UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

December 29, 1998

James E. Carlon, Esq.
Counsel for Plaintiff
P.O. Box 249
Pierre, South Dakota 57501

Caitlin F. Collier, Esq.
Counsel for Defendant-Debtor
P.O. Box 435
Vermillion, South Dakota 57069

Subject: ***Sundquist v. Kaupp (In re William J. Kaupp),***
Adversary No. 98-3014
Chapter 7; Bankr. No. 98-30047

Dear Counsel:

The matters before the Court are the parties' cross motions for summary judgment. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that summary judgment shall be entered for Defendant-Debtor and that Plaintiff's claim against Defendant-Debtor shall not be excepted from the discharge.

**Summary of facts.** On February 16, 1998, William J. Kaupp, the owner and operator of Billy's Café and Lounge, a restaurant and bar in downtown Gregory, served alcohol to 15-year old Amber Sundquist (Amber). Sometime thereafter, Amber and her sister Lindsey Sundquist (Lindsey) were involved in a one-vehicle accident on a rural road outside Gregory. Amber, who was driving, was thrown from the vehicle and died as a result of her injuries. Lindsey, a passenger in the vehicle, survived but was seriously injured. Kaupp was subsequently charged with and convicted of serving alcohol to a minor.

On May 1, 1998, Kaupp (Debtor) filed a petition for relief under Chapter 7. His original schedules did not list any claims arising out of the events of February 16. However, on July 21, 1998, he amended his schedules to list a disputed, contingent, and

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unliquidated claim on behalf of Gary Sundquist (Sundquist), Amber and Lindsey's father.

On August 5, 1998, Sundquist, as Special Administrator of the Estate of Amber Sundquist and Guardian Ad Litem of Lindsey Sundquist, commenced an adversary proceeding seeking a determination that his claim against Debtor for damages resulting from Amber's death and Lindsey's injuries was non dischargeable pursuant to 11 U.S.C. § 523(a)(6). On August 19, 1998, Debtor answered the complaint, essentially admitting only that he was in bankruptcy and that Sundquist was listed as a creditor in his schedules.

On September 16, 1998, Debtor filed a motion for summary judgment. Sundquist did not file a response to Debtor's motion, but he did file his own motion for summary judgment on October 16, 1998. Debtor filed a response to Sundquist's motion on November 6, 1998. No formal discovery was filed and neither party offered affidavits in support of his motion. The matter was taken under advisement.

**Discussion: Non dischargeability under § 523(a)(6).** A Chapter 7 debtor is not entitled to a discharge of 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). The question of what constitutes a "willful and malicious injury" has been answered by the Supreme Court:

> The word "willful" in [§ 523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the [§ 523](a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply

> "the act itself." Restatement (Second) of Torts § 8A, comment *a*, p. 15 (1964) (emphasis added).

*Kawaauhau v. Geiger*, ___ U.S. ___, ___, 118 S.Ct. 974, 977 (1998).

Despite being a relatively recent case, *Geiger* has been applied to permit the discharge of a wide variety of debts, including claims for an employer's failure to provide workers' compensation insurance and to provide adequate protection to employees working in a high-crime area, *Roumeliotis v. Popa (In re Popa)*, 140 F.3d 317 (1st Cir. 1998); an attorney's failure to settle a lawsuit before summary judgment was entered against his client, *Berger v. Buck (In re Buck)*, 220 B.R. 999 (10th Cir. B.A.P. 1998); failure to pay condominium fees, *Salem Bend Condominium Assoc'n. v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345 (6th Cir. B.A.P. 1998); an employee's receipt of commercial bribes and breach of state law duties of employee liability, *Novartis Corp. v. Luppino (In re Luppino)*, 221 B.R. 693 (Bankr. S.D.N.Y. 1998); a merchant's failure to turn over proceeds pursuant to a floor planning agreement, *Florida Outdoor Equip., Inc. v. Tomlinson (In re Tomlinson)*, 220 B.R. 134 (Bankr. M.D. Fla. 1998); a debtor's conveying a secured creditor's collateral to third parties, *AVCO Fin. Servs. v. Kidd (In re Kidd)*, 219 B.R. 278 (Bankr. D. Mont. 1998); and a debtor's setting fire to his landlord's house, *Allstate Ins. v. Dziuk (In re Dziuk)*, 218 B.R. 485 (Bankr. D. Minn. 1998).

At the same time, *Geiger* has not prevented courts from making a determination of non dischargeability pursuant to § 523(a)(6), given the right set of facts. Among the debts that have been excepted from discharge following *Geiger* are claims for assault, battery, and false imprisonment, *Erickson v. Halverson (In re Halverson)*, 226 B.R. 22 (Bankr. D. Minn. 1998); transferring assets in anticipation of a divorce action, *Shteysel v. Shteysel (In re B. Shteysel)*, 221 B.R. 486 (Bankr. E.D. Wis. 1998); and sexual harassment, *Ludwig v. Martino (In re Martino)*, 220 B.R. 129 (Bankr. M.D. Fla. 1998).

In each of the foregoing cases, it was accepted that the

defendant-debtor intended the act that led to the plaintiff-creditor's injury. The difference in the outcome of the two lines of cases is simply that in the former, the courts determined that the defendant-debtor did not intend the consequences of that act. Absent that intent, the debt was dischargeable. Therefore, it is clear that to prevail in this case, Sundquist must show *more* than that Debtor intended the act of serving alcohol to Amber. He must also show that Debtor intended the injuries to Amber and Lindsey.

**Discussion: Summary Judgment.** Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

*Amerinet*, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The movant meets this burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997)(quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106

F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

For the purpose of his motion for summary judgment, Debtor has admitted that he served alcohol to Amber and that, as a result, Amber and Lindsey were injured. If Sundquist needed only to prove an intentional act that led to his daughters' injuries, such a showing would entitle him to summary judgment in his favor. However, under *Geiger*, Sundquist must prove an intentional injury. Debtor denies that he intended the injuries that Amber and Lindsey suffered, and the record is devoid of any evidence to the contrary. Therefore, Sundquist has failed to make a showing sufficient to establish the "willful and malicious" injury required for a determination of non dischargeability under 11 U.S.C. § 523(a)(6) and Debtor is entitled to judgment as a matter of law. Debtor's motion for summary judgment shall be granted; Sundquist's motion will be denied.

The Court notes that in South Dakota a tavern owner enjoys absolute immunity from civil liability for injuries inflicted by intoxicated persons. *See Wegleitner v. Sattler*, 582 N.W.2d 688, 696 (S.D. 1998) (upholding the constitutionality of S.D.C.L. §§ 35-4-78 and 35-11-1, which codify the common law rule of absolute immunity). This also may have precluded any claim by Sundquist on behalf of either Amber or Lindsey against Debtor. However, the Court does not reach that issue. While it is in both his answer and his response to Sundquist's motion for summary judgment, Debtor did not raise it in his own motion for summary judgment.

Finally, the Court is sympathetic to the tragic loss suffered by Plaintiff Sundquist and his family. The result reached today, however, is mandated by the law.

Counsel for Defendant-Debtor shall prepare an appropriate order and judgment.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

DEC 29 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By _____

NOTICE OF ENTRY
Under F.R. Bankr. P. 9022(a)
Entered
DEC 29 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

INH:sh

cc: adversary file (docket original in adversary; serve copies on counsel for each party, U.S. Trustee, and case trustee)

Case: 98-03014 Form id: 122 Ntc Date: 12/29/1998 Off: 3 Page : 1
Total notices mailed: 3

Aty Carlon, James E. PO Box 249, Pierre, SD 57501
Aty Collier, Caitlin F. PO Box 435, Vermillion, SD 57069-0435
Intereste Lovald, John S. Box 66, Pierre, SD 57501