35054-7
Adversary Case No. 99-3013-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

August 6, 2001

Janet E. Haakenson, Haakenson & Haakenson, Janesville, WI for Plaintiff
R. Alan Bates, Feingold & Bates, Janesville, WI for Defendant

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The plaintiff seeks a summary judgment that her claim is excepted from the debtor's discharge under 11 U.S.C. §523(a)(6). The relevant facts are not in dispute.

On July 20, 1996, the debtor physically attacked the plaintiff by grabbing and pulling her hair, kicking her in the groin, and biting off and permanently severing part of her index finger. The debtor was charged in state court under Wis. Stat. §940.19(5) with aggravated battery with intent to cause substantial bodily harm. On January 21, 1997, the debtor entered a guilty plea and was sentenced to 120 days in jail and three years probation, and ordered to undergo alcohol and drug treatment.

On July 2, 1998, the plaintiff commenced an intentional tort action against the debtor in state court. Prior to judgment being rendered, the debtor filed her chapter 7 petition on October 9, 1998. The tort action was stayed and the plaintiff filed this adversary proceeding under §523(a)(6), and sought a summary judgment, arguing that as a result of the guilty plea in the state criminal action, the debtor was collaterally estopped from contesting the willful and malicious nature of the injury that gave rise to the debt. This Court issued a memorandum decision on March 1, 2000 denying the motion on the grounds that the guilty plea did not

support the use of collateral estoppel and that material factual issues (such as debtor's assertion of self-defense) remained to be resolved.

Denied summary judgment, the parties agreed to a lifting of the stay to permit the state tort action to proceed to judgment. On June 4, 2001, after a trial, judgment was entered against the debtor in the amount of \$38,953.03. The judgment provided in pertinent part: "[t]hat[debtor] did intentionally commit battery to [plaintiff] and that [debtor's] intentional battery to [plaintiff] was the cause of [plaintiff's] injuries..."

The plaintiff now moves for summary judgment for the second time. She contends that the tort judgment supports collateral estoppel and bars the debtor from contesting the willful and malicious nature of her debt for purposes of §523(a)(6). She is correct.

The standard for summary judgment was described in In re Cole, 234 B.R. 417 (Bankr. W.D. Wis. 1999):

The movant has the burden to demonstrate that there is no genuine issue of material fact in dispute. Celotex v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). Furthermore, the evidence offered by the movant is viewed in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). However, once the Motion for Summary Judgment has been made and properly supported, Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, the party opposing the motion may not rely on the mere allegations and denials contained in its pleadings, but must submit countervailing evidence to show that a genuine issue exists for trial. Fed. R. Civ. P. 56(e). No genuine issue for trial exists if the record, taken as a whole, does not allow a rational trier of fact to find for the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 538 (1986).

Id. at 418 citing In re Balay, 113 B.R. 429, 434 (Bankr. N.D. Ill. 1990). In our case, the plaintiff, as the moving party, has the burden of proof in the first instance. Once carried, the burden shifts to the debtor to produce substantial evidence of a genuine dispute as to a material fact. Further, the Court must view all facts and indulge all inferences in the light most favorable to the debtor.

This Court has previously considered the preclusive effect of a prior Wisconsin state court judgment in a proceeding under §523(a)(6). See In re Wagner, 79 B.R. 1016 (Bankr. W.D. Wis. 1987). In Wagner, the debtor fatally struck his hired man in the head four times with an iron bar. The debtor was acquitted of first degree murder, but was found liable for battery in the civil suit brought by the deceased's widow. When the debtor filed for bankruptcy, the widow moved for summary judgment to hold the judgment non-dischargeable as a debt arising from a willful and malicious injury under §523(a)(6). She argued that the doctrine of collateral

estoppel applied and that the judgment establishing the tort of battery also established the debtor's conduct as willful and malicious.

Wagner first discussed the Supreme Court case of Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979) and subsequent cases and found that collateral estoppel was applicable to non-dischargeability actions:

For purposes of [res judicata] only, in Brown v. Felsen, 442 U.S. 127, 138, 99 S.Ct. 2205, 2212, 60 L.Ed.2d 767 (1979) the Supreme Court found sufficient congressional intent to deny res judicata effect to state court judgments in dischargeability litigation.... The Supreme Court in Brown reserved, however, the question whether [collateral estoppel] remained possible in dischargeability litigation.

Id. at 1019 quoting In re Byard, 47 B.R. 700, 701-702 (Bankr. M.D. Tenn. 1985), before noting that 28 U.S.C. §1738 required a federal court to accord a state court judgment the same preclusive effect that it would receive in the rendering court:

[T]his court is cognizant of a recent line of Supreme Court cases in which the court has re-examined the interplay between a grant of federal jurisdiction and preclusion principles. The analysis has centered on 28 U.S.C. § 1738 which provides in part:

The judicial proceedings of any court of any state ... shall have the same full faith and credit in every court within the United States and its territories and possession as they have by law or usage in the courts of such state.

In In re Byard, 47 B.R. 700 (Bankr. M.D. Tenn. 1985), a comprehensive opinion analyzing these developments, Judge Lundin explained the current state of the law as follows:

The principles of 'full faith and credit' under § 1738 have undergone intensive re-examination and clarification in several recent Supreme Court opinions. The rule as stated by the Supreme Court is that 'a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered....'

A recent Supreme Court case addressing the application of section 1738 is Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). Marrese dictates that federal courts must determine a preclusive effect of a state court judgment under a two-part test.

First, it is necessary to examine state preclusion law in determining the preclusive effect of a state court judgment. "Only if state law indicates that a particular claim or issue would be barred" is it necessary to move to the second part of the test--whether an exception to section 1738 should apply....

Id. at 1018-1019 (citations omitted). With that background, Wagner articulated the following test for determining whether a prior Wisconsin state court judgment would have collateral estoppel effect in a non-dischargeability proceeding:

To determine the application of collateral estoppel to this case we must first determine what preclusive effect, if any, Wisconsin courts would give to the [state court] judgment. Then, if Wisconsin would grant preclusive effect to the judgment, we must see whether any exemption to section 1738 applies. Under Wisconsin law four basic requirements must be satisfied before collateral estoppel can be applied:

1. The prior judgment must be valid and final on its merits;
2. There must be identity of issues;
3. There must be identity or privity of parties;
4. The issues in the prior action asked to be invoked must have been actually litigated and necessarily determined.

Id. at 1019-1020 (citations and footnote omitted). The parties in Wagner agreed that all the elements of this test were satisfied except for the identity of issues element:

In order to satisfy the identity of issues requirement the paramount considerations and the burdens of proof must be the same in both proceedings. In State ex rel. Flowers v. H & SS Department, 81 Wis.2d 376, 260 N.W.2d 727 (1978) the Supreme Court of Wisconsin explained that "[t]he second proceeding must involve ... the same bundle of legal principles that contributed to the rendering of the first judgment...."

Under section 523(a)(6), an injury may be malicious "if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word 'willful' means 'deliberate or intentional,' a deliberate and intentional act which necessarily leads to injury...." The general rule is that "liabilities arising from assault and battery are generally considered as founded upon a willful and malicious injury and therefore within the exception...."

In addition, ... the jury was instructed pursuant to Wis. JI-civil-2005 (Adapted)

which provides in relevant part:

A battery is the unlawful and intentional use of force and violence upon the person of another, resulting in the infliction of physical harm to such other. The use of force or violence in any degree upon the person of another is unlawful when no permission for the bodily contact has been given by the person upon whom such force or violence has been committed.

An essential element of a battery is that the use of force or violence upon the person of another must have been intentional, that is, consciously directed at the person of such other by the one charged with the commission of a battery. One who through carelessness or negligence inflicts physical harm upon another without an intent to invade the person of another or to cause bodily contact with such other is not guilty of battery.

The necessary elements of a battery, all of which must be found to have existed before you may find that a battery has been committed, are these:

- (1) An unlawful use of force or violence upon another.
- (2) The intentional direction of such force or violence at the person of another.
- (3) The sustaining of bodily harm by the person against whom such force or violence is directed.

As the jury instructions standards indicate, the paramount considerations in the [state court] action and a dischargeability determination pursuant to section 523(a)(6) are virtually identical. The defendant has questioned whether the state court burden of proof is the same as the burden of proof in a dischargeability proceeding. The jury in the state court action was held to a standard of "clear and convincing evidence" in reaching its determination of battery, which is the same burden as is applied under ... § 523(a)(6).¹ However, the damages were determined using a lesser standard. Damages are a necessary element of liability in a tort claim. That difference in the burden of proof does not destroy the identity of issues in this case. Under section 523(a)(6) the nature of the act gives rise to nondischargeability, not the amount of damages resulting from the act.

¹Although the analysis in Wagner remains valid, its discussion of the burden of proof under § 523(a)(6) has since been invalidated by the Supreme Court's decision in Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991), which held that a preponderance of evidence standard applies to all § 523(a) actions.

Id. at 1020-1021 (citations and footnotes omitted).

In our case, three of the four elements of the Wagner test are clearly satisfied. First, because the time to appeal has expired, the state court judgment is a now valid and final judgment. Second, both the state court and non-dischargeability actions involve the same parties. Third, the same issues are involved in both actions, i.e. whether the debtor acted intentionally and for the purpose of causing harm to the plaintiff, and these issues were actually litigated in the state proceeding. For example, in its findings of fact, the state court specifically found:

10. That [debtor] intended to hit the Plaintiff, intended to continue to fight, that she hung on to Plaintiff's hair and made it difficult for the fight to be broken up, as shown by the pictures, and that the [debtor] bit off the Plaintiff's finger. For a human to bite off another human's finger to the point it's severed, it is hard to believe that it was not done with intent, someone would have to bite so hard that that would be done, and so I hereby find [that] the biting of Plaintiff's finger was an intentional act by the [debtor].
11. That the force which [debtor] used was not reasonable under the circumstances, and that even if I were to believe that Plaintiff started the fight by throwing a purse, that biting off a finger under those circumstances is not a reasonable use of force under the circumstances, so I find that self-defense does not apply here.

Turning to the identity of the issues element, Wagner instructs that this element requires the paramount considerations and the burdens of proof to be the same in both proceedings. In our case, the state battery and bankruptcy non-dischargeability actions clearly involve the same paramount considerations. But there exists uncertainty as to the burden of proof. In the non-dischargeability action, the applicable burden of proof is the preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991). That is not as clear in the state court action. The judgment itself offers no guidance, but a review of Wisconsin's law on the burden of proof in civil battery cases suggests that the state court applied an even higher burden of proof.

In State v. Walberg, 109 Wis.2d 96, 325 N.W.2d 687 (1982), the Wisconsin Supreme Court explained that:

There are two different burdens of proof that apply in civil actions: fair preponderance of the evidence and clear and convincing evidence. The fair preponderance standard applies in ordinary civil actions. The clear and convincing standard applies in cases where public policy requires a higher standard of proof than in the ordinary civil action. This so-called middle burden

of proof has been required in such cases as fraud, undue influence, and prosecutions of civil ordinance violations which are also crimes under state law.

Id. at 102, 325 N.W.2d at 690-691. In a subsequent case, Kruse v. Horlamus Industries, Inc., 130 Wis.2d 357, 387 N.W.2d 64 (1986), the Wisconsin Supreme explained the quantum of proof necessary to sustain the middle burden:

In Wisconsin, the middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases but a lesser degree than that required to convict in a criminal case. Wangen v. Ford Motor Co., 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980). This court has generally required the middle burden of proof "[i]n the class of cases involving fraud, of which undue influence is a specie, gross negligence, and civil actions involving criminal acts." Kuehn v. Kuehn, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960). In general, "clear preponderance" has only been considered substantially equivalent to "clear, satisfactory and convincing evidence" where the civil case involved a crime, fraud or gross negligence. See, e.g., Trzebietowski v. Jereski, 159 Wis. 190, 149 N.W. 743 (1914) (civil case involving a crime), and Hafemann v. Seymer, 191 Wis. 174, 210 N.W. 373 (1926) (gross negligence), both cited in Kuehn, supra, 11 Wis.2d at 27, 104 N.W.2d 138. "The middle standard for burden of proof was established by this court as applicable to more serious allegations than factual issues in the usual civil case.... This court has stated that 'a greater degree of certitude is required before there is a finding against a defendant who will be subjected to the stigma attached to the commission of certain classes of acts.' ..." (Citations omitted.) Wangen v. Ford Co., 97 Wis.2d at 300, 294 N.W.2d 437.

Id. at 67, 387 N.W.2d at 363-364 (footnote omitted).

As the foregoing cases indicate, the middle burden requires evidence that is clear and convincing and applies to civil actions that involve more serious allegations than those present in ordinary civil actions. Thus, the middle burden is deemed appropriate in civil actions involving fraud, gross negligence and criminal acts. In our case, the civil battery case involved conduct for which criminal liability could attach. Hence, it is probably the type of case in which the middle burden is appropriate. At least one court has so held. See Macherey v. Home Ins. Co., 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994) (upholding trial court's use of the middle approach in a civil battery case).

Whichever burden the state court applied, the identity of the issues element of the Wagner test would be satisfied. Neither state burden is lower than that required to be applied in bankruptcy court determinations under §523(a)(6).

There remains the second prong of the Wagner test:

The second step of the Marrese analysis would require this court to determine whether an implied or express repealer to section 1738 existed. In Marrese, the court stated that "[r]esolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action. Our previous decisions indicate that the primary consideration must be the intent of Congress...." The trend has been for the Supreme Court to take a restrictive and narrow view of the implied or express repealer to section 1738....

At least one commentator who has exhaustively reviewed collateral estoppel in a dischargeability proceeding pursuant to sections 523(a)(2), (4), and (6) has suggested a balancing of policy considerations between preclusion and exclusive federal jurisdiction.... The policy considerations behind collateral estoppel are judicial economy, promoting reliance on judicial decisions, finality, and strengthening comity interests between federal and state courts.... The policy in favor of exclusive federal jurisdiction is founded on the desire for uniformity and certainty of decisions by experienced courts.

"[W]here the policies behind preclusion are furthered by reliance on the existing judgment, and where the policies supporting exclusive jurisdiction have no application, relitigation should not be permitted...." In this case federal policies favoring exclusive federal jurisdiction would not be curtailed if collateral estoppel were to be applied. This is not a case where the state court has no experience dealing with the issues involved. State courts regularly deal with battery and wrongful death suits. The case was vigorously litigated for eleven days on legal standards that are essentially identical to those of the federal courts. The risk of inconsistent lines of precedent or idiosyncratic results is nil.

The requirements for the application of collateral estoppel to the present case have been met. The issue of the willfulness and malice of the injury ... was thoroughly litigated. The verdict, based on jury instructions which are essentially identical to the standards required in section 523(a)(6), found that a battery had been committed. There is no doubt that [debtor's] actions ... constituted a willful and malicious injury.... Thus, [debtor] is barred from relitigating that issue in this forum.

Id. at 1021-1022 (citations and footnotes omitted).

As in Wagner, the balancing of policy considerations between preclusion and exclusive federal jurisdiction in this case tips in favor of permitting collateral estoppel effect to attach to the state court judgment. The state court ruled on a matter of state law and found that the

debtor had intentionally committed battery to the plaintiff. Further, the evidence required to secure the state court judgment was subjected to the same or a higher standard of proof than that required for non-dischargeability. Thus, the state judgment must be given collateral estoppel effect and the debtor is barred from relitigating the willful and malicious nature of the plaintiff's debt for purposes of §523(a)(6). The debt due the plaintiff is not dischargeable in this case. It may be so ordered.