

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
PAUL D. LEON,	§	CASE NO. 00-36656-SAF-7
DEBTOR.	§	
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JOSE M. CALVILLO,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 01-3026
	§	
PAUL D. LEON,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, Jose Calvillo seeks a judgment declaring that \$100,000 of a judgment entered in the state court is not dischargeable pursuant to 11 U.S.C. §523(a)(6). Paul D. Leon, the debtor, disagrees. The court conducted a trial on September 26, 2001. The parties submitted the matter for adjudication based on seven exhibits and the argument of counsel.

The determination of the discharge of a debt is a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§157(b)(2)(I) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rule 7052.

Calvillo filed a medical malpractice law suit against Leon in the County Court at Law Number 3 for Dallas County, Texas, case no. 98-8819-C. Among other claims, Calvillo alleged a claim against Leon for gross negligence under Texas law. Leon filed an answer to the complaint, denying liability.

Calvillo filed a motion for summary judgment. To support the motion, Calvillo relied on Leon's failure to respond to his request for admissions. Calvillo sought a judgment of \$950,000. In the request for admissions, Calvillo requested that Leon admit that Calvillo should be awarded \$100,000 as damages for Leon's gross negligence.

Leon filed a petition for relief under Chapter 13 of the Bankruptcy Code. The bankruptcy court granted relief from the automatic stay to allow the state court litigation to proceed. Thereafter, the state court granted Calvillo's motion for summary judgment, ordering that Calvillo obtain a judgment of \$950,000. Calvillo obtained an abstract of judgment in that amount.

Following the dismissal of his Chapter 13 bankruptcy case, Leon filed the underlying case under Chapter 7 of the Bankruptcy Code. In this adversary proceeding, Calvillo contends that \$100,000 of the \$950,000 of the state court judgment must be excluded from Leon's discharge under 11 U.S.C. §523(a)(6).

Calvillo contends that based on the lack of a response to the request for admissions, \$100,000 of the judgment represents

damages for gross negligence. As such, Calvillo asserts that the debt is for willful and malicious injury under §523(a)(6). Leon responds that Calvillo merely obtained a money judgment from the state court, which is dischargeable.

Exceptions to discharge should be construed in favor of the debtor, since the Bankruptcy Code provides a fresh start to debtors unhampered by pre-existing financial burdens. In re Davis, 194 F.3d 570, 573 (5th Cir. 1999). But, the Code does not create a haven for wrongdoers. Rather it provides the “‘honest but unfortunate debtor’ who surrenders his property a new opportunity in life unhampered by pre-existing debt.” Id. at 574. The creditor objecting to the discharge of a debt has the burden of establishing the exception by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-88 (1991).

Calvillo contends that \$100,000 of the judgment must be excepted from discharge under 11 U.S.C. §523(a)(6). Section 523(a)(6) excepts from an individual debtor’s discharge a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity[.]” 11 U.S.C. §523(a)(6). A “willful” injury requires “a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). To establish an intentional injury, the creditor must establish “either an objective substantial certainty of harm or a subjective motive to

cause harm." In re Miller, 156 F.3d 598, 606 (5th Cir. 1998), cert. denied, 526 U.S. 1016 (1999). In addition to being willful, the injury must be "malicious." 11 U.S.C. §523(a)(6). Malicious means "without just cause or excuse." In re Garner, 56 F.3d 677, 681 (5th Cir. 1995). The Supreme Court, in Kawaauhau, neither collapsed the malicious definition into the willful injury definition nor otherwise erased the words "and malicious" out of the statute. In re Grisham, 245 B.R. 65, 71 (Bankr. N.D. Tex. 2000).

Calvillo has tried this adversary proceeding on the state court record. Presumably, Calvillo would have this court apply the doctrine of issue preclusion to the state court record. The state court judgment awards a money judgment of \$950,000. While Leon did not respond to the request for admissions that his gross negligence caused \$100,000 of damages, the state court did not make specific, subordinate, factual findings on the identical dischargeability issues of willful and malicious injury. Consequently, the state court judgment does not preclude the litigation of the §523(a)(6) claim in this court. Matter of King, 103 F.3d 17, 19-20 (5th Cir. 1997).

Gross negligence in Texas does not equate to willful and malicious conduct under §523(a)(6). As a prerequisite to an award of exemplary damages in Texas, a plaintiff may establish the gross negligence of a defendant. Garner, 56 F.3d at 681.

Gross negligence is an entire want of care that would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person affected by it. Jones v. Texaco, Inc., 945 F.Supp. 1037, 1048 (S.D. Tex. 1996) (citing Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981)). Conscious indifference is not the same as a deliberate or intentional injury. Calvillo has presented no evidence that Leon's acts had a substantial certainty to cause harm or that he acted with a subjective motive to cause harm. Calvillo has presented no evidence that Leon acted without either just cause or excuse. Leon's deemed admissions to gross negligence before the state court does not equate to evidence of an injury under §523(a)(6).

Calvillo argues that the operative Texas pattern jury instructions for negligence cases would have a state court use a malice definition for a determination of damages if a jury found gross negligence. As defined by Texas law, malice would cover the §523(a)(6) definition. Garner, 56 F.3d at 681. However, Calvillo did not request an admission of malice by Leon. The state court made no specific finding of malice. The state court made no specific finding of an award of punitive damages. Calvillo could have presented evidence at this trial, but failed to do so.

Consequently, Calvillo has failed to meet his burden of proof by a preponderance of evidence. Accordingly, the debt is discharged.

Based on the foregoing,

IT IS ORDERED that the complaint is **DISMISSED**.

Signed this _____ day of November, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge

Cover- Asensio and Allen