

FEB 10 2009

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-08-1178-DMoPa
)		
7	CYRUS PARTOW,)	Bk. No.	05-14150
)		
8	Debtor.)	Adv. No.	05-01417
)		
9	_____)		
)		
10	CYRUS PARTOW,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM ¹	
)		
13	KIRK TURNER,)		
)		
14	Appellee.)		
)		

Argued and Submitted on January 23, 2009
at Pasadena, California

Filed - February 10, 2009

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Theodor C. Albert, Bankruptcy Judge, Presiding

Before: DUNN, MONTALI and PAPPAS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Kirk Turner ("Turner") initiated an adversary proceeding
2 against the debtor, Cyrus Partow, to except from discharge a
3 stipulated judgment he obtained against the debtor in state
4 court. At the start of the four-day trial in the adversary
5 proceeding, the debtor moved to dismiss the action for failure to
6 prosecute, which motion the bankruptcy court denied. After
7 taking the matter under advisement, the bankruptcy court
8 determined that the stipulated judgment was nondischargeable
9 under 11 U.S.C. § 523(a)(6).²

10 The debtor appeals, arguing that the bankruptcy court abused
11 its discretion in denying his motion to dismiss for failure to
12 prosecute and erred in applying an incorrect legal standard to
13 determine "willfulness" under § 523(a)(6). We AFFIRM.

14 15 **I. FACTS**

16 The stipulated judgment arose from the debtor's involvement
17 in a theft when he was a high school student. As revealed below,
18 the consequences of his crime dog the debtor still.

19 On November 13, 2000, in the course of his employment as a
20 driver for a beer distributing company, Turner was delivering
21 beer to a convenience store in Laguna Beach, California. Turner
22 parked the delivery truck next to the front door of the store and
23 went into the store to make his delivery, leaving one or two of
24 the bays of the delivery truck open.

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
enacted and promulgated prior to October 17, 2005, the effective
date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 The debtor and his friend, Erick Battersby ("Battersby"),
2 had driven to the convenience store in the debtor's father's SUV.
3 They noticed the open bay doors of the delivery truck and decided
4 to steal some beer. While Battersby snatched several cases of
5 beer from the delivery truck, the debtor waited in the driver's
6 seat of the SUV with the engine running.

7 Turner spied Battersby unloading the beer cases into the SUV
8 and sprinted out of the store to stop the theft. As Battersby
9 entered the rear door of the SUV, Turner grabbed the right arm of
10 his shirt sleeve. Seeing Turner close in on Battersby, the
11 debtor yelled and hit the accelerator of the SUV, speeding out of
12 the parking lot.

13 Turner meanwhile held onto Battersby's shirt sleeve until it
14 tore off. Turner fell to the pavement, and the rear wheel of the
15 SUV rolled over his feet. As the debtor and Battersby raced away
16 in the SUV, they saw Turner on the ground. The debtor did not
17 stop to investigate the extent of Turner's injuries.

18 Turner managed to write down the license plate number of the
19 SUV. Three weeks later, the police arrested and took the debtor
20 and Battersby into custody, booking them on robbery charges.

21 Turner subsequently sued the debtor in state court to
22 recover damages arising from his injuries, medical expenses, and
23 loss of income.³ On September 15, 2003, Turner obtained a
24

25 ³ Turner also named the debtor's father, Syd Partow,
26 Battersby, and his father, David Battersby, as defendants in the
27 state court action. Syd Partow settled the state court action
28 with Turner for \$25,000. Turner obtained a default judgment
against Battersby in the total amount of \$752,540.58, and against
David Battersby in the total amount of \$75,000.

1 stipulated judgment against the debtor in the amount of \$75,000,
2 plus interest. The stipulated judgment provided that it was
3 nondischargeable in bankruptcy by the debtor under § 523(a)(6).⁴
4 Although the debtor agreed to settle the case, he refused to
5 agree to a recital of facts that included an admission by the
6 debtor that he intentionally injured Turner. No findings of fact
7 accompanied the stipulated judgment.

8 Four months after the debtor filed for chapter 7 bankruptcy
9 relief on June 13, 2005, Turner filed an adversary proceeding
10 against the debtor to except the stipulated judgment from
11 discharge under § 523(a)(6). Because no findings had been made
12 in the state court action, the bankruptcy court set a trial to
13 determine whether the debt owed Turner by the debtor arose from a
14 willful and malicious injury within the meaning of § 523(a)(6).

15 Prior to the trial, the bankruptcy court held a status
16 conference. At the status conference, the bankruptcy court set
17 the trial for September 20, 2007, and referred counsel to its
18 website for a copy of its trial procedures posted there.⁵ It

19
20 ⁴ We agree with the bankruptcy court's correct observation
21 that the provision that the stipulated judgment was
nondischargeable was not binding on the parties.

22 ⁵ The bankruptcy court established its own trial procedures
23 supplemental to the local bankruptcy rules of the Central
24 District of California ("local rules"). The bankruptcy court's
trial procedures state, in relevant part:

25 Trial Briefs: Unless otherwise ordered by the Court, trial
26 briefs are required. Trial briefs shall be filed seven (7)
calendar days prior to trial.

27 Testimony: All direct testimony shall be by declaration
28 unless:

(continued...)

1 reminded the attorneys for the debtor and Turner to file a joint
2 pretrial statement and a joint pretrial order, as required under
3 the local rules.⁶ The bankruptcy court further told counsel that
4 its trial procedures required direct testimony by declaration.
5 It strongly recommended to counsel that they file trial briefs;
6 the bankruptcy court cautioned counsel that "the person who
7 doesn't file a trial brief is at a severe disadvantage." Tr. of
8 July 12, 2007 Hr'g, 6:23-25, 7:1.

9
10
11 _____
12 ⁵(...continued)

13 I) the witness is adverse or refuses to give testimony
14 by declaration; or
15 ii) the testimony is offered to impeach or rebut.

16 . . .

17 Plaintiff(s) shall file and serve its/their declarations on
18 counsel for the defendant(s) thirty (30) days before the trial
19 date. Defendant(s) shall serve its/their declarations on counsel
20 for the plaintiff(s) twenty-one (21) days before the trial date.

21 Evidentiary objections to any declaration must be served and
22 filed at least seven (7) calendar days before the trial date.

23 ⁶ Local Bankruptcy Rule 7016-1(b) for the Central District
24 of California provides, in relevant part:

25 (1) When Required: In any adversary proceeding or contested
26 matter, unless otherwise ordered by the court, attorneys for the
27 parties shall prepare and file a written joint pre-trial order
28 approved by counsel for all parties. Unless otherwise specified
by the court, the joint pre-trial order shall be filed and served
not less than 14 days before the date set for the trial or pre-
trial conference, if one is ordered. Preparation and filing of
the pre-trial order shall be the responsibility of the parties'
counsel, and it shall be equally the responsibility of the
parties themselves if the parties are not represented by counsel.
All parties shall meet and confer at least 28 days before the
date set for trial or pre-trial conference, if one is ordered,
for the purpose of preparing the pre-trial order.

1 On September 4, 2007, counsel for the debtor filed a direct
2 testimony declaration. Approximately one week later, he filed a
3 unilateral pretrial order and a trial brief. Counsel for Turner
4 filed two direct testimony declarations the day before the trial.
5 He did not file a trial brief.

6 At the start of the trial, counsel for the debtor moved to
7 dismiss the action for failure to prosecute under Rule 41(b) of
8 the Federal Rules of Civil Procedure ("FRCP 41(b)")⁷ and the
9 local rules⁸ on the grounds that Turner's attorney did not
10 properly prepare for trial by failing to comply with the local
11 rules and the bankruptcy court's trial procedures.

14 ⁷ FRCP 41(b), incorporated by Rule 7041, provides:

15
16 If the plaintiff fails to prosecute or to comply with
17 these rules or a court order, a defendant may move to
18 dismiss the action or any claim against it. Unless the
19 dismissal order states otherwise, a dismissal under
20 this subdivision (b) and any dismissal not under this
rule - except one for lack of jurisdiction, improper
venue, or failure to join a party under Rule 19 -
operates as an adjudication on the merits.

21 ⁸ Counsel for debtor referenced the local rules in moving to
22 dismiss the action for failure to prosecute, but did not cite to
the specific local rule.

23 Local Bankruptcy Rule 7016-1(g) for the Central District of
California provides:

24 Failure of counsel for any party to appear before the
25 court at status conference or pre-trial conference or
to complete the necessary preparations therefor or to
26 appear at or to be prepared for trial may be considered
27 an abandonment or failure to prosecute or defend
diligently, and judgment may be entered against the
28 defaulting party either with respect to a specific
issue or as to the entire proceeding.

1 Counsel for the debtor pointed out that, though the
2 bankruptcy court's trial procedures required direct testimony
3 declarations to be filed thirty days before the trial, Turner's
4 attorney did not file them until the day before the trial. As a
5 result, the debtor's attorney had no opportunity to prepare
6 written evidentiary objections to the direct testimony
7 declarations, as required under the bankruptcy court's trial
8 procedures. Moreover, the debtor's attorney contended, one of
9 the direct testimony declarations contained allegations he had
10 never seen, causing prejudice to the debtor by forcing the
11 debtor's attorney "to shoot from the hip" in making evidentiary
12 objections. Tr. of September 20, 2007 Hr'g, 6:15.

13 Counsel for the debtor also noted that Turner's attorney
14 failed to participate in preparing a joint pretrial order and to
15 file a trial brief. Thus, Turner's attorney substantially failed
16 to comply with the local rules and the bankruptcy court's trial
17 procedures. Should the bankruptcy court decline to dismiss the
18 action, the debtor maintained, it would "send[] a bad message,
19 that there's no consequence for blatant disregard of the
20 [bankruptcy court's] orders" Tr. of September 20, 2007
21 Hr'g, 7:15-17.

22 The bankruptcy court declined to dismiss the case. It was
23 reluctant to "deny[] [Turner] his day in court," believing that,
24 though there was a "grievous breach of the [bankruptcy court's]
25 procedure" by Turner's counsel, "[t]he rules [were] secondary to
26 justice." Tr. of September 20, 2007 Hr'g, 15:1-2, 16:1-2, 18:3-
27 4. The bankruptcy court allowed the trial to proceed,
28 determining that such noncompliance was not "so fundamental as to

1 prevent entirely [Turner] from presenting a case." Tr. of
2 September 20, 2007 Hr'g, 21:23-24.

3 The bankruptcy court conducted the trial over four days,
4 during which the debtor, Battersby, and Turner testified. At the
5 conclusion of the trial, it took the matter under advisement.
6 Shortly thereafter, the bankruptcy court issued its statement of
7 decision, determining the stipulated judgment to be
8 nondischargeable as it arose from a willful and malicious injury
9 inflicted by the debtor to Turner within the meaning of
10 § 523(a)(6). On July 2, 2008, the bankruptcy court entered
11 judgment in favor of Turner.

12 The debtor appeals.

14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
17 § 158.

19 **III. ISSUES**

20 (1) Whether the bankruptcy court abused its discretion in
21 declining to dismiss the action for failure to prosecute.

22 (2) Whether the bankruptcy court erred in its determination
23 of "willfulness" under § 523(a)(6).

25 **IV. STANDARDS OF REVIEW**

26 "We review de novo whether a particular type of debt is
27 nondischargeable as a willful and malicious injury under
28 § 523(a)(6)." Maaskant v. Peck (In re Peck), 295 B.R. 353, 360

1 (9th Cir. BAP 2003), quoting Tsurukawa v. Nikon Precision, Inc.
2 (In re Tsurukawa), 258 B.R. 192, 195 (9th Cir. BAP 2001) (internal
3 quotations omitted). See also Carrillo v. Su (In re Su), 290
4 F.3d 1140, 1142 (9th Cir. 2002) (“Whether a claim is
5 nondischargeable presents mixed issues of law and fact and is
6 reviewed de novo.”). We review de novo a bankruptcy court’s
7 conclusions of law, id., and its interpretations of the
8 Bankruptcy Code. See Nichols v. Birdsell, 491 F.3d 987, 989 (9th
9 Cir. 2007).

10 We review the bankruptcy court’s findings of fact for clear
11 error. Rifino v. United States (In re Rifino), 245 F.3d 1083,
12 1087 (9th Cir. 2001). A finding of fact is clearly erroneous,
13 even though there is evidence to support it, if we have the
14 definite and firm conviction that a mistake has been committed.
15 Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d
16 862, 869 (9th Cir. 2001). “Where there are two permissible views
17 of the evidence, the factfinder’s choice between them cannot be
18 clearly erroneous.” Anderson v. City of Bessemer City, N.C., 470
19 U.S. 564, 574 (1985).

20 We review a bankruptcy court’s decision on a motion to
21 dismiss an action for lack of prosecution for an abuse of
22 discretion. Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138
23 n.10 (9th Cir. 2000). We will not disturb the bankruptcy court’s
24 exercise of discretion unless we have a definite and firm
25 conviction that it committed a clear error of judgment in the
26 conclusion it reached upon a weighing of the relevant factors.
27 Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir.

1 1994), quoting Nealey v. Transportacion Maritima Mexicana, S.A.,
2 662 F.2d 1275, 1278 (9th Cir. 1980).

3 4 **V. DISCUSSION**

5 A. The bankruptcy court did not abuse its discretion in
6 declining to dismiss the action for failure to prosecute

7 The following five factors ("FRCP 41(b) factors") apply in
8 determining whether to dismiss an action for lack of prosecution
9 under FRCP 41(b): (1) the public's interest in expeditious
10 resolution of litigation; (2) the court's need to manage its
11 docket; (3) the risk of prejudice to the defendant; (4) the
12 public policy favoring the disposition of cases on their merits;
13 and (5) the availability of less drastic sanctions. In re Eisen,
14 31 F.3d at 1451. "Although beneficial to the reviewing court,
15 [the bankruptcy court] is not required to make specific findings
16 on each of the essential factors." Id. If the bankruptcy court
17 does not make such findings, we review the record independently
18 to determine whether the bankruptcy court abused its discretion.
19 Id., quoting Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.
20 1986).

21 The debtor argues that the bankruptcy court abused its
22 discretion in declining to dismiss the action for failure to
23 prosecute. The debtor maintains that the FRCP 41(b) factors
24 weigh in favor of dismissing the action. He particularly
25 emphasizes the prejudice he suffered in his attorney being unable
26 to prepare written evidentiary objections to the new allegations
27 in the untimely-filed Turner declaration. The debtor also
28 stresses the facts that Turner's attorney failed to file a trial

1 brief and to participate in preparing the pretrial order, despite
2 the requirements set forth in the local rules and the bankruptcy
3 court's trial procedures, as weighing in favor of dismissal.

4 Reviewing the record before us, the bankruptcy court
5 considered at least three of the FRCP 41(b) factors when it
6 decided not to dismiss the action: the risk of prejudice to the
7 defendant; the public policy favoring the disposition of cases on
8 their merits; and the availability of less drastic sanctions.

9 In determining whether the defendant has been prejudiced,
10 courts "examine whether the plaintiff's actions impair the
11 defendant's ability to go to trial or threaten to interfere with
12 the rightful decision of the case." Malone v. U.S. Postal Serv.,
13 833 F.2d 128, 131 (9th Cir. 1987). Accord Tenorio v. Osinga (In
14 re Osinga), 91 B.R. 893, 895 (9th Cir. BAP 1988) (citing Malone,
15 833 F.2d at 131). Here, despite the failure of Turner's attorney
16 to submit timely the direct witness declarations and to file a
17 trial brief, counsel for the debtor told the bankruptcy court
18 that he "[knew] this case" and would not "[have] show[n] up at
19 this Court not prepared to try this case." Tr. of September 20,
20 2007 Hr'g, 20:21-23. The bankruptcy court thus decided to have
21 the parties proceed "as best [they could]." Tr. of September 20,
22 2007 Hr'g, 21:17. The bankruptcy court also allowed the debtor's
23 attorney a continuing objection to all evidence presented by
24 Turner during the trial. The bankruptcy court understood the
25 prejudice to the debtor and his counsel from the failures of
26 Turner's counsel to comply with the local rules and the
27 bankruptcy court's trial procedures and factored that
28 understanding into its decision to allow the trial to proceed.

1 With respect to the factor of public policy favoring the
2 disposition of cases on their merits, "courts weigh this factor
3 against the plaintiff's delay and the prejudice suffered by the
4 defendant." In re Eisen, 31 F.3d at 1454. The bankruptcy court
5 expressly considered this factor. Although it understood the
6 frustration of the debtor's attorney in being unable to prepare
7 written evidentiary objections, the bankruptcy court believed
8 that allowing Turner to have his day in court outweighed the
9 prejudice suffered by the debtor.

10 In considering the availability of less drastic sanctions,
11 courts must make "a reasonable exploration of possible and
12 meaningful alternatives." In re Eisen, 31 F.3d at 1455, citing
13 Anderson v. Air West, Inc., 542 F.2d 522, 525 (9th Cir.
14 1976) (internal quotations omitted). Otherwise, "if it imposes a
15 sanction of dismissal without first considering the impact of the
16 sanction and the adequacy of less drastic sanctions," the
17 bankruptcy court will have abused its discretion. Malone, 833
18 F.2d at 132, quoting United States v. Nat'l Med. Enters, Inc.,
19 792 F.2d 906, 912 (9th Cir. 1986) (internal quotations omitted).
20 The bankruptcy court does not need to explain why alternatives to
21 dismissal are infeasible, though its explanation would be
22 helpful. In re Osinga, 91 B.R. at 895. Here, the bankruptcy
23 court considered a possible monetary sanction against Turner's
24 attorney in lieu of dismissal for his failure to comply with its
25 trial procedures and the local rules. The bankruptcy court
26 decided to schedule a hearing to consider "what the amount of
27 sanctions that should be imposed upon [Turner's attorney] are" so
28 that he would "remember this occasion and try next time to take

1 rules more seriously for the benefit of all.”⁹ Tr. of September
2 20, 2007 Hr’g, 18:7-9, 18:14-15.

3 Based on the bankruptcy court’s reasoned consideration of
4 FRCP 41(b) factors, we conclude that the bankruptcy court did not
5 abuse its discretion in denying the debtor’s motion to dismiss
6 for failure to prosecute.

7
8 B. The bankruptcy court did not err in its determination of
9 “willfulness” under § 523(a) (6)

10 The debtor challenges the bankruptcy court’s
11 nondischargeability determination on two grounds: (1) the
12 bankruptcy court applied an incorrect legal standard to determine
13 willfulness under § 523(a) (6), and (2) the debtor did not believe
14 that injury to Turner was substantially certain to occur.

15
16 1. The bankruptcy court applied the correct legal standard
17 in determining “willfulness” under § 523(a) (6)

18 Section 523(a) (6) excepts from discharge debts arising from
19 “willful and malicious” injury by the debtor to another person.¹⁰

20 For an injury to be willful, the debtor must have a subjective
21 motive to inflict injury or must believe that injury is
22 substantially certain to occur as a result of his or her conduct.

23
24 ⁹ No such hearing has been scheduled, based on our review of
the adversary proceeding docket.

25
26 ¹⁰ Courts in the Ninth Circuit treat the “malicious” injury
requirement as separate from the “willful” injury requirement.
27 Carrillo v. Su (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002).
28 Accord In re Peck, 295 B.R. at 365. We need not address the
“malicious” injury requirement, however, as the debtor does not
challenge the bankruptcy court’s determination on this point.

1 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th
2 Cir. 2001). In other words, the debtor must have acted with
3 "actual knowledge that harm to the creditor was substantially
4 certain" to result. In re Su, 290 F.3d at 1146; Ditto v.
5 McCurdy, 510 F.3d 1070, 1078 n.8 (9th Cir. 2007).

6 The bankruptcy court need not simply take the debtor's word
7 as to his state of mind. Id. at 1146 n.6. "[T]he bankruptcy
8 court may consider circumstantial evidence that tends to
9 establish what the debtor must have actually known when taking
10 the injury-producing action." Id. Accord Nahman v. Jacks (In re
11 Jacks), 266 B.R. 728, 742 (9th Cir. BAP 2001) ("[S]ubjective
12 intent may be gleaned from objective factors.").

13 The debtor contends that the bankruptcy court used an
14 incorrect legal standard to determine "willfulness" under
15 § 523(a)(6). As established by Su, courts within the Ninth
16 Circuit use a subjective approach in determining willfulness,
17 i.e., they look to whether the debtor acted with the desire to
18 injure or a belief that injury was substantially certain to
19 occur. Here, the debtor claims the bankruptcy court used an
20 objective approach, i.e., it looked to whether an objective,
21 reasonable person would have known that his actions were
22 substantially certain to cause injury.

23 In its statement of decision, the bankruptcy court found
24 that "the debtor had no subjective motive to inflict Turner's
25 injuries . . . [as] Turner was a complete stranger to [him]."
26 Statement of Decision After Trial, 8:24-26. "The debtor's only
27 motive," the bankruptcy court determined, "was to get away and
28 flee the scene of his . . . crime, without getting caught."

1 Statement of Decision After Trial, 8:26, 9:1. It acknowledged
2 that the debtor testified that "he did not really want to hurt
3 Turner and that his actions were caused by fear." Statement of
4 Decision After Trial, 9:2-3.

5 However, the bankruptcy court also found that the debtor was
6 aware that Turner was in very close proximity to Battersby when
7 he unloaded the beer cases into the back seat of the SUV. The
8 debtor saw that Turner had closed in on Battersby and knew that
9 Turner had grabbed Battersby's shirt.

10 The debtor therefore must have known, the bankruptcy court
11 deduced, that Turner was clinging to the SUV by Battersby's shirt
12 as the debtor drove away. Given these circumstances, the
13 bankruptcy court reasoned, "the debtor must have realized that
14 injuries would, in all likelihood, be caused to Turner when the
15 debtor at this same moment accelerated the SUV out of the parking
16 lot at a high rate of speed." Statement of Decision After Trial,
17 9:10-13. Although the debtor acted out of fear of being caught
18 in the crime, the bankruptcy court concluded, "he was quite
19 willing to act in a way as to likely inflict grievous injury, all
20 in hope of evading his pursuer." Statement of Decision After
21 Trial, 9:23-25.

22 From these findings, we conclude that the bankruptcy court
23 applied the appropriate legal standard to determine willfulness.
24 The debtor testified that he did not intend to injure Turner,
25 which the bankruptcy court accepted as true. The bankruptcy
26 court then looked to whether the debtor believed that injury was
27 substantially certain to occur as a result of his hasty escape.
28 The bankruptcy court considered circumstantial evidence -

1 Turner's position relative to the SUV, what the debtor saw before
2 he sped away - to ascertain the debtor's state of mind at the
3 time Turner was injured.

4 The debtor takes issue with the language used by the
5 bankruptcy court in its determination as to his state of mind.
6 By framing his state of mind as what he "must have realized," the
7 debtor contends, the bankruptcy court applied the objective
8 approach. The debtor equates "must have realized" with "should
9 have known," i.e., what an objective, reasonable person should
10 have known as to the risk of injury in proceeding with his or her
11 conduct - the standard for recklessness.

12 However, the bankruptcy court's use of the phrase "must have
13 realized" simply refers to what the debtor must have known, i.e.,
14 his actual knowledge, nothing more nor less. The findings in its
15 statement of decision reveal that the bankruptcy court applied
16 the subjective approach, having considered the testimony and
17 analyzed the surrounding circumstances as described by the
18 witnesses. From such circumstantial evidence, it deduced that
19 the debtor had actual knowledge that his speedy escape from the
20 store in the SUV was substantially certain to injure Turner.

- 21
- 22 2. The bankruptcy court did not clearly err in its
23 determination that the debtor acted with actual
24 knowledge that injury to Turner was substantially
25 certain to result from his conduct

26 The debtor asserts that he neither appreciated nor
27 recognized the risk of injury to Turner that could result from
28 his conduct. At the time of the theft, the debtor was a high
school student; as such, he lacked the experience and judgment to

