**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

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July 11, 2002

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Subject: *Richard C. Larson v. Jonathan L. Zoss (In re Zoss)*, Adversary No. 02-4024; Chapter 7; Bankr. No. 01-41418

Dear Counsel:

The matter before the Court is Plaintiff's complaint for a determination of nondischargeability under 11 U.S.C. § 523(a)(6). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that should Plaintiff recover damages against Defendant-Debtor in his state court action for injuries arising on March 29, 1996, said damages are nondischargeable under § 523(a)(6).

SUMMARY OF FACTS. The material facts regarding the injury suffered by Plaintiff Richard C. Larson are not in dispute. Jonathan L. Zoss hosted a beer party as his rural home on March 29, 1996. Larson briefly attended the party with some friends, arriving by car. Shortly after Larson arrived at Zoss' home that evening, Zoss admits that he hit Larson three times in the head. Zoss also admits that he did not hit Larson in self-defense; he did not really recall why he hit Larson. Zoss' punches put Larson to the floor, bloodied his nose, and made his nose crooked. His friends picked up Larson, and they left by car. Zoss and another

friend soon followed in a separate car, but their motive in doing so is unclear. Zoss eventually drove around the car in which Larson was riding and parked his car across the rural road to stop the other car. The other car collided with Zoss' car. The accident, however, did not contribute to or aggravate the injury that Larson had received earlier to his nose when Zoss hit him.

Larson later received medical treatment for the injury to his nose. Two surgeries were required to effect a repair.

In 1999, Larson commenced a civil action against Zoss to recover for his injuries. That action was pending when Zoss filed a Chapter 7 petition on December 17, 2001. Larson timely commenced this adversary proceeding against Zoss requesting a determination by this Court that his civil claim against Zoss is nondischargeable under § 523(a)(6). Zoss counters that since he had been drinking that night and since he does not recall any reason for hitting Larson, his conduct does not constitute a willful and malicious act under § 523(a)(6).

APPLICABLE LAW. A debt for a willful and malicious injury to another person or to the property of another person is excepted from discharge under 11 U.S.C. § 523(a)(6). Like all statutory exceptions to discharge, this exception is to be construed narrowly. *Barclays American/Business Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 879 (8th Cir. 1985). The creditor has the burden to establish that the debt falls within the exception. *Werner v. Hoffman*, 5 F.3d 1170, 1172 (8th Cir. 1993). The creditor's burden of proof is by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 191 (1991); *United States v. Foust (In re Foust)*, 52 F.3d 766, 768 (8th Cir. 1995).

The question of what constitutes a "willful" 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*, 523 U.S. 57, 61-62 (1998).

"Malicious" conduct is something more than a reckless disregard for the creditor's economic interests and expectancies. *Long*, 774 F.2d at 881. Absent some additional aggravated circumstances, establishing that a debtor knowingly violated the creditor's legal rights is insufficient to establish malice. *Id.* Instead, the expected harm to the creditor must be certain or substantially certain to occur. *Id.* The conduct must necessarily be known by the debtor to cause injury. *Id.* Objective information may be used to ascertain the debtor's intent to cause harm. *Id.* In sum, "malicious" conduct is conduct targeted at the creditor that is certain or almost certain to cause harm, *Waugh v. Eldridge (In re Waugh)*, 95 F.3d 706, 711 (8th Cir. 1996), and that is committed without just cause or excuse. *Dennis v. Novotny (In re Novotny)*, 226 B.R. 211, 218 (Bankr. D.N.D. 1998)(quoting therein *Tinker v. Colwell*, 193 U.S. 473, 486 (1904)).

Intent is a fact question. *Waugh*, 95 F.3d at 710. Evidence of the surrounding circumstances may be presented from which intent may be inferred. *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987)(cites therein). The debtor may be required to overcome the circumstantial evidence with more than unsupported assertions of honest intent. *Id.* at 1287-88 (cites therein).

DISCUSSION. The Court concludes that Zoss willfully inflicted an injury on Larson. Zoss intended not just to hit Zoss, but to injure him, whatever may have been the motivation.

This Court is also satisfied that the injury was malicious. Larson was the intended recipient of Zoss' punches. Zoss' actions were not in self-defense or in protection of another; Zoss himself could not identify any justifiable cause or excuse for his actions.

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**Total labels:** 5

**Not printed due to inadequate address:** 2

Since formal liability and monetary damages have not yet been determined, the parties will need to return to state court for those determinations.[1] If the state court awards damages to Larson, this Court concludes that those damages are nondischargeable under § 523(a)(6).

An appropriate order will be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve copies on parties in interest)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUL 12 2002

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

UNITED STATES BANKRUPTCY COURT SEAL

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

JUL 12 2002

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

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[1] The parties asked this Court only to determine nondischargeability under § 523(a)(6). However, to foster judicial economy, the parties may want to rely on this decision for a final determination of liability and present only the issue of unpaid damages to the state court, if that amount cannot be calculated by agreement.