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JUDGE: M. A. Mahoney
PARTIES: Charles Ray Stewart, Henry Charles Smith, Bertha Mae Palmer
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ATTORNEYS: T. L. Hall, J. A. Johnson
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re:

CHARLES RAY STEWART — Case No. 98-12119-WSS-7

Debtor.

HENRY CHARLES SMITH and
BERTHA MAE PALMER

Plaintiffs,

vs. — Adv. No. 98-1141

CHARLES RAY STEWART

Defendant.

ORDER AND JUDGMENT PARTIALLY GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT AND DECLARING DEBT DISCHARGEABLE UNDER 11 U.S.C. § 523(a)(6) AND PARTIALLY DENYING DEBTOR'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO 11 U.S.C. § 523(a)(9) AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEBTOR'S MOTION TO STRIKE

Theodore L. Hall, Mobile, Alabama, Attorney for Debtor
James A. Johnson, Mobile, Alabama, Attorney for Plaintiffs

This matter is before the Court on the motion of Henry Charles Smith and Bertha Mae Palmer (plaintiffs) for summary judgment and of Charles Ray Stewart (debtor) for summary judgment on plaintiffs' complaint to declare a debt to be nondischargeable pursuant to 11 U.S.C. §§ 523(a)(6) and (9), and on debtor's motion to strike certain materials submitted by plaintiffs. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court has the authority to enter a final order. For the reasons indicated below, the motion of debtor for summary judgment is granted in part and denied in part, the

motion of debtor to strike materials is denied, and the motion of plaintiffs for summary judgment is denied.

FACTS

On June 17, 1998, debtor filed for relief under chapter 7, title 11, United States Code. On July 26, 1998, plaintiffs filed a complaint to determine dischargeability of a debt owed to them pursuant to 11 U.S.C. §§ 523(a)(6) and (9). The debt at issue arose from the events described below. This account was taken from the transcript of debtor's criminal trial on March 11 and 12, 1996 and other materials provided by the parties.

On June 26, 1994, debtor awoke at about 11:00 a.m. He picked his sister up and brought her back to his house. They cleaned his home and debtor put some lima beans in a crock pot. During this time, debtor consumed two Budweiser beers while he cleaned and cooked.

Sometime between 12:00 noon and 1:00 p.m., debtor went to the grocery store with his girlfriend Cynthia Stewart. After completing his shopping, debtor dropped Cynthia off at her home. He arrived back home from the grocery store at about 2:00 p.m. Debtor and his sister then went to Chickasabogue Park.

Upon arriving at the park, debtor went down by the creek where people often gathered. Debtor's friend, Ollice Darrell Fillingim, saw debtor at the creek. Fillingim was drinking with a group of people at a separate picnic area. Fillingim testified that debtor had a beer in his hand while he was at the creek, but Fillingim did not know how many beers debtor consumed.

Jackie Hall, a friend of debtor, was at the park on June 26, 1994 watching her daughter swim in the creek. Hall testified that she saw debtor sometime between 1:00 and 2:00 p.m. when

she was walking to the beach with her daughter. According to Hall, debtor had a beer in his hand at that time.

Shortly after arriving at the creek, debtor and his sister drove back to debtor's home to check on the beans. Later, they returned to the park.

Sometime after returning to the park, debtor, his sister, and Fillingim drove to Fillingim's campsite located in the park. At debtor's criminal trial, Fillingim testified that debtor had a "swallow" of Canadian Club Classic whiskey while at his campsite. Fillingim could not remember how much whiskey or how many beers debtor drank while at the park. Fillingim testified that debtor may have drunk "a beer or so."

The attorney for the state attempted to refresh Fillingim's memory regarding the amount of alcohol consumed by debtor with a tape recorded statement given by Fillingim to Lieutenant Labarron Smith on June 27, 1994, a day after the accident. In the statement, Fillingim stated that the "swallow" of whiskey consumed by debtor contained "probably four shots," and that debtor consumed four to five beers on the day of the accident. Fillingim testified at trial that he remembered his conversation with Lieutenant Smith, but he could not recall the substance of their conversation. Fillingim had been drinking on June 26, 1994, and he admitted that he was very intoxicated.

Debtor testified that the only alcohol he consumed on June 26, 1994 was the two beers he had shortly after waking up. He stated that he does not drink liquor[1] and that he did not consume any alcohol while at Fillingim's campsite or at anytime while he was at the park.

Fifteen to thirty minutes after debtor allegedly had a drink at Fillingim's campsite, debtor, accompanied by his sister and Fillingim, left the park in his truck. They stopped at a gas station where debtor's sister purchased a pack of cigarettes. Then debtor dropped his sister off at her home and started back to the park to drop Fillingim off at his campsite.

On his way to the park, debtor headed south on Whistler Street. The street is in a residential area and the posted speed limit is 30 miles per hour. While proceeding down Whistler, debtor stated that he started to adjust the radio and then he "heard something like [he] hit something." Fillingim also testified that he heard the truck hit something as he bent over to pick up his beer. As Fillingim looked up, he saw something or someone fly over the truck. Debtor stopped or slowed down, and looked back. He saw nothing and continued driving to the park.

The impact heard or felt by debtor and Fillingim was the truck hitting two children, Jeffrey Palmer and Anthony Palmer. The accident caused the death of both children.

Thirteen-year-old Henry Palmer (Anthony's brother and Jeffery's cousin), and eleven-year-old Shenita Latrice Palmer (the victims' sister) witnessed the accident, although neither could give a detailed account because the accident happened so fast. Henry testified that the

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[1]Liquor is a distilled rather than fermented alcoholic beverage. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 697 (1985). Debtor admitted that he drank two beers on June 26, 1994. Beer is not a liquor because it is an alcoholic beverage brewed by slow fermentation, rather than distillation. *Id*. at 140.

debtor's truck was traveling down Whistler Street at about 50-60 miles per hour. Shenita indicated that the truck slowed down after striking the boys, but then continued southbound on Whistler Street.

Based on the trial testimony and the fact that Officer Elliot Fields was called to the scene at 8:35 p.m., it appears that the accident occurred shortly after the evening twilight, probably between 7:15 and 8:15 p.m. The sun had not fully set, but visibility was reduced.

At approximately 10:00 p.m., Officer Linda Sanford arrived at the scene of the accident. Sanford's experience at the time of the accident included participation in several state-sponsored traffic investigative programs. According to Sanford's investigation, debtor's truck veered off Whistler Street onto the shoulder. The truck continued traveling on the shoulder for approximately 125 feet (measured horizontally along the edge of the road) before reentering the road. The children were struck near the midpoint of the 125 foot distance, approximately four feet from the edge of the road.

Approximately 1:00 a.m. the morning of June 27, 1994, Officer Sanford, Lieutenant Smith, and Chief Clyde Foster went to debtor's home. Officer Sanford stated that debtor appeared to have just awoken when she first saw him and he "appeared to be in an intoxicated state . . . smell[ing] of alcoholic beverage." Furthermore, debtor had to be assisted into the police car. While in the car, he fell asleep. Neither Officer Sanford nor anyone else administered a Breathalyzer test at anytime.

About 2:00 a.m., debtor agreed to give the police a statement. The officer who took debtor's statement, Lieutenant Smith, testified that debtor smelled of alcohol, but he was

coherent and able to respond to his questions. Debtor stated at trial that he did not have anything to drink after the accident.

Fillingim testified that debtor was not intoxicated at the time of the accident, although his recollection at trial of the amount of alcohol consumed by debtor differed from the statement he gave police the day after the accident. Moreover, Fillingim admitted that he had trouble recalling exactly what happened on June 26, 1994, primarily because he was intoxicated that day.

On March 12, 1996, a jury found debtor guilty of manslaughter and leaving the scene of an accident with injury. Debtor was sentenced to a term of five years imprisonment on each count and ordered to pay a $100 fine and court costs.

After the criminal trial, plaintiffs filed a civil action against debtor for wrongful death. While debtor was incarcerated, plaintiffs obtained a default judgment and award in the Circuit Court of Mobile County, Alabama for $3,000,000.00, plus costs. The Circuit Court took brief testimony from plaintiffs in determining the amount of damages. No record of this testimony has been provided.

LAW

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been adopted in Rule 7056 of the Federal Rules of Bankruptcy Procedure. A court shall grant summary judgment to a party when the movant shows 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. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to

determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510, 2511. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.*; *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 477 U.S. 317, 323 (1986).

As grounds for their contention that a discharge of the judgment debt should be denied, plaintiffs argue that the debt was: (1) for willful and malicious injury by the debtor to another person under 11 U.S.C. § 523(a)(6), and/or (2) for death caused by debtor's operation of a motor vehicle and such operation was unlawful because debtor was intoxicated under 11 U.S.C. § 523(a)(9). Plaintiffs also request the Court to grant summary judgment on the issue of damages and to set their claim at $3,000,000.00 plus costs. There is no dispute that debtor's operation of his motor vehicle caused the death of Jeffery and Anthony Palmer. The question is whether summary judgment is appropriate pursuant to either of the § 523 discharge provisions at issue and/or on the amount of plaintiffs' damages.

A.

In its decision last year in *Kawaauhau v. Geiger*, 118 S. Ct. 974, 140 L. Ed. 2d 90, 523 U.S. 57 (1998), the United States Supreme Court clarified the standard a creditor must satisfy to prove that a debt resulted from a "willful and malicious injury by the debtor to another entity" under 11 U.S.C. § 523(a)(6). *See Grogan v. Garner*, 111 S. Ct. 654, 112 L. Ed. 2d 755, 498 U.S. 279 (1991) (creditor has the burden to prove nondischargeability by a preponderance of evidence). The Supreme Court opined that nondischargeability under § 523(a)(6) requires "a

deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau*, 118 S. Ct. at 977 (medical malpractice debt declared dischargeable).

This Court finds that based upon the evidence presented, there is not any issue as to debtor's intent. The facts show that debtor did not intend the injury that resulted from his act, i.e., the death of Jeffrey and Anthony Palmer. Both debtor and Fillingim, the passenger at the time of the accident, testified that they did not see the children before, or even after they were hit. It is impossible to conclude that debtor intended to hit, let alone cause the death of, the children if he never saw them.

This Court's decision is unchanged even if it assumes that debtor was intoxicated and knew of his intoxication. If true, this would prove that debtor deliberately or intentionally drove while intoxicated, but it still does not prove an intent to hit the children. The Supreme Court declined to interpret § 523(a)(6) to encompass every traffic accident resulting from an intentional act involved in maneuvering a vehicle (e.g., rotating the steering wheel) unless the debtor intended to inflict the injuries, or at least the collision, that resulted from the act. *Id*. Unlike a simple act necessary to maneuver a vehicle, intentionally driving while intoxicated is a reprehensible action. Nonetheless, both actions are analogous in that they do not satisfy § 523(a)(6) absent proof of an intent to cause the injury that resulted from the action.

Interpreting the facts in a light most favorable to plaintiffs, including assuming debtor intended to drive while intoxicated, the Court finds debtor did not deliberately or intentionally injure or hit Jeffrey and Anthony Palmer. The judgment debt is not for a "willful and malicious injury." Accordingly, the Court grants partial summary judgment to debtor and partially denies

plaintiffs' motion for summary judgment on whether the debt is dischargeable pursuant to 11 U.S.C. § 523(a)(6). Debtor is not denied a discharge under § 523(a)(6).

B.

A debt is nondischargeable pursuant 11 U.S.C. § 523(a)(9) if it is the result of: (1) debtor's operation of a motor vehicle, (2) which caused death or personal injury, and (3) such operation was unlawful because the debtor was intoxicated. There is no dispute that the judgment debt in this case is: (1) for debtor's operation of a motor vehicle, (2) which caused the death of Jeffrey and Anthony Palmer. The material factual issue under § 523(a)(9) is whether debtor's operation of his motor vehicle was unlawful because he was intoxicated.

To determine whether debtor was intoxicated for purposes of § 523(a)(9), state law must be applied. *Wiggins v. Harper* (*In re Wiggins*), 180 B.R. 676, 679 (M.D. Ala. 1995). In Alabama, driving while intoxicated is unlawful pursuant to CODE OF ALA. § 32-5A-191(a) (1989). This provision provides that:

> (a) a person shall not drive or be in actual physical control of any vehicle while:
>
> (1) There is 0.10 percent or more by weight of alcohol in his blood; [or]
>
> (2) Under the influence of alcohol;
>
> * * * * * * *

CODE OF ALA. § 32-5A-191(a) (1989). In this case, a DUI test was never administered. Therefore, the Court need only examine subsection (a)(2) in determining if debtor's operation of his vehicle was unlawful because he was intoxicated.

According to jurisprudence in Alabama, a person is "under the influence of alcohol" pursuant to § 32-5A-191(a)(2) if she or he has "consumed such an amount of alcohol as to affect

his ability to operate a vehicle in a safe manner." *In re Wiggins*, 180 B.R. at 680 (citing *Ex parte Buckner*, 509 So.2d 184 (Ala. Crim. App. 1989) and *Pitts v. City of Auburn*, 552 So.2d 184 (Ala. Crim. App. 1989)).

For the following reasons, the Court finds that there is a genuine issue of material fact regarding whether debtor was intoxicated at the time of the accident. Therefore, the motions of both parties for summary judgment on whether the debt should be discharged under § 523(a)(9) must be denied.

First, there was conflicting testimony at the criminal trial regarding how much debtor had to drink on June 26, 1994, the day of the accident. Debtor stated that he drank two beers before 12:00 noon and no other alcohol the entire day. Ms. Hall stated that she saw the debtor at the park around 2:00 with beer in hand. Mr. Fillingim provided conflicting accounts, but in both statements he said that debtor consumed whiskey while at his campsite in the early evening of June 26, 1994. The observations of Officers Sanford and Smith regarding debtor's appearance hours after the accident also indicate that debtor probably consumed alcohol after 12:00 noon on the day of the accident. Debtor's condition while in the presence of the officers may have resulted from alcohol consumption after the accident and, consequently, it may not in and of itself prove that debtor was unlawfully intoxicated when the accident occurred. However, even if the officers' testimony on its own does not prove that debtor was intoxicated at the time of the accident, it conflicts with debtor's assertion that he had nothing to drink after 12:00 noon. Arguably, Mr. Fillingim's statement is the most damaging to debtor's claim that he was not intoxicated at the time of the accident, but Mr. Fillingim was admittedly intoxicated. Moreover, Mr. Fillingim testified that he did not believe that debtor was intoxicated on June 26, 1994.

Second, in addition to testimony regarding how much alcohol debtor actually consumed on the day of the accident, the Court can consider circumstantial evidence, including evidence on debtor's ability to drive at the time of the accident, in determining if the debt should be declared nondischargeable under § 523(a)(9). *Rice v. State*, 611 So.2d 1161 (Ala. Crim. App. 1992) (a determination that defendant was driving under the influence may be based on circumstantial evidence). In this case, the testimony of eyewitnesses to the accident and other evidence regarding what happened at the accident scene do not resolve whether debtor was intoxicated at the time of the accident. Debtor's conviction for manslaughter and the analysis of the accident scene performed by Officer Sanford indicate that debtor was driving recklessly. This supports the inference that debtor was intoxicated. However, the Court finds that, viewing all of the evidence in a light most favorable to debtor, there is again a genuine issue of material fact. Reckless driving is not always the result of intoxication. Debtor stated that he was adjusting his radio. Thus, plaintiffs' motion for summary judgment pursuant to § 523(a)(9) must be denied.

Viewing the evidence in a light most favorable to plaintiffs for consideration of their summary judgment motion, there is a fact issue as well as to whether debtor was intoxicated at the time of the accident. The testimony at trial was in conflict about how much he drank the day of the accident and whether he was intoxicated. Based on this testimony and the evidence of debtor's reckless driving, a fact finder could reasonably conclude that debtor was intoxicated. Therefore, debtor's motion for summary judgment pursuant to § 523(a)(9) also must be denied.

C.

The Court finds that the motion of plaintiffs' for summary judgment as to the amount of damages and the amount of plaintiffs' claim must be denied. The state court default judgment

and award of $3,000,000.00 plus costs does not have collateral estoppel effect on this proceeding and summary judgment on the amount of plaintiffs' damages is therefore denied.

The Court of Appeals for the Eleventh Circuit has stated that the collateral estoppel law of the state rendering the prior judgment must be applied in a dischargeability proceeding. *In re St. Laurent*, 991 F.2d 672 (11th Cir.1993). Recently, the Honorable Benjamin Cohen rendered a thoughtful and thorough decision in which he concluded that federal common law rather than state law on collateral estoppel should be applied in determining whether a state court default judgment should have collateral estoppel effect in a discharge proceeding. *Angus v. Wald* (*In re Wald*), 208 B.R. 516 (Bankr. N.D. Ala. 1997) (Judge Cohen concluded that whether state or federal law was applied, the state court default judgment would not have collateral estoppel effect).

It is unnecessary for this Court to determine what law must be applied. Under both federal and Alabama law the award set forth in the default judgment does not have collateral estoppel effect on this proceeding. Under Alabama law, the default judgment obtained by plaintiffs does not have collateral estoppel effect because no issues were actually litigated in the state court. *Wheeler v. First Alabama Bank of Birmingham*, 364 So.2d 1190 (Ala. 1978) (requirements for collateral estoppel are: (1) issue identical to one involved in previous suit; (2) issue actually litigated in prior action; and (3) resolution of issue was necessary to the prior judgment). Based on the same requirement (i.e., that the issue was actually litigated in the prior action), a default judgment ordinarily does not have collateral estoppel effect when federal law is applied. *Bush v. Balfour Beatty Bahamas, Ltd.* (*In re Bush*), 62 F.3d 1319 (11th Cir. 1995) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982)). The court in *Bush*

applied collateral estoppel because the debtor substantially participated in the action in which a default judgment was entered and such judgment was a sanction on debtor for his obstructive conduct. *Id*. There is no evidence that Mr. Stewart participated in the state court default judgment or that he engaged in any obstructive or dilatory conduct. Therefore, the state court default judgment and award of $3,000,000.00 plus costs does not have collateral estoppel effect on this proceeding and summary judgment as to the amount of plaintiffs' claim is denied.

D.

Debtor filed a motion to strike certain materials submitted by plaintiffs in support of their motion for summary judgment. If the Court includes or excludes the materials at issue, its decision to deny plaintiffs' motion for summary judgment is unchanged. The evidence was conflicting without the contested materials. It was conflicting with them. Thus, it is unnecessary to determine if debtor's motion to strike is warranted for purposes of these motions for summary judgment and debtor's motion to strike is therefore denied.

CONCLUSION

Debtor is not denied a discharge of his debt to plaintiffs pursuant to 11 U.S.C. § 523(a)(6). As to 11 U.S.C. § 523(a)(9) and the amount of the debt, a genuine issue of fact exists and summary judgment is inappropriate.

The denial of the summary judgment motions as to § 523(a)(9) leaves the parties with several choices. They can submit the issue to the Court on the same transcript excerpts for ultimate decision. The Court will then weigh the facts based upon the preponderance of the evidence standard. The parties can submit additional transcript excerpts or call witnesses to

supplement the transcript as well. The Court will set the matter for a pretrial conference to discuss these issues.

THEREFORE IT IS ORDERED AND ADJUDGED:

1. The motion of Charles Ray Stewart for summary judgment pursuant to 11 U.S.C. § 523(a)(6) is GRANTED and the debt owed to Henry Charles Smith and Bertha Mae Palmer based on the wrongful death of Jeffrey and Anthony Palmer is declared dischargeable under § 523(a)(6);

2. The motion of Charles Ray Stewart for summary judgment pursuant to 11 U.S.C. § 523(a)(9) is DENIED;

3. The motion of Henry Charles Smith and Bertha Mae Palmer for summary judgment pursuant to 11 U.S.C. § 523(a)(6) and/or § 523(a)(9) is DENIED;

4. The motion of Henry Charles Smith and Bertha Mae Palmer for summary judgment as to damages and the amount of their claim is DENIED;

5. The motion of Charles Ray Stewart to strike materials submitted by plaintiffs is DENIED;

6. A pretrial conference is set on **March 9, 1999 at 8:30 a.m.**, Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, Alabama 36602.

Dated: February 18, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE