

No. 18-271

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 REHEARING

Michael R. Behan
Counsel of Record
Schram, Behan & Behan
4127 Okemos Road, Suite 3
Okemos, Michigan 48864
(517) 347-3500
behanm@me.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PROCEDURAL SUMMARY	1
PETITION FOR REHEARING OF THE COURT'S DENIAL OF PETITION FOR WRIT OF CERTIORARI	1
ARGUMENT	1
THE COURT SHOULD RESOLVE A DIVISION BETWEEN THE CIRCUIT COURTS AS TO WHETHER THE 'SUBSTANTIAL CERTAINTY' TEST ANNOUNCED BY THE COURT IN <i>KAWAAUHAU V. GEIGER</i> IS TO BE JUDGED BY A BANKRUPTCY COURT SUBJECTIVELY OR OBJECTIVELY – AND THE CONFUSION LEADS TO UNNECESSARY BANKRUPTCY LITIGATION THAT COULD BE REDUCED ..	1
CONCLUSION	6
CERTIFICATION OF COUNSEL OF FILING IN GOOD FAITH	7

TABLE OF AUTHORITIES

CASES

<i>In re Englehart</i> , 229 F.3d 1163 (10th Cir. 2000)	4
<i>Jendusa-Nicolai v. Larsen</i> , 677 F.3d 320 (7th Cir. 2012)	5
<i>In re Kane</i> , 755 F.3d 1285 (11th Cir. 2014)	4
<i>Kawaauhau v. Geiger</i> , 523 U.S. 57 (1998)	<i>passim</i>
<i>In re Markowitz</i> , 190 F.3d 455 (6th Cir. 1999)	3
<i>In re Ormsby</i> , 591 F.3d 1199 (9th Cir. 2010)	4, 5
<i>In re Shcolnik</i> , 670 F.3d 624 (5th Cir. 2012)	4, 5
<i>In re Thoms</i> , 505 F. App'x 603 (8th Cir. 2013)	4

STATUTES

11 U.S.C. § 523(a)(6)	1, 2, 3, 4
---------------------------------	------------

OTHER AUTHORITIES

Restatement (Second) of Torts (1964)	2
Restatement § 8A, cmt. <i>a</i>	2
Restatement § 8A, cmt. <i>b</i>	2, 3

PROCEDURAL SUMMARY

The United States Supreme Court denied Petitioners, Zachary N. Trost and Kimberly A. Trost's Petition for a Writ of Certiorari on November 5, 2018.

PETITION FOR REHEARING OF THE COURT'S DENIAL OF PETITION FOR WRIT OF CERTIORARI

Petitioners, Zachary N. Trost and Kimberly A. Trost, respectfully petition this Court for a rehearing and reversal of the Order of the Court entered on November 5, 2018 denying their petition for a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals, with respect to the non-dischargeable nature of the Judgment awarded Respondent, Sherry Trost.

ARGUMENT

**THE COURT SHOULD RESOLVE A
DIVISION BETWEEN THE CIRCUIT
COURTS AS TO WHETHER THE
'SUBSTANTIAL CERTAINTY' TEST
ANNOUNCED BY THE COURT IN
KAWAAUHAU V. GEIGER IS TO BE
JUDGED BY A BANKRUPTCY COURT
SUBJECTIVELY OR OBJECTIVELY - AND
THE CONFUSION LEADS TO
UNNECESSARY BANKRUPTCY
LITIGATION THAT COULD BE REDUCED**

The Bankruptcy Code precludes discharge for any debt that is the result of a "willful and malicious injury by the debtor to another." 11 U.S.C. § 523(a)(6). "As used in that section, the word 'willful' indicates 'a

deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

This Court has instructed that:

[t]he word “willful” 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. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead “willful acts that cause injury.”

Geiger, 523 U.S. at 61-62 (emphasis in original). In *Geiger*, the Court considered whether, in the context of § 523(a)(6), “willfulness” encompassed “acts, done intentionally, that cause injury..., or only acts done with the actual intent to cause injury.” 523 U.S. at 61. Citing the Restatement (Second) of Torts (1964) (the “Restatement”), the Court held that § 523(a)(6) encompassed “‘intentional torts,’ as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend ‘the *consequences* of an act,’ not simply ‘the act itself.’” *Id.* at 61-62 (emphasis in *Geiger*) (quoting Restatement § 8A, cmt. *a*).

The section of the Restatement cited favorably in *Geiger* provides further that intent is found when “the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement § 8A, cmt. *a*. Comment *b* continues:

If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness.... As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence.... All three have their important place in the law of torts, but the liability attached to them will differ.

Id., cmt. b. Although *Geiger* did not specifically incorporate the Restatement's "substantial certainty" test, courts that have considered this issue post-*Geiger* have relied upon *Geiger*'s favorable reference to that section of the Restatement in defining intent -- for the purposes of § 523(a)(6) -- as either a deliberate intent to cause the injury, or a substantial certainty that the injury will occur.

There remains, however, a problematic split among the Circuits as to whether that substantial certainty must be judged subjectively or objectively. According to the Sixth Circuit (as adopted in the case at bar and as announced in *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999) ("[W]e now hold that unless 'the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it,' he has not committed a 'willful and malicious injury' as defined under

§ 523(a)(6).” (internal citations omitted)); *In re Thoms*, 505 F. App’x 603, 605 (8th Cir. 2013) (summary order) (noting that “[w]e construe the § 523(a)(6) exception narrowly,” and holding that “[i]f the debtor knows that the consequences are certain, or substantially certain, to result from his conduct, the debtor is treated as if he had, in fact, desired to produce those consequences” (internal citations omitted)); *In re Ormsby*, 591 F.3d 1199, 1206 (9th Cir. 2010) (requiring creditor to show that “debtor believes that injury is substantially certain to result from his own conduct”); *In re Englehart*, 229 F.3d 1163 (10th Cir. 2000) (applying the subjective standard, and rejecting the objective standard as “at odds with the considerations discussed [in *Geiger*]” (internal citations omitted)), *with In re Shcolnik*, 670 F.3d 624, 630 (5th Cir. 2012) (finding willfulness where creditor showed an “objective substantial certainty of harm” (internal citations omitted)); *see also In re Kane*, 755 F.3d 1285, 1293 (11th Cir. 2014) (recognizing the Circuit split, and applying the subjective standard as “more stringent,” without deciding which standard applies).

In a Seventh Circuit opinion, Judge Posner recognized the divergence among Circuit courts on this issue, observing ultimately that:

whatever the semantic confusion, we imagine that all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act.

Jendusa-Nicolai v. Larsen, 677 F.3d 320, 324 (7th Cir. 2012). The Second Court joined in endorsing the subjective standard. It accords better with the Supreme Court’s directive in *Geiger*, see 523 U.S. at 61

(“nondischargeability takes a deliberate or intentional *injury*” (emphasis in original)), as well as the Restatement definition that is cited favorably in *Geiger*, see Restatement § 8A (“the actor ... believes that the consequences are substantially certain to result from [his action]”). A subjective standard is also in keeping with the Bankruptcy Code’s focus on intentional conduct by the debtor. An objective standard, by contrast, looks past the actual will or intent of the debtor, and instead considers an objective observer’s understanding of whether the injury was substantially certain to occur. This inquiry sounds more in recklessness than intent. *Cf. Geiger*, 523 U.S. at 61 (willfulness encompasses intentional, not reckless, torts).

The Ninth Circuit advocates a subjective standard, while the Fifth Circuit advocates an objective standard. *Compare In re Ormsby*, 591 F.3d at 1206 (requiring creditor to show that “debtor believes that injury is substantially certain to result from his own conduct”), with *In re Shcolnik*, 670 F.3d at 630 (finding willfulness where creditor showed an “objective substantial certainty of harm”). This Court should provide and answer to these divisions.

This case provides an excellent opportunity for the Court to end the use of the different standards and thereby reduce the issues actually litigated in the Bankruptcy Courts.

CONCLUSION

NOW WHEREFORE, petitioners respectfully requests the Supreme Court grant their petition for rehearing and reversal of the Supreme Court's denial of the Petition for a Writ of Certiorari. There are many whom can be benefited by this case being briefed and heard by the Supreme Court.

Respectfully Submitted,

Michael R. Behan

Counsel of Record

Schram, Behan & Behan

4127 Okemos Road, Suite 3

Okemos, Michigan 48864

(517) 347-3500

behanm@me.com

Counsel for Petitioners

**CERTIFICATION OF COUNSEL
OF FILING IN GOOD FAITH**

The undersigned hereby certifies that this Petition for Rehearing is restricted by the grounds specified in Rule 44.2 of the Rules of the Supreme Court, is presented in good faith, and not for delay. The grounds stated herein are based on other substantial grounds (continued division amongst the circuit courts) not previously presented to the Court by the Appellants.

Respectfully Submitted,



Michael R. Behan

Counsel of Record

Schram, Behan & Behan

4127 Okemos Road, Suite 3

Okemos, Michigan 48864

(517) 347-3500

behanm@me.com

Counsel for Petitioners

November 30, 2018