UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

RICHARD J. RIEGER,
KAY A. RIEGER,
Debtors.

Case No. 96-22013-MDM

Chapter 7

GERALD T. NIEDERT,
Plaintiff,

v.

Adversary No. 96-2440

RICHARD J. RIEGER,
Defendant.

MEMORANDUM DECISION

The defendant, Richard Rieger, filed a joint petition with his wife for relief under chapter 7 of the Bankruptcy Code on March 15, 1996. The plaintiff, Gerald Niedert, brought this adversary proceeding against Mr. Rieger under 11 U.S.C. § 523(a)(6). A trial was held over the course of four days, followed by post-trial briefs, after which the court took the matter under advisement.

This court has jurisdiction to hear this adversary proceeding pursuant to 28 U.S.C. § 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This decision constitutes the court's findings of facts and conclusions of law under Fed. R. Bankr. P. 7052.

For the reasons stated in this decision, the plaintiff is not entitled by law to recover damages from the defendant, and the complaint will be dismissed.

I. FACTS

In 1988, Mr. Rieger purchased nine lots in the Loramoor Subdivision in Lake Geneva, Wisconsin. There were a total of fourteen lots in the Loramoor Association. Mr. Niedert purchased lot 8 in the subdivision through his business in the early 1980s and then conveyed the property to himself in 1986. Lot 8 is a riparian lot overlooking Lake Geneva. Both Messrs. Niedert and Rieger were members of the Loramoor Property Owners Association, created for the benefit of lot owners of the Loramoor Subdivision.

During the latter part of 1988, Mr. Niedert began planning the construction of a home on lot 8. The provisions of the Declaration of Restrictions governing the development of the subdivision limited construction of homes on lots 7 and 8 to one story[1] in order to preserve a lake view from the homes to the south located farther from the lake. During an annual meeting of the Loramoor Property Owners Board of Directors, Mr. Niedert requested that the one-story height restriction be lifted from his lot, since his original plans called for a one and one half story house with a 35 foot roof peak, which is considerably higher than most one story dwellings. The owners present at the meeting were Gerald Niedert, Jerry Polek, Richard Rieger, and Joseph Martin (Trial Exhibit 51, Loramoor Property Owners Association September 10, 1988, Annual Meeting Report). The owners agreed that the building restrictions were vague. Loramoor's attorney, David Schiltz, was also at the meeting and testified that he was instructed to further review the restrictions.

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[1]Restriction B.2 read: "Buildings constructed on Lots 7 and 8 shall be restricted to a one-story residence." (Trial Exhibit 25, Declaration of Restrictions for Loramoor Subdivision, dated August 31, 1981, and recorded September 16, 1981). There was no restriction on the height of the roof.

Shortly thereafter, the Association's Architectural Committee convened to consider whether the restriction should be lifted. The committee consisted of three persons elected by the lot owners to two year terms. The association's by-laws provided the following:

> It shall be the purpose of the Architectural Committee to insure that all buildings constructed in such subdivision shall be of a type to effectively promote the desireability [sic] of such subdivision. The committee has the authority to approve or disapprove all proposed improvements to be made upon the premises which are required by the Restrictions to be submitted to them for approval. In passing upon plans and specifications, the committee shall take into consideration the suitability of said building, the cost and size thereof, the materials to be used in the construction thereof, and the view from adjacent and neighboring properties.

(Trial Exhibit 24, Loramoor Property Owners Association, Inc., By-Laws). The minutes of the September 10, 1988, meeting show that Jerry Polek, Joseph Martin, and Richard Rieger were elected to serve as the architectural committee.

As a result of the architectural committee meeting, Mr. Polek sent a letter drafted by Mr. Schiltz to the property owners asking whether there were any objections to a request by Mr. Niedert for a variance of the one story restriction on lot 8. The letter explained,

> The officers met with the association attorney and were advised that the wording of the covenants is sufficiently vague that were it to be challenged in court the association would in all probability lose. Mr. Niedert is a very reasonable man and in no way wishes to instigate legal action. Likewise the association does not want to incur the expense of having to defend itself in the event of litigation. To repeat, Mr. Niedert has been very cooperative in his request. The officers feel that his request is reasonable and should be approved.

(Trial Exhibit 52, January 17, 1989, letter from Jerry Polek, Assn. President). The letter instructed the owners to object in writing to the Association's attorney by February 1, 1989. Mr. Rieger stated at trial that he never received the letter. Jerry Polek informed Mr. Niedert in February that no objections to the variance were received by the association's attorney (Trial

Exhibit 54, February 6, 1989, letter from Jerry Polek, Assn. President). Mr. Niedert's request to build a two story home on lot 8 was thereby granted, and the Declaration of Restrictions was later amended.

The Declaration of Restrictions provided that the provisions "may be amended from time to time by the consent of ninety (90%) per cent of all the owners of lots in such subdivision, excepting Lot No. 6, during the initial twenty (20) year period of time when such Declaration is declared to be in effect." (Trial Exhibit 25, Declaration of Restrictions for Loramoor Subdivision, § E, dated August 31, 1981, and recorded September 16, 1981). Mr. Rieger owned three of the subdivision's fourteen lots. Outlot 1, which is adjacent to the subdivision and was also owned by Mr. Rieger, did not gain membership and voting rights until 1991. There was a total of eleven homeowners in the subdivision. Mr. Niedert unsuccessfully sought clarification from the committee whether the 90% voting requirement to amend the restrictions referred to the percentage of lots or the percentage of lot owners. Nevertheless, the subdivision's Declaration of Restrictions was amended to read:

> Section B. 2 of the Declaration of Restrictions for Loramoor Subdivision dated August 31, 1981 and recorded in Volume 275 at Pages 528 through 532 as Document No. 72870 is hereby amended as follows:
>
> 2. Any building constructed on Lot 7 shall be restricted to a one-story residence.

(Trial Exhibit 26, Amendment of Declaration of Restrictions for Loramoor Subdivision, dated May 9, 1989, and recorded May 17, 1989). The Amendment, which was drafted and notarized by David Schiltz, was signed by Jerry Polek, President, and Joseph Martin, Secretary/Treasurer. Thus, Mr. Niedert no longer had a one story restriction on lot 8.

Mr. Polek testified that he delivered Mr. Niedert's original set of blueprints (Trial Exhibit 14) to Mr. Rieger for review in the summer of 1993. Mr. Rieger, however, denied that he had consented to the construction of Mr. Niedert's two story house, and he refused to initial the blueprints. Both Messrs. Polek and Martin initialed the blueprints, and Mr. Polek later informed Mr. Niedert that his plans had been approved.

Mr. Niedert started building a two story house on his lot in July 1993. The footings for the entire house were poured, the basement walls were in place, and the drainage system was laid when Mr. Niedert was sued by his neighbors, George and Leona Loeber on August 31, 1993. The Loebers sought a temporary injunction stopping construction of Mr. Niedert's home. They had purchased lot 3 from Mr. Rieger in the fall of 1989 for approximately $250,000.00. Lot 3 was directly south of lots 7 and 8, and Mr. Rieger made it clear in his negotiations with the Loebers that any home built between lot 3 and the lake would be no higher than a single story. The Loebers' motion for temporary injunction was supported by an affidavit signed by Mr. Rieger on September 3, 1993. Mr. Rieger's affidavit stated that "as far as [he] knew, Niedert could not build a two-story residence and that [he] was completely in the dark as to why Niedert believed otherwise. . . . [and he] had absolutely no knowledge of any Amendment to the Declaration of Restrictions nor had [he] ever been asked for [his] consent to such an Amendment." (Trial Exhibit 33, Affidavit of Richard Rieger, ¶¶ 8, 9). The Loebers obtained a temporary injunction stopping construction of Mr. Niedert's home.

Mr. Niedert eventually entered into a settlement agreement with the Loebers which allowed him to build a modified two story house with a roof elevation of about 31 feet. (Trial Exhibit 7, November 8, 1993, Amended Stipulation and Final Judgment Order). It is the cost of

the modification of the plans and construction to fit the existing foundation that is the major component of Mr. Niedert's requested damages.

After the association's annual meeting in October 1993, the Loramoor owners also agreed that Mr. Niedert could build a two-story house with a lower roof line. At the same time, Mr. Niedert agreed to pave the pedestrian easement bordering his lot line and to allow golf carts access to the waterfront. It was the custom of subdivision residents to ride their golf carts from their homes to the lake, and the existing gravel path running along the edge of Mr. Niedert's property made for a bumpy ride. According to Mr. Rieger, he only agreed to the construction of the revised two story home because of the easement contingencies. Mr. Rieger, along with committee members Alan Gaule and John Nolan, then signed Mr. Niedert's modified set of house plans (Trial Exhibit 15). Additionally, Mr. Niedert sent letters to association members who were not present at the annual meeting and requested their written approval to build a modified two story home. Mr. Niedert received written consent by Richard Hulina (Trial Exhibit 9), Nestor Alabarca (Trial Exhibit 11), and Donald Geller (Trial Exhibit 13). In all, Mr. Niedert obtained ten of the eleven lot owners' consent to build a two story home (*See* Trial Exhibits 1A & 1B).

Arthur Reeves, President of Reeves Custom Builders, Inc., constructed Mr. Niedert's home. In order to accommodate a lower pitched roof, the design of the house changed significantly. Originally, Mr. Niedert planned to build a one and one half story home with a high pitched gable roof. In order to accommodate a lower pitched hipped roof, the walls had to be extended upward, resulting in a complete, rather than partial, second story. Along with the height of the roof, the eaves, windows, masonry, and trim had to be redesigned. The second

design increased the size of the house by approximately 1000 square feet, and Mr. Niedert paid increased costs of approximately $120,000.00. The cost of building according to the original plans had been about $1,110,000.

In March 1994, Mr. Niedert withdrew his permission to use golf carts on the path.[2] He explained his reasons in a letter[3] to association president, John Nolan: (1) there was no means by which to control the number of carts on the street, easement and pier; (2) there was no way to control who drove the carts; (3) the use of carts on Loramoor Road was dangerous; (4) operating carts could increase insurance costs; (5) the use of carts would disturb the ambiance of the subdivision; (6) operating a golf cart on a public right-of-way may be illegal; and (7) the buzzing of carts would affect the residential character and tranquility of Mr. Niedert's home (Trial Exhibit 45, March 4, 1994 letter from Gerald Niedert).

Loramoor Association's attorney, David Schiltz, was also of the opinion that the use of golf carts on the easement was objectionable. Mr. Schiltz testified that he had advised the association members several times that driving golf carts on Loramoor Road, a public road, was illegal. The only way residents could get from their homes to the pedestrian easement was by driving on the public road. He told the owners that he had discussed the matter with the Chief of Police, Joseph Leedle, and warnings and then citations would be issued to those found operating golf carts on public roadways (*See also* Trial Exhibit 56, June 9, 1995 letter from David Schiltz).

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[2]The right to use golf carts was *not* part of the stipulation between Mr. Niedert and the Loebers.

[3]Carbon copied and certified mailed to Richard Rieger.

Shortly after Mr. Niedert had continued construction on his *modified* two-story home, he was sued by other neighbors, Donald and Lee Geller, on September 26, 1994. The Gellers, who were represented by the same attorney as the Loebers, also sought a temporary and permanent injunction compelling Mr. Niedert to tear down his partially constructed two-story home. The Geller's motion for injunction was supported by an affidavit of Mr. Rieger, signed September 23, 1994. The affidavit was nearly identical to the previous affidavit used to support the Loeber injunction. Mr. Rieger admitted at trial that he did not fully review the affidavit when he signed it. Mr. Niedert successfully defended the second injunction and was awarded $18,898.78 by the trial court in costs and attorney fees against the Gellers. He was also successful in defending the Gellers' appeal.

II. ARGUMENTS

Mr. Niedert argues that Mr. Rieger's conduct was willful and malicious, and the resulting damages are nondischargeable under § 523(a)(6). When he sold his lot to the Loebers, Mr. Rieger represented to them that the lot owned by Mr. Niedert would only have a one story home on it, even though he knew the restriction had been lifted just months before. Mr. Niedert claims that he relied upon the lack of objections by the lot owners, including Mr. Rieger, as well as the change in the subdivision restriction, that he had authority to construct a two story home. Mr. Rieger then signed two identical affidavits, several years apart, attesting to the Walworth County Circuit Court that he was "in the dark" about a process that he was very much involved with.

Mr. Rieger contends that his conduct was not willful and malicious, and he never intended to harm Mr. Niedert. He signed the affidavit in support of the Loeber lawsuit because

he believed that no official amendment to the deed restrictions had been properly enacted. Mr. Rieger claims that he did not fully review the affidavit in support of the Geller injunction because of his poor health at the time, and he believed that the permission granted Mr. Niedert was contingent upon the use of golf carts on the easement. Additionally, no evidence was presented to suggest that either state court relied upon the affidavits of Mr. Rieger in reaching their conclusions. The Loeber lawsuit was resolved between the parties, and Mr. Rieger did not participate in the hearing on the Geller lawsuit.

III. ANALYSIS

A. *Willful and Malicious Injury under 11 U.S.C. § 523(a)(6)*

In keeping with the purpose of the Bankruptcy Code, exceptions to discharge of debts are to be strictly construed against the creditor and liberally in favor of the debtor. *Matter of Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992). The Code provides that where a debtor's obligation arises from "willful and malicious injury" to another, that debt is nondischargeable. 11 U.S.C. § 523(a)(6).[4] In order for the debt to be excepted from discharge, Mr. Niedert must prove by a preponderance of the evidence that he has an enforceable obligation against Mr. Reiger, and that Mr. Rieger's actions were both "willful and malicious." *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661 (1991). A "willful" act is one that is deliberate and intentional, and a

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[4]Section 523(a)(6) of the Bankruptcy Code provides:

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt –
>
> > (6) 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).

"malicious" act is one that is wrongful and taken without just cause or excuse, even though without ill will. *Matter of Thirtyacre*, 36 F.3d 697, 700-01 (7th Cir. 1994). The Seventh Circuit has concluded that § 523(a)(6) does not require specific intent to injure in order to prevent discharge. *Id.*; *In re Rosenberger*, 208 B.R. 445, 447 (Bankr. C.D. Ill. 1997).

In adopting this definition of malice, the Seventh Circuit rejected the stricter standard adopted by some courts which require a *specific* intent to do harm. Also, the court did not expressly determine whether "malice" requires that the act inevitably or necessarily cause injury. *See In re Knapp*, 179 B.R. 106 (Bankr. S.D. Ill. 1995) (discussing Seventh Circuit's approach to § 523(a)(6)). Some lower courts applying the standard set forth in *Thirtyacre* have nevertheless held that in order to find malice, the act in question must necessarily lead to or be substantially certain to cause harm. *In re Rosenberger*, 208 B.R. at 447; *Matter of Staggs*, 177 B.R. 92, 96 (N.D. Ind. 1995). The standards for an exception to discharge under 11 U.S.C. § 523(a)(6) is an issue currently before the United States Supreme Court in *In re Geiger*, 113 F.3d 848, 852-53 (8th Cir.), *cert. granted*, 118 S.Ct. 31 (1997), but that case has not yet been decided.

B. *Damages*

In his post-trial brief, Mr. Niedert requested compensatory and punitive damages, plus costs and disbursements in bringing this action. To accommodate the revised roof line dimensions and height requirements, construction costs and expenses were increased by $120,056.16 (Trial Exhibits 31A & 31B). The Loebers' preliminary injunction delayed construction by approximately six months, during which Mr. Niedert was paying rent. Also because of the delays, Mr. Niedert was required to reapply for building permits, and he incurred

architectural fees for the redesign. Additionally, Mr. Niedert has not been reimbursed for $4,000.00 in legal fees incurred defending the Gellers' appeal of the trial court's dismissal of their lawsuit. Mr. Niedert also seeks prejudgment interest at the rate of 5% per annum from the filing of the Loebers' lawsuit on August 31, 1993, to the date of judgment. Finally, Mr. Niedert seeks an award of punitive damages of three times the amount of the compensatory damages sought.

Mr. Rieger contends that Mr. Niedert has not been damaged because the changes to the house have increased its value. Furthermore, no evidence was presented to substantiate any claims of emotional distress or damage to reputation suffered by Mr. Niedert.

While it is likely that the value of Mr. Niedert's house increased with the increased construction costs, as it is a considerably larger house, the court is satisfied that Mr. Niedert suffered substantial damages. The Restatement of Torts explains: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, *to the extent that this is equitable*." RESTATEMENT (SECOND) OF TORTS § 920 (1979) (emphasis added). The Comments elaborate:

> The rule stated in this Section is limited by the general principle underlying the assessment of damages in tort cases, which is that an injured person is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the . . . tort. This principle is intended primarily to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will. Thus, when a person has land or chattels that he has devoted to a particular purpose, he is entitled to continue to use them for that purpose, and the person who interferes with the use is not entitled to have damages mitigated by the fact that he has added to their market value. In these cases the good faith, and reasonableness of the attitudes, of the parties are factors in determining the measure of recovery. Thus unless the plaintiff is capricious or spiteful and the defendant has acted by mistake, so that his

> conduct was not knowingly tortious, the damages may not be diminished by the fact that the defendant's interference has increased the monetary value of the property.

RESTATEMENT (SECOND) OF TORTS § 920 cmt. f (1979) (citations omitted).

The increased construction costs and ensuing increase in the home's value was forced upon Mr. Niedert. The evidence established that, in order to accommodate a lower pitched roof on a foundation that was already $50,000.00 along, the builder had no choice but to build a more expensive home. However, it was vastly different from the home Mr. Niedert planned for so long. For a considerable period of time before the house was built, Mr. Niedert devoted full time to the pursuit of his dream home. He subscribed to numerous architectural magazines. He had several architects draw plans before he selected the one he wanted. This project was extremely important to him. He was forced by Mr. Rieger's actions to settle for a house that might be bigger, might be very nice, but is vastly different from what he wanted. The extra money it cost him was not spent voluntarily, and he might have had more interesting plans for it. Thus, Mr. Rieger argument as to the lack of damages is unavailing, and equity favors Mr. Niedert. At the very least, Mr. Niedert incurred additional building costs of $120,056.16, architects' fees of $7,000.00, building permits of $300.00, and six months rent for the delay in the amount of $7,200.00, for a total of $134,556.15.

The filing of the substantially similar affidavit in the Geller lawsuit did not have the catastrophic effect that the earlier affidavit did. The evidence that Mr. Rieger lied in this affidavit is more obvious. He had approved the plans to the revised two story house in writing, and yet he swore he was still "in the dark" as to why Mr. Niedert thought he could build a two story house. His excuse of bad health is completely incredible, and there is no evidence he was

prevented from reading or understanding a perfectly clear document. However, this time the court did not give credence to the document as it did not issue a restraining order and dismissed the case as frivolous. The Gellers were ordered to pay substantial attorneys' fees to Mr. Niedert. This time the affidavit did no harm. There is no evidence that the Gellers would not have filed the suit without this affidavit, and in fact, they probably would have.[5] Therefore, the trial court expenses and attorneys' fees, and the fees on appeal, were not caused to any large extent by Mr. Rieger.

C. State Law Claim and Federal Law Exception to Discharge.

The harm caused to Mr. Niedert occurred completely independently of this bankruptcy and is unrelated to bankruptcy law. When the court is called upon to determine whether an unliquidated cause of action attributable to acts occurring before the bankruptcy is excepted from the debtor's discharge, the bankruptcy court must apply state law to determine whether Mr. Niedert suffered a compensable injury. *See In re Klause*, 181 B.R. 487, 492-93 (Bankr. C.D. Cal. 1995) (holding that the trier of fact looks to state law to determine whether there is liability and the amount of compensatory and punitive damages, and then the trier of fact determines whether that set of facts qualifies as a nondischargeable claim under the bankruptcy code). The harm inflicted by Mr. Rieger in this case was the submission of false affidavits regarding Mr. Niedert's right to build his house, which furthered the litigation of others against him. Without

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[5]The trial record includes a picture of the pedestrian easement where the paving blocks on the Gellers' side have been removed and stacked on Mr. Niedert's side (Trial Exhibits 47 & 48). A related lawsuit is pending. Mr. Rieger appears to be an insignificant player in the Niedert/Geller dispute.

the two actions against him, Mr. Niedert would not have incurred expenses relating to the modified construction, rental payments due to delay, and attorney fees.

If the submission of false affidavits were compensable under Wisconsin law, there is no question that the standards under 11 U.S.C. § 523(a)(6) are met. Mr. Rieger did the most harm in filing the false affidavit in support of the Loebers' lawsuit for an injunction to stop construction of Mr. Niedert's house according to his original plans. The Loebers received a temporary restraining order, and it is highly likely that the affidavit was a substantial cause. The affidavit was used for the specific purpose of obtaining the injunction, and it achieved the desired result. The TRO was the direct cause of Mr. Niedert's damages incurred by stopping construction and changing plans. Since the affidavit was false, which this court will discuss further in a moment, it was without justification or excuse. The intentional wrongful act, causal connection and damages that flowed from the act are excepted from the discharge under federal law to the extent that the plaintiff is entitled to damages under state law.

Mr. Rieger insists that the affidavit was not false, and therefore he should be absolved of any harm that befell Mr. Niedert on account of it. To simplify, he says he did not know the restriction was lifted from lot 8 in 1989, and he did not know Mr. Niedert had received architectural committee approval to go ahead with his plans. That is why he was "in the dark" as to why Mr. Niedert thought he could build his contemplated house. Surrounding events reveal he is not credible in his assertion of ignorance in the fall of 1993 as to events that took place in the prior four years.

The minutes of the 1989 annual meeting of the subdivision association clearly state that Mr. Rieger was present, and the lifting of the restriction on lot 8 was discussed. He voiced no

objection to Mr. Niedert's plans, and the minutes and Mr. Schiltz' subsequent letter to owners indicate as much. This contemporaneous letter from the attorney, and Mr. Schiltz' testimony regarding the same meeting, is more credible than Mr. Rieger's self-serving statements to the contrary. The matter was then referred to the architectural committee, of which Mr. Rieger was a member. He remembered the discussion there, but after it was referred to Mr. Schiltz, he claims he heard nothing. The letter asking if there were objections to Mr. Niedert's proposal was sent to him, but he states he never received it. Even if he did not, which is unlikely, he was put on notice at the meeting that Mr. Niedert was pursuing the request, the attorney had been instructed to pursue it, and he should not be "in the dark."

Another reason why Mr. Rieger had to have known about Mr. Niedert's plans involves the delivery of those plans to Mr. Rieger by Mr. Polek. When Mr. Rieger questioned Mr. Polek about the obviously two story plans, Mr. Polek said the restriction had "been taken care of," or words to that effect, and he would explain later. Mr. Polek had indicated his approval on the plans. Even if his cryptic comment was never explained, Mr. Polek's approval and indication there was no problem with a two story house would have told Mr. Rieger that, somehow, Mr. Niedert was not prohibited from building his home.

Most telling, however, is Mr. Rieger's own admission that he saw the house going up. He walked his dog by there every day. He had only seen one set of plans. Granted, these were marked as a draft, not for construction, but Mr. Rieger was on the architectural committee, and no other plans had been submitted. It is incredible that he could think the foundation was for anything but that original house. Still, he did not ask Mr. Niedert or the other members of the architectural committee why it was going up, nor did he protest until the opportunity of the

Loeber lawsuit presented itself. He clearly knew Mr. Niedert had a right to do what he was doing.

When the Loeber lawsuit did present itself, a plausible motive for filing the false affidavit emerges. A few months earlier, Mr. Rieger had sold lot 3 to the Loebers for about $250,000.00. He had represented to them that their lot would maintain a clear view of the lake, which would now be obstructed by Mr. Niedert's house. The lot would have been worth far less without the unrestricted view, and that would have cost Mr. Rieger a lot of money. He could not contradict himself once the Loebers found out about the two story house which would soon block their view.

Mr. Rieger's misrepresentation as to the value of lot 3 is not an isolated incident. He had also lied to Waukesha State Bank about the value of his outlot and its access to the lake when he offered it as collateral when seeking additional credit, and the trial court in the foreclosure action so found (Trial Exhibit 35). The fact that he lied again when the Gellers filed their lawsuit is further evidence of his facile willingness to conduct his business and legal affairs unencumbered by the truth.

The above discussion of the debtor's conduct illustrates the anomaly that can occur when a cause of action is based on a state law claim, and the plaintiff also seeks to meet the standards for an exception to discharge under federal law. Here, the plaintiff has met the federal standards for the exception to discharge; unfortunately, however, the cause of action is not compensable under state law. Thus, there is no debt to except from discharge. Since under state law, no civil liability can arise on account of a witness' affidavit or testimony given in connection with litigation, punitive damages and prejudgment interest are likewise denied.

The fact that a person can file an intentionally false affidavit that is used by a court to issue an injunction causing substantial damages to an innocent party, without incurring liability, is highly counterintuitive. However, there is an overriding policy under state law which provides that a witness' statements, which include testimony, affidavits and depositions, made in connection with litigation are entitled to absolute immunity from civil liability, as long as the statements bear a proper relationship to the issues being litigated. *Bergman v. Hupy*, 64 Wis. 2d 747, 749, 221 N.W.2d 898, 900 (1974). All doubts are to be resolved in favor of relevancy. *Snow v. Koeppl*, 159 Wis. 2d 77, 81, 464 N.W.2d 215, 216 (Ct. App. 1990) (citing *Bussewitz v. Wisconsin Teachers' Ass'n*, 188 Wis. 121, 125, 205 N.W. 808, 810 (1925)); *see also Giffin v. Summerlin*, 78 F.3d 1227 (7th Cir. 1996) (following rule of absolute immunity of witnesses under Indiana law). "Witnesses are immune from civil liability for damages caused by false and malicious testimony, if relevant to the issues in the matter where the testimony is given." *Bromond v. Holt*, 24 Wis. 2d 336, 341-42, 129 N.W.2d 149, 152 (1964); *Malcolm H. v. Ackerman*, 1997 WL 728425 (Ct. App. Nov. 25, 1997) (recommended for publication). The affidavit Mr. Rieger filed in the Loeber action was false, but it was relevant to the subject matter of the lawsuit, and he cannot be held civilly liable for the harm that flowed from it.

There are exceptions to the absolute immunity rule for slander of title, *Kensington Dev. Corp. v. Israel*, 142 Wis. 2d 894, 903, 419 N.W.2d 241, 245 (1988), and statements made to law enforcement officers, *Bergman v. Hupy*, 64 Wis. 2d at 751-52, 221 N.W.2d at 901, which provide a conditional privilege, and civil liability may attach for false and malicious testimony. Nevertheless, conditional privilege is not applicable to the facts of this case.

Several courts have noted that there is a good policy reason for the rule of absolute immunity from civil liability in connection with evidence presented to a court:

> If parties are shadowed by the fear that by some mistake as to facts or some excess of zeal, or by some error . . . they may be subjected to harassing litigation . . . they may well feel that justice is too dearly bought and that it is safest to abandon its pursuit . . . . [F]eelings are often wounded and reputations are sometimes soiled. This is, of course to be regretted, but . . . "[T]he paramount public interest here intervenes and overrides considerations of mere private right as between the parties."

Malcolm H., 1997 WL 728425 at *2; *Snow*, 159 Wis. 2d at 80, 464 N.W.2d at 216-17; *Bussewitz*, 188 Wis. at 127-28, 205 N.W. at 811; *Keeley v. Great N. Ry.*, 156 Wis. 181, 187, 145 N.W. 664, 665 (1914). Thus, there is no exception to discharge, notwithstanding the debtor's willful and malicious harm to the plaintiff's interests and the substantial damage that resulted.

IV. CONCLUSION

For the reasons stated above, the debtor has no liability to the plaintiff that may be excepted from the debtor's discharge under 11 U.S.C. § 523(a)(6). A separate order dismissing the complaint will be entered.

Dated at Milwaukee, Wisconsin, February 23, 1998.

BY THE COURT

Honorable Margaret Dee McGarity
United States Bankruptcy Judge