IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PATRICIA J. HEESE,	)	CV85-L-81
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM
	)	
WILLIAM L. ALFONSIN,	)	
	)	
Defendant.	)	

The defendant filed a motion for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P. For the limited purposes of the Motion for Summary Judgment, the plaintiff admits that the following facts are undisputed.

The plaintiff was a passenger in an automobile driven by the defendant on March 18, 1982. The defendant was driving at an unlawful rate of speed and was under the influence of alcohol at the time his car left the traveled portion of the road and struck a tree. As a consequence of the accident, the plaintiff was injured. On May 14, 1984, the defendant filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Virginia. On February 6, 1985, venue was transferred to this court.

In ruling on a motion for summary judgment "the facts and inferences which may be derived therefrom must be viewed in a light most favorable to the nonmoving party, and the burden is on the movant to establish that no genuine issue of material fact remains and that the case may be decided as a matter of law." Fields v Gander, 734 F.2d 1313, 1314 (C.A. 8th Cir. 1984). The United States Supreme Court determined that summary judgment is authorized "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v Arkansas National Gas Corp., 321 U.S. 620, 627 (1944); accord, Poller v Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). Since no genuine issue of fact exists, the legal issue for this court to decide is whether the defendant's liability, incurred as a result of driving while under the influence of alcohol, is dischargeable in bankruptcy.

The relevant statute involved in this case is 11 U.S.C. §523(a)(6)(1982) which provides that a discharge in bankruptcy is not applicable to a debt "for willful and malicious injury by the debtor to another entity or to the

property of another entity". The United States Supreme Court first considered a "willful and malicious injur[y]" nondischargeable under the Bankruptcy Act of 1898 in Tinker V Colwell, 193 U.S. 473 (1904). The Supreme Court stated:

> "[W]e think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously...."

Id. at 487. Two divergent judicial standards arose as a result of the Tinker decision. Some courts interpreted the statutory language to require a deliberate injury coupled with an evil intent while other courts required no more than a reckless disregard for the rights of others. Matter of Morgan, 22 B.R. 38, 39 (Bkrtcy.D.Neb. 1982).

The Bankruptcy Act of 1978 adopted the "willful and malicious injury" language in section 523(a)(6), but the legislative history obviated the "reckless disregard" standard. The legislative history indicated that,

> "[t]o the extent that Tinker v Colwell...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."

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 362-65, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6320-6321. Despite this apparently clear expression of Congressional intent, some courts continued to apply the "reckless disregard" standard. In re Compos, 768 F.2d 1155, 1157-1158 (C.A. 10th Cir. 1985).

Such was the state of the law at the time the court in Matter of Morgan, 22 B.R. 38 (Bkrtcy. D.Neb. 1982), determined that indebtedness due as a result of damages caused by drunk driving was dischargeable. The court found that:

> "[A] drinking driver clearly intends the act of driving, but there is no evidence...to suggest that he intended the injury. Therefore, the injury here involved cannot be said to be willful in the sense that it is deliberate nor can the injury here involved be said to be malicious in the sense that is was done with any evil intent to produce it."

Id. at 39.

The issue of whether driving while under the influence--

with or without knowledge of the probable consequences--constitutes conduct that is "willful" and malicious" was further upended by the amendment to Title 11 in July of 1984. Congress added section 523(a)(9) which expressly precludes the discharge of liability incurred as a result of the debtor's operation of a motor vehicle while legally intoxicated.

The Eighth Circuit Court of Appeals recognized in In re Long, 774 F.2d 875, 880 (1985), that two differing lines of analysis exist in the treatment of cases occurring subsequent to the Bankruptcy Act of 1978, but prior to the 1984 amendment to the Bankruptcy Code. The Eighth Circuit noted that in In re Compos, 768 F.2d 1155 (1985), the Tenth Circuit ruled that "mere reckless disregard of the rights of others would not suffice to prevent discharge of a debt under §523(a)(6), Id. at 880; however, the Ninth Circuit in In re Adams, 761 F.2d 1422 (1985), gave retroactive effect to the legislative amendment of 1984. Id. at 880, n. 6. The Eighth Circuit explicitly did not resolve the conflicting results of the aforementioned cases, but noted that "Adams is consistent with Compos in requiring a very high level of personal misconduct, going beyond mere recklessness, before a debt is deemed nondischargeable for 'willful and malicious injury.'"

The court in In re Compos, 768 F.2d 1155 (C.A. 10th Cir. 1985), relied on the legislative history accompanying the enactment of the 1978 Bankruptcy Code. Accordingly, the court held that the "reckless disregard" standard of Tinker was obsolete and that §523(a)(6) required proof of an intent to injure. Id. at 1158. The court was unpersuaded by the 1983 remarks of Senator DeConcini, addressed to the Senate, in support of his proposed amendment changing the existing bankruptcy standard to foreclose discharges for debtors whose liabilities arose as a result of driving while intoxicated. The court did footnote the 1984 amendment, §523(a)(9), of the Bankruptcy Code.

This court finds the reasoning of In re Adams, 761 F.2d 1422 (C.A. 9th Cir. 1985), influential in the disposition of the present case. The Adams court concluded that the voluntary acts of drinking and driving while under the influence constitute conduct sufficiently intentional to support a finding of willfulness and malice and that such a determination must be given retroactive application. Id. at 1427. In reaching this decision, the court reviewed the legislative history accompanying the 1984 amendment to §523 in which Congress indicated that:

> "[section 523(a)(9) clarifies present law relating to the nondischargeability of debts incurred by drunk drivers. Debts incurred by persons driving while intoxicated are presumed to be willfully and maliciously incurred under this provision."

130 Cong. Rec. H7489 (daily ed. June 29, 1984)(statement of Representative Rodino), reprinted in 1984 U.S. Code Cong. & Ad. News 576, 577. The court in Adams was also influenced by the conflict among bankruptcy courts regarding the construction of §523(a)(6) at the time the 1984 amendment was enacted. Id. at 1426-1427. Thus, the court concluded that the 1984 amendment prescribing the discharge of indebtedness for liabilities arising from drunk driving was intended to clarify rather than change the existing law. Id. at 1427.

Whether or not the 1984 amendment was intended to be a change or a clarification of existing law, this court cannot ignore the effect of its enactment. The subsequent amendment and its legislative history, although not controlling, is entitled to substantial weight in construing the earlier provisions of the Bankruptcy Code. See May Department Stores Co. v Smith, 572 F.2d 1275, 1278 (C.A. 8th Cir. 1978) cert denied, 439 U.S. 837 (1978). In light of Congress' most recent expression of the dischargeability of debts incurred as a result of driving while intoxicated, this court finds that the defendant's voluntary act of driving while intoxicated is sufficiently intentional to meet the "willful and malicious" standard of section 523(a)(6). Proof that the defendant had knowledge of the probable consequences of his drinking and driving is not necessary. This construction is to be given retroactive effect. Consequently, the holding in Matter of Morgan, 22 B.R. 38 (Bkrtcy. D.Neb. 1982), is overruled and the defendant's debt to the plaintiff is nondischargeable.

Because the complaint asks for determination of the defendant's liability and fixing of damages, judgment will not be entered.

IT THEREFORE IS ORDERED that the defendant's motion for summary judgment is denied. The plaintiff is entitled to a declaration that the defendant's debt to the plaintiff is not dischargeable in bankruptcy.

Dated this 17th day of April, 1986.

BY THE COURT

United States District Judge