UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

In the Matter of: T. J. Vollbracht	CASE NO. 02-13104
DON BERRY	PLAINTIFF
VERSUS	ADV. PROC. NO. 02-1131
T. J. VOLLBRACHT	DEFENDANT

OPINION

The initial decision of this court, which was affirmed by the United States District Court, was reversed and remanded by the United States Court of Appeals for the Fifth Circuit, (hereinafter Circuit Court), for further proceedings consistent with the Circuit Court's opinion.

I.

The above captioned adversary proceeding was initiated by the plaintiff, Don Berry, (hereinafter Berry), against the defendant/debtor, T. J. Vollbracht, (hereinafter Vollbracht), to except from discharge in Vollbracht's bankruptcy case, pursuant to §523(a)(6) of the Bankruptcy Code, a debt that might potentially be owed to Berry as a result of an altercation with Vollbracht.

This court, in a bench opinion issued immediately following the completion of the adversary proceeding trial, concluded that the potential debt was not the product of a willful and malicious injury, and, therefore, was dischargeable. This decision, which was ultimately reversed and remanded, has been reconsidered as set forth herein.

II.

With due respect, the court noted a significant difference in a factual issue that was originally developed by the proof at trial and the language appearing in the Circuit Court's opinion. On several occasions, the Circuit Court stated that Vollbracht punched Berry multiple times. The evidence presented at trial had earlier convinced this court that there was only one punch thrown by Vollbracht, and that occurred after an intoxicated Berry had gotten out of his vehicle, threatened to whip everyone present at Vollbracht's residence, and proceeded toward Vollbracht in a menacing manner. The court reviewed its trial notes, and, in order to conclusively resolve this issue, re-opened the proof, without objection, for the specific purpose of hearing testimony concerning this issue. Since this court did not thoroughly "flesh out" all of its factual findings in the aforementioned bench opinion, it will do so now.

On the evening of August 4, 2001, Berry; his son, Jacob; his step-daughter, Laura Anderson; Shea, a friend of Laura's; and Allen Livingston; stopped at Vollbracht's house where an outdoor party was on-going. They were not invited guests. They were told that Vollbracht was not present, and they departed. Later that evening, they returned. Both Berry and Livingston had been drinking. At some point, Berry's son, Jacob, stood on the hood of the vehicle and started dancing. When some of the guests began laughing, Berry became angry. He was then asked to leave the premises by Vollbracht. Berry got into his vehicle, but, because of a mechanical problem, the vehicle's transmission would not engage, and Berry could not proceed down the driveway. This frustrated him further. Berry exited the car, cursed, and threatened to whip everyone at the party. According to Vollbracht, Berry then "charged" at him. This version

is consistent with the testimony of two other witnesses, Chris Terry and Candace Terry, who both stated that Berry angrily proceeded directly toward Vollbracht. At this moment, Vollbracht struck Berry only once, and the altercation was ended. Mrs. Terry, who is a nurse, helped Berry get to his feet, examined him cursorily, and then drove Berry and his son to their residence in her vehicle.

As noted in the Circuit Court opinion, this court found that Vollbracht intended to strike Berry, but also concluded that Vollbracht's conduct was not malicious because he "did not intend the consequences of the seriousness of the blow that he inflicted." In keeping with the Circuit Court's mandate, this court will elaborate further on whether Vollbracht's actions were justified, and whether he was acting in self-defense.

III.

In rendering its bench decision, this court considered the decisions of *Kawaauhau v. Geiger*, 523 U.S. 57, 140 L.Ed. 2d 90, 118 S.Ct. 974 (1998), *In re Miller*, 156 F.3d 598 (5th Cir. 1998), and *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996), but did not adequately articulate the application of the standards set forth in these opinions to the facts of this proceeding.

Vollbracht obviously intended to strike Berry, but he only threw one punch which this court believes was justifiable under the prevailing circumstances. Vollbracht should not be expected to cower or flee from his own residence. Vollbracht did not continue to pummel Berry with multiple blows. In the opinion of the court, he acted to defend himself and to prevent an assault by Berry. As Vollbracht testified at the most recent hearing, while he was not personally afraid of Berry, he was afraid that Berry was about to strike him. Berry was intoxicated. He had been asked to leave the premises and had gotten into his vehicle, but, when his car would not

operate properly, he became more belligerent, threatened the guests at Vollbracht's residence and, proceeded directly toward Vollbracht. Berry's friend, Allen Livingston, corroborated most of these facts with the exception that he denied that Berry "charged" at Vollbracht. Considering all the testimony, which described a continuous escalation of Berry's frustration and anger, this court thought that part of Livingston's testimony lacked credibility. Livingston was present in the courtroom at the most recent hearing. but was not called as a witness to refute any aspects of the altercation as recounted by Vollbracht and the Terrys. As the trier of fact, this court believes that Berry did indeed angrily approach Vollbracht with an intent of inflicting harm upon him.

As noted by the Circuit Court, Vollbracht does not have to establish that he was acting in self-defense in the context of defending a criminal prosecution. However, this court believes that Vollbracht did act in self-defense and was reasonably justified in protecting himself from Berry. The proof presented is convincing that the aggressor in this scenario was Berry, not Vollbracht.

The majority of the Circuit Court panel concluded that the theories of collateral estoppel and res judicata would not preclude this court on remand from considering the issue of self-defense in examining Vollbracht's conduct. The dissenting opinion concluded that a consideration of self-defense should be precluded because of Vollbracht's conviction of simple assault in the Justice Court of Yalobusha County, Mississippi, pointing out that self-defense was apparently rejected by the Justice Court. So that this might be considered in a proper context, this court believes that it is obligated to point out that the Justice Court in Mississippi is not a court of record. The presiding Justice Court Judge in Vollbracht's case was a non-lawyer, and Vollbracht was not represented by counsel. In fact, the only lawyers present were the prosecuting

attorney and Berry's personal attorney; so, the odds of gaining an acquittal were hardly "stacked" in Vollbracht's favor. Regardless, whether the issue of self-defense was adequately and fairly litigated in the Justice Court proceeding would be extremely difficult to determine.

As a corollary, this court would echo footnote 8 in the Circuit Court's opinion to the effect that Vollbracht's conviction for the offense of simple assault in Mississippi does not mean that a civil debt arising from his conduct should be peremptorily considered non-dischargeable in his bankruptcy case. The statute at issue, Miss. Code Ann. §97-3-7 (2001), includes "negligently injuring the body of another." As such, the misdemeanor conviction cannot be given either collateral estoppel or res judicata effect insofar as a determination of willful and malicious conduct for §523(a)(6) purposes is concerned. *Matter of Miller*, 156 F.3d 598, 603 (5th Cir. 1998), *citing Kawaauhau v. Geiger*, 523 U.S. 57, 140 L.Ed. 2d 90, 118 S.Ct. 974 (1998).

IV.

This court has thoroughly reconsidered the factual events that unfolded on the evening of August 4, 2001, and has re-applied the relevant precedents, set forth herein, to these events. While it is unfortunate that this altercation occurred, and even more unfortunate that Don Berry was injured, this court must again conclude that the conduct of T.J. Vollbracht was not willful and malicious as contemplated by §523(a)(6) of the Bankruptcy Code. Vollbracht justifiably defended himself from an imminent assault that was about to be perpetrated by Berry. As such, any civil debt that might be owed to Berry by Vollbracht should be dischargeable in Vollbracht's bankruptcy case.

Berry's complaint is not well taken and will be dismissed with prejudice by a separate order to be entered contemporaneously herewith.

This the 20th day of March, 2008.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE