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ADV. NUMBER: 96-1139
JUDGE: M. A. Mahoney
PARTIES: Albert R. Walker, Anita Merritt, as administratrix of the estate of Beverly Hargett Gamble, deceased
CHAPTER: 7
ATTORNEYS:
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KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ALBERT R. WALKER — Case No. 96-10885-MAM-7

Debtor.

ANITA MERRITT, as administratrix
of the estate of Beverly Hargett Gamble,
deceased

Plaintiff,

v. — Adv. No. 96-1139

ALBERT R. WALKER,

Defendant.

ORDER AND JUDGMENT
DETERMINING DISCHARGEABILITY OF PLAINTIFF'S DEBT

This matter is before the Court after the trial of the complaint of Anita Merritt, plaintiff, against Albert R. Walker, defendant/debtor, to determine the dischargeability of his debt to her pursuant to 11 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court holds that the debt is dischargeable.

FACTS

Albert R. Walker is a medical doctor specializing in psychiatry. He treated Beverly Gamble, the sister of the plaintiff, Anita Merritt. Ms. Gamble died on February 27, 1991. The cause of death was listed on the death certificate as "accidental - chronic prescription abuse." No one disputes that a toxicology report indicated that she died of an overdose of propoxyphene

(Darvocet). Dr. Walker stipulated that he was negligent in not supervising more closely the amount of medication that Beverly Gamble was obtaining.

Beverly Gamble had a medical and psychiatric history that, according to the evidence, commenced in at least 1985. She was first admitted to Providence Hospital in Mobile in 1987. She had been involved in an auto accident but upon examination was found not to be seriously injured. However, she was found to be suffering from alcohol abuse problems. Over the years, she was treated by as many as 10 different psychiatrists and doctors for various physical and psychiatric maladies. Dr. Walker first treated Ms. Gamble in 1987 when he was working at Providence Hospital. He treated her during her stay at the hospital. She then came to him for further treatment approximately nine months later in 1988. He had therapy sessions with her at his office thereafter. He prescribed Xanax, propoxyphene (usually Darvocet), Lucamil and Prozac for her. These drugs were used to treat her chronic neck pain, her depression and her anxiety attacks. Ms. Gamble told Dr. Walker that she was not drinking and he saw no signs that she was. The plaintiff did not notice any drinking problem and even gave Ms. Gamble beer to drink on occasion. Dr. Walker testified that he advised Ms. Gamble of the dangers of her medications. His medical records on Ms. Gamble do not reflect these warnings. All of the expert witnesses indicated that this is not uncommon.

Dr. Walker felt Ms. Gamble made good progress from 1989 to 1991. She was future oriented and had plans for dental work and a move to a new residence. Patricia Moseley, another sister of Ms. Gamble, felt that Ms. Gamble was better. Ms. Merritt testified that she thought Ms. Gamble was "doing real good" in the year before her death. No one noticed Ms. Gamble drinking to any degree or noticed her in an overmedicated state.

Ms. Gamble did obtain a significant amount of Darvocet or generic propoxyphene in the year before her death. She even attempted to forge one or two prescriptions at the K&B pharmacy at Skyline in Mobile in 1989. The pharmacist caught her and verbally chastised her. Dr. Walker also discussed the matter with Ms. Gamble and she indicated it would not happen again. Dr. Walker's dosage notes on the Darvocet indicated that only four pills were to be taken each day. This number is in the acceptable range of dosage in the Physicians Desk Reference and according to the medical experts who testified. Dr. Walker never gave Ms. Gamble more than 120 pills per prescription or more than one refill. However, because Ms. Gamble had to rely on other people for transportation to the doctor and the pharmacy, she asked Dr. Walker for new prescriptions for new pharmacies from time to time for the convenience of her driver. Dr. Walker complied with the requests because he knew of her transportation situation. However, with the number of prescriptions Ms. Gamble was filling, if she took all of the pills, she was exceeding the four per day dosage. Mr. Jerry Reddoch, a pharmacist at Village Drugs in Mobile, testified that he called Dr. Walker to question the amount of propoxyphene Ms. Gamble was receiving and refilling in September to November 1990. Dr. Walker's appointment book shows he was not in the office when one or more of the calls were made. Mr. Reddoch testified that Dr. Walker stated Ms. Gamble was a "special case" and he had her medications under control.

The plaintiff's expert, Dr. Herlihy, indicated that prescribing Darvocet at all for Ms. Gamble and giving her access to the number of pills she got was outside the acceptable standard of care of a reasonable psychiatrist in this community. Defendant's experts disagreed. They alleged that Dr. Walker acted within the acceptable standards in this community. Although dependent on the Darvocet, she was functioning well. They believed her circumstances,

prolonged mental and physical problems, made Dr. Walker's treatment acceptable, albeit unusual due to the difficulty for medical management which she presented. She maintained a "fragile adjustment" to life. Dr. Walker did not have medical malpractice insurance. He believed it expired in 1990, prior to Ms. Gamble's death. He did not have the insurance because it was not cost efficient, he had not assets to protect, and he did not think he would be sued in his practice. Dr. Walker had no hospital privileges at the time of the trial or in 1991.

In 1995, Dr. Walker pled guilty to given an unlawful prescription to an undercover agent. He gave a short term prescription to someone who had not previously been his patient after obtaining a brief medical history. He did not lose his medical license.

LAW

This is a case to determine the dischargeabilty of the debt owed to Beverly Gamble's estate by Dr. Walker for medical malpractice pursuant to 11 U.S.C. § 523(a)(6). Plaintiff contends that Dr. Walker's actions constituted "willful and malicious injury" to Ms. Gamble. Ms. Merritt must prove her case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 11 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

In the Eleventh Circuit, the proof required for an injury to be considered "willful and malicious" is twofold:

> According to the applicable decisions in the Eleventh Circuit, the phrase "willful and malicious" has been interpreted to require more than the intent to perform the act that resulted in the injury. The Debtor must have intended the injury or committed an intentional act which was "substantially certain" to cause injury. *See*, *In re Walker*, 48 F.3d 1161, 1165 (11th Cir. 1995); *In re Ikner*, 883 F.2d 986, 991 (11th Cir. 1989); *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1263 (11th Cir. 1988). Under these cases, the term "malicious" means wrongful and without just cause. Such malice may be implied or constructive. *Walker*, 48 F.3d at 1164.

> Thus, the issue under § 523(a)(6) is whether the conduct of the doctor constitutes an intentional wrongful act or omission which was substantially certain to cause the Plaintiff injury or loss.

Abrahamson v. Doyan (In re Doyan), 1996 WL 684026*10 (Bankr. S.D. Fla. 1996); *see also*, *Conte v. Gautam (In re Conte)*, 33 F.3d 303 (3d Cir. 1994) (applying same standard).

Dr. Walker admits he was negligent. Negligent conduct does not rise to the "willful and malicious" level. *Fernandez v. McMahon (In re McMahon)*, 183 B.R. 948, 952 (Bankr. M.D. Fla. 1995). The issue, according to the case law, is whether prescribing propoxyphene in the amounts and over the length of time Dr. Walker did to a patient who had abused alcohol in the past and had attempted to forge prescriptions was "substantially certain" to cause the overdose and death of Ms. Gamble. The other issue is whether Dr. Walker's failure to carry medical malpractice insurance either contributed to the above or itself was an intentional act which was substantially certain to injure Ms. Gamble.

The expert witnesses disagreed as to whether Dr. Walker's conduct met the standard of care required of psychiatrists in this community. Dr. Herlihy, the plaintiff's expert, testified that providing propoxyphene prescriptions in the number and duration given to Ms. Gamble was below the acceptable standard of care and "like putting a gun in her hand." Drs. Smith, Barnes and Rudder testified that Ms. Gamble was a difficult patient whose problems were only controllable, not curable, and that long term prescriptions of Darvocet, even in the face of her dependence on the drug, were acceptable treatment in rare cases such as hers. In the Court's view, the expert testimony of Dr. Herlihy, standing alone, does not prove willful and malicious conduct. First, the other competent doctors disagreed with him. Second, failing to act in a manner that meets the acceptable standard of medical care in the community may only be

negligent conduct. That does not rise to the level of "willful and malicious" activity. *Smith v. Assevero (In re Assevero)*, 185 B.R. 951, 955 (Bankr. N.D. Ga. 1995).

Dr. Walker testified that he believed his treatment was appropriate because Ms. Gamble appeared to be improving. Her two sisters noticed her improvement. No one noticed any detrimental consequences from the prolonged dosage of Darvocet. No one noticed any alcohol abuse occurring. Dr. Walker knew Ms. Gamble was dependent on others to transport her to doctor's visits and to pick up prescriptions. Her requests for new prescriptions at different pharmacies was plausible. She never exhibited overdosage symptoms around him either. The dosages he prescribed were within the acceptable range. Ms. Gamble had been on the same regimen of treatment for about a year with no ill effects. For all of these reasons, coupled with the fact that not all of the doctors thought the treatment outside the acceptable range, the Court cannot find that Dr. Walker was substantially certain his prescriptions or treatment were going to injure or kill Ms. Gamble. *Assevero* at 185 B.R. 956 ("Foreseeability or merely knowing that harm might result is not the degree of culpability which supports a determination of nondischargeability under Section 523(a)(6).").

Dr. Walker canceled his malpractice insurance in 1990. In hindsight, this was a poor choice. However, the Court cannot find that the lack of insurance was substantially certain to cause harm to Ms. Gamble. Unlike the *Doyan* case cited above, Dr. Walker did not set out to make himself judgment proof which would show some fear of suit and intentional action to avoid the results. There was also no showing by a preponderance of the evidence that in 1990 he believed that Ms. Gamble would have a reason to sue him. Everyone who saw her thought she was doing well.

The Court is not determining the amount of the debt owed to Ms. Merritt, if any. That determination will be left to the claim allowance and disallowance process.

THEREFORE IT IS ORDERED AND ADJUDGED that the Plaintiff, Anita S. Merritt, take nothing by her complaint against the defendant, Ronald Walker, and that the debt owed by the defendant to the plaintiff is dischargeable in defendant's bankruptcy case.

Dated: January 30, 1997

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE