

res judicata
523(a)(6)
523(a)(9)
retroactivity
ORS 487.540(1)
ORS 475.005(14)

Barney v. Lamb-Oostman (In re Barney), BAP. No. OR-92-1865-RJO
(9th Cir. BAP Mar. 26, 1993) (affirming Judge Perris)

A prepetition default judgment was res judicata as to the validity and amount of a claim in a subsequent dischargeability proceeding. The court did not err in finding that the debtor, while intentionally intoxicated on paint thinner, drove his car into that of the plaintiff. Under the Oregon criminal statute in effect at the time of the accident, paint thinner could constitute a drug if used for the purpose of intoxication. The debt was therefore nondischargeable under both § 523(a)(6) and (a)(9).

P93-5(8)

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re)	BAP No. OR-92-1865-RJO
MICHAEL LOWELL BARNEY,)	BK. No. 391-35481-P7
)	Adv. No. 91-3551
Debtor.)	
_____)	
MICHAEL LOWELL BARNEY,)	
Appellant,)	
v.)	<u>MEMORANDUM</u>
DAWN LAMB-OOSTMAN,)	
)	
Appellee.)	
_____)	

Argued and Submitted on
February 17, 1993 at Portland, Oregon

Filed - MAR 26 1993

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: RUSSELL, JONES, and OLLASON, Bankruptcy Judges.

1 The bankruptcy court held that an obligation incurred for
2 damages, obtained by a default judgment in state court, resulting
3 from a collision where the debtor operated his automobile while
4 intoxicated, was nondischargeable under
5 § 523(a)(9)¹ and § 523(a)(6). AFFIRMED.

6 I. FACTS

7 On October 31, 1978, Creditor/Appellee Dawn Lamb-Oostman
8 ("Lamb-Oostman") was traveling west on East Burnside Avenue in
9 Portland, Oregon at approximately 12:43 p.m. Ms. Lamb-Oostman's
10 car was struck head-on by a car driven on the wrong side of the
11 road by Michael L. Barney ("Barney"), the Debtor/Appellant.
12 Barney was arrested for driving under the influence, reckless
13 driving, hit and run, and driving without insurance. The debtor
14 was convicted of Assault III by a plea agreement.

15 On August 19, 1979, Lamb-Oostman filed a civil complaint
16 seeking damages of approximately \$121,748.00 for injuries
17 suffered as a result of the accident. A default judgment was
18 entered for \$126,748.58. Barney has not paid any part of the
19 civil court judgment. The judgment was renewed on or about July
20 30, 1990.

21 On August 15, 1991, Barney filed a Chapter 7 petition. Lamb-
22 Oostman filed a complaint in bankruptcy court seeking a
23 determination of nondischargeability of this debt under
24

25 ¹ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.
and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et
seq.

1 § 523(a)(6). The complaint was later amended to add a claim
2 under § 523(a)(9). After trial, the court found the debt to be
3 nondischargeable under both § 523(a)(6) and § 523(a)(9). Barney
4 appeals. We affirm.

5 II. ISSUES

6 Whether the judgment against the debtor that arose from a
7 collision caused by the operation of automobile while under the
8 influence of paint thinner is nondischargeable.

9 III. STANDARD OF REVIEW

10 Findings of fact are reviewed under the clearly erroneous
11 standard, while conclusions of law are reviewed de novo. In re
12 Holm, 931 F.2d 620, 622 (9th Cir. 1991); In re Acequia, Inc.,
13 787 F.2d 1352, 1357 (9th Cir. 1986); Federal Rule of Bankruptcy
14 Procedure 8013.

15 IV. DISCUSSION

16 A. Issues Waived

17 We must first note that Barney failed to address certain
18 issues, such as laches, designated in his statement of issues
19 filed with this Panel. We need not address those issues here and
20 deem them to be waived for purposes of this appeal.

21 B. Res Judicata of State Default Judgment

22 First, Barney contends that a bankruptcy court cannot
23 recognize res judicata or give collateral estoppel effect to a
24 default judgement. We disagree.

25 The amount of the judgment has been fully established in
26 state court and shall not be relitigated here. The doctrine of

1 "res judicata" does preclude the debtor in dischargeability
2 proceedings from raising issues as to the validity and amount of
3 a claim by a party based upon a prior judgment whether actually
4 litigated or entered by default." Russell, Bankruptcy Evidence
5 Manual, § 3 at 13-14 (West 1991-92 Ed.); In re Comer, 723 F.2d
6 737, 740 (9th Cir. 1984).

7 C. Nondischargeability

8 Whether this liability is nondischargeable is another matter
9 entirely, one that is governed by § 523. We agree with the
10 bankruptcy court that the facts of this case support a finding of
11 nondischargeability under § 523(a)(6) and
12 § 523(a)(9).

13 The bankruptcy court, after a trial on the issue of
14 nondischargeability, orally announced the following findings of
15 fact:

16 Defendant sniffed paint thinner at the Timber Lanes.
17 Thereafter Defendant drove his car. Defendant drove off
18 the right side of the road and hit at least one mail
19 box. He then swerved into the oncoming lane of
20 traffic. Two cars swerved to the right to avoid a
21 head-on collision with Defendant's car. Defendant had
22 a head-on collision with plaintiff's car which was the
third car. . . . When interviewed by Officer Foteff,
defendant denied going off the road or into the
oncoming lanes - - lane of traffic. Officer Foteff
smelled paint thinner on Defendant's breath at the time
he interviewed him after the accident.

(Transcript of Proceedings, July 7, 1992). As we have stated,
23 supra, these findings of fact are reviewed under the "clearly
24 erroneous" standard. The eyewitness testimony offered by Roger
25 Collins, Sr. and John Berryman support the conclusions of
26 Barney's erratic driving just prior to the collision. That

1 testimony, combined with Lamb-Oostman's and Officer Foteff's
2 testimony, clearly support the court's factual conclusions.
3 Barney admitted to Officer Foteff after the collision that he had
4 been sniffing paint thinner to get high. No evidence was offered
5 by Barney at trial to contradict the evidence offered of his
6 intoxication from inhaling paint thinner. The court's factual
7 findings cannot be said to be clearly erroneous.

8 The application of these facts to § 523 are conclusions of
9 law reviewed de novo. See Standard of Review, supra. The elements
10 of a nondischargeability action must be proven by a preponderance
11 of the evidence. Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654,
12 661 (1991).

13 Section 523(a)(6) excepts from discharge any debt resulting
14 from "willful and malicious injury" by an individual debtor to
15 another entity or the property belonging to another entity. In
16 In re Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986), the Ninth
17 Circuit has held that the requirement of "willful and malicious"
18 in § 523(a)(6) does not require a creditor to prove that a debtor
19 acted with intent to injure, but that there was an "intentional
20 act which caused an injury." The court in Cecchini went on to
21 say that "[w]hen a wrongful act . . . done intentionally,
22 necessarily produces harm and is without just cause or excuse, it
23 is 'willful and malicious' even absent proof of a specific intent
24 to injure." Id. at 1443; In re Aubrey, 111 B.R. 268, 274-75
25 (9th Cir. BAP 1990).
26

1 Section 523(a)(9)², excepts from discharge any debt "for
2 death or personal injury caused by the debtor's operation of [a]
3 motor vehicle if such operation was unlawful because the debtor
4 was intoxicated from using alcohol, a drug, or another
5 substance."

6 The facts of this case clearly support a finding of
7 nondischargeability under either § 523(a)(6) or
8 § 523(a)(9) or both. Barney inhaled paint thinner to become
9 intoxicated and operated a motor vehicle while intoxicated. This
10 was a wrongful act done intentionally which produced harm without
11 just cause or excuse, which satisfies the willful and malicious
12 standard of § 523(a)(6). Section 523(a)(9) is satisfied almost
13 by definition.

14 Barney argues that involuntary intoxication is a defense to
15 nondischargeability and that the bankruptcy court erred by
16 excluding evidence of involuntary intoxication at trial.
17 However, nowhere in Barney's brief or in the record is there an
18 indication of exactly what act was lacking in volition (i.e.,
19 whether the inhaling of paint thinner was involuntary or the
20 operation of the car). No offer of proof was made at trial.
21 Failure to make an offer of proof precludes raising the question
22

23 ² Section § 523(a)(9) as amended was the statute in effect
24 at the time Barney filed his bankruptcy petition which was on
25 August 15, 1991. Subsection (a)(9) was revised by the Criminal
26 Victims Protection Act of 1990, Pub. L. 101-581, which became
effective for all cases filed after November 15, 1990. This same
revision was also a part of the Crime Control Act of 1990, Pub. L.
101-647, November 29, 1990.

1 on appeal. Fed.R.Evid. 103(a)(2). See Yost v. A.O. Smith Corp.,
2 562 F.2d 592, 595 (8th Cir. 1977). Further, no mention of the
3 substance of what evidence could be offered appears in Barney's
4 brief. We cannot tell what evidence was erroneously excluded, or
5 even if any evidence exists on the issue of an involuntary act.
6 In the face of Barney's admissions to Officer Foteff, it appears
7 highly improbable that any evidence exists of involuntary acts.
8 We cannot remand based on a general allegation of
9 involuntariness, where no offer of proof was made nor any
10 indication is given of what evidence might be offered.

11 Barney further argues that because paint thinner is not an
12 "intoxicating liquor" or a "controlled substance" under the
13 Oregon statute, he therefore cannot be liable. Oregon law in
14 effect in 1978 at the time that the accident occurred³ was as
15 follows:

16 A person commits the offense of driving while under the
17 influence of intoxicants if he drives a vehicle while:

18 . . .

19 (b) he is under the influence of intoxicating liquor,
20 a dangerous drug or narcotic drug; or

21 (c) he is under the influence of intoxicating liquor,
22 and a dangerous drug or narcotic drug.

23 Or.Rev.Stat. § 487.540(1)(1977). In addition to pharmaceutical

24 ³ Barney argues that the Oregon statute in effect at the
25 time the action for nondischargeability was filed is controlling
26 in this case. This is in error. The controlling statute for the
state law violation was the one in effect when the violation
occurred. The bankruptcy law in effect at the time of the filing
of the bankruptcy petition governs the adversary action brought
under the bankruptcy code.

1 type drugs such as those used for medical treatment, a "drug" is
2 also defined by the Oregon statute as:

3 (c) Substances (other than food) intended to affect
4 the structure or any function of the body of humans or
animals;

5 Or.Rev.Stat. § 475.005(14)(1977).

6 Barney argues that paint thinner is "intended solely for the
7 purpose of affecting paint and not the human body" and therefore
8 is not a "drug" under the statute. (Trial Transcript at 60).

9 While we may agree that paint thinner is not normally intended to
10 affect the human body, when it is ingested or inhaled for the
11 purposes of becoming intoxicated it would clearly qualify as an
12 intoxicant. We agree with the bankruptcy court that paint
13 thinner is a drug within the meaning of Or.Rev.Stat. § 487.540(1)
14 and § 475.005(14) when used by a person for the purpose of
15 getting high. We cannot agree that Oregon law permits the
16 operation of a motor vehicle while under the influence of an
17 intoxicant because "paint thinner" is not specifically listed as
18 a "drug" under the Oregon statute. Clearly the intent of the law
19 is to prohibit people from driving while impaired. The
20 bankruptcy court's reading is consistent with this intent.

21 V. CONCLUSION

22 For the foregoing reasons we conclude that the bankruptcy
23 court did not err in finding Barney's debt to be
24 nondischargeable under § 523(a)(6) and § 523(a)(9). AFFIRMED.
25 Lamb-Oostman's request for sanctions pursuant to Fed.R.App.P. 38
26 is DENIED.