

No. _____

In the Supreme Court of the United States

ZACHARY N. TROST AND KIMBERLY A. TROST,
Petitioners,

v.

SHERRY TROST,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. For a debt arising out of unlawful conduct to be considered non-dischargeable in bankruptcy pursuant to *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), what should constitute sufficient evidence that a wrongdoer intended the *consequences* of the wrongful act and not merely the wrongful act itself?
- II. What party should bear the burden of proving that a wrongdoer intended the ‘the *consequences* of the wrongful act’ and not merely the wrongful act itself, for a debt associated with the wrongdoing to be non dischargeable in bankruptcy?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the caption. Petitioners, Zachary N. Trost and Kimberly A. Trost, were the defendants in the Bankruptcy Court and the appellants at the Bankruptcy Appellant Panel and the Seventh Circuit Court of Appeals. Respondent, Sherry Trost (Step-Mother to Zachary Trost) was the plaintiff and sued the Petitioners in a District Court Action that resulted in a \$108,797.06 verdict against the Petitioners. When the Petitioners filed for Bankruptcy, the Respondent successfully sued Petitioners in the Bankruptcy Court, where the Bankruptcy Court opined the Judgment to be non dischargeable.

CORPORATE DISCLOSURE STATEMENT

Neither the Petitioners, Zachary N. Trost and Kimberly A. Trost, nor the Respondent, Sherry Trost (Zachary Trost's step-mother) are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Zachary N. Trost and Kimberly A. Trost, respectfully petition this Court for a writ of certiorari to review the decisions of the lower courts, particularly the opinion of the Sixth Circuit Court of Appeals, with respect to the non-dischargeable nature of the Judgment awarded Respondent, Sherry Trost, who was unable to show any evidence that the Petitioner-Debtors *intended to cause* the injury complained-of in the event that gave rise to the judgment she obtained against them.

OPINIONS BELOW

The Sixth Circuit Court of Appeal's opinion is unpublished but reproduced in the appendix hereto at A. The opinion of Bankruptcy Appellate Panel of the Sixth Circuit Court of Appeals is unpublished but reproduced in the appendix hereto at B. The original opinion of the Bankruptcy Court of the Western District of Michigan is reported at 545 B.R. 193 (2016), and reproduced in the appendix hereto at C.

JURISDICTION

The Sixth Circuit Court of Appeals filed its decision in this case on May 30, 2018. There were no motions for rehearing or any other motions altering the timing for filing this petition. The Supreme Court has jurisdiction under 28 U.S.C. § 1254 (1), to review the Sixth Circuit Court of Appeal's decision on a *Writ of Certiorari*.

CONSTITUTIONAL PROVISION INVOLVED

There is no specific Constitution provisions involved in this case other than the fact the Bankruptcy Court's (and Circuit Courts) appear to be creating their own interpretations and broadening what this Court specifically stated in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998).

EXISTING SUPREME COURT PRECEDENT SOUGHT TO BE REVIEWED

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998). In *Geiger*, this Court specifically stated that a wrongdoer must intend 'the consequences of an act,' not simply 'the act itself' for a debt to be consider non dischargeable. The important distinction between these two issues has been blurred by the lower courts, if not altogether eliminated. Unnecessary litigation can be avoided if this Court would provide some additional clarity.

INTRODUCTION

For a debt arising out of unlawful conduct to be considered non-dischargeable under the bankruptcy code, a wrongdoer must intend 'the consequences of an act,' not simply 'the act itself.' " *Kawaauhau v. Geiger*, 523 U.S. 57 at 61–62, (1998) ((quoting Restatement (Second) of Torts § 8A, Comment a, p. 15 (1964)). Understandably, lower courts (and most specifically the bankruptcy courts) have blurred the important distinction drawn by this court concerning the difference between a bad act resulting in harm and the actual intent to cause the resulting harm. Clarification on this issue is needed and this case (whether the Petitioners win or lose) presents the Court with an

excellent opportunity to lend clarity and eliminate needlessly filed bankruptcy petitions (and litigation).

STATEMENT OF THE CASE

This case involves the family of Fred Trost, the former star and owner of a television show called *Michigan Outdoors*. *Michigan Outdoors* ran on TV for over 20 years throughout the State of Michigan. During its time, the show accumulated significant debts, including, but not limited to, a multi-million dollar civil judgment known as the “Buck Stop Judgment.” Initially, Fred or his businesses were responsible for the debts. At some point, however, Respondent Sherry Trost, (Fred’s second wife and the step-mother to Petitioner, Zachary Trost), agreed to assume liability for the show’s debts so that Fred could continue to operate the show. Sherry incurred substantial tax liability as a result. This is the *injury* Respondent claims the Petitioners are responsible for and which she claims to be non-dischargeable.

Following Fred Trost’s sudden death in July 2007, Sherry Trost and Zachary Trost came to an agreement whereby Zachary Trost agreed to pay off the debts Sherry Trost had incurred running the show (primarily tax debts owed by Sherry Trost prior to Fred Trost’s death), in exchange for the assets that Sherry Trost claimed ownership to related to the television show. In June 2009, Sherry Trost sued Zachary and Kimberly for breach of contract and common law conversion in the United States District Court for the Western District of Michigan. The lawsuit brought by Sherry Trost was grounded primarily upon *contractually* based theories of recovery but included claims for fraud and conversion. Sherry Trost prevailed at trial on the

breach of contract and conversion counts but (significantly) the jury returned a verdict of no cause of action in favor of the Petitioners on the fraud count. The verdict against the Petitioners resulted in a Judgment in the amount of \$108,797.06.

On appeal, the Sixth Circuit Court of Appeals upheld the verdict and concluded, “The trial evidence detailed the property at issue, how Sherry came to own it, the circumstances surrounding *the formation of Sherry’s contract with Zachary, Sherry’s partial performance of it, and Zachary’s breach.*” *Trost v. Trost*, 525 F. App’x 335, 339 (6th Cir. 2013) (unpublished) (emphasis added). Unable to pay the debt owing his step-mother, Petitioners Zachary Trost and Kimberly Trost filed a chapter 7 bankruptcy petition in an attempt to discharge the judgment. Respondent, Sherry Trost, filed an adversary proceeding asserting that the debt should be excepted from discharge under § 523(a)(6) because the Petitioners had intended a willful and malicious injury.

Although the *injury* complained-of by Sherry Trost occurred before the agreement reached with Zachary Trost, and although there was no evidence that the Petitioners had intended a willful and malicious injury upon the Respondent, the Bankruptcy Court issued an opinion that the judgment was non dischargeable under § 523(a)(6) count and the Sixth Circuit affirmed.

REASONS FOR ALLOWANCE OF THE WRIT

In *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998), the Court addressed *the degree to which* a creditor must establish that a debtor intended to injure a creditor for the debtor's wrongful act to be deemed non-dischargeable. While watered down over the past two decades by other circuits and certain bankruptcy court's within this circuit, the *Geiger* decision made it clear that establishing the willfulness element under § 523(a)(6) "takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Geiger* at 61, 118 S. Ct. 974. This Court stated that the alleged wrongdoer must "intend 'the consequences of an act,' not simply 'the act itself.'" *Geiger* at 61–62, 118 S. Ct. 974 (quoting Restatement (Second) of Torts § 8A, Comment a, p. 15 (1964)).

The lower federal courts (and the bankruptcy bar) need clarification and/or guidance as to what this Court intends as an appropriate standard for a creditor establishing sufficient evidence of the "consequences of the act" element. In this case, there is no evidence the Petitioners had intentions to deliberately or intentionally cause the injury complained-of by the Respondent. In fact, the injury complained-of by the Respondent (the taxes and debts from the television show) *already existed* at the time the Petitioners breached their promise to pay the debts purportedly in exchange for the memorabilia. While a jury concluded that the Petitioners engaged in unlawful conduct, there is no evidence that the Petitioners intended 'the consequences of the act' (as *Geiger* requires).

Notable in this case (and in so many other similar cases), is the that the lower courts inferred wrongful intent to injury from wrongful behavior in the underlying activities. These are mutually exclusive issues. In detailing Zachary Trost's conduct with his step-mother, the Sixth Circuit pointed out that "[the] trial evidence detailed the property at issue, how Sherry came to own it, the circumstances surrounding the formation of Sherry's contract with Zachary, Sherry's partial performance of it, and Zachary's breach." *Trost v. Trost*, 525 F. App'x 335, 339 (6th Cir. 2013) (unpublished).

These are significant observations, in light of the issue of non-dischargeability, because in its own way the opinion summarizes the relationship between the parties in an interesting and noteworthy way. Acknowledging that the Zachary and Kimberly Trost were wrong in keeping the memorabilia after Sherry demanded it back, what is at the heart of their dispute was a contract between the parties. According to the record, Zach Trost did contractual obligate himself to sell memorabilia and tapes and pay off the existing debts and taxes already held by Sherry Trost. None of this, however, was the cause of the damages Sherry Trost claims to have sustained (the taxes and debts that already existed), nor was it intentionally done to cause harm to Sherry Trost.

There is no denying that a jury determined that what the Petitioners was unlawful, but there is absolutely no evidence (nor was any ever even offered) that the Petitioners intended to cause the *injury* complained-of by the Respondent. This is at the core of what should be the *Geiger* standard. Without of

evidence of actual intent to cause injury, the fact that the Petitioners were found to have acted unlawfully and even to have caused harm (not returning the videotapes and memorabilia) as the Sixth Circuit points out, is not enough to trigger non-dischargeability.

Significantly, with *Gieger*, this Court specifically rejected the much broader interpretation of “willful and malicious” that had previously been utilized in the Sixth Circuit (notably in a case known as *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987)). Under the old *Perkins* standard, trial courts were permitted to determine that ‘willful and malicious injury occurs’ when one intends the act and *should know* the consequences of the act. With the *Trost* opinion, the Sixth Circuit appears to be returning to the *Perkins* standard (and other lower courts are doing the same).

Wrongful behavior, injury as a result of wrongful behavior, and willful *and* malicious intent to injure, are separate and distinct conclusions requiring evidence of all three. Lacking in this case is any evidence that the Petitioners willfully *and* maliciously ‘intended to cause injury’.

In this case, the Bankruptcy Court, and thereafter the Sixth Circuit, appears to have actually wrongfully shifted the burden to the Petitioners to establish that they did not commit a ‘deliberate or intentional act that caused a deliberate or intentional injury’ upon the Respondent. Clarity for the lower courts is needed not just on this issue of what constitutes sufficient evidence of *the degree to which* a creditor must establish that a debtor intended to injure a creditor (for non dischargeability to be properly applied) but also on the

question of which party bears the burden of persuasion on this issue.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter and the important issues presented herein.

Respectfully Submitted,

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