



J. Craig Whitley
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division**

IN RE:

MARTHA MEDLOCK GALLAGHER,

Debtors.

**Case No. 02-33036
(Chapter 7)**

SUSAN F. KEEVER,

Plaintiff.

Adv. Proc. No. 02-3243

vs.

MARTHA MEDLOCK GALLAGHER,

Defendant.

ORDER

This matter came before the Court on the Plaintiff's Motion for Summary Judgment filed December 21, 2005 and the Defendant's Response of January 11, 2006. A hearing was held on January 12, 2006.

Having considered the matter, the Court concludes that the Plaintiff's Motion should be GRANTED.

STATEMENT OF FACTS

1. Defendant/Debtor, Martha Medlock Gallagher (“Gallagher”), filed a voluntary Chapter 7 case in this Court on September 26, 2002.

2. On the date of bankruptcy, Gallagher was embroiled in state court litigation with the Plaintiff, Susan F. Keever (“Keever”).¹ Keever was suing Gallagher for alienation of affections and criminal conversation with Keever’s husband. Gallagher’s bankruptcy filing stayed the state litigation.

3. On December 26, 2002, Keever filed an adversary proceeding against Gallagher in this Court.

4. In the bankruptcy action, Keever asserted the same tort claims as those raised by the state suit. She also requested that the resulting liability be declared nondischargeable as a willful and malicious injury in accord with 11 U.S.C. § 523(a)(6).

5. By a Consent Order entered in Gallagher’s bankruptcy case and dated June 29, 2004, the parties agreed that the two actions presented identical issues and agreed to return to Gaston County Superior Court to try the state tort claims before a jury. They further agreed that should the state action result in a monetary judgment for Keever, the parties would then return to bankruptcy court to consider whether that debt was dischargeable.

6. The matter went to trial in Gaston County Superior Court and the jury returned a verdict upon questions in Keever's favor. The jury found both alienation of affections and criminal conversation. Keever was awarded actual damages in the amount of \$50,000. Further, upon an express finding that Gallagher had maliciously and wrongfully injured

¹ See *Susan Fortenberry Keever v. Martha Gallagher*, 02-CVS-2090 (Gaston County).

Keever by interfering with a genuine marital relationship between Keever and her spouse, the jury also awarded punitive damages of \$75,000. Superior Court Judge Patti entered a judgment consistent with the jury's verdict on May 5, 2005.

7. Thereafter, Keever returned to this Court and moved for summary judgment on the dischargeability issue. Keever asserts that the state jury necessarily found that Gallagher had wronged her in a way that constituted a "willful and malicious injury" as per 11 U.S.C. § 523(a)(6).²

8. Gallagher opposed the motion arguing at hearing that the state jury was not asked to consider whether she had intended to harm Keever and therefore, it had not made findings sufficient to support a "malicious" injury determination. Gallagher also argued that with the jury having since been dismissed, the matter was closed and no court may now consider the matter.

ISSUES PRESENTED

9. Under principles of collateral estoppel, does the state court judgment preclude further litigation as to whether Keever's debts were occasioned by a "malicious" injury within the meaning of Section 523(a)(6)?

10. If not, did the release of the state jury foreclose further proceedings in this court to determine whether these were "malicious" injuries?

ANALYSIS

11. Keever has the burden of proof in this dischargeability action. The standard is "preponderance of the evidence." *Grogan v. Garner*, 498 U.S. 279, 287-88 (1991).

² See Motion dated December 21, 2005.

12. To succeed on her summary judgment motion, Keever must demonstrate that “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); See Fed. R. Bankr. P. 7056. A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Equal Employment Opportunity Comm’n v. Dollar Gen. Corp.*, 252 F.Supp.2d 277, 282 (M.D.N.C. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

13. This bifurcated action, with one part determined in state court and the remainder in bankruptcy court is somewhat awkward but it is in keeping with the strong judicial preference that domestic disputes be tried in state, and not federal, court. See *Robbins v. Robbins*, 964 F.2d 344, 345-6 (4th Cir. 1992); *Claughton v. Claughton*, 33 F.3d 4, 5 (4th Cir. 1994).

14. Section 523(a)(6) excepts from discharge any 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).

15. Keever maintains that in finding Gallagher to have alienated the affections of her husband and also having committed criminal conversation with him, the state court made the necessary findings to support a legal determination that this was a “willful and malicious” injury. Effectively, Keever is arguing collateral estoppel.

16. Collateral estoppel precludes relitigation of an issue decided previously in a prior judicial proceeding, if the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995).

17. Under full faith and credit, a federal court must afford a state judgment the same preclusive effect that a state court would give that judgment. 28 U.S.C. §1738. *In re Heckert*, 272 F.3d 253, 257-58 (4th Cir. 2001); See *In re Ansari*, 113 F.3d 17, 19 (4th Cir. 1997).

18. Collateral estoppel applies to bankruptcy dischargeability actions. *Grogan v. Garner*, 498 U.S. 279, 285 n. 11 (1991). In such cases, the federal court uses the forum state's law of collateral estoppel. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82, (1982). Accordingly, North Carolina law applies.

19. In this case, choice of law is immaterial in that the elements of collateral estoppel under North Carolina law and bankruptcy law are basically identical. These are: (1) an identity of parties; (2) an identity of issues; (3) issues which were actually and necessarily litigated; and (4) a final decision. Compare *Combs v. Richardson*, 838 F.2d 112, 115 (4th Cir. 1988) with *In re Wilkerson*, 57 N.C. App. 63, 70, 291 S.E.2d 182, 183 (1982); See *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Cromwell v. Sac County*, 94 U.S. 351, 353 (1877)).

20. In the current case, the parties admitted identity of parties and of issues in the Consent Order dated June 29, 2004. There was a final decision by the State Court establishing Keever's debt, its nature and its amount. The only question remaining is whether the state court tort ruling necessarily determined that this debt was the product of a "willful and malicious" act, as defined in Section 523(a)(6).

21. By "willful injury," Section 523(a)(6) refers to an injury which itself was "deliberate or intentional" and not simply an intentional act that resulted in an injury.

Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). At hearing, Gallagher conceded that the state judgment determined that this was a “willful” injury.

22. Keever and Gallagher disagree on whether the state court ruling determined that this debt was the product of Gallagher’s malice. Keever argues --- it is a logical argument given that the state verdict judgment states that Gallagher “maliciously and wrongfully injure[d]” Keever’s relationship with her spouse.³ However, Gallagher argues that actual malice is not a necessary element of alienation of affections⁴ and as such there can be no collateral estoppel effect arising from the state verdict. In support, she cites a recent decision of the 8th Circuit Bankruptcy Appellate Panel (“BAP”). *In re Stage*, 321 B.R. 486 (B.A.P. 8th Cir. 2005).

23. Factually, *Stage* is similar to the present case. A Missouri state court found Stage to have alienated the affections of Osborne’s spouse and entered a money judgment in Osborne’s favor. Stage filed Chapter 7. Osborne then objected to the dischargeability of this debt under Section 523(a)(6) as a “willful and malicious injury.” Osborne also argued that the Missouri jury verdict collaterally estopped Stage from relitigating the “willful and malicious” issues in bankruptcy court. The bankruptcy judge agreed with Osborne, but was reversed on appeal by the BAP.⁵

24. In making its ruling, the BAP analyzed Missouri tort law and then applied it to Eighth Circuit bankruptcy precedent. In Missouri, alienation of affection requires a

³ See May 5, 2005 State Court Judgment, para. 1(a) and 2.

⁴ The elements of criminal conversation (sexual relations with a married person) contain no scienter requirement. As such, the discussion will focus on alienation of affections until we reach the question of punitive damages, where it is an element of both torts.

⁵ This same issue is currently on appeal at the 8th Circuit Court of Appeals in a separate case. *See Jamrose v. D'amato*, 2005 WL 3749823.

finding of (1) wrongful conduct of the defendant; (2) plaintiff's loss of the affections or consortium of his or her spouse; and (3) a causal connection between the defendant's conduct and the plaintiff's loss. *Id.* at 493.

25. The bankruptcy court had concluded that "wrongful conduct" under state law was equivalent to "malice" for Section 523(a)(6) purposes. Accordingly, it had found issue preclusion and granted Osborne's motion for summary judgment, holding the debt nondischargeable.

26. The BAP found error in this analysis. "Wrongful conduct" under Missouri case law includes both actual malice (intentional acts, intent to alienate the affections of the plaintiff's spouse) and implied malice (wrongful acts, which irrespective of intent have as a probable and natural consequence the alienation of a spouse's affections.) *Id.* at 495-496.

27. However, Eighth Circuit bankruptcy precedent deems "implied malice" insufficient for Section 523(a)(6) purposes: "Malice means the debtor intended to harm the creditor ... at least in the sense that the debtor's tortuous conduct was certain or almost certain to cause harm." *Id.* at 493.

28. With the 8th Circuit requiring a specific intent to harm the creditor and since this intent was not a necessary element of the Missouri tort law action, the BAP's decision was clear. It concluded that Osborne's state judgment lacked a collateral estoppel effect in Stage's dischargeability action. Malice would have to be tried in bankruptcy court.

29. North Carolina's tort of alienation of affection is similar to Missouri's. It requires: (1) plaintiff and spouse were happily married and a genuine love and affection existed between them; (2) that love and affection was alienated and destroyed; and (3) the

wrongful and malicious acts of defendant produced the alienation of affections. *Chappell v. Redding*, 67 N.C. App. 397, 399, 313 S.E. 2d 239, 241 (1984).

30. Since “malice” is an element of the tort, one might assume that this decides the matter in Keever’s favor. However, North Carolina, like Missouri, recognizes implied malice as supporting alienation of affection, “The “malicious acts” required have been defined as acts constituting ‘unjustifiable conduct causing the injury complained of’.” 17 N.C. Index 4th Husband and Wife Section 56 (2005), citing *Chappell*, 67 N.C. App. at 400, 313 S.E.2d at 241; *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980), disc. review denied, 311 N.C. 399, 319 S.E.2d 268 (1984).

31. This being so, the current motion might end with a finding of no preclusive effect just as in *Stage*. However, two distinctions between the cases dictate a different result.

32. First, unlike the Missouri plaintiff, Keever obtained a punitive damages award in state court. In order to recover punitive damages in an alienation of affections and criminal conversation case, North Carolina law requires a showing of “circumstances of aggravation in addition to the malice implied by law, from the conduct of the defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages.” *Chappell*, 67 N.C. App. at 403, 313 S.E.2d at 243. The conduct must be aggravated, malicious, or of a wanton character. *Id.* In short, it requires actual malice of the type described in *Stage*.

33. The Gaston County jury considered and found such “circumstances of aggravation.” The jury also must have considered this to be a very aggravated case. The punitive damages award was greater than Keever’s actual damages award (\$75,000 in punitive as opposed to \$50,000 actual).

34. With this distinction, even under Eighth Circuit law, Keever's judgment would collaterally estop Gallagher from relitigating "maliciousness" at this point in bankruptcy court.

35. The second problem with Gallagher's argument reveals itself in the proceeding paragraph. This case is not controlled by Eighth Circuit precedent; rather, it is the precedent of the Fourth Circuit Court of Appeals that applies.

36. The Fourth Circuit employs a broader definition of "malice" in Section 523(a)(6) cases than does the Eighth Circuit, holding that legally implied malice is sufficient to justify denial of discharge of a debt. *In re McNallen*, 62 F.3d 619, 625-6 (4th Cir. 1995); *In re Stanley*, 66 F.3d 664 (4th Cir. 1995); *St. Paul Fir & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1010 (4th Cir. 1985).

37. *McNallen* involved a debtor who before bankruptcy had come to the misguided conclusion that his mother, an Alzheimer's patient, was not incapacitated. Acting on his belief, McNallen attempted to remove mom from her nursing home. His sister, the mother's attorney-in-fact, sued McNallen. A Texas state jury found McNallen to have committed an intentional tort against his mother and awarded her both actual and punitive damages. McNallen then filed Chapter 7. In the Section 523(a)(6) dischargeability suit that followed, the sister argued that the Texas judgment had a preclusive effect on the bankruptcy issues of "willful and malicious." McNallen on the other hand contended that the Texas court had not found actual malice and so there could be no collateral estoppel.

38. The Fourth Circuit agreed with the sister. While actual malice might be in doubt, there was no question that the Texas jury had found that McNallen's conduct legally

“outrageous,” in that it “transgressed the bounds of decency.” At a minimum, the jury had found implied malice. *McNallen*, 62 F.3d at 626.

39. Based on this finding the *McNallen* court concluded that collateral estoppel prevented relitigation of the “malice” issue in the bankruptcy dischargeability action. It did so, even while noting that “willful and malicious” is a legal issue and even though exceptions to discharge are narrowly construed. *McNallen*, 62 F.3d at 625; accord *Combs v. Richardson*, 838 F.2d 112, 113 (4th Cir. 1988).

40. In the case of *Vaughn*, the Fourth Circuit reviewed and then reaffirmed its earlier Section 523(a)(6) decision. *St. Paul Fir & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1010 (4th Cir. 1985). In *Vaughn*, the Court concluded that “malice” included both specific and implied malice as demonstrated by “acts and conduct of the debtor in the context of the surrounding circumstances.” *Vaughn*, 779 F.2d at 1010.⁶

41. These Fourth Circuit cases control the current dispute. The Gaston County jury determined malice—first, when it found for Keever on the alienation of affection claim and then when it awarded punitive damages on both causes.⁷ This Court is of the opinion that the Gaston County jury found actual malice, not implied. However, even if Gallagher were correct and the jury only found legally implied malice that is sufficient for our purposes. Either way, Gallagher is collaterally estopped from relitigating this point in bankruptcy court.

⁶ The next month the Circuit Court reiterated its view in another Section 523(a)(6) case. Malice does not mean the same thing for nondischargeability purposes as it often does in other contexts; debtor may act with malice even though he bears no subjective ill will toward and does not specifically intend to injure, the creditor. *In re Stanley*, 66 F.3d 664, 667 (4th Cir.1995).

⁷ As noted *supra*, criminal conversation does not require a requisite intent. *Misenheimer v. Burris*, 169 N.C. App. 539, 541, 610 S.E.2d 271, 272-3 (2005). However, like alienation of affections, if punitive damages are to be awarded there must be “circumstances of aggravation” present. *Nunn v. Allen*, 154 N.C. App. 523, 538-9, 574 S.E.2d 35, 45 (2002).

42. This court rejects Gallagher's assertion that malice was not determined in the state action. Accordingly, her second argument (to wit, since the jury was dismissed without determining malice, no court can now consider the issue) is moot. Even so, a comment or two is in order.

43. First, Gallagher agreed in the consent order that the tort was to be tried in state court and that if Keever succeeded this Court would determine dischargeability. Thus, her second argument is contrary to her agreement.

44. Second, the state action either determined malice for the present purposes or it did not. This court holds that it did. However, if one accepts Gallagher's argument that the state action did not determine malice, there could be no preclusive effect on the bankruptcy malice issue; it would still exist and would have to be tried in this Court under Section 523(a)(6). Gallagher can't have it both ways.

ORDER

For these reasons, the Court hereby **GRANTS** Keever's Motion for Summary Judgment. The Debts owed to her by Gallagher are not discharged by the latter's bankruptcy case.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order.

United States Bankruptcy Court