

# In the United States Bankruptcy Court

## for the Southern District of Iowa

---

ANDREW JUSTIN McSORLEY

*Debtor(s).*

Bankruptcy No. 05-05911

Chapter 7

---

JEREMY A. BROKAW; JOEL  
BROKAW and KARMA BROKAW

*Plaintiff(s)*

Adversary No. 05-30213

vs.

ANDREW JUSTIN McSORLEY

*Defendant(s)*

---

### ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

---

This matter came before the undersigned on October 5, 2006 pursuant to assignment. Steven Hahn appeared for Debtor Andrew J. McSorley. Martin Diaz appeared for Plaintiffs Jeremy, Joel and Karma Brokaw. After the presentation of evidence, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and (J).

#### STATEMENT OF THE CASE

Plaintiffs, Jeremy Brokaw and his parents, contend that Debtor Andrew McSorley is not entitled to discharge their personal injury claim for physical harm and damages pursuant to 11 U.S.C. § 523(a)(6). More specifically, the Brokaws allege that on January 13, 2004, Debtor struck Jeremy with his elbow or fist during a high school basketball game. They allege that such action was willful and malicious, thereby precluding discharge.

#### FINDINGS OF FACT

This adversary action stems from a personal injury suit that Plaintiffs filed against Debtor in Iowa District Court in Henry County on July 6, 2005. The suit alleges Debtor assaulted Jeremy during a high school basketball game on January 13, 2004. Debtor was in his senior year of high school, playing varsity basketball for Winfield-Mt. Union High ("Winfield"). Jeremy was a junior, playing on the varsity basketball team for the Iowa Mennonite School ("IMS").

Plaintiffs offered two exhibits consisting of video footage of the game, both of which were admitted into evidence. The first exhibit was a recording of the entire game; the second exhibit was a two-minute segment of the third quarter, during which the incident in question occurred. The two-minute segment was viewed and analyzed during trial. It was within this time frame that Debtor's conduct became increasingly aggressive, culminating with the alleged assault on Jeremy.

The footage shows Debtor "undercutting" an IMS player who was performing a layup. That is, the IMS player had left his feet with the ball in close scoring proximity to the basket when Debtor ran under him, swinging his elbow. This action knocked the IMS player's feet out from beneath him, causing him to fall directly to the floor. A referee called Debtor for a personal foul for this conduct.

After the IMS player took his foul shots, Winfield received possession of the ball. During the inbounding of the ball,

Debtor can be observed forcefully swinging his elbow towards the head of another IMS player. Debtor did not make contact with the player and the referee closest to the players did not see the incident. However, the referee testified at trial that had he seen the Debtor's actions, he would have called a technical foul on the Debtor due to the violent nature of his actions.

A short while later, the incident giving rise to Plaintiffs' personal injury suit occurred. Winfield obtained possession of the ball after a missed shot by a member of the IMS team. Debtor's teammates cleared the ball to their end of the court to obtain offensive scoring position. Jeremy was on defense, guarding Debtor in the corner of the court, between the three point line and the basket; the ball was not near these players and Debtor was not in position to receive a pass. Debtor and Jeremy were facing each other when Debtor pivoted about 180 degrees, turning towards Jeremy's direction, while swinging in a forward motion and striking Jeremy's head. Because of the quality of the film, it is impossible to see whether Debtor's right elbow or fist struck Jeremy above his left ear. Debtor's momentum carried him a full 360 degrees, returning him to his original position. The blow knocked Jeremy to the floor. The referee was positioned on the baseline and testified that he witnessed this activity and immediately called a technical foul on Debtor. Neither player reentered the game; Debtor was ejected due to his conduct and Jeremy's injury prevented him from continuing play.

Plaintiffs subsequently filed a personal injury lawsuit against Debtor, seeking actual damages for medical expenses as well as physical and mental pain. They also seek punitive damages. The lawsuit was automatically stayed when Debtor filed his bankruptcy petition. The parties have jointly requested that this Court determine the dischargeability of the claim should a verdict be entered against Debtor in the personal injury suit. Plaintiffs also request that the Court refer the suit back to the Iowa District Court for resolution of the damages claim.

### CONCLUSIONS OF LAW

Plaintiffs assert Debtor willfully and maliciously inflicted injury upon Jeremy, and that any amount of damages recovered through the personal injury suit should be excepted from discharge pursuant to § 523(a)(6) of the Bankruptcy Code. This section provides, in pertinent part:

(a) discharge under section 727 . . . of this title does not discharge an individual debtor from any debt...

(6) 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). Plaintiffs have the burden of proving the elements of their claim under § 523(a) by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). "Willful" and "malicious" are two separate elements and Plaintiffs must prove each in order to except the debt from discharge. In re Scarborough, 171 F.3d 638, 641 (8th Cir. 1999).

The "willful" element of § 523(a)(6) requires Plaintiffs to prove "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis in original). Reckless or negligent conduct is not sufficient. Id. at 62.

The "malicious" element requires Plaintiffs to show Debtor's conduct was targeted at Jeremy, at least in the sense that the conduct was certain or almost certain to cause him harm. In re Madsen, 195 F.3d 988,989 (8th Cir. 1999). The standard of proof for malice does not require spite, ill will, or personal animosity. In re Fors, 259 B.R. 131, 137 (B.A.P. 8th Cir. 2001).

### RELEVANCE OF VIDEOTAPE EVIDENCE

At trial, Debtor objected to the admission of Plaintiffs' Exhibit 2; the two-minute video segment. Debtor had no objection to the Court viewing the entire game, but felt the two-minute video segment was taken out of context. Debtor asserted that conduct captured during the two minute time frame, such as the undercutting incident, was not relevant. The Court noted this objection subject to later resolution.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The Court has "broad discretion in determining the relevance of a given item of evidence." United States v. Wilson, 787 F.2d 375, 389 (8th Cir. 1986). However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Generally, "the balance of Rule 403 weighing should be struck in favor of admission." Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1244 (8th Cir. 1983).

After having viewed the two-minute clip, as well as the entire game, the Court concludes that Exhibit 2 is relevant and its probative value substantially outweighs any unfair prejudice caused by highlighting a portion of the game. Plaintiffs assert that Debtor's conduct was willful and malicious. Exhibit 2 gives insight into the Debtor's mental state in the moments before he allegedly assaulted Jeremy. Further, the conduct captured within the time frame of Exhibit 2 assists in the determination of Debtor's intent, a crucial element to determining dischargeability in this case. Accordingly, Debtor's objection to Exhibit 2 is overruled.

## ANALYSIS

Debtor argues that in deciding whether his conduct was willful and malicious, the Court must consider the context in which the incident occurred. In his pre-trial statement, Debtor asserts that Jeremy assumed the risks of the sporting event, including the contact that occurred between the players. However, "a team sport participant generally assumes unintentional injuries caused by another participant; [not] injuries inflicted intentionally." Leonard v. Behrens, 601 N.W.2d 76, 79-80 (Iowa 1999).

While incidental contact, and sometimes injury, is inherent in any sport, the Court concludes that the injury inflicted by Debtor was willful. Debtor's conduct is documented by video footage of the game. In the moments before the incident occurred, Debtor's behavior manifested an intent to cause injury. He purposefully undercut an IMS player going up for a layup. Deliberate undercutting is recognized as a dangerous fouling technique due to the high risk that injury will be inflicted upon the undercut player. Additionally, Debtor swung a high elbow in a punch-like manner at another IMS player, when the referees were unable to see his actions.

When the incident involving Jeremy occurred, action surrounding the ball was on the opposite side of the court. The two players were isolated from the center of play; Debtor's action was not a tactical effort to position himself for a pass or to free himself from his defender. The video footage illustrates that Debtor purposefully swung forcefully at Jeremy's head. Plaintiffs have demonstrated by a preponderance of the evidence that Debtor was intent on inflicting "deliberate or intentional injury." Kawaauhau, 523 U.S. at 61.

The Court also finds Debtor's actions were maliciously targeted at Jeremy and they were certain to cause him harm. See Madsen, 195 F.3d at 989. In evaluating malice, the Court may look to the likelihood of harm in an objective sense to evaluate Debtor's intent. In re Long, 774 F.2d 875, 881 (8th Cir. 1985). Just minutes prior to the incident in question, Debtor engaged in deliberate undercutting, a foul categorized as dangerous because of its high risk of injury to other players. Moments after a swing and a miss at another IMS player, Debtor struck Jeremy on the head. The force with which the Debtor delivered the blow, especially given his proximity to Jeremy, was certain or highly likely to inflict injury. Thus, an objective examination of the facts and circumstances reveals that malice was present in Debtor's conduct. Though the presence of "spite, ill will, or personal animosity" is not required for a finding of malice, the Court finds that Debtor acted out of spite and ill will towards Jeremy because the game tape reveals that Debtor's team was losing badly and Debtor appeared clearly frustrated with the course of the game. Fors, 259 B.R. at 137. Accordingly, the Court finds that Debtor possessed a specific, subjective intent to injure and acted with malice.

Plaintiffs have met their burden to satisfy the elements of their nondischargeability claim by a preponderance of the evidence. The evidence demonstrates that Debtor acted willfully and with malice. Therefore, the Court holds Plaintiffs' personal injury claim is excepted from discharge under § 523 (a)(6).

**WHEREFORE**, Plaintiffs have satisfied the necessary elements of 11 U.S.C. § 523(a)(6) by a preponderance of evidence.

**FURTHER**, Plaintiffs' complaint to except debt from discharge is GRANTED.

**FURTHER**, Plaintiffs' claim is excepted from discharge under §523(a)(6).

**FURTHER**, the automatic stay in this case is modified to allow Plaintiff to proceed in Iowa District Court in Henry County with their previously filed lawsuit against Debtor Andrew Justin McSorley.

DATED AND ENTERED: October 18, 2006

Paul J. Kilburg  
Bankruptcy Judge