

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: MARGARET KAWAAUHAU, ET VIR., Petitioners v.  
PAUL W. GEIGER  
CASE NO: 97-115  
PLACE: Washington, D.C.  
DATE: Wednesday, January 21, 1998  
PAGES: 1-38

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**Supreme Court U.S.**

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARGARET KAWAAUHAU, :

4 ET VIR., :

5 Petitioners :

6 v. : No. 97-115

7 PAUL W. GEIGER :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, January 21, 1998

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 11:11 a.m.

14 APPEARANCES:

15 NORMAN W. PRESSMAN, ESQ., St. Louis, Missouri; on behalf  
16 of the Petitioners.

17 LAURA K. GRANDY, ESQ., Belleville, Illinois; on behalf of  
18 the Respondent.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 97-115, Margaret Kawaauhau v. Paul Geiger.

5 Mr. Pressman, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF NORMAN W. PRESSMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. PRESSMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 Section 523 of the Bankruptcy Code excepts  
12 willful and malicious injuries from discharge and the  
13 bankruptcy court's finding here that Paul Geiger  
14 intentionally administered substandard care and that his  
15 action shocked even a person lacking formal medical  
16 training met this Court's standards set out in Tinker v.  
17 Colwell because his actions constituted a willful  
18 disregard of his duty.

19 QUESTION: Well, Mr. Pressman, when you say that  
20 there was a finding that he intentionally administered  
21 substandard care, is that any different than a finding  
22 that the -- that his standard, the standard of care which  
23 he recognized was negligent?

24 MR. PRESSMAN: The distinction here, Your Honor,  
25 is that Dr. Geiger knew the standard of care. He was

1 asked and the record shows that he knew the proper  
2 standard of care was the administration of intravenous  
3 penicillin and he said, notwithstanding that, I gave  
4 Mrs. Kawaauhau oral tetracycline. The distinction here is  
5 the intentional administration of something --

6 QUESTION: Well, I'm not sure I follow you,  
7 because you could say that about any number of things  
8 where you talk about medical malpractice. The standard  
9 was to perform surgery, but a -- in a hypothesis, but this  
10 particular doctor prescribed medicine instead. He  
11 intentionally prescribed medicine and, therefore, his  
12 action was not merely negligent but intentional. I think  
13 that just blurs the entire dist -- difference between  
14 negligence and intent.

15 MR. PRESSMAN: The distinction here, Your Honor,  
16 is that this is not a case of a slip of the scalpel. If  
17 Dr. Geiger had reached into his bag and pulled out the  
18 wrong medicine, or if he had botched a complicated medical  
19 procedure, we wouldn't have a case.

20 QUESTION: Well, what if you have a driver who  
21 intentionally puts his car in reverse and doesn't look  
22 back to see what's behind him and drives over somebody. I  
23 mean, under your theory, then that's inten -- it's willful  
24 and no bankruptcy provision applicable.

25 QUESTION: Indeed, first degree murder.

1 QUESTION: Yeah, I suppose.

2 MR. PRESSMAN: In that -- I would agree with  
3 that -- that --

4 QUESTION: You would agree.

5 MR. PRESSMAN: -- description, Justice  
6 O'Connor --

7 QUESTION: Yes.

8 MR. PRESSMAN: -- that if somebody intentionally  
9 says, I'm going to put my car in reverse and I'm going to  
10 drive back and I don't care who's there, I think that is  
11 intentional.

12 I believe an example which shows our point is --

13 QUESTION: You know, I just find it hard to  
14 believe that that's what Congress had in mind in writing  
15 this provision for exclusion under the bankruptcy law.

16 MR. PRESSMAN: Well, my response to that, Your  
17 Honor, would be twofold. First, I think if we go back to  
18 the Tinker case --

19 QUESTION: Well, I find Tinker a little hard to  
20 understand myself. I mean, maybe we can confine it to  
21 what it is, but I think that's a weak read.

22 MR. PRESSMAN: Well, Your Honor, I would compare  
23 what happened here -- and let me start by saying, I think  
24 what's hard initially to understand about this case is  
25 that people assume that a physician would always act

1 according to his duty and would never intentionally  
2 disregard it.

3 I think a better example here, an example which  
4 illustrates our point, was one used the other day which we  
5 considered, the builder who uses substandard steel. He  
6 doesn't -- building collapses, it violates a code  
7 provision. He doesn't intend to kill anyone.

8 QUESTION: Do you think that there's anything  
9 in this record that indicates that the doctor intended  
10 that the petitioner lose her leg --

11 MR. PRESSMAN: No.

12 QUESTION: -- or suffer some serious health  
13 loss?

14 MR. PRESSMAN: No. We concede that Dr. Geiger  
15 did not intend to hurt Mrs. Kawaauhau, but our position,  
16 Justice O'Connor, is that -- and Dr. Geiger testified  
17 numerous times, he admitted it, that he knew that  
18 intravenous tetra -- intravenous penicillin was the  
19 correct standard of care and --

20 QUESTION: -- said candidly that you are not  
21 contending that he meant to hurt -- that the doctor meant  
22 to hurt this woman and yet you say that the Tinker case is  
23 helpful to you, and that I don't understand, so -- I  
24 thought Tinker was a clear case of intending what in those  
25 days was a very grave offense against a man's property.

1 MR. PRESSMAN: Your Honor, let me address that  
2 point.

3 In Tinker, when Justice Peckham wrote for the  
4 Court, he recognized and he -- recognized that the willful  
5 and malicious test had two prongs, willful and malicious.  
6 When analyzing whether Mr. Colwell -- Mr. Tinker's action  
7 was willful, he said the action is willful, not that the  
8 injury was willful. He referred to the action and he said  
9 it was willful in the view -- in the idea that it was  
10 intentional and deliberate.

11 Dr. Geiger's actions here were intentional.

12 QUESTION: Well, but the trouble in Tinker was  
13 that the act which the defendant performed could not, as a  
14 matter of law or as a matter of definition, be performed  
15 without the necessary consequence of the kind of injury  
16 for which the law allowed recovery.

17 That is not the case here. The relationship  
18 between any deficiency in the doctor's care and the  
19 ultimate loss of the leg was not a relationship as a  
20 matter of law or as a matter of definition. It was a  
21 contingent factual relationship.

22 It turned out that way, but you can't say, I  
23 think, that at any given moment when he decided to use an  
24 oral antibiotic as opposed to an injection or what-not,  
25 that there was any kind of legal inevitability to the

1 consequence for which the plaintiff is seeking to recover  
2 and that, I think, is why you have a problem in relying on  
3 Tinker.

4 MR. PRESSMAN: Justice Souter, I believe that  
5 Peter Halford, the expert defin -- deposition, the expert  
6 who testified both in Hawaii and in the bankruptcy court,  
7 testified to that fact. He stated that the intentional  
8 administration of substandard care led to the worsening of  
9 her condition and the eventual amputation of her leg.

10 QUESTION: There's -- I don't think there's any  
11 question in anyone's mind that it did. I don't believe  
12 the people on the other side will argue or have suggested  
13 that it did. But in fact, the relationship is one of  
14 simple factual cause and effect. It is not the kind of  
15 necessity relationship that Tinker relied upon.

16 MR. PRESSMAN: And I think the point of your  
17 question and Justice Ginsburg's question is, does the term  
18 willful apply to the injury or does it apply to the act --

19 QUESTION: Well, how --

20 MR. PRESSMAN: -- and our point is --

21 QUESTION: How can you say that an injury was  
22 willful if you're not referring to the act by which it was  
23 caused? I mean, injuries don't have intentions of their  
24 own.

25 MR. PRESSMAN: Your Honor, the definition of

1 injury is twofold. The word injury can mean either the  
2 damage, the cut on my hand, the result of an action, or it  
3 can mean the action which causes the harm.

4 QUESTION: How can an injury mean the action  
5 which causes the harm? I've never heard of that.

6 MR. PRESSMAN: In the phrase, for instance, his  
7 injury to the painting, it is the act and I believe --

8 QUESTION: Well, his --

9 QUESTION: Whoever said that?

10 QUESTION: Whoever said that?

11 QUESTION: Yes.

12 (Laughter.)

13 QUESTION: Send them back to school.

14 MR. PRESSMAN: Your Honor, let me cite the  
15 definition from the Merriam-Webster Dictionary. Injury:  
16 an act or the result of inflicting something that causes  
17 loss or pain. We cannot forgive his injury of the  
18 painting, or, his falsehood gave great injury to his  
19 brother's reputation.

20 We're saying that the word injury is the act,  
21 not the damage, and I believe that's the definition  
22 which --

23 QUESTION: What dictionary was that? Let me --

24 MR. PRESSMAN: That is the Merriam-Webster  
25 Dictionary and a similar dictionary -- a similar

1 definition, Your Honor, appears in the Oxford Second  
2 Edition.

3 QUESTION: If one asks, what injuries did you  
4 suffer, well, I broke my collarbone, I dislocated my hip,  
5 that's what one thinks of as the injuries.

6 MR. PRESSMAN: And I believe if I were starting  
7 with a clean slate in this case and I didn't have the  
8 definition that we had in Tinker, I think I'd have to -- I  
9 do have to fight that battle.

10 QUESTION: I mean, the problem I think that at  
11 least you have is, this is not your -- the tort in your  
12 case is not an intentional tort on the Restatement's  
13 definition of intentional torts, I take it, and if that is  
14 so -- if that is so, and I -- it seems so, then either the  
15 word willful means to pick up intentional torts, in which  
16 case you'd lose, or somehow willful extends beyond  
17 intentional torts in the way you suggest, in which case  
18 you might win.

19 But if you're right, it seems to create an  
20 irrational distinction among negligence torts. Sometimes  
21 what is really the same thing, negligence, would not be  
22 dischargeable. Sometimes what is really the same thing,  
23 negligence, would be dischargeable, and that irrational  
24 distinction, though sometimes it would benefit your  
25 clients and sometimes hurt them, you see, doesn't seem one

1 that the statute would like -- be intended to make.

2 Now, I put that to you because I'd like to hear  
3 your response, since I think it's important.

4 MR. PRESSMAN: I believe that in order to rule  
5 in our favor, one has to look at the term willful as  
6 meaning the same thing that this Court held, that willful  
7 means voluntary.

8 Dr. Geiger in this case was asked and he knew  
9 what he was doing. His action was intentional.  
10 Therefore, we meet the standard, the standard this Court  
11 set out.

12 I don't believe I've answered your question,  
13 though.

14 QUESTION: But then it would work without the  
15 special provision for, I knew I got into that car when I  
16 imbibed much too much and I happened to kill or maim  
17 someone. So I knew what was intentional was, I got drunk.  
18 What was not -- but you're transferring that -- that's the  
19 act. I put myself in that shape so that I couldn't drive  
20 carefully.

21 MR. PRESSMAN: And Your Honor, in 1946 the  
22 Eighth Circuit in Harrison v. Walker held that drunk  
23 driving was a willful and malicious injury. It was only  
24 until after the enactment of the Bankruptcy Code in 1978  
25 that there was some uncertainty as to whether that was

1 still the law.

2 QUESTION: Yes, but now we have a specific  
3 provision doing that and, if malpractice should work the  
4 same way, one would expect a similarly specific provision.

5 MR. PRESSMAN: Our position, Justice Ginsburg,  
6 is that the Congress reenacted the identical language in  
7 the Bankruptcy Code of 1978 and therefore the same  
8 interpretations apply.

9 If you look to the legislative history, which my  
10 colleague relies on, it doesn't say that Tinker is  
11 overruled.

12 QUESTION: But you run up against that terrible  
13 problem that Tinker was a deliberate trespass on another  
14 man's property. Those were the facts. This was criminal  
15 con -- what do they call it?

16 MR. PRESSMAN: Criminal conversation, Your  
17 Honor.

18 QUESTION: Right.

19 MR. PRESSMAN: It was -- nothing that I've seen  
20 in either the State court or the Supreme Court, this  
21 Court's opinion indicates that Mr. Tinker even knew who  
22 Mr. Colwell's wife was. It was an act which was  
23 intentional in that he --

24 QUESTION: Mr. Pressman, every act, every --  
25 even a negligent act has some willful action connected

1 with it. You will to leave the snow on your sidewalk  
2 which somebody slips and falls on, but we don't call that  
3 doing willful injury to someone.

4 It seems to me we call it willful only when the  
5 intentional act is not one that leads to the injury, but  
6 the intentional act is the injuring. That's what I've  
7 always thought willful injury meant, not that there's some  
8 willful act along the line. There always is.

9 MR. PRESSMAN: Your Honor, if willful modifies  
10 injury, I don't think we have a very good position, but in  
11 Tinker, Your Honor, Mr. Tinker wasn't intending to hurt  
12 Mr. Colwell.

13 QUESTION: He didn't have to intend to hurt  
14 Mr. Colwell. He had to intend to do the injury, and he  
15 did intend to do the injury, which was criminal  
16 conversation.

17 MR. PRESSMAN: I would have to disagree with  
18 you, Justice Scalia. I don't --

19 QUESTION: I take Tinker to mean only you don't  
20 have to hate the person. You don't have to have some  
21 personal desire, maliciousness towards the individual, but  
22 that's quite separate from whether you intended to produce  
23 the harm, the very harm that you produced, and it seems to  
24 me in Tinker the person did.

25 MR. PRESSMAN: I don't see any evidence in the

1 Tinker opinion that Mr. Tinker intended to harm anybody.

2 QUESTION: He knew that he was sleeping with  
3 some other man's wife. Did he not know that?

4 MR. PRESSMAN: In the opinions that I have read,  
5 that fact is not apparent. It appears that he slept with  
6 someone who was not his wife.

7 QUESTION: Well, that --

8 QUESTION: Well --

9 QUESTION: -- you'd have a good case if that  
10 were so.

11 QUESTION: I -- no, please. You --

12 QUESTION: I have some language here in the  
13 House report which says that Tinker is overruled in -- I  
14 mean, when they passed the statute. It says they --  
15 willful means deliberate or intentional. To the extent  
16 that Tinker v. Colwell held a looser standard, it's  
17 overruled.

18 QUESTION: Of course, in enacting the statute  
19 they didn't change the language. A little hard to --

20 MR. PRESSMAN: And Justice O'Connor, you're  
21 correct, they did not change the language of the statute  
22 and this Court has noted that reenacting the same language  
23 would be a strange way to change a statute.

24 But even if we get to the legislative history --

25 QUESTION: That's a good answer.

1 MR. PRESSMAN: I've won that argument?

2 (Laughter.)

3 QUESTION: Mr. Pressman, I -- I'd like you to  
4 comment on this. One of the questions that I had, and I  
5 had it even after reading Tinker, was whether there was  
6 redundancy in the statute unless I read it your way, and I  
7 decided that there wasn't redundancy in the statute and  
8 this is the way I worked it out, and you tell me whether  
9 I'm wrong, or whether Tinker is inconsistent with this.

10 It's got to be willful and malicious. We start,  
11 I guess, with the definition of malicious as the act whose  
12 purpose is to harm the third party. I don't suppose  
13 willful adds anything to that sense of malicious. You  
14 can't be any worse than that.

15 But there's also a sense of malicious in which,  
16 although you do not personally have a purpose or an animus  
17 to hurt the victim, what you do inevitably will hurt the  
18 victim, and I think that's what was going on in Tinker.

19 In that sense of malicious, the word willful  
20 does add something, because if you take willful there to  
21 mean, he knows it's going to hurt the other person, he  
22 knows the inevitability of it and he does it anyway,  
23 knowing that that will be the consequence, that, then, as  
24 it were, jacks up the moral reprehensibility, the  
25 seriousness of the act.

1           So in the weaker sense of malicious, willful  
2 adds something, and I thought that was consistent with  
3 Tinker. Am I wrong?

4           MR. PRESSMAN: Your Honor, in terms of the  
5 redundancy of the words, I believe it's difficult to come  
6 up with an action which is malicious but not willful. I  
7 think it's easy to come up with an action that is willful  
8 and not malicious.

9           An example of the second action would be if  
10 someone came in here to harm one of the justices and  
11 Marshall Bosley shot him. His action would be willful but  
12 not malicious. He wasn't disregarding his duty.

13           On -- an example of something which is malicious  
14 but not willful might be someone who came from a State  
15 where carrying a firearm was perfectly okay, but he knew  
16 in the City of Washington, D.C. that carrying one was  
17 illegal. He carries it through the airport, makes it  
18 here, it drops out of his pocket, the bullet hits someone.  
19 His action there I think is arguably not willful but it's  
20 malicious. He had a duty. He disregarded his duty.

21           I think that's an example of something where you  
22 use both of the words willful and malicious.

23           If the words willful and malicious both modify  
24 injury, then I think they are redundant, because --

25           QUESTION: Excuse me. What action of his was

1 malicious there, the dropping of the gun, or the carrying  
2 of the gun? I agree with you, the carrying of the gun,  
3 intentionally violating the law is malicious.

4 MR. PRESSMAN: It was not the dropping of the  
5 gun, because that was an accident.

6 QUESTION: Right.

7 MR. PRESSMAN: It was the carrying of the gun --

8 QUESTION: Well, you're --

9 QUESTION: You'd say that was malicious.

10 MR. PRESSMAN: Yes.

11 QUESTION: You're using malicious in the sense  
12 of doing any wrongful act without just excuse, right?

13 MR. PRESSMAN: Without just excuse --

14 QUESTION: Yes.

15 MR. PRESSMAN: -- or a willful disregard, or a  
16 dis --

17 QUESTION: Do you think that the -- well, I  
18 guess you do think that that, maybe third or weakest sense  
19 of malice is the sense in which this -- that this statute  
20 used it, but if that is the case, then the word willful  
21 adds the requirement that the harm that results to  
22 whatever the eventual victim is be a harm which is either  
23 intended or known by the actor to be the necessary  
24 consequence and if that's what willful does in this case,  
25 that doesn't fit your case.

1 MR. PRESSMAN: I would agree with that. If the  
2 word willful modifies injury, then I don't have a very  
3 good case.

4 QUESTION: What else would willful modify  
5 besides injury?

6 MR. PRESSMAN: Your Honor, in Tinker, this Court  
7 says an act is willful in that -- in the -- in that the  
8 act is intentional or voluntary, not that the injury is  
9 intentional or voluntary. That's what this Court I  
10 believe said in Tinker.

11 QUESTION: So you interpret the statute as  
12 saying, for a willful act which results in malicious  
13 injury --

14 MR. PRESSMAN: Justice Kennedy, that is the way  
15 I interpreted it and that is the way I read Tinker.

16 QUESTION: Well, maybe we'd better clarify  
17 Tinker and do it soon if that's your reading of it.

18 I think the language used is somewhat careless,  
19 but it did say in Tinker the act is willful in the sense  
20 that it is intentional and voluntary and we think it is  
21 also malicious. I don't know what the Court meant by  
22 that, but perhaps some clarification of that language is  
23 in order.

24 MR. PRESSMAN: Your Honor, I'd also point out  
25 that in this case the standard that this Court set in

1 Tinker has been a standard which has not -- which has been  
2 well-used until the 1978 amendments. The matter came up  
3 before the courts in the McIntyre case and it came up  
4 before the case in Aetna.

5 In McIntyre the Court found itself with a case  
6 of someone who converted some collateral, even though  
7 there was no default on the loan. There was no problem  
8 with the Court finding that action was intentional and  
9 malicious.

10 The amicus in this case on my opponent's side  
11 has suggested that they're concerned about consumers being  
12 injured by my position and I think that answer is taken  
13 care of by the Aetna case, where there were some  
14 inadvertent -- there was some inadvertent conversion of  
15 collateral.

16 QUESTION: May I ask about a few of the facts  
17 here, it is extraordinary that a doctor would have no  
18 malpractice insurance, but that was the case here, was it  
19 not?

20 MR. PRESSMAN: Yes, it was, Your Honor. There  
21 was no malpractice insurance, and --

22 QUESTION: Doesn't Hawaii State law require it?

23 MR. PRESSMAN: I don't believe it does. Some  
24 States do require it. Missouri does not require it and I  
25 don't believe that Illinois requires it.

1           QUESTION: Explain to me how consumers would not  
2 be hurt by your position. Most consumer debt is probably  
3 credit card debt. Let's assume a consumer who has a lot  
4 of credit card debt seeks a discharge in bankruptcy and  
5 the credit card company comes in and says, at a time when  
6 you knew you were insolvent you sought additional credit.

7           MR. PRESSMAN: Justice Scalia --

8           QUESTION: That's a willful -- willful act and  
9 therefore all of your charges, once you knew you couldn't  
10 pay them, are not dischargeable in bankruptcy. Wouldn't  
11 that be the consequence? I think it would.

12          MR. PRESSMAN: In that case, yes, but I think  
13 the amicus point is that --

14          QUESTION: But that's a lot of cases, and you  
15 think that all credit card charges run up after the person  
16 is insolvent are not dischargeable in bankruptcy?

17          MR. PRESSMAN: It's a matter of what the facts  
18 are before the judge. In that situation, I think it would  
19 be.

20                 The point I think the amicus made was that in  
21 credit card debt in this country, if I buy a refrigerator  
22 at Sears, I give a lien on my refrigerator to Sears and  
23 the concern is that people will buy a refrigerator and  
24 maybe give it to their aunt, or sell it and 2 years later  
25 file and then find themselves being charged with

1 committing a willful and malicious conversion, as the act  
2 used to mention, and in the Davis case, someone who  
3 converted collateral in accordance with an ordinary  
4 practice, a custom that was agreed upon with the lender,  
5 was found not to have acted willfully and maliciously.

6 In the example given by the amicus, I'd say if  
7 someone bought 25 refrigerators from Sears and then filed  
8 bankruptcy 3 days later, or a month later, I think that  
9 would be willful and malicious, at least if I were the  
10 judge hearing that evidence.

11 Mr. Chief Justice, this Court has long held that  
12 the discharge is for the honest and unfortunate consumer  
13 debtor, and I think the evidence in the record below here  
14 shows that Dr. Geiger is none of the above.

15 Justice Murphy in her dissent below said that  
16 those words could be better applied to the Kawaauhaus,  
17 people, honest consumers who had the unfortun -- the  
18 misfortune to land in Dr. Geiger's office.

19 I'd ask to reserve my time if there's no further  
20 questions.

21 QUESTION: Very well, Mr. Pressman.

22 Ms. Grandy, we'll hear from you.

23 ORAL ARGUMENT OF LAURA K. GRANDY

24 ON BEHALF OF THE RESPONDENT

25 MS. GRANDY: Mr. Chief Justice, and may it

1 please the Court:

2 The Eighth Circuit held that the debt owed by  
3 Dr. Geiger to the petitioner was dischargeable because he  
4 had no intent to harm the petitioner. That has been  
5 admitted this morning.

6 The Eighth Circuit opinion is supported by the  
7 plain meaning of section 523(a)(6), the legislative  
8 history of section 523(a)(6), the purposes and policy of  
9 the Bankruptcy Code, and the Tinker case itself.

10 The plain meaning of section 523(a)(6) focuses  
11 on the language, willful and malicious injury. Willful  
12 and malicious both modify injury. You need both a willful  
13 injury and you need a malicious injury to comply with  
14 section 523(a)(6).

15 Willful was defined in Tinker as meaning  
16 intentional and voluntary. In the legislative history the  
17 Congress said willful means intentional and deliberate.  
18 It wasn't a whole lot different than the Tinker  
19 definition.

20 Malice has been defined --

21 QUESTION: Are there some instances in which  
22 reckless conduct is so reckless that you can apply the  
23 definition of willful and malicious to it?

24 MS. GRANDY: No, Your Honor. Reckless conduct  
25 is not intentional conduct and the statute, the

1 congressional history as well as Tinker looked to  
2 intentional conduct.

3 Tinker in particular, the examples they gave,  
4 Justice Peckham gave an example of, if I negligently drive  
5 my car into a busy thoroughfare, injuring someone, that  
6 would not be an intentional injury because I didn't intend  
7 to injure anyone, as opposed to if I intentionally went  
8 into that thoroughfare to injure someone. That would be  
9 intentional --

10 QUESTION: And the case where the man throws the  
11 firecracker into the gasoline-laden basement and the  
12 explosion injures the fellow worker, that's -- is -- how  
13 does that come out, in your view?

14 MS. GRANDY: Your Honor, you're referring to the  
15 Hartley case, I believe, which --

16 QUESTION: Yes.

17 MS. GRANDY: -- was also decided by the Eighth  
18 Circuit, and what the Eighth Circuit said there was, the  
19 intent was to cause an injury.

20 The injury was to startle and scare the employee  
21 in that case, as opposed to the injury which went further  
22 and actually injured the -- caused physical harm to him  
23 and the Court in that case said, when you have an intent  
24 to injure someone, be it startling or scaring them, we're  
25 not going to say the injury was only meant this far, not

1 this far.

2 In this case before you, we have no intent to  
3 injure at all.

4 QUESTION: Well then, Ms. Grandy, did I  
5 understand you to say that Justice Peckham in 1903 was  
6 talking about driving a car into a busy intersection  
7 and --

8 MS. GRANDY: He said driving into a crowded  
9 thoroughfare. I was assuming he was driving a cart or  
10 buggy, Your Honor.

11 QUESTION: Yes.

12 MS. GRANDY: I didn't think he was driving a  
13 car.

14 QUESTION: Not a car, okay.

15 (Laughter.)

16 MS. GRANDY: I had to think about that, too.

17 QUESTION: If willful means intending to injure,  
18 what's left for malicious? What does that add?

19 MS. GRANDY: What malicious adds is almost an  
20 escape clause. You can have an intentional injury that's  
21 not necessarily malicious.

22 For instance, the banks of the Mississippi River  
23 are swelling and I know if I cut a hole in the levee I may  
24 flood out Farmer A, but I'm going to save the village down  
25 the river and that's why I'm cutting a hole in the levee.

1 I don't intend necessarily to injure Farmer A,  
2 although my actions will and I know they will injure  
3 Farmer A, but my just cause or excuse, which comes out of  
4 the malicious definition, is that I'm trying to save the  
5 village down below, or in the example given earlier, where  
6 the deputy or the marshal stops someone from injuring you,  
7 he intends to injure that person, but his excuse is, he's  
8 trying to save the justices.

9 So that's what malicious adds.

10 QUESTION: May I ask just one question about  
11 this famous Tinker case for you?

12 Do you agree -- and I'm inclined to think he's  
13 right -- with your opponent that the opinion there did not  
14 rely at all on the notion that the defendant or the  
15 bankrupt tried to injure the husband of the woman he  
16 seduced? It was merely the question of whether she'd  
17 given consent and that was not enough to void --

18 MS. GRANDY: In that case, Your Honor, the  
19 injury went to the marital right itself.

20 QUESTION: That's right, but --

21 MS. GRANDY: That's what the Court determined.

22 QUESTION: -- my question is whether, is it not  
23 correct that the defendant, or the seducer, whichever  
24 party it was, it's clear from the record that there's --  
25 the Court did not rely at all on the notion that he was

1 trying to injure the husband of the woman he seduced?

2 MS. GRANDY: That's correct, Your Honor.

3 QUESTION: So that basically are you saying  
4 Tinker is an unusual fact situation and it was un --  
5 overruled by legislative history, or we should overrule it  
6 now? What is your position about Tinker?

7 MS. GRANDY: Your Honor, I don't think the  
8 legislative history necessarily overruled Tinker. I --  
9 the legislative history said that to the extent that other  
10 cases have relied on Tinker to hold a reckless disregard  
11 standard, they are overruled.

12 QUESTION: Right.

13 MS. GRANDY: Within Tinker itself, one of the  
14 real, or one of the main substances that have come out of  
15 Tinker is the implied malice standard and I think that's  
16 what the Court was referring to there.

17 In an act such as that, it's implied, whether  
18 you knew her husband or not, you were damaging his marital  
19 rights. You didn't have to know him. It was implied the  
20 minute that type of act was done, and there are --

21 QUESTION: Well, why couldn't we by analogy say  
22 here there's implied -- an implied intent just as much as  
23 was implied there?

24 MS. GRANDY: Because in this case, Your Honor,  
25 there's no showing of any intent at all, which is admitted

1 by the other side, to cause any injury.

2 QUESTION: Well, if you could --

3 QUESTION: Well --

4 QUESTION: -- be malicious without being  
5 intentional, then what about the act of practicing  
6 medicine, not having malpractice insurance and then  
7 injuring your patients through negligently failing to look  
8 up the right remedies?

9 I mean, if you can have -- what is -- I mean,  
10 practicing -- for a doctor to practice medicine, doesn't  
11 have malpractice insurance, just goes bankrupt and can't  
12 pay the debt, I mean, is that the equivalent today to what  
13 criminal conversation was 100 years ago?

14 MS. GRANDY: No, it isn't, Your Honor. The  
15 intent not to have malpractices insurance isn't an intent  
16 to cause an injury.

17 QUESTION: No, and you'd have to say it's not  
18 intentional, but malicious.

19 I mean, the argument he's making from Tinker is  
20 that it is -- it is -- it's not intentional, or it is  
21 intentional, exactly like here. In Tinker, you could have  
22 been found to fall within the statute, though you're --  
23 say he was sleeping with a woman. He may have been  
24 negligent and not known that she was married, all right.

25 He says, similarly the person here, the doctor,

1 gave a certain remedy not knowing, though he should have  
2 known, just like Tinker should have known, what the right  
3 remedy was. So he says, that's all of a muchness. I  
4 mean, that's the same case, he said.

5 MS. GRANDY: No, it isn't, Your Honor.

6 QUESTION: Because?

7 MS. GRANDY: I believe in Tinker --

8 QUESTION: All right, go ahead.

9 MS. GRANDY: If we go with your facts, Your  
10 Honor, if in Tinker the husband did not know she was  
11 married at all, I would agree, but --

12 QUESTION: The adulterer -- yes.

13 MS. GRANDY: Yes. Yes, that Mr. -- yes, that he  
14 did not believe that she was married, then I think that  
15 fact cannot be true. I don't think those are the facts in  
16 Tinker.

17 QUESTION: But there's no showing that he did  
18 know in Tinker.

19 MS. GRANDY: There's no showing that he didn't  
20 know, but I think the conclusions that are set forth by  
21 the Court in that case imply that he did know. The Court  
22 says this is one of the grossest --

23 QUESTION: Well, it surely doesn't say so. It  
24 surely doesn't say so.

25 QUESTION: Well, could it have --

1 MS. GRANDY: I'm sorry --

2 QUESTION: Just as a matter of -- the definition  
3 of the offense, could it have been criminal conversation  
4 if he didn't know?

5 MS. GRANDY: If he didn't know?

6 QUESTION: I was assuming that it couldn't have  
7 been criminal conversation unless he, in fact, knew of the  
8 marriage. Am I wrong?

9 QUESTION: I assumed so, too, unless --

10 MS. GRANDY: I --

11 QUESTION: Unless the crime was fornication and  
12 not adultery. I thought it was an adultery crime.

13 MS. GRANDY: Yes, Your Honor. In Tinker, in  
14 order to prove criminal conversation you had to prove that  
15 there was a marriage and that the act was performed, and  
16 those two --

17 QUESTION: Well, but do you have to know that  
18 the defendant knew that there was a marriage?

19 MS. GRANDY: In --

20 QUESTION: That he knew that the woman he was  
21 sleeping with was married?

22 MS. GRANDY: I don't know, Your Honor.

23 QUESTION: In the argument I think they argued  
24 that he didn't have to know, and that rather he ran the  
25 risk of the woman being married.

1 QUESTION: I think we're going to get back to  
2 the 18th Century pretty soon, the Statute of Anne again.

3 (Laughter.)

4 MS. GRANDY: The case doesn't tell us, Your  
5 Honor.

6 QUESTION: No, it doesn't. I mean --

7 MS. GRANDY: No.

8 QUESTION: -- you read the opinion, he might not  
9 have known anything about the marital status of the woman  
10 that he seduced.

11 MS. GRANDY: That's correct, Your Honor, but the  
12 examples that are given throughout Tinker refer to  
13 intentional conduct. If you look at the examples given by  
14 Justice Bailey --

15 QUESTION: Right, but they implied the intent  
16 because the facts were so outrageous to the judges at the  
17 time and I don't know -- you know, the same kind of  
18 reasoning might justify -- I'm not saying it would, but  
19 the conclusion of, well, this doctor was sufficiently  
20 outrageous in his failure to be careful and so forth and  
21 so on, that you'd take the same reasoning the Court used  
22 in Tinker, that you imply the intent. That's what they  
23 did. They implied the intent.

24 MS. GRANDY: They --

25 QUESTION: Or inferred it, I guess is the proper

1 way to say it.

2 MS. GRANDY: My -- Your Honor, I believe that  
3 the implied intent actually grew from the examples they  
4 gave of other intentional conduct in that case --

5 QUESTION: Well, the implication of --

6 MS. GRANDY: -- not necessarily from Tinker.

7 QUESTION: The implication of malice was that  
8 there was a wrongful act done without any justification or  
9 excuse.

10 MS. GRANDY: Well, it was as --

11 QUESTION: And it was intentionally done and so  
12 that implied the necessary malice.

13 MS. GRANDY: If he were intentionally doing a  
14 wrongful act, he would have had to have known it was wrong  
15 to sleep with Mr. Tinker -- Mrs. Colwell, then --

16 QUESTION: No --

17 MS. GRANDY: -- Your Honor, because he knew she  
18 was married.

19 QUESTION: No. It was the kind of act which was  
20 done without excuse and therefore the Court implied  
21 malice. That's the way I read the case.

22 MS. GRANDY: Right, Your Honor. I was just  
23 bringing up the language --

24 QUESTION: It was Mr. Justice Peckham's case,  
25 not mine.

1 (Laughter.)

2 MS. GRANDY: It is a difficult case to read and  
3 I think --

4 QUESTION: No, but however you read it, isn't it  
5 fair to say that either he did not have to know of the  
6 marriage, but the injury followed as a matter of law  
7 whether he knew or not, or that he did have to know of the  
8 marriage and therefore we should assume simply by the  
9 definition of the offense that he knew in this case, and  
10 therefore the injury followed as a matter of law.

11 One -- either way, the injury in that case was  
12 inevitable and the injury in this case is not, isn't  
13 that --

14 MS. GRANDY: Yes, Your Honor.

15 QUESTION: -- the distinction that you would  
16 rely on?

17 MS. GRANDY: Yes. At the time that Dr. Geiger  
18 made the choice to do the various procedures that he did  
19 throughout this, his intent was never to injure, nor was  
20 his choice governed by any intent to injure.

21 QUESTION: Nor was the injury, as it were,  
22 logically a necessity of whatever deficiency he may have  
23 been guilty of.

24 MS. GRANDY: That's --

25 QUESTION: It happened, but it didn't

1 necessarily happen.

2 MS. GRANDY: That's correct, Your Honor.

3 QUESTION: But as you see the case, then,  
4 malpractice actions in general as a category would not  
5 come under (a)(6).

6 MS. GRANDY: No, Your Honor, not unless there  
7 was some intent on the part of a doctor to injure and I  
8 don't believe you find that in malpractice cases.

9 QUESTION: How do you regard defamation actions  
10 for (a)(6) purposes?

11 MS. GRANDY: You would have to have an intent to  
12 defame the person. If --

13 QUESTION: Well, isn't that an element of the  
14 crime of defama -- or the action of defamation itself?

15 MS. GRANDY: I believe it is, Your Honor.

16 QUESTION: I mean -- or can you negligently  
17 defame someone? I don't know.

18 QUESTION: I thought you had to say something  
19 defamatory knowing of its falsity.

20 MS. GRANDY: That's correct, Your Honor.

21 QUESTION: I don't think it's correct, only if  
22 you're defaming a public figure.

23 MS. GRANDY: Okay. There are exceptions.

24 (Laughter.)

25 MS. GRANDY: Your Honor, the Eighth Circuit

1 looked for its definition of intent to the Restatement  
2 and, in doing that, it determined that an intentional act  
3 is one where the actor desires or believes that the  
4 results are going to occur and, looking at that  
5 definition, the Court determined that Dr. Geiger did not  
6 intend to harm the patient, therefore he had no willful  
7 desire, or therefore there was no willful injury.

8 Having reached that point, the Eighth Circuit  
9 concluded that section 523(a)(6) did not apply and  
10 therefore the debt was dischargeable.

11 QUESTION: Do you know what the practice is in  
12 the States with respect to requiring, as a condition of  
13 retaining a medical license, malpractice insurance?

14 MS. GRANDY: No, I don't, Your Honor, but as a  
15 policy reason, if the State was concerned that this  
16 Court's ruling would have some effect to cause doctors to  
17 not carry malpractice insurance, they could govern that by  
18 licensing it within their own States and requiring  
19 insurance, just as in -- most States are now requiring, or  
20 several States are requiring insurance in order to have a  
21 driver's license.

22 Dr. Geiger, as found by the bankruptcy court,  
23 had several reasons for his treatment. He in prescribing  
24 various types of medicine at all times 1) believed his  
25 patient was getting better, 2) thought he was -- she had

1 the ability to absorb medicine very well through her  
2 stomach, which is why he made the various choices he made,  
3 thought her infection had burned out, and thought she had  
4 developed a superinfection in determining to stop using  
5 antibiotics altogether.

6 So even if you were to take the definition of  
7 malice as set forth in the Tinker case, Dr. Geiger would  
8 have just cause or excuse for having done what he did.

9 The legislative history also supports this by  
10 looking at the language to the extent other cases have  
11 relied on Tinker to hold a reckless disregard standard.  
12 There, the courts once again are focus -- or Congress is  
13 focusing on the intent of the injury itself, because a  
14 reckless act would be one that would not require intent.

15 Within the section 500 of the Restatement is the  
16 definition of recklessness and within that subsection (f)  
17 of that definition there's a comparison of intentional  
18 misconduct to recklessness and, when you compare the two,  
19 recklessness does not require an intent. That's why we  
20 feel reckless conduct, which the Eighth Circuit said at  
21 the very worst his conduct was reckless, it would be  
22 dischargeable because there's -- you don't have the  
23 element of intent in a reckless type of act.

24 Tinker we -- I do not believe is in conflict  
25 with the decision of the Eighth Circuit, because most of

1 the examples in Tinker appear to require an intent to  
2 injure. The implied malice standard is limited to certain  
3 facts in certain situations and Tinker certainly does not  
4 support a reckless disregard standard, so the legislative  
5 history is not overruling Tinker but basically saying,  
6 read Tinker correctly.

7 The purposes and policy of the Bankruptcy Code  
8 will be furthered by the decision of the Eighth Circuit.  
9 This is because the purpose of the Bankruptcy Code overall  
10 is to provide a debtor with a fresh start and that is why  
11 exceptions to discharge are narrowly reviewed. The --  
12 requiring an intent to cause an injury would lead to such  
13 a narrow interpretation and enhance the fresh starts.

14 Intentional act, if you only require that which  
15 results in injury, would lead to virtually everything  
16 being nondischargeable, as pointed out by the Eighth  
17 Circuit. If you speed up to a yellow light because you're  
18 in a hurry to pick someone up, that would be an  
19 intentional act. It would be nondischargeable. If you're  
20 driving too fast for conditions, even though you're  
21 driving within the speed limit, that would be an  
22 intentional act which would be nondischargeable.

23 Buying something on credit because you think you  
24 can pay for it, but intentionally buying it and then  
25 ultimately losing your job and not being able to pay for

1 it would be an intentional act and be nondischargeable  
2 under that theory.

3 Once again, Justice Peckham's example of driving  
4 into a crowded thoroughfare would be an intentional act  
5 under that definition.

6 We feel the policies and the purpose of the  
7 Bankruptcy Code are furthered by this Court deeming that  
8 the decision of the Eighth Circuit was correct and  
9 affirming that decision.

10 QUESTION: Thank you, Ms. Grandy.

11 Mr. Pressman, you have 5 minutes remaining.

12 REBUTTAL ARGUMENT OF NORMAN W. PRESSMAN

13 ON BEHALF OF THE PETITIONER

14 MR. PRESSMAN: Mr. Chief Justice, unless there  
15 are any questions I will --

16 QUESTION: I don't mean to be -- I'm just  
17 curious. How do you pronounce your client's name?

18 MR. PRESSMAN: Kawaauhau.

19 QUESTION: Thank you.

20 QUESTION: I thought in Hawaiian every vowel was  
21 supposed to be pronounced.

22 MR. PRESSMAN: Mr. Kaw -- I've had trouble  
23 pronouncing it. That's -- my understanding is that that's  
24 how to pronounce it.

25 QUESTION: Well, you --

1 MR. PRESSMAN: Kawaauhau. Maybe it's Kawaauhau.

2 I --

3 QUESTION: I'm sure you know better than we do.

4 MR. PRESSMAN: I may be using the St. Louis  
5 pronunciation.

6 (Laughter.)

7 CHIEF JUSTICE REHNQUIST: Very well. Thank you,  
8 Mr. Pressman. The case is submitted.

9 MR. PRESSMAN: Thank you, Your Honor.

10 (Whereupon, at 11:53 a.m., the case in the  
11 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MARGARET KAWAAUHAU, ET VIR., Petitioners v. PAUL W. GEIGER  
CASE NO: 97-115

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedele  
(REPORTER)