UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

CHARLES F. WYSONG, JR.

Debtor

Case No. 99-15911
Chapter 7

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., PORTLAND FEMINIST WOMEN'S HEALTH CENTER, ROBERT CRIST, M.D., WARREN M. HERN, M.D., ELIZABETH P. NEWHALL, M.D., and JAMES NEWHALL, M.D.

Plaintiffs

v.

CHARLES F. WYSONG, JR.

Defendant

Adversary Proceeding
No. 00-1079

MEMORANDUM

Appearances: Charles Dupree, Chattanooga, Tennessee, Attorney for Plaintiff

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Attorneys for Plaintiff

Richard P. Jahn, Jr., Chattanooga, Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The plaintiffs sued the debtor, Charles Wysong, and other anti-abortion protesters in federal district court in Oregon. The jury awarded compensatory damages against Mr. Wysong that total more than $500,000, treble damages under the federal RICO statutes that total almost $1.6 million, and punitive damages that total $8 million.[1]

The district judge also entered an order imposing a permanent injunction against certain activities by Mr. Wysong and the other defendants. The district judge based the injunction on his own findings of fact after hearing the evidence presented to the jury.

In this proceeding, the plaintiffs seek to prevent Mr. Wysong from discharging the judgment debt in bankruptcy. The plaintiffs contend the judgment debt should be excepted from discharge or Mr. Wysong's discharge should be completely denied so that none of his debts will be discharged. 11 U.S.C. § 523(a) & § 727(a).

The plaintiffs and Mr. Wysong have filed cross motions for summary judgment. To obtain summary judgment, a party must show that there are no genuine issues of material fact, and the undisputed facts entitle it to judgment. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c). The plaintiffs rely on collateral estoppel. They contend that the facts necessarily found by the jury are equivalent to the facts that must be proved to except the judgment debt from discharge under § 523.

The plaintiffs also rely on the facts found by the judge to support issuance of the injunction. Mr. Wysong contends the plaintiffs cannot rely on the facts found by the district judge to support the injunction. The jury – not the judge – found the facts that underlie the judgment for damages. The first question, then, is whether the facts necessarily found by the jury are sufficient to prove that the debt comes within one of the exceptions from discharge. If not, then the court will

[1] RICO refers to the Racketeer Influenced and Corrupt Organizations Act, which is part of the federal criminal law but also provides civil remedies for persons injured by a violation of the act. 18 U.S.C. §§ 1961–1968.

be required to decide whether the district judge's findings of fact are relevant to the nature of the judgment debt.

Federal rules of collateral estoppel determine the effect of the judgment from the district court in Oregon. *Remus Joint Venture v. McAnally*, 116 F.3d 180, footnote 5 (6th Cir. 1997); *Shearer v. Dunkley (In re Dunkley)*, 221 B.R. 207 (Bankr. N. D. Ill. 1998). Collateral estoppel applies to a particular issue if (1) the precise issue was raised and actually litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior proceeding. *Smith v. Securities and Exchange Commission*, 129 F.3d 356, 362 (6th Cir. 1997).

Mr. Wysong appealed the judgment to the court or appeals, and a panel of three judges reversed the judgment. The court of appeals vacated that decision and rendered an *en banc* decision reversing the three judge panel. It affirmed the judgment for compensatory damages but remanded to the district court for it to consider whether the award of punitive damages violated due process. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

Mr. Wysong filed a petition for review with the United States Supreme Court. The Supreme Court recently denied the petition. *American Coalition of Life Activists v. Planned Parenthood of Columbia/Willamette, Inc.*, 123 S.Ct. 2637, 156 L.Ed.2d 655 (2003). Apparently the case has now gone back to the district court on the question of whether the punitive damages violate due process. The court can rule on the summary judgment motions without knowing the exact amount of the punitive damages or even whether there will be any punitive damages. This a result of two factors. First, as a general rule, punitive damages are excepted from discharge if the compensatory damages for the same acts are excepted from discharge. *Abbo v. Rossi, McCreery*

& Associates, Inc. (In re Abbo), 168 F.3d 930 (6th Cir. 1999). Second, a decision on dischargeability of a prior judgment is essentially a declaratory judgment; when the prior judgment includes a breakdown of the damages, as in this proceeding, the bankruptcy court can declare which types of damages included in the prior judgment are or are not dischargeable.

Paragraph 14 of Mr. Wysong's affidavit includes four complaints regarding whether he had a full and fair opportunity to litigate the issues in the Oregon lawsuit. First, Mr. Wysong complains that even though he is not lawyer, he represented himself at the trial. Second, additional security measures taken by the court gave the jury the impression the defendants were dangerous public enemies. Third, the district judge allowed the plaintiffs to present evidence that should not have been allowed, including the opinion of the judge's court officer, a United States Marshal, that certain posters were threats to the plaintiffs. Fourth, the judge allowed the plaintiffs to summarize the defendants' depositions in a false and distorted way and to read summaries to the jury.

The purpose of collateral estoppel can easily be frustrated if it applies only when the litigant had an attorney during all phases of the earlier proceeding. Mr. Wysong's lack of an attorney during the trial and his having acted as his own attorney do not necessarily mean he lacked a full and fair opportunity to litigate the issues. *Nelson v. Tsamasfyros (In re Tsamasfyros)*, 940 F.2d 605 (9th Cir. 1991); *Securities and Exchange Commission v. Kane (In re Kane)*, 212 B.R. 697 (Bankr. D. Mass. 1997); *American Express Travel Related Services Co. v. Hernandez (In re Hernandez)*, 195 B.R. 824 (Bankr. D. P. R. 1996).

Mr. Wysong's attorney withdrew for personal reasons shortly before the trial. Mr. Wysong requested that he be allowed to represent himself, and the district judge agreed but only after urging him to obtain counsel. All the other defendants were represented by attorneys. Affidavit of Maria T. Vullo, Exh. Q, pp. 70-73; Exh. R, pp. 43-44. Facts other than the lack of an attorney may prove that a *pro se* litigant did not have a full and fair opportunity to litigate, but no such facts have

been shown in this case. *West v. Ruff*, 961 F.2d 1064 (2d Cir. 1992); *Cruz v. Root*, 932 F.Supp. 66 (W. D. N. Y. 1996).

Additional security measures generally do not make a trial unfair even in a criminal case. *United States v. Elder*, 90 F.3d 1100 (6th Cir. 1996); *Morgan v. Aispuro*, 946 F.2d 1462 (9th Cir. 1991).

Mr. Wysong's other complaints pertain to alleged errors in the admission of evidence. Errors in the admission or exclusion of evidence do not automatically prove the lack of a full and fair opportunity to litigate the issues. *Raines Brothers Constr. Co. v. Memphis and Shelby County Board of Adjustment*, 967 F.Supp. 998 (W. D. Tenn. 1997); *Bar-Tec, Inc. v. Akrouche*, 959 F.Supp. 793 (S. D. Ohio 1997).[2]

In summary, Mr. Wysong has not shown any unfairness in the trial that would prevent the judgment from having collateral estoppel effect in this proceeding. The next question is whether the burden of proof in the Oregon trial was the same burden that is required to except a debt from discharge under Bankruptcy Code § 523(a).

Some of the jury instructions required the plaintiffs to prove a particular point by a preponderance of the evidence. Early in the jury instructions, however, the district judge stated that the plaintiffs were required to prove all the necessary facts by a preponderance of the evidence. Complaint, Exh. E, p. 8. This is the same burden of proof required in an action under § 523(a). *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Bankruptcy Code § 523(a)(6) excepts from discharge a debt for willful and malicious injury to another entity or another entity's property. 11 U.S.C. § 523(a)(6). The plaintiffs alleged that

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[2] With regard to the deposition summaries, the court also notes that Mr. Wysong had the opportunity to counter the summaries even though it was not immediately after they after they were read. Affidavit of Maria T. Vullo, Exh. Q, pp. 219-220.

the defendants, including Mr. Wysong, violated or conspired to violate a federal statute known as the FACE Act. FACE is the acronym for Freedom of Access to Clinic Entrances. 18 U.S.C. § 248(a)(1), (c).

The plaintiffs based their claims under the FACE Act on the publication and distribution of three items: (1) the Dirty Dozen poster, (2) the Crist poster, (3) the Nuremberg files. The plaintiffs alleged the posters and the Nuremberg files were threats against them that the defendants distributed or published for the purpose of intimidating the plaintiffs or interfering with their business.

To hold Mr. Wysong liable under the FACE Act, the jury necessarily found that the posters and the Nuremberg files were "true threats" and therefore not protected by the First Amendment. This required the jury to find that a reasonable person would view the posters and files as true threats. 18 U.S.C. § 248(d)(1); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000); *see also Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1966).[3] The conclusion that a reasonable person would view the posters and files as true threats might not equate to a finding of willfulness under § 523(a)(6), but the FACE Act contains another intent requirement for liability. The plaintiffs were required to prove the intent to perform the act and awareness of the natural and probable consequences of the act. 18 U.S.C. § 248(a)(1); S. Rep. No. 103-117, 103d Cong., 1st Sess. 24 n. 39 (1993). Willfulness under § 523(a)(6) requires the intent to cause injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 977-978, 140 L.Ed.2d 90 (1998). This includes the intent to perform the act and the belief that the consequences are substantially certain to follow. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999); *Miller v. J. D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998). This intent and the intent required by the FACE Act are

[3] The Nuremberg files were part of or included a true threat even if they were not entirely a true threat. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002).

essentially the same. Thus, Mr. Wysong's liability under the FACE Act necessarily involved a decision by the jury that his actions were willful as required by § 523(a)(6).

The jury instructions also support the conclusion that jury found Mr. Wysong's actions to be willful within the meaning of § 523(a)(6). The gist of the instructions was that a defendant could be held liable only if he used a true threat for the purpose of preventing the plaintiffs from providing reproductive health services. Complaint Exh. E, pp. 19–20. Thus, a defendant could be held liable for damages under the FACE Act only if he intended to harm the plaintiffs by preventing them from providing the services they normally provided. This is essentially the same intent required for willfulness under § 523(a)(6).

Willfulness under § 523(a)(6) also brings to mind the category of intentional torts instead of negligent or reckless torts. *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977. The FACE Act imposes liability for threats made with the intent to intimidate or interfere with abortion providers. This is similar to several intentional torts – assault, intentional infliction of emotional distress, and intentional interference with business. Restatement Torts 2d §§ 21, 46, 766, 766A & 766B; 38 Am.Jur.2d *Fright, Shock, and Mental Disturbance* § 12 (1999).

For these reasons, the court concludes that the jury's award of damages under the FACE Act necessarily required a decision that Mr. Wysong willfully injured the plaintiffs or their property within the meaning of § 523(a)(6) of the Bankruptcy Code.

Bankruptcy Code § 523(a)(6) also requires the injury to be "malicious." Malice does not require hatred, ill will, or spite toward the victim. *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S.Ct. 38, 61 L.Ed. 205 (1916). Malice deals with the debtor's underlying motive for the intent to injure the plaintiff. For example, self-defense may include the intent to injure the attacker but not malice. Malice does not exist because the person who strikes back in self-defense has a just cause or excuse for striking back – a cause the law recognizes as excusing him from liability. *See*, *e.g.*, *Navistar Financial*

Corp. v. Stelluti (In re Stelluti), 94 F.3d 84 (2d Cir. 1996); *Hagen v. NcNallen (In re McNallen)*, 62 F.3d 619, 625 (4th Cir. 1995); *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226 (6th Cir. 1991); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241 (5th Cir. 1983)[4]; *but see Miller v. J. D. Abrams, Inc. (In re Miller)*, 156 F.3d 598, 604-606 (5th Cir. 1998).[5]

The jury did not find any legal justification – any just cause or excuse – that saved Mr. Wysong from liability. Instead, it found Mr. Wysong's use of the threats to be a legal wrong against the plaintiffs. In this regard, the FACE Act is aimed at preventing wrongful acts – the use of true threats to intimidate and interfere with the service provided by the plaintiffs. The FACE Act allowed the jury to impose liability on Mr. Wysong and the other defendants only for their legally wrongful acts; the FACE Act did not prevent the defendants from using other constitutionally protected means of protest. *United States v. Weslin*, 156 F.3d 292, 297-98 (2d Cir. 1998); *United States v. Soderna*, 82 F.3d 1370, 1374-76 (7th Cir. 1996).

In summary, the jury's verdict supports a finding that Mr. Wysong's actions were malicious within the meaning Bankruptcy Code § 523(a)(6).

The FACE Act allowed liability for an *attempt* to intimidate or interfere with the plaintiffs' business. This raises the question of whether the jury imposed damages for unsuccessful attempts to injure the plaintiffs or their property.

According to the jury instructions, the jury could have awarded compensatory damages under the FACE Act for expenses the plaintiffs incurred for additional security measures and

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[4] Three legal dictionaries define malice as the intentional doing of a wrongful act without just cause or excuse and with the intent to cause injury. *Black's Law Dictionary* 862 (1979); *Ballentine's Law Dictionary* 767 (1969); William P. Statsky, *West's Legal Thesaurus/Dictionary 474 (1986).*

[5] The Fifth Circuit criticizes this approach on the ground that if a person intends to cause an injury then he can not have a legal excuse; this reasoning subsumes a finding of liability – the lack of a legal excuse – into the meaning of willful injury.

damages for mental anguish, such as shock or fear. Complaint Exh. E, pp. 37-38. The jury apparently measured the damages by the amount the plaintiffs spent for additional security. This result can be deciphered by comparing the damages awarded for violations of the RICO Act, as explained below.

To prove a violation of the RICO statutes, the plaintiffs were required to prove racketeering activity. 18 U.S.C. §§ 1961(1)(B) & 1962. As racketeering activity, they attempted to prove a violation of another federal criminal statute, known as the Hobbs Act. 18 U.S.C. 1951. According to the jury instructions, the Hobbs Act prohibits obstructing or interfering with commerce through extortion, attempted extortion, or conspiracy to commit extortion. Complaint Exh. E, p28. The district judge instructed the jury that a violation of the Hobbs Act required proof that (1) the posters and the Nuremberg files were true threats, (2) the defendant by threat of force, violence, or fear, involving the use of the posters and the files, deprived or attempted to deprive or conspired to deprive a plaintiff of his or her property, and (3) the defendant had the intent to deprive the plaintiff of his or her property or protected right to provide abortion services. Complaint Exh. E, pp. 29–30.

The District Judge instructed the jury that property included (1) money spent by a plaintiff for security measures taken as a result of a defendant's threats, and (2) the protected right to provide abortion services free of wrongful threats, violence, coercion, or fear. Complaint Exh. E, p. 29. The damages instruction, however, was more limited:

> With respect to any violation of RICO, in order for a plaintiff to recover from a defendant, the plaintiff must show, by a preponderance of the evidence, that a defendant's violation of RICO or conspiracy to violate RICO caused damage specifically to the plaintiff's business or property in the nature of expenses for security measures.
>
> . . . .
>
> In considering the issue of damages, if any, with respect to each individual claim alleged by each plaintiff under RICO, you should assess the dollar amount you find to be justified, by a preponderance of the evidence, for alleged damages to a plaintiff in his or her business or property.
>
> In this case, economic losses are limited to those amounts incurred for security measures as a result of defendants' alleged unlawful acts.

Complaint Exh. E, pp. 37–38.

These instructions leave no doubt that the jury could have awarded damages under the RICO Act only for the money spent by a plaintiff on additional security measures. Thus, the jury awarded damages under the RICO Act based on a defendant's success in depriving a plaintiff of his or her property, specifically the money spent for additional security. The damages were not based merely on a defendant's unsuccessful attempt to deprive a plaintiff of property.

The jury awarded compensatory damages under RICO in an exact amount down to the number of cents – $526,336.14. As to Mr. Wysong, the jury awarded exactly the same compensatory damages for violations of the FACE Act. Thus, the jury apparently awarded compensatory damages under the FACE Act for the additional security costs incurred by the plaintiffs because the defendants' threats were successful.

In any event, the jury instructions did not allow the jury to award damages when there was no injury. Unlike RICO, the FACE Act allows damages other than economic loss. The FACE Act, however, still requires an injury, and the jury instructions reflected this requirement. If an attempt did not cause any injury, then the jury could not have awarded damages based on the attempt.

In this regard, the FACE Act expressly allows the recovery of actual damages, punitive damages, or a statutory penalty. 18 U.S.C. § 248(c)(1). Actual damages can be recovered only as compensation for an injury. *See*, *e.g.*, *Birdsall v. Coolidge*, 93 U.S. 64, 23 L.Ed. 802 (1876); *McMillian v. F.D.I.C.*, 81 F.3D 1041 (11th Cir. 1996); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000); *Mackie v. Rieser*, 296 F.3d 909 (9th Cir. 2002), *cert. den.* 537 U.S. 1189, 123 S.Ct. 1259, 154 L.Ed.2d 1022 (2003) *Red Cloud-Owen v. Albany Steel, Inc.*, 958 F.Supp. 94 (N. D. N. Y. 1997); *In re Pulliam*, 262 B.R. 538 (Bankr. D. Kan. 2001). Thus, the plaintiffs could not have recovered actual damages under the FACE for an attempt that caused no injury.

Willful and malicious injury includes not only economic loss but also psychological or emotional injury, and therefore, damages for either can be excepted from discharge. *See, e. g. Hagan v. McNallen (In re McNallen)*, 62 F.3d 619 (4th Cir. 1995); *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916 (6th Cir. B.A.P. 2000); *Robinson v. Louie (In re Louie)*, 213 B.R. 754 (Bankr. N. D. Cal. 1997). Even if the damages under the FACE Act include not only the plaintiffs' economic loss (the cost of additional security measures) but also psychological damages, the total is still non-dischargeable. Either kind of damages must have been awarded for willful and malicious injuries inflicted by Mr. Wysong.

Mr. Wysong has a similar argument based on the theory that the jury found him liable only for conspiring to violate the FACE Act. The verdict form did not ask the jury to distinguish between violating the FACE Act and conspiring to violate it. Complaint Exh. A. The district judge instructed the jury that a defendant could be liable for conspiracy to violate the FACE Act "even if the conspiracy was not successful and no unlawful acts were actually committed." Complaint Exh. E, p. 21. For the purpose of argument, the court assumes the jury could have found Mr. Wysong liable based on his involvement in a conspiracy to violate the FACE Act, even if the conspiracy was not successful.

The same reasoning applies here that applied with regard to an attempt to threaten the plaintiffs. The participants and the conspiracy did not merely conspire to threaten the plaintiffs; they were successful. The jury could have awarded damages only for injuries actually inflicted by the conspiracy.

Mr. Wysong can also argue that the jury may have held him liable because the conspiracy willfully and maliciously injured the plaintiffs even though he personally did not act willfully and maliciously. Section 523(a)(6) excepts a debt from discharge if the debt is for willful and malicious injury "by the debtor." 11 U.S.C. § 523(a)(6). At lease one court has held that his language

does not allow the acts of another person to be treated as the debtor's willful and malicious acts. *Hamilton v. Nolan (In re Nolan)*, 220 B.R. 727 (Bankr. D. Colo. 1998).

This court disagrees. The debtor may inflict an injury by acting in concert with other persons. For example, if a debtor convinced another person to hammer dents in the plaintiff's car, the plaintiff's loss was willfully and maliciously inflicted "by the debtor" just as if he had hammered the car himself. In a conspiracy, the debtor's connection to the willful and malicious injury may be more tenuous. Tort law, however, has long recognized that a member of a conspiracy can be liable for a tort committed by the conspiracy even though the member's acts as part of the conspiracy did not amount to a tort. Restatement Torts 2d § 876. Likewise, the courts have excepted debts from discharge based on the law of agency, partnership, and conspiracy. *BancBoston Mortgage Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556 (6th Cir. 1992) (partnership); *National Union Fire Ins. Co. v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296 (2d Cir. 1996) (agency); *Haemonetics Corp. v. Dupre*, 238 B.R. 224 (D. Mass. 1999); *Smith v. Federal Deposit Insurance Corp. (In re Smith)*, 160 B.R. 549 (N. D. Tex. 1993); *Aetna Casualty and Surety Co. v. Markarian (In re Markarian)*, 228 B.R. 24 (B.A.P. 1st Cir. 1998); *In re Tamburo*, 82 F.Supp. 995 (D. Md. 1949); *Haile v. McDonald (In re McDonald)*, 73 B.R. 877 (Bankr. N. D. Tex. 1949). If the verdict was based solely on the conspiracy's success, Mr. Wysong is still personally liable for its willful and malicious injury to the plaintiffs, and the resulting debt is not dischargeable.

In the *Haemonetics* case the court found the debtor took part in a conspiracy to willfully and maliciously injure her husband's employer and imputed the conspiracy's actions to her. The court applied a legal standard from § 876 of the Restatement 2d of Torts (1977); it required the debtor to have assisted the conspiracy with knowledge of its tortious plan. *Haemonetics*, 238 B.R. 224, 228-29. The district judge's jury instructions in the Oregon lawsuit required essentially the same facts:

> You must find that there was a plan to commit at least one of the violations alleged by the plaintiffs as an object of the conspiracy, with

> all of you agreeing as to the particular violation the conspirators agreed to commit.
>
> One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to further some object or purpose of the conspiracy even though the person does not have full knowledge of all the details of the conspiracy.

Complaint Exh. E, pp. 21-22.

The remainder of the jury instructions regarding the conspiracy to violate the FACE Act agree with the standard used in *Haemonetics*. The court concludes that if the jury based Mr. Wysong's liability on the acts of the conspiracy, then its willful and malicious acts are imputable to him, and the compensatory damages awarded by the jury for the resulting injury to the plaintiffs are a non-dischargeable debt under § 523(a)(6).

In summary, the jury must have based its verdict under the FACE Act on willful and malicious acts by Mr. Wysong or willful and malicious acts by a conspiracy whose acts are imputable to Mr. Wysong as a member. Therefore, the compensatory damages that the jury awarded for violations of the FACE Act are non-dischargeable under Bankruptcy Code § 523(a)(6).

The jury also awarded punitive damages against Mr. Wysong for violations of the FACE Act. The jury instructions allowed the jury to award punitive damages if a defendant acted maliciously. The court defined malice as ill will or spite or the intent to cause injury. The verdict does not reveal whether the jury decided that the defendants acted with ill will or spite toward the plaintiffs. The intent to cause injury is equivalent to willfulness under § 523(a)(6). If the jury found only the intent to cause injury, then arguably the jury did not find malice as required by § 523(a)(6).

Malice under § 523(a)(6) is usually proved by proving willfulness – the intent to cause injury. The intent to injure the plaintiff or the plaintiff's property is malicious *unless* the debtor had a just cause or excuse for intending to cause the injury. A just cause or excuse means a legally

recognized ground for escaping liability. Malice is generally defined by the absence of a just cause or excuse. *Miller v. J. D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998).

The jury instructions also allowed the jury to award punitive damages if a defendant's conduct was reckless. The court defined recklessness as a complete indifference to the safety and rights of others. Complaint Exh. E, pp. 39-40. Reckless acts are not necessarily willful and malicious under § 523(a)(6). *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999). But the jury's award of punitive damages cannot be attributed purely to recklessness. Since the compensatory damages for violations of the FACE Act are damages for willful and malicious injury, the punitive damages for the same violations are damages for willful and malicious injury. *Abbo v. Rossi, McCreery & Associates, Inc. (In re Abbo)*, 168 F.3d 930 (6th Cir. 1999).

The next question is whether the damages awarded under the federal RICO statutes are non-dischargeable under § 523(a)(6). The court has already dealt with the evidence required to prove a violation of the RICO statutes. The plaintiffs were required to prove racketeering activity. 18 U.S.C. §§ 1961(1)(B) & 1962. They alleged as racketeering activity violations of the Hobbs Act. 18 U.S.C. 1951. According to the jury instructions, the Hobbs Act prohibits obstructing or interfering with commerce through extortion, attempted extortion, or conspiracy to commit extortion. Complaint Exh. E, p28. The District Judge instructed the jury that a violation of the Hobbs Act required proof that (1) the posters and the Nuremberg files were true threats, (2) the defendant by threat of force, violence, or fear, involving the use of the posters and the files, deprived or attempted to deprive or conspired to deprive a plaintiff of his or her property, and (3) the defendant had the intent to deprive the plaintiff of his or her property or protected right to provide abortion services. Complaint Exh. E, pp. 29–30.

Generally, the proof required under these instructions to show a violation of the Hobbs Act and the RICO Act will make the judgment for compensatory damages under RICO non-dischargeable as a debt for willful and malicious injury. But the attempt and conspiracy problems that

existed with regard to the FACE Act also exist with regard to the RICO damages. Suppose the jury awarded damages for an attempt or a conspiracy even if they were not successful.

The court's earlier reasoning with regard to the FACE Act has already answered the question regarding attempt. The jury awarded damages based on a defendant's success in depriving a plaintiff of his or her property.

With regard to the FACE Act judgment, the court has already concluded that when the debtor is part of a conspiracy to commit willful and malicious acts, then its willful and malicious acts can be imputed to the debtor. The same reasoning applies to the RICO judgment, but Mr. Wysong has an additional argument as to the RICO liability.

The jury instruction allowed the jury to find a defendant liable for acts committed by the conspiracy before the defendant became a member. Complaint Exh. E p. 35. This leads to Mr. Wysong's argument: damages based on acts of the conspiracy before he became a member are dischargeable because they are not a debt for willful and malicious injury "by the debtor" as required by Bankruptcy Code § 523(a)(6). 11 U.S.C. § 523(a)(6).

With regard to the RICO claims, the alleged enterprise was the American Coalition of Life Activists (the ACLA). Complaint Exh. E, p. 25. Mr. Wysong's answer and his affidavit in support of summary judgment admit that he was involved in the production and publication of the Crist poster after he joined the ACLA. Complaint ¶¶ 41 & 42; Answer ¶¶ 25, 39, 41 & 42; Affidavit of Charles Wysong ¶ 8. The jury verdict awarded damages to Dr. Crist under both the FACE Act and the RICO Act.

Mr. Wysong denies that he or the ACLA was involved with the Nuremberg files. In an earlier opinion denying a motion for summary judgment, the district judge found that the ACLA was involved in the publication and distribution of the Nuremberg files in 1996, which was after Mr. Wysong became a member of the ACLA. *Planned Parenthood of Columbia/Willamette, Inc. v.*

American Coalition of Life Activists, 23 F.Supp.2d 1182, 1187-1188 (D. Ore. 1998). This defeats Mr. Wysong's factual argument that neither he nor ACLA was involved in publication and distribution of the Nuremberg files.

The question is whether some of the damages should be discharged because they were based on the conspiracy's acts before Mr. Wysong joined. Consider Mr. Wysong's argument regarding the Deadly Dozen poster. He denies any involvement with the alleged conspiracy because the poster was apparently produced and first unveiled before he joined the ACLA. This overlooks a point that applies to both posters and the Nuremberg files. The wrongdoing inherent in a true threat continues after the threat is made. It does not occur only with the production and first publication of the threat. When a conspiracy exists for the purpose of making threats, a person who joins with the intent to continue the conspiracy's purpose should be treated as having adopted the conspiracy's earlier, continuing threats. In this regard, the district court enjoined the defendants from continuing to disseminate the posters or the Nuremberg files only after the jury reached its verdict. Complaint, Exhs. A, C & D. The court sees no reason to distinguish between the threats and the resulting damages based on the timing of Mr. Wysong's entry into the conspiracy.

The court reiterates its earlier reasoning that the willful and malicious injury inflicted by the conspiracy should be imputed to Mr. Wysong as a person who joined the conspiracy.[6]

The court concludes that the damages assessed under the RICO Act are also non-dischargeable. This includes not only the compensatory damages but also the treble damages. A debt "for" willful and malicious injury can include the entire liability for the injury as determined by state law or other federal law that governs liability. The debt can include punitive damages and treble damages under the RICO Act. *Katahn Associates, Inc. v. Wien (In re Wien),* 155 B.R. 479, (Bankr.

[6] This does [not] mean that the debtor's liability for willful and malicious injuries inflicted by another person will always be non-dischargeable as a debt for willful and malicious injury "by the debtor." *See*, *Yelton v. Eggers (In re Eggers)*, 51 B.R. 452 (Bankr. E. D. Tenn. 1985) (parent discharged from statutory liability for damages caused by minor son's reckless driving).

N. D. Ill. 1993); *see also*, *Cohen v. De La Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998); *Abbo v. Rossi, McCreery & Associates, Inc. (In re Abbo)*, 168 F.3d 930 (6th Cir. 1999). The non-dischargeable debt is the debt for committing the wrongful act, not just the debt for the value of the property or the actual damages.[7]

The next question is whether or to what extent the judgment debt is non-dischargeable under Bankruptcy Code § 523(a)(4). Section 523(a)(4) contains several exceptions from discharge, including debts for larceny. 11 U.S.C. § 523(a)(4). The plaintiffs contend the judgment debt is a debt for larceny.

The plaintiffs based their RICO claims on extortion by Mr. Wysong or the conspiracy in violation of the Hobbs Act. To prove extortion, the plaintiffs were required to prove that the defendants deprived them of property in the form of either the money they spent for additional protection or the business they were deprived of. The jury apparently agreed that the defendants deprived the plaintiffs of property in the form of the additional security costs. Of course, the defendants were not attempting to obtain property for their own use or benefit. The courts have generally defined larceny to as the wrongful and fraudulent taking of property from another with the intent to convert it to the taker's use without the consent of the owner. *Dynamic Food Service Equipment, Inc. v. Stern (In re Stern)*, 231 B.R. 25, 26 (S. D. N. Y. 1999); *Ramos v. Rivera (In re Rivera)*, 217 B.R. 379, 385 (Bankr. D. Conn. 1998); *Chemical Bank v. Marcou (In re Marcou)*, 209 B.R. 287, 293 (Bankr. E. D. N. Y. 1997); *Davis v. Kindrick (In re Davis)*, 213 B.R. 504, 509 (Bankr. N. D. Ohio 1997).[8] Mr. Wysong or the conspiracy did not take any property from the plaintiffs with

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[7] Apparently the defendants failed to appeal on the ground that the Hobbs Act did not apply, and therefore, they can not have the RICO judgment set aside on the basis of *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003). Even if they could, the jury verdict on the RICO claim would still support a finding of willful and malicious acts that injured the plaintiffs.

[8] These cases also reveal that larceny under § 523(a)(4) is defined according to federal common law.

the intent to convert it to his or their own use, and therefore, the debt can not be excepted from discharge as a debt for larceny. The debt appears to fit more easily within the exception for willful and malicious injury than the exception for larceny.

In summary, the court finds that the judgment against Mr. Wysong is non-dischargeable under § 523(a)(6). The court reaches this conclusion on the basis of collateral estoppel. To recover the judgment in the Oregon trial, the plaintiffs were required to prove the same facts required to prove that the judgment debts are for willful and malicious injury by Mr. Wysong to the plaintiffs or their property. It follows that there are no genuine issues of material fact, and based on the undisputed facts, the law entitles the plaintiffs to judgment under § 523(a)(6). Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c).

The court turns now to the plaintiffs' objections to discharge. 11 U.S.C. § 727. The plaintiffs have not requested summary judgment on their objections to discharge. Mr. Wysong's brief in support of his motion for summary judgment is devoted almost entirely to the dischargeability questions, but the affidavit in support of the motion addresses the discharge questions. The question for the court, then, is whether Mr. Wysong is entitled to summary judgment on the plaintiffs' objections to discharge.

The complaint relies on Bankruptcy Code § 727(a)(2), (3), (4) and (5). 11 U.S.C. § 727(a)(2)–(5). The complaint makes the following allegations:

> 64. On information and belief, Wysong, either along [sic] or in conjunction with family members, has arranged for strategic transfer and placement of assets in the names of third parties in order to assure that his assets will be invulnerable to the judgment debts he currently owes to abortion providers and any judgment debts he may incur in the future as a result of his anti-abortion activities.
>
> 65. Wysong is the President and a member of the board of an organization called American Rights Coalition, Inc. Wysong has signatory authority on American Rights Coalition bank account, which he uses to pay for his personal expenses. Wysong also has drawn multiple loans, none of which he has begun to repay and none of which are listed on his Schedules, against

> the American Rights Coalition bank account for personal expenses and expenses incurred in connection with the Litigation. Wysong testified that the loans he draws from the American Rights Coaction account are based on promissory note he created, which he uses to draw funds and move funds back and forth from his personal assets in to American Rights Coalition. Wysong also uses the American Rights Coalition account to transfer monies to family members on a regular basis. In addition to his use of the American Rights Coalition bank account, Wysong and members of his family use other assets, including automobiles, under the name of American Rights Coalition for their own personal use.
>
> 66. Upon information and belief, Wysong has not filed income tax returns since 1992. Wysong additionally testified that certain of his financial records have been destroyed by water damage.

Mr. Wysong's answer denies the allegations of paragraph 64 of the complaint. As to paragraph 65, he admits he is president of American Rights Coalition but denies he is currently a member of the board. He admits he has signature power on its bank accounts. He denies using the bank account to pay personal expenses and states that, with the board's permission, he has occasionally repaid himself for expenses advanced by him. He denies using the account to regularly transfer money to family members. He also denies that he and family members use other assets of American Rights Coalition, including automobiles. He admits borrowing money from American Rights Coalition and states the loans were duly noted in the books and records of American Rights Coalition. He denies creating a promissory note that he uses to draw funds from American Rights Coalition or to move funds back and forth between his personal assets and American Rights Coalition. He also states that his assets and the assets of American Rights Coalition are separate and distinct and have been so treated. As to paragraph 66, Mr. Wysong admits not filing income tax returns for the past six years but states that his payroll information is available and returns could easily be prepared. He admits that some of his financial records suffered water damage but states that bank statements and cancelled checks are available from his bank.

Mr. Wysong filed an affidavit in support of his motion for summary judgment. In the affidavit he states:

> 10. In 1987 I founded a non-profit corporation called American Rights Coalition, Inc. It is based in Chattanooga, Tennessee. This ministry accepted donations from pro-life supporters to help women who are having physical and emotional problems after abortion. . . . .
>
> 11. The American Rights Coalition has another primary activity: It organizes and supports efforts to get copies of the Ten Commandments into homes, churches and public places. It sells framed copies of the Ten Commandments in various sizes. I have 15 children, and from time to time some of them have worked for American Rights to assemble the frames and glass and ship the prints to customers. With Board knowledge and approval, I have written paychecks to my children on occasion for work done.
>
> 12. The assets of American Rights Coalition have always been kept separate from my own. I have borrowed some money from American Rights in the past and signed promissory notes prepared by the company attorney for these loans. All loans were with Board knowledge and approval. There is no fund of my assets which I transfer back and forth to my children, or back and forth between me and American Rights Coalition.
>
> 13. I last owned real estate in 1990. I have not accumulated any significant assets, as my income has gone to support my family and church. Our home was given to my wife by a church in 1992.

Earlier statements in the affidavit are simple denials in the words of § 727 without any factual details. Affidavit of Charles Wysong, ¶¶ 2-5.

In response to Mr. Wysong's motion, the plaintiffs submitted a brief and the affidavit of Maria T. Vullo with numerous exhibits attached. The exhibits include portions of the transcripts of the Rule 2004 examinations of Mr. Wysong and his wife. The plaintiffs also filed portions of the deposition of Mark Cunningham who is the office manager for American Rights Coalition.

The plaintiffs' main contention under § 727(a)(2) centers on the relationship between Mr. Wysong and American Rights Coalition. The plaintiffs seem to be arguing that Mr. Wysong uses American Rights Coalition as a means of protecting his assets or as a means of supporting himself and his family without having any assets from which creditors might collect their debts. In the words of the plaintiffs' brief, they contend that Mr. Wysong uses the corporation as his "personal

checkbook." Plaintiffs' Brief in Opposition to Debtor's Motion for Summary Judgment and in Support of Plaintiff's Cross Motion for Summary Judgment, p. 13.

Mr. Wysong seems to be arguing that American Rights Coalition is a legitimate legal entity separate from him, that it is not merely a corporate front for his personal activities, and that his relationship to the corporation, including the use of corporate property, is essentially the same as usual relationship of a small corporation to the president who founded it and operates it.

At this point the plaintiffs' theory is rather vague, but the facts do raise the question of whether American Rights Coalition is simply a vehicle for Mr. Wysong's personal activities. This is the kind of dispute that is difficult to resolve from portions of transcripts without a more detailed look at the corporate records. *718 Arch Street Associates, Ltd. v. Blatstein (In re Blatstein)*, 192 F.3d 88 (3d Cir. 1999); *Eisenberg v. Casale (In re Casale)*, 62 B.R. 889 (Bankr. E. D. N. Y. 1986) *aff'd* 72 B.R. 222 (E. D. N. Y. 1987). Therefore, the court will deny summary judgment at this time. Of course, either party can ask for summary judgment again when the facts and the legal theories are more developed.

The plaintiffs' objection under § 727(a)(3) has focused on Mr. Wysong's lack of tax returns, some missing financial records, and his alleged use of American Rights Coalition as his personal checkbook. The undisputed facts now before the court are that Mr. Wysong has not filed tax returns since 1992 and that some of his financial records are missing. The court cannot determine the significance of either to the broader question of whether he failed to keep adequate records. There is a factual dispute as to whether he concealed, destroyed, or falsified records. Mr. Wysong says some of his records were accidentally destroyed. The plaintiffs think the timing was suspicious and question the extent of the records destroyed. The evidence now before the court does not answer the question of what kind or amount of record keeping should have been expected of Mr. Wysong. There are genuine issues of material fact that justify denial of summary judgment.

The false oath objection under § 727(a)(4) has come to focus on debts and income that Mr. Wysong allegedly did not schedule in his bankruptcy case, particularly loans from American Rights Coalition and money paid to him personally for speaking engagements. Plaintiffs' Brief in Opposition to Debtor's Motion for Summary Judgment and in Support of Plaintiff's Cross Motion for Summary Judgment, p. 46. Whether the unexplained failure to schedule these debts and income justifies denial of discharge depends on the explanation given by Mr. Wysong. Therefore, the court denies summary judgment for Mr. Wysong.

The plaintiffs objected to discharge under § 727(a)(5) on the ground that Mr. Wysong has failed to explain the loss or deficiency of assets to meet his liabilities. The court sees little life in this objection except to the extent it is linked to other objections – under § 727(a)(2) for transfer or concealment of assets, under § 727(a)3) for destruction, concealment, or failure to keep adequate records, and under § 727(a)(4) for making a false oath or account. They raise the question of what property should be counted as Mr. Wysong's property and what has been done with it. Since the court has denied summary judgment as to those objections, the court will not grant Mr. Wysong summary judgment on this objection. Of course, he can raise the issue again.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 1/5/04)