

No. _____

In the
Supreme Court of the United States

BRIAN K. FAILON,

Petitioner,

v.

COMPASS CHEMICAL INTERNATIONAL, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 523(a)(6) of the Bankruptcy Code excludes from discharge any debt “for willful and malicious injury by the debtor to another entity or the property of another entity.” 11 U.S.C. § 523(a)(6). In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), this Court held that debts attributable to negligent or reckless acts do not fall within the statutory exception. In doing so, the Court ruled that the language of § 523(a)(6) encompassed only acts done with the actual intent to cause injury and not merely intentional acts that happen to cause injury.

The question presented here is:

Whether a debt arising from a spoliation sanction issued to the debtor because he intentionally wiped the hard drive of his employer-owned laptop computer clean prior to leaving his then-employer -- conduct which was judicially described as “at least negligent and may have been deliberate” – but did not cause the company any competitive harm and did not have any substantive monetary relief awarded against him for *any* of the eleven counts brought against him in a subsequent civil suit that the former employer ultimately voluntarily dismissed without prejudice was a “malicious injury by the debtor to another” under § 523(a)(6) of the Bankruptcy Code that could not be discharged in bankruptcy.

PARTIES TO THE PROCEEDINGS

Petitioner is Brian K. Failon. Respondent is Compass Chemical International, LLC (“Compass”).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian K. Failon respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is unpublished and is reproduced in the Appendix (“App”) at 1a-2a. The opinion of the District Court for the Eastern District of Virginia (the “District Court”) also is unpublished and is reproduced at App. 3a-6a. Finally, the opinion of the United States Bankruptcy Court for the Eastern District of Virginia (the “Bankruptcy Court”) is unpublished and is reproduced at App. 7a-36a.

JURISDICTION

The Fourth Circuit entered its judgment on February 12, 2018. App. 1a. This Petition is timely filed within ninety days thereafter, and Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

“(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of 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).

STATEMENT OF THE CASE

1. *Factual Background.* Failon worked for Compass from 1999 through July 2009. About a month before he left the company, Compass sent Failon a new employment agreement that reduced his base salary by thirty percent. A few days later, Failon met with a competitor of Compass about working with the competitor in the future. A few days after that, Failon reformatted his Compass-owned desktop computer and wiped the hard drive of a Compass-owned laptop. He also instructed that the statement from the company doing the wiping not include the wipe of the hard drive. A few weeks later, Failon rejected the new employment agreement and returned the Compass-owned laptop. Failon then formed a new company and began to solicit clients of Compass.

In November 2009, Compass sued Failon and the new company in Georgia (the “Georgia Litigation”). The complaint asserted eleven (11) different counts, including (i) breach of contract, (ii) conversion, (iii) breach of fiduciary duty, and (iv) misappropriation of trade secrets. *Compass Chemical Int’l, LLC v. True North Products, LLC et al.*, 1:09cv03491-MHC (N.D. Ga.), Dkt. Entry No. 1, Document 1-1, December 11, 2009 <https://ecf.gand.uscourts.gov/doc1/05513893059>. Compass sought both compensatory *and* punitive damages. *Id.*

In October 2010, Compass filed a motion for spoliation sanctions in the Georgia Litigation based on (1) Failon having wiped the hard drive of a Compass-owned laptop and reformatted his Compass-owned desktop computer prior to his departure, and (2) his inconsistent testimony on the issue during discovery. The district court referred the motion to a magistrate judge who conducted a three-day evidentiary hearing.

In February 2011, the magistrate judge issued his report and recommendation (the “Spoliation Report”). *Compass Chemical Int’l, LLC v. True North Products, LLC et al.*, 1:09cv03491-MHC (N.D. Ga.), Dkt. Entry No. 219, February 15, 2011, <https://ecf.gand.uscourts.gov/doc1/05514785585>. The Spoliation Report found that even though Failon had no duty under Georgia state law to preserve evidence (such as the information on his desktop and laptop computers), he *did* have such a duty under federal law, and that federal law, not state law, governed the matter. *Id.* at 56-61. The Report then found that Failon had engaged in spoliation of evidence as to his laptop computer (but not as to the reformatting of his desktop computer) and had lied about it.

The Spoliation Report also found, however:

- that “Mr. Failon’s actions in destroying evidence, viewed objectively are ***at least negligent*** and may have been deliberate” (JA149¹) (emphasis added);

¹ “JA” refers to the Joint Appendix filed in the Fourth Circuit. *Failon v. Compass Chemical Int’l, LLC*, Record No. 17-1709, Dkt. Entry No. 21, filed on August 30, 2017.

- that Compass, as part of the spoliation proceeding in Georgia, did not identify “any probative evidence corroborating what it alleges might have been found on the laptop.” JA152;
- that “despite knowledge of the competitors Mr. Failon solicited, [Compass] [did not identify] any specific confidential information that has been disclosed to a third party, or any third party who is alleged to have received any confidential information.” JA152-53;
- that Compass gave “***no indication that it could establish any damages*** caused by any unauthorized use or disclosure of confidential information.” JA153 (emphasis added);
- that the evidence that ***was*** recovered in the case – evidence from Failon’s former desktop and his thumb drive – was “just as consistent with Mr. Failon’s assertion that he did not take or disclose any confidential information as it is with plaintiff’s claims.” JA153;
- that Compass failed to “present extrinsic evidence tending to show that the destroyed evidence would have been favorable to its case.” JA153; and
- that as a result of the above-findings, terminating sanctions – such as a default judgment – were not appropriate. JA153.

The Report recommended that the district court sanction Failon. In reaching this decision, the magistrate judge applied a five-factor test that included a finding that Failon had acted in “bad faith.” The “bad faith” factor, however, did not require a showing that Failon acted with malice -- indeed, the Report made no such finding – only that he was culpable. JA148-149. The Report concluded that a monetary sanction was appropriate but it declined to recommend either an adverse inference instruction or the grant of default judgment. JA156 (“The spoliation ***was not so egregious*** as to justify the harshest inference instructions.”) (emphasis added).

The district court approved the Spoliation Report and directed Failon to pay Compass \$123,835.95 (the “Spoliation Damages”), which represented payment for part of Compass’s attorney’s fees associated with its spoliation motion. No trial, however, was ever held on Compass’s substantive claims against Failon. Instead, on March 27, 2015, Compass asked the district court to dismiss the case without prejudice, which the court did on April 14, 2015.

2. *Bankruptcy proceedings.* Failon filed for bankruptcy in June 2011. In September 2011, Compass filed a complaint against Failon in the Bankruptcy Court, initiating an adversary proceeding. In June 2015, Compass filed a partial motion for summary judgment in the adversary proceeding seeking summary judgment as to the dischargeability of the Spoliation Damages. On March 29, 2016, the Bankruptcy Court granted the partial motion, holding the Spoliation Damages nondischargeable under 11 U.S.C. § 523(a)(6). In so holding, the Bankruptcy Court applied the factual findings from the Spoliation Report to the elements of § 523(a)(6).

3. *District Court proceedings.* Failon appealed the Bankruptcy Court's summary judgment decision to the District Court. In doing so, Failon contended the Bankruptcy Court erred when it ruled *as a matter of law* that the Spoliation Damages were non-dischargeable under § 523(a)(6). Importantly, Failon emphasized that the fact that the Report expressly rejected Compass's request for a terminating sanction or a mandatory adverse inference was significant proof in favor of his position that he did not act maliciously -- as that word is understood and defined under § 523(a)(6) -- when he wiped his laptop computer. *See, e.g.*, JA246-251; 256-258.

The District Court disagreed and held that the Bankruptcy Court did not err. App. 3a-6a. In an opinion that contained only one paragraph as to the substantive question before it, the District Court summarily said:

In this case, Failon intended to injure Compass when he wiped his computer. Failon acted deliberately and intentionally, and he knowingly disregarded Compass's rights. Further, the facts show that Failon had intent to injure Compass with these actions. Accordingly, the Spoliation Damages awarded in the Georgia Litigation because of these actions are not dischargeable in bankruptcy under § 523(a)(6).

App. 6a.

4. *Court of Appeals.* Failon appealed to the Fourth Circuit. In his appeal, Failon, as he did in the District Court, principally relied on the fact that (i) a showing of "malice" was not required for the award of sanctions in the Spoliation Report, (ii) the Report

made no such showing, and (iii) it expressly declined to recommend terminating sanctions or a mandatory adverse inference. Failon also highlighted the fact that Circuits are split as to what qualifies as “malicious” conduct under § 523(a)(6) and that the Fourth Circuit needed to provide clear guidance as to the meaning of such conduct. *Failon v. Compass Chemical Int’l, LLC*, Record No. 17-1709, Dkt. Entry No. 28, filed on October 16, 2017.

The Court of Appeals, however, affirmed the District Court’s order. App. 1a-2a. In a two-page unpublished per curiam opinion that neither substantively addressed any of Failon’s arguments nor made *any* mention of Failon’s concerns about the lack of Circuit-level uniformity as to the standard for “malicious” conduct under § 523(a)(6). Instead, the Fourth Circuit simply noted that it had reviewed the parties’ briefs and the record below and was affirming the ruling below “for the reasons stated by the district court.” App. 2a.

5. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review Because Circuit Courts Are “All Over The Lot” As To The Meaning Of “Malicious” Under 11 U.S.C. § 523(a)(6) And Decisional Law In The Fourth Circuit Is Behind The Times

This Court should grant review of this case because Circuit Courts are split as to the meaning of “malicious” conduct under 11 U.S.C. § 523(a)(6) in the wake of *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In *Geiger*, this Court held that debts attributable to negligent or reckless acts do not fall within the

statutory exception. 523 U.S. at 61. In doing so, the Court concluded that the language of § 523(a)(6) encompassed only acts done with the actual intent to cause injury and not merely intentional acts that happen to cause injury. *Id.*

Since then, however, Circuits have diverged widely as to proper post-*Geiger* standard for “malicious” conduct. As Judge Posner observed in addressing what qualifies as “malicious” conduct under § 523(a)(6): “to our surprise . . . courts are all over the lot in defining this phrase in section 523(a)(6).” *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012). He then detailed many of the differing Circuit-level definitions and even noted how at least of them rested on pre-*Kawaauhau v. Geiger* jurisprudence:

The Second Circuit defines “malicious” as “wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will.” *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006), quoting *Navistar Financial Corp. v. Stelluti*, 94 F.3d 84, 87 (2d Cir. 1996). The Fifth Circuit equates “willful and malicious injury” to “either an objective substantial certainty of harm or a subjective motive to cause harm.” *Williams v. International Brotherhood of Electrical Workers Local 520*, *supra*, 337 F.3d 504, 509 (July 7, 2003), quoting *Miller v. J.D. Abrams, Inc.*, *supra*, 156 F.3d 598, 606 (5th Cir. 1998). The Sixth Circuit, in *Wheeler v. Laudani*, *supra*, 783 F.2d 610, 615 (6th Cir. 1986), defined “willful” as “deliberate and intentional,” and “malicious” as “in conscious disregard of one's duties or without just cause

or excuse; it does not require ill will or specific intent to do harm.” After the Supreme Court's decision in *Kawaauhau v. Geiger*, the Sixth Circuit, without questioning the definition in *Wheeler*, said that the debtor “must will or desire harm, or believe injury is substantially certain to occur as a result of his behavior.” *Markowitz v. Campbell*, 190 F.3d 455, 465 n. 10 (6th Cir. 1999). Yet the Eleventh Circuit continues to use a formula almost identical to that in the Sixth Circuit's *Wheeler* opinion: “‘Malicious’ means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will. To establish malice, a showing of specific intent to harm another is not necessary.” *Maxfield v. Jennings, supra*, 670 F.3d 1329, 1334 (11th Cir. 2012) (internal quotations and citations omitted). We too had quoted *Wheeler's* formula approvingly, in *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994), but we have not revisited the issue since *Kawaauhau v. Geiger*.

The Eighth Circuit says that conduct is “malicious” only if it is “certain or almost certain ... to cause harm.” *Fischer v. Scarborough, supra*, 171 F.3d 638, 643 (8th Cir. 1999), quoting *Johnson v. Miera*, 926 F.2d 741, 743–44 (8th Cir. 1991). The Ninth Circuit requires, for willfulness, a showing “either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct,” while “a ‘malicious’ injury involves ‘(1) a wrongful act, (2) done intentionally, (3) which necessarily

causes injury, and (4) is done without just cause or excuse.” *Petralia v. Jercich*, 238 F.3d 1202, 1208–09 (9th Cir. 2001) (emphasis in original), quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997) (en banc). The Tenth Circuit in *Panalis v. Moore*, 357 F.3d 1125, 1129 (10th Cir. 2004), fused “willful” and “malicious,” saying that “willful” means “the debtor must ‘desire ... [to cause] the consequences of his act or ... believe [that] the consequences are substantially certain to result from it’ ” (quoting *Mitsubishi Motors Credit of America, Inc. v. Longley*, 235 B.R. 651, 657 (10th Cir. BAP 1999), quoting in turn Restatement (Second) of Torts § 8A (1965)), while “malicious” requires “proof ‘that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury’ ” (quoting *Hope v. Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995)).

Id. at 323.

Judge Posner collected the key language from these varying standards and struggled to find uniformity:

Notice the redundancies — “deliberate and intentional,” “objective ... certainty” (“subjective certainty” is an oxymoron; the proper term is “certitude”—confidence, often misplaced, in the correctness of one's belief), “subjective motive,” “will or desire,” “wrongful act ... done without just cause or excuse.” Notice the ambiguity of a phrase like “specific intent to do harm”—how does

that differ from “intent to do harm,” the latter being required by *Kawaauhau v. Geiger*? And what does “necessarily causes injury” mean? And is “objective substantial certainty of harm” really intended to substitute for intent to harm, or is the point rather that if harm is certain we disbelieve that it was inflicted accidentally? Notice that the Eighth Circuit, in defining “malicious” as “certain or almost certain ... to cause harm,” confused a state of mind (malice) with the consequence of an act (harm).

Id. at 323-324.

Judge Posner thus concluded that “each circuit seems content to go its own way, without attempting to reconcile its verbal formulas with those of the other circuits.” *Id.* at 324.

Likewise, a bankruptcy court in Pennsylvania made similar observations and highlighted in detail the differing approaches to “malicious” conduct in the context of § 523(a)(6):

Courts also have invoked different standards for determining whether an intentional tort involved “malice” within the meaning of § 523(a)(6). For example, in *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985), the court reasoned that, for the debt for any injury arising from an intentional tort to be nondischargeable under § 523(a)(6), the debtor’s conduct must be “more culpable than that which is in reckless disregard of creditors’ economic interests and expectancies.” Further, in assessing the debtor’s culpability, “knowledge

that legal rights are being violated is insufficient to establish malice, absent some additional 'aggravated circumstances'" *Id.* Other courts, too, have stated that the existence of "aggravating circumstances" and a conscious disregard of one's societal duties to others are essential aspects of the malice requirement under § 523(a)(6). *See, e.g., In re Logue*, 294 B.R. 59, 63 (B.A.P. 8th Cir. 2003); *In re Richardson*, 2007 Bankr. LEXIS 2831, 2007 WL 2381990, at *6-7 (Bankr. N.D. Ala. Aug. 17, 2007); *In re Weiser*, 2007 WL 4868319, at *2 (Bankr. N.D. Ind. Apr. 4, 2007); *In re Hambley*, 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005); *In re Blankfort*, 217 B.R. 138, 143-45 (Bankr. S.D.N.Y. 1998).

In this unsettled area of the law, one court has summarized the differing standards for malice as follows:

One standard requires proof from the creditor that the debtor acted with the specific intent to injure the creditor. A second view is that the creditor need only prove that the debtor acted without just cause or excuse. A third approach requires that the debtor's conduct target the creditor, at least in the sense that the conduct was certain or almost certain to cause financial harm. A fourth approach, which has been characterized as a "totality of the circumstances" approach, adopts the position that an injury is malicious if the debtor fails to act in subjective good faith.

In re Pineau, 149 B.R. 239, 242 (D. Me. 1993)
(emphasis added) (citing *In re Horltdt*, 86 B.R.
823 (Bankr. E.D. Pa. 1988)).

GMAC, Inc. v. Coley (In re Coley), 433 B.R. 477, 499-
500 (Bankr. E.D. 2010).

For its part, the Fourth Circuit has not spoken definitively or authoritatively as to the proper meaning of “malicious” under § 523(a)(6). Instead, simply parroting language from *Geiger*, it has collapsed the “willful” and “malicious” inquiries into one unitary question: whether the injury was a deliberate or intentional injury” or “merely a deliberate or intentional *act* that leads to injury.” *Duncan v. Duncan (In Re Duncan)* 448 F.3d 715, 729 (4th Cir. 2006). This articulation, however, is nothing more than a statement of the guiding principle behind *Geiger* and is not an actual statement of what is – or is not – required to show “malicious” conduct for purposes of § 523(a)(6).

Indeed, in the absence of a controlling statement of law by the Fourth Circuit, the lower courts in the Circuit have relied – inappropriately – on pre-*Geiger* authority to address the question. Specifically, in its own lower court briefing, Compass highlighted the case of *In re Wooten*, 423 B.R. 108, 130 (Bankr. E.D. Va. 2010) to assert that “malice” is defined as “an act causing injury without just cause or excuse.” However, digging deeper into the citations from *In re Wooten*, it is clear that *Wooten* cited the case of *In re Powers*, 227 B.R. 73, 76 (Bankr. E.D. Va. 1998), which articulated the malice standard from the Fourth Circuit’s pre-*Geiger* decision in *In re Stanley*, 66 F.3d 664, 667 (4th Cir. 1995). This lineage is important because the standard in *In re Stanley* was expressly

abrogated three years later by *Geiger*. As explained in *In re Powers*, *Geiger* “eliminated foreseeability from the definition of intent” and essentially confined § 523(a)(6) to an “intentional tort standard” where a key requirement was subjective intent to cause harm. 277 B.R. at 76. In other words, as with courts in other Circuits, lower courts in the Fourth Circuit have resorted to looking at pre-*Geiger* authority to help articulate the meaning of “malicious” under § 523(a)(6).

This hodge-podge of irreconcilable Circuit-level and lower-level standards for what constitutes “malicious” conduct under § 523(a)(6) needs substantial clarity from this Court and counsels in favor of granting a write.

II. Under A Properly-Formulated Post-*Geiger* Standard, Failon’s Spoliation Conduct Was Not “Malicious” Under 11 U.S.C. § 523(a)(6)

The standard for what is nondischargable under *Geiger* has been rightfully called a “stringent requirement.” *Duncan*, 448 F.3d at 727. This is especially true because in order to promote the general goal of the Bankruptcy Code -- providing bankrupt debtors with a fresh start -- any “exceptions to discharge ‘should be confined to those plainly expressed,’” *Geiger*, 523 U.S. at 62 (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)), and otherwise construed narrowly. *Nunnery v. Nunnery (In re Rountree)*, 478 F.3d 215 (4th Cir. 2007))

Here, under a properly formulated post-*Geiger* standard, Failon’s conduct is not “malicious” under § 523(a)(6) and the Fourth Circuit, the District Court, and the Bankruptcy Court all erred in concluding that

it was, especially *as a matter of law*. As Failon has repeatedly explained, the Spoliation Report's findings, *at most*, show that he acted with reckless disregard to Compass's rights vis-à-vis his laptop. Under a properly applied standard for "malicious," this is legally insufficient to establish malicious conduct:

The conduct must "be *more culpable than that which is in reckless disregard* of creditors' economic interests and expectancies, as distinguished from mere legal rights. Moreover, *knowledge that legal rights are being violated is insufficient to establish malice*, absent some additional 'aggravated circumstances'...." *In re Mulder*, 306 B.R. 265, 270 (Bankr. N.D. Iowa 2004) (citation omitted).

Keefe Law Firm v. Days (In re Days), 540 B.R. 423, 429-430 (Bankr. E.D. Mo. 2015) (emphasis added). It was therefore error for the Bankruptcy Court, the District Court, and the Fourth Circuit to hold that Failon's conduct was malicious.

Indeed, to hold otherwise is to return to pre-*Geiger* standards and to punish Failon for simply intending the *act* – the wiping of the computer – that could have caused (but did not) possible financial harm to Compass, rather than *intending to actually cause financial harm* to Compass. Defamation this is not. See *Steier v. Best (In re Best)*, 109 Fed. Appx. 1, 2004 U.S. App. LEXIS 13773 at **11 (6th Cir. June 30, 2004). Nor is it intentional infliction of emotional distress. *Id.* Or assault. *Jendusa-Nicolai v. Larsen*, 677 F.3d 320 (7th Cir. 2012). Or any *other* kind of comparable conduct where the debtor acted with

“*knowing disregard* for the plaintiff’s [creditor’s] rights.” *Johnson v. Davis (In re Davis)*, 262 B.R. 663, 670-71 (Bankr. E.D. Va. 2001) (emphasis added).

Again, as noted above, in the context of determining “maliciousness,” knowing disregard does not mean knowing disregard of a creditor’s economic interests or expectancies. *Keefe Law Firm. v. Days (In re Days)*, 540 B.R. 423, 439-30 (Bankr. E.D. Mo. 2015). Rather, it means that the debtor targeted the creditor in a way that was “certain or almost certain to cause *financial* harm.” *In re Pineau*, 149 B.R. 239, 242 (D. Me. 1993) (emphasis added). And again, the record from the underlying Georgia litigation failed to show – especially as a matter of law – that Failon ***targeted*** Compass in a way that was certain or almost certain to cause it ***financial*** harm. To the contrary, the record showed just the opposite, as Compass failed to show (i) that the destroyed evidence would have been favorable to it – i.e., that it would have made any difference; (ii) that Failon revealed any confidential information to any third-parties; or (iii) that it could show any damages resulting from the spoliation conduct. *See* JA152-53. These findings simply negate any conclusion that Failon acted maliciously in wiping his laptop.

And as a final matter, it should be noted that neither the District Court nor the Fourth Circuit even attempted to address, much less addressed, whether Failon intended to cause *actual financial harm* to Compass. Nor did they address the key distinction between acting with reckless disregard for a creditor’s rights versus acting with *knowing* disregard for a creditor’s rights. In essence, the courts broadly concluded that Failon’s *intentional* conduct in wiping the hard drive of his laptop computer necessarily

translated into malicious conduct. These conclusions were and are erroneous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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