IT IS ORDERED as set forth below:

Date: December 30, 2015

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
KAREN LYNN KELLEY, Debtor.	:	BANKRUPTCY CASE NO. 15-11293-WHD
PATRICIA REED, Individually and As Administrator of the Estate of Ben Edward Reed, Jr., BEN EDWARD REED, Plaintiffs,	:	ADVERSARY PROCEEDING No. 15-1051-WHD
v.	:	
KAREN LYNN KELLEY, Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Summary Judgment filed by Karen Lynn Kelley (hereinafter the "Debtor") in the above-captioned adversary proceeding. This matter arises in

connection with a complaint filed by Patricia Reed, in her individual capacity and as the administrator of the estate of her son, Ben Edward Reed, Jr. (hereinafter "Reed, Jr."), and Ben Edward Reed, Sr. (hereinafter, collectively, the "Plaintiffs") contesting the dischargeability of a debt pursuant to section 523(a)(6) of the Bankruptcy Code.[1] This Court has subject matter jurisdiction over this matter, *see* 11 U.S.C. §§ 157(a), 1334, which constitutes a core proceeding, *see* 28 U.S.C. § 157(b)(2)(I).

Background

On January 14, 2008, the Debtor purchased an all-terrain vehicle (hereinafter the "ATV") for her son, Roderick Boyd (hereinafter "Boyd"), who was at that time thirteen years old. When she purchased the ATV, the Debtor was provided with a list of warnings concerning the ATV's operation, specifically:

> (a) A child under the age of 16 should not operate this particular ATV;
> (b) The ATV should not be operated without reading the owner's manual;
> (c) The ATV should not be operated without wearing a helmet;
> (d) The ATV should not be driven too fast for the operator's skills or the condition of the roadway;
> (e) Passengers should not be carried on the ATV; and,
> (f) The ATV should not be operated on a public road or street.

Complaint, Exh. A, Order & Judgment, *Reed v. Boyd*, 10-CV-704 (Sup. Ct. Ga. June 2, 2015), at 2-3. The Debtor was also cautioned that ignoring those warnings risked severe or even fatal injury. In spite of these warnings, the Debtor allowed Boyd, who had not thoroughly read the

[1] 11 U.S.C. § 101 *et seq.*

owner's manual, to operate the ATV three times between the date of purchase and May 25, 2008. The Debtor was also aware that other children were occasionally riding the ATV as Boyd's passengers.

On May 25, 2008, the Debtor allowed Boyd to use the ATV for the fourth time and he drove off on a public street. Later that day, Boyd was riding the ATV on a trail near his home with Reed, Jr. riding as a passenger. Neither of the boys was wearing a helmet. Because Boyd was driving too fast for the conditions and his skill level, he lost control of the ATV and had a collision, resulting in the death of Reed, Jr.

The Plaintiffs subsequently brought suit against Boyd and the Debtor in the Superior Court of Troup County, Georgia (hereinafter the "Superior Court"). On June 2, 2015, after a bench trial, the Superior Court found that "[t]he negligence of Boyd was the proximate cause of the death of Reed, Jr.," but imputed Boyd's negligence to the Debtor, whom the Superior Court concluded was negligent in her own right for "entrusting the ATV to…a young and inexperienced driver;…failing to assure that Boyd was properly trained…; and,…failing to properly supervise Boyd." *Id.* at 4. The Superior Court entered judgment against Boyd and the Debtor in the amount of $1,010,127.12—$1,000,000 as the value of Reed, Jr.'s life at the time of his death, and $10,127.12 as reimbursement for funeral and burial expenses.

The Debtor filed her petition under Chapter 7 of the Bankruptcy Code on June 18, 2015, and the Plaintiffs initiated this adversary proceeding on September 22, 2015,

alleging that the judgment debt is nondischargeable pursuant to § 523(a)(6) because it arose from a willful and malicious injury. On November 5, 2015, the Debtor filed the instant motion for summary judgment.

Discussion

A. Collateral Estoppel

Before analyzing the appropriateness of summary judgment in this case, it is necessary to consider what effect, if any, the Superior Court's judgment has on the instant proceeding. The Debtor asserts that she is entitled to judgment as a matter of law because collateral estoppel prevents the Plaintiffs from re-litigating the issue of whether the Debtor's actions resulted in a willful and malicious injury. She argues that because the Superior Court found that the Plaintiffs' injury arose from negligence, this Court should be estopped from finding that the injury was willful and malicious.

"Collateral estoppel prevents the relitigation of issues already litigated and determined by a valid and final judgment in another court." *HSSM #7 Ltd. P'ship v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996). The Supreme Court has explicitly found that a bankruptcy court may apply collateral estoppel in discharge-exception proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991). When a bankruptcy court applies collateral estoppel to a case in front of it, it "must 'look to the law of the State in which [a] judgment was rendered in order to determine its preclusive effect.'" *Lusk v. Williams (In re Williams)*, 282

B.R. 267, 271-72 (Bankr. N.D. Ga. 2002) (Mullins, J.) (quoting *Sciarrone v. Brownlee (In re Brownlee)*, 83 B.R. 836, 838 (Bankr. N.D. Ga. 1988) (Bihary, J.)). In Georgia, application of collateral estoppel requires the satisfaction of four elements:

> (1) there must be an identity of issues between the first and second actions; (2) the duplicated issue must have been actually and necessarily litigated in the prior court proceeding; (3) determination of the issue must have been essential to the prior judgment; and (4) the party to be estopped must have had a full and fair opportunity to litigate the issue in the course of the earlier proceeding.

Morris v. Cunningham (In re Cunningham), 355 B.R. 913, 918 (Bankr. N.D. Ga. 2006) (Bihary, J.).

Here, the Court cannot determine whether collateral estoppel is appropriate because there is not sufficient evidence to conclude that there is an identity of issues between the case at bar and the proceeding in the Superior Court. The issue in the instant case is whether the debt owed to the Plaintiffs arose from a willful and malicious injury. On the other hand, it appears from the Superior Court's judgment that the only issue presented in that court was whether Boyd and the Debtor were negligent, which, as discussed below, is an entirely different standard than determining whether the injury caused was willful and malicious. Because the Court cannot be certain that questions of willfulness and maliciousness were "actually and necessarily litigated" in the Superior Court, it cannot conclude that the Superior Court's judgment precludes a finding that the debt at issue in this case is nondischargeable.

B. Summary Judgment

Notwithstanding the inapplicability of collateral estoppel, summary judgment is nevertheless appropriate in this case. Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings in bankruptcy through Federal Rule of Bankruptcy Procedure 7056, provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also* FED. R. BANKR. P. 7056; *Chavez v. Mercantil Commercebank, N.A.*, 701 F.3d 896, 899 (11th Cir. 2012). "A fact is material if proof of its existence or nonexistence would affect the outcome of the case under controlling substantive law." *Philadelphia Indem. Ins. Co. v. Manitou Constr., Inc.*, 2015 WL 3904557 (N.D. Ga. June 25, 2015), at *3 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine if a reasonable jury could return a verdict in favor of the nonmovant. *Id.* The Court emphasizes that "[a]n evidentiary difference as to an immaterial matter will not bar a summary judgment." *Robbins v. Gould*, 278 F.2d 116, 119 (5th Cir. 1960).

The burden is on the movant to cite to materials in the record that support its assertion that there is no genuine dispute of material fact. FED. R. CIV. P. 56(c)(1); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant establishes a prima facie case supporting entry of summary judgment, the burden shifts to the nonmovant to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial."

Celotex Corp., 477 U.S. at 324 (internal quotation marks omitted). A court should view all evidentiary materials "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Here, the material facts are not subject to genuine dispute. The Debtor has asked the Court to give preclusive effect to the Superior Court's judgment, indicating her position that those are the facts of this case. In response, the Plaintiffs have provided a "Statement of Material Facts of Which There Is a Genuine Issue to Be Tried," but it too primarily relies on the facts found by the Superior Court in its judgment. That both parties have used the findings of the Superior Court as the foundation of their fact statements shows that these facts are not subject to genuine dispute. The only additional facts stated by the Plaintiffs and supported by the record that could potentially be "in dispute" are that the Debtor was advised that ignoring the warnings given to her risked severe injury or death, and that the Debtor knew that other children were riding the ATV with Boyd.[2] These facts, however, are immaterial. Even if they are true, the Debtor would still be entitled to judgment as a matter of law under the standard for excepting a debt from discharge under § 523(a)(6).

[2] The Plaintiffs make other recitations in their filing, but the Court will not consider these statements, as they state conclusions not supported by the record. *See Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("[C]onclusory allegations without specific supporting facts have no probative value."); *Larkin v. Envoy Orlando Holidays, LLC*, 2015 WL 4590639, at *1 (M.D. Fla. July 28, 2015) ("The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by the facts.").

Section 523(a)(6) excepts from discharge debts "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); *see also* 11 U.S.C. § 101(15) ("The term 'entity' includes person, estate, trust, governmental unit, and United States trustee."). The plaintiff bears the burden of proving the exception applies by a preponderance of the evidence. *Kane v. Stewart Tilghman Fox & Bianchi PA (In re Kane)*, 755 F.3d 1285, 1293 (11th Cir. 2014). As is the case with all exceptions to discharge, courts are to strictly construe the provisions of § 523(a)(6). *Gen. Ret. Sys. of the City of Detroit v. Dixon (In re Dixon)*, 525 B.R. 827, 840 (Bankr. N.D. Ga. 2015) (Hagenau, J.); *see also Kawaauhau v. Geiger*, 523 U.S. 57 (1998) ("[E]xceptions to discharge should be confined to those plainly expressed….").

"Willful," as used in § 523(a)(6), "modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely…a deliberate or intentional *act* that leads to injury." *Kawaauhau*, 523 U.S. at 61. Accordingly, the creditor must establish that the debtor intended the injury, not just the act. This generally confines application of § 523(a)(6) to debts arising as the result of intentional torts. *See In re Swofford*, 2008 WL 7842040 (Bankr. N.D. Ga. Dec. 29, 2008), at *2 (Brizendine, J.). Debts arising from injuries caused by a debtor's negligence or recklessness, "do not fall within the compass of § 523(a)(6)." *Kawaauhau*, 523 U.S. at 64; *accord Lee v. Ikner (In re Ikner)*, 883 F.2d 986, 989 (11th Cir. 1989) ("Willful means intentional or deliberate and

can not [sic] be established merely by applying a recklessness standard."). Even if a debtor's conduct "evidences an entire want of care or conscious indifference to the consequences," it "is not sufficient under the legal standard established in this exception to discharge." *In re Swofford*, 2008 WL 7842040, at *2. "An injury is malicious under Section 523(a)(6) when same is determined to be 'wrongful and without just cause or excessive,' or simply resulting from a bad act having no redeeming social value or purpose whatsoever." *AgGeorgia Farm Credit, ACA v. Crumley (In re Crumley)*, 2011 WL 7068913, at *3 (Bankr. N.D. Ga. Aug. 10, 2011) (Brizendine, J.).

The Plaintiffs have not presented any evidence to suggest that the Debtor acted with the purpose of causing injury to Reed, Jr. Instead, they argue that the injury was willful because the Debtor allowed Boyd to use the ATV in contravention of the warnings with the substantial certainty that Reed, Jr. would be severely injured or killed. The intent required to show that an injury was willful can be inferred by proving that the debtor was substantially certain that the injury would occur as a result of the debtor's act. *In re Kane*, 755 F.3d at 1293; *see also In re Swofford*, 2008 WL 7842040, at *2 (noting that a showing of desire to cause the injury, knowledge that the injury would occur, or belief that the injury was substantially certain to occur is necessary to support a finding of willfulness). Courts have developed two tests to determine if a debtor acted with a substantial certainty that injury would occur, one subjective and the other objective. *See In re Kane*, 75 F.3d at 1293. The subjective standard asks

whether the debtor "actually knew that the act was substantially certain to cause injury," and the objective standard asks whether "a debtor's act was in fact substantially certain to cause injury." *Id.* The Federal Circuit Courts have split on which test to apply, and the Eleventh Circuit has not yet definitively chosen its preferred approach. *Id.*

The District Court for the Eastern District of Pennsylvania, hearing an appeal from the bankruptcy court, applied both the subjective and the objective test in *Innaurato v. Elwood (In re Elwood)*, 319 B.R. 371 (E.D. Penn. 2005), a case this Court finds highly instructive, as its facts are substantially similar to those in the case at bar. In *In re Elwood*, the debtor had allowed a sixteen-year old girl, who did not even have her learner's permit, to drive his car so she could pick up her boyfriend from a train station. The girl had driven the car ten times before without incident, but on this occasion caused an accident. The debtor entered bankruptcy, and the husband and wife injured in the accident brought an adversary proceeding seeking to have the debt owed to them excepted from discharge pursuant to § 523(a)(6), arguing that the debtor must have been at least substantially certain that an accident would result from allowing an unlicensed teenager to drive a car. *Id.* at 372. Applying the subjective test first, the district court concluded that because the girl had driven the car ten times, without incident, the debtor could not have had a subjective certainty that injury would occur. *Id.* at 373. Turning to the objective test, the court held that a reasonable person, knowing that the girl had driven ten times without incident, would likewise not have had a

certainty that she would cause an accident when she drove the eleventh time. *Id.* Therefore, the debtor at most "was aware that lending his car to an unlicensed driver entailed certain risks," and thus the plaintiffs' injuries were not willful "within the meaning of § 523(a)(6)." *Id.* at 373 & n.1.

Similar to the debtor in *In re Elwood*, the Debtor in this case was or should have been aware that her actions entailed certain risks, but there is nothing to suggest a substantial certainty that the injury to Reed, Jr. would occur. Under the subjective test, there is nothing in the record indicating any kind of personal knowledge on the Debtor's part that Reed, Jr. would be injured if she let Boyd drive the ATV. On the contrary, Boyd's unblemished record up to that point likely caused her to believe the opposite. Applying the objective standard, a reasonable person would have known there were risks, potentially even great ones, involved in violating the warnings, but would not have had a substantial certainty that injury would result from allowing a thirteen-year old who had shown himself capable of handling the vehicle on three previous occasions to drive the ATV. Evidence showing that the Debtor received the warnings, including the warning concerning the risk of severe injury or death, and had knowledge that other children were riding as passengers may be probative of negligence, recklessness, or indifference to the consequences, but those facts do not show that the Debtor had or should have had a substantial certainty that the injury would occur. Accordingly, the Court must conclude that the debt owed to the Plaintiffs as a result of Reed, Jr.'s death does not

fall within the narrow exception to discharge of § 523(a)(6).

C. Attorney's Fees

Before concluding, the Court wishes to address the Debtor's request for attorney's fees. In her prayer for relief, the Debtor requests that the Court order the Plaintiffs to pay the Debtor's attorney's fees pursuant to sections 707(b)(5)(A) and 523(d) of the Bankruptcy Code. However, the cost-shifting provision in § 707(b)(5)(A) only applies to motions filed pursuant to subsection (b) of § 707 (motions to dismiss for abuse) and the similar provision in § 523(d) only applies in cases involving § 523(a)(2) (debts obtained fraudulently). As neither of these cost-shifting provisions is applicable here, the Court will not grant an award of attorney's fees.

Conclusion

For the reasons set forth above, the Debtor's Motion for Summary Judgment is hereby **GRANTED**, and judgment will be entered for the Debtor in accordance with this Order.

The Clerk is **DIRECTED** to serve a copy of this Order on the Debtor, the Plaintiffs, and respective counsel.

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