UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Christine Mae Read, Debtor.	C/A No. 98-08285-W Adv. Pro. No. 98-80295-W
Jimmy Ray Stroud, Plaintiff, v. Christine Mae Read, Defendant.	**ORDER** Chapter 7

THIS MATTER comes before the Court upon the Complaint filed by the Plaintiff, Jimmy Ray Stroud ("Plaintiff" or "Mr. Stroud"), seeking a determination that certain debts owed to him from the Debtor/Defendant, Christine Mae Read ("Debtor" or "Ms. Read") are excepted from discharge pursuant to 11 U.S.C. § 523(a)(5) and (a)(6).[1] Based upon the stipulation of the parties, the arguments of counsel and the exhibits introduced into evidence, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[2]

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[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, shall be by section number only.

[2] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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FINDINGS OF FACT

Mr. Stroud and Ms. Read were divorced on January 16, 1991 in Davidson County in the State of Tennessee. The parties shared joint custody of the couples' only child.

Beginning in 1992, the parties began to have disagreements about visitation of the child. Ms. Read alleged that the child was being abused and refused to allow Mr. Stroud visitation rights. That allegation was referred to the Tennessee Department of Health Services which filed a petition against Mr. Stroud. On December 22, 1993, as a result of the petition, an Order was issued which placed the child in protective custody. Mr. Stroud filed an appeal of that Order to the Circuit Court for Davidson County. On June 7, 1994, the Circuit Court for Davidson County vacated the December 22, 1993 Order and remanded the issue of visitation to the Probate Court. On July 18, 1994, the Probate Court issued its Order which required Ms. Read to return the child to Tennessee for visitation with Mr. Stroud. On August 23, 1994 by separate Order, the Probate Court additionally awarded attorney's fees and costs incurred in the defense of the petition filed by the Tennessee Department of Health Services in the amount of $35,378.30 to Mr. Stroud. The award of attorney's fees in the amount of $35,378.30 against Ms. Read was subsequently reversed on August 23, 1995 by the Court of Appeals which concluded that "[w]e are unable to find any statutory authority which allows the probate court to assess attorney's fees against the Mother in a dependent-neglect case" and "[w]e are of the opinion that the probate court erred in assessing costs and attorney's fees against the Mother since the Mother was not a party to the petition filed by DHS."

However, while the appeal of the August 23, 1994 Order concerning attorney's fees and

costs was pending, Ms. Read again refused to allow visitation to Mr. Stroud. On February 13, 1995, Mr. Stroud filed a complaint in the Tennessee Probate Court against Ms. Read for failure to allow visitation and for the further recovery of attorney's fees. Ms. Read did not file an Answer or other responsive pleading to this complaint and on May 9, 1995, the Probate Court for Davidson County, Tennessee found Ms. Read in contempt and awarded attorney's fee and costs against her in favor of Mr. Stroud in the amount of $10,274.85. The May 9, 1995 Order held in part as follows:

> IT IS FURTHER ORDERED, that judgment in the total amount of $10,274.85 is awarded in the nature of child support, the Court finding that the Father had to incur these amounts of attorneys fees and expenses in the best interest of and for the well being and benefit of the minor child in order for her to re-establish and maintain a meaningful relationship with her father, said father-daughter relationship having been seriously damaged and almost destroyed by the mother's willful and malicious actions in Tennessee and South Carolina, Respondent's contempt having posed a threat to [child]'s health and welfare by [child]'s loss of contact with her natural father.

The May 9, 1995 Order was not appealed and became a final Order. Even though the May 9, 1995 Order was entered prior to the entry of the August 23, 1995 Order, the May 9, 1995 Order was entered based upon Ms. Read's "willful and malicious actions in Tennessee and South Carolina" and not the actions of the Tennessee Department of Health Services and therefore not affected by the August 23, 1995 Order.

Later in 1995 or early 1996, Mr. Stroud filed an additional lawsuit in the Circuit Court for Davidson County, Tennessee, against Ms. Read for malicious prosecution, injury to the parent/child relationship and defamation. Paragraph Four of the complaint states in part that Ms. Read "maliciously and without probable cause or justification" alleged that Mr. Stroud had

sexually abused their minor child." The Fourteenth Paragraph of the Complaint states that "[b]y reason of the acts of Christina Stroud Read, Jimmy Stroud had been and is greatly injured in his ability to obtain work, and has suffered injury to his reputation and his relationship with his minor daughter, and has suffered great mental anguish over the past two years, together with significant legal expenses.

Ms. Read did not file an Answer or other responsive pleading and on May 22, 1996, following a damages hearing on May 1, 1996, an Order was entered in the Circuit Court for Davidson County awarding $55,000 in compensatory damages and $35,000 in punitive damages in favor of Mr. Stroud against Ms. Read.

Again, while some of the allegations in this complaint included the malicious prosecution by Ms. Read of the litigation that was addressed in the August 23, 1995 Order, the May 22, 1996 Order was not dependent on the outcome of the pending appeal. The allegations in this subsequent complaint were based upon Ms. Read's continued refusal to allow Mr. Stroud visitation with his daughter and her malicious and willful acts in preventing visitation and defaming his character.

Ms. Read then filed a Chapter 7 petition on September 24, 1998. This adversary proceeding was subsequently filed on December 21, 1998.

The Court scheduled a trial on the matter for June 15, 1999. At the June 15, 1999 trial, counsel for the respective parties agreed that pursuant to Tennessee state law, the collateral estoppel doctrine applied to default judgments. Additionally, the parties stipulated that if Ms. Read were collaterally estopped from relitigating the matters raised by the Tennessee state court proceedings, a trial in this matter would be unnecessary. Based upon this stipulation, the Court

continued the trial on the merits until July 13, 1999 and took the matter of collateral estoppel under advisement.

CONCLUSIONS OF LAW

Section 523(a)(6) states that a discharge under the bankruptcy code does not discharge an individual debtor from 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).

In this case, Mr. Stroud asserts that the elements of § 523(a)(6) have already been determined by the Tennessee State Court and Ms. Read is precluded from re-litigating the issues in this adversary proceeding. The Court agrees.

Collateral estoppel applies to dischargeability proceedings under Section 523(a). Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991). The collateral estoppel doctrine has been defined as follows:

> Prior judgment between same parties on different causes of action is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered. E.I duPont de Nemours & Co. v. Union Carbide Corp., D.C. Ill., 250 F.Supp. 816, 819. When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. City of St. Joseph v. Johnson, Mo. App. 539 S.W. 2d 784, 7845.

Brown v. Evans (In re Evans), 98-05148-W; C - 98-80212-W (Bkrtcy. D.S.C. 4/26/99) citing Black's Law Dictionary 237 (5th ed. 1979).

As stated in the Findings of Fact, the Order of the Probate Court of Tennessee dated May

9, 1995 awarding $10,274.85 to Mr. Stroud clearly found that the award was based upon Ms. Read's willful and malicious actions. Additionally, while the Order of May 22, 1996 did not make specific findings of willfulness or maliciousness as did the Order of May 9, 1995, based upon the allegations of the complaint and the definition of "willfulness" and "maliciousness", it is clear that the award of $35,000.00 in compensatory damages and $55,000.00 in punitive damages was based upon actions that were willful and malicious.

> To begin, the Court must look to the history surrounding § 523(a)(6) and the terms "willful" and "malice".
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> > In Tinker v. Colwell, 193 U.S. 473 (1904) the Supreme Court defined willful and malicious injuries as those resulting from acts done intentionally and without justification or excuse. In Tinker, the court held that in order to declare a debt non-dischargeable, the trial court need not find specific or special malice on the part of the debtor towards an individual. When Congress revised the bankruptcy code the Tinker decision was overruled to an extent. The House report states:
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> > > "willful" means deliberate or intentional. To the extent that Tinker v. Colwell, 139 U.S. 473 (1902) (sic), held that a looser standard is intended, and to the extent that other cases have relied on Tinker to apply a "reckless disregard" standard they are overruled. S.Rep. No. 95-989, 95th Cong., 2d Sess. 79 (1978); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 365 (1977), reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 6320.
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> > We have stated that:
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> > > Congress did not intend to overrule Tinker in toto. ... [T]here is no need to show specific malice under § 523(a)(6) of the Code on the part of the debtor. Something implied is no

> less true than something expressed. Only the method of proof of the truth is different. Implied malice, which may be shown by the acts and conduct of the debtor in the context of their surrounding circumstances, is sufficient under 11 U.S.C. § 523(a)(6).
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> St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1008-09 (4th Cir.1985).

In re Micka, 826 F.2d 1060, 1987 WL 38378 (4th Cir. (Md.))(Unpubl.). From the legislative history, it is clear that "willful" means deliberate and intentional. Also, "[t]he Fourth Circuit in St. Paul Fire & Marine [779 F.2d 1003 (4th Cir. 1985)] observed that the 'willful' standard is not a loose standard and that more than 'reckless disregard' is required". In re Rownd, 210 B.R. 973, 977 (Bkrtcy.E.D.N.C. 1997).

In 1995, the Fourth Circuit Court of Appeals issued its landmark decision on § 523(a)(6) in In re Stanley 66 F.3d 664, 667-668 (4th Cir.1995) in which the Fourth Circuit defined the term "malice".

> "Malice," however, does not mean the same thing in Section 523(a) that it often does in other contexts. A debtor may act with malice even though he bears no subjective ill will toward, and does not specifically intend to injure, his creditor. See id. at 1008-09. Hence, a debtor's injurious act done "deliberately and intentionally in knowing disregard of the rights of another," i.e., a creditor, is sufficiently willful and malicious, and prevents discharge of the debt. Id. at 1010 (citation omitted).

In re Stanley, 66 F.3d 664, 667-668 (4th Cir.1995). Also see In re Hatton, 204 B.R. 470 (Bkrtcy.E.D.Va. 1996) and In re Bernstein 197 B.R. 475 (Bkrtcy.D.Md. 1996).

In re Harper, 95-71225-W (Bkrtcy. D.S.C. 11/26/97) aff'd at Ruben v. Harper (In re Harper), C/A 2:98-793-18 (D.S.C. 7/24/98). Based upon these definitions and because the Orders entered by default acted as an admission as to the truth of the allegations contained in the Complaint, it is the finding of the Court that the actions of Ms. Read were deliberate, intentional and in knowing disregard of the rights of Mr. Stroud.

Ms. Read however takes the position that she is not collaterally estopped from re-litigating the issues alleged in State Court because the Orders were entered as default judgments. Again, the Court disagrees. As stated by the Fourth Circuit Court of Appeals in In re Ansari, 113 F.3d 17 (4th Cir. 1997), when applying collateral estoppel to preclude the re-litigation of a matter decided by a state court judgment in a subsequent dischargeability proceeding, the bankruptcy court must apply the state law of the forum state in which the judgment was entered. In this case, the Court must apply Tennessee state law. The parties have stipulated that the correct statement of Tennessee state law on the issue is found in Nichas v. Capadalis, 954 S.W.2d 735 (Tenn. App. Mar 18, 1997) which appears to afford collateral estoppel effect to default judgments.

> By permitting a default judgment to be entered against him, a defendant "impliedly confesses all of the material allegations of fact contained in [the] complaint, except the amount of the plaintiff's unliquidated damages." Patterson v. Rockwell Int'l, 665 S.W.2d 96, 101 (Tenn.1984). As a general rule, therefore, the defendant against whom a default judgment has been entered is thereafter precluded from litigating any substantive issues in the lawsuit, except for the establishment of the amount of damages. Witter v. Nesbit, 878 S.W.2d 116, 119 (Tenn.App.1993), cert. denied, 513 U.S. 873, 115 S.Ct. 199, 130 L.Ed.2d 130 (1994). In accordance with this principle, appellate review of a default judgment or decree is "quite limited." 5 C.J.S. Appeal & Error § 718 (1993).

Nichas v. Capadalis, 954 S.W.2d at 739. Because the default judgment against Ms. Read acted as an admission to the truth of the allegations contained in the complaint and because the definite and certain allegations contained the necessary elements for a finding of non-dischargeability pursuant to § 523(a)(6), the Court finds that Ms. Read should be collateral estopped from relitigating these matters.

Ms. Read further takes the position that she should not be collaterally estopped from

relitigating the issues in the May 22, 1996 Order because it was based upon allegations that were reversed by the August 23, 1995 Order. The Court disagrees. The May 22, 1996 Order was entered after, and apparently with the knowledge of, the entry of the August 23, 1995 Order from the Court of Appeals which reversed the August 23, 1994 Order. Additionally, while some of the allegations in the complaint included the malicious prosecution by Ms. Read of the litigation that was subsequently reversed by the August 23, 1995 Order, the May 22, 1996 Order was not dependent on the outcome of the pending appeal and, in fact, the complaint referenced that the August 23, 1994 Order was on appeal. It appears that the allegations in this complaint were based upon Ms. Read's overall refusal to allow Mr. Stroud visitation with his daughter and her continued malicious and willful acts in preventing visitation and defaming his character. The allegations in this complaint were not dependent upon any findings in the August 23, 1994 Order or the August 23, 1995 Order.

For all of these reasons, it is the finding of the Court that collateral estoppel applies to the two State Court default Orders and that the debt owed to Mr. Stroud is non-dischargeable pursuant to § 523(a)(6). It is therefore,

ORDERED, that the debt owed to the Plaintiff, Jimmy Ray Stroud, from the Debtor Christine Mae Read in the amount of $10,274.85 arising out of an Order entered in the Probate Court of Tennessee on May 9, 1995 is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). It is further,

ORDERED, that the debt owed to the Plaintiff arising out of the Order of May 22, 1996 entered in the Circuit Court for Davidson County, State of Tennessee in the amount of $90,000.00 is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).[3]

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 30, 1999.

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[3] Based upon the finding of the Court that the debts are non-dischargeable pursuant to § 523(a)(6), the Court need not address the dischargeability of the debts pursuant to § 523 (a)(5).

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

JUL 1 1999

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH
Deputy Clerk

Mortimer
MacNeill
Judex