UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Gregory Charles Fors,
Debtor.

Bky. No. 99-31984
Chapter 7 Case

Connie Johnson, Darrell Johnson,
Christie Reid, and Tawna Schilling,
Plaintiffs,
v.
Gregory Charles Fors,
Defendant.

Adv. No. 99-3160

Tamara Bird,

Plaintiff,
v.
Gregory Charles Fors,
Defendant.

Adv. No. 99-3163

MEMORANDUM ORDER

This matter came before the Court for a joint hearing on cross motions for summary judgment in the above captioned adversary proceedings on January 5, 2000. Plaintiffs Connie Johnson, Darrell Johnson, and Tawna Schilling were represented by attorney Darrell Carter. Plaintiff Tamara Bird was represented by attorney Susan A. McKay. Defendant, Debtor, Gregory Charles Fors, was represented by attorney Joseph W. Dicker. Defendant seeks summary judgment against all four Plaintiffs[1]. Defendants Connie Johnson, Darrell Johnson, and Tawna Schilling, made cross-motions for summary judgment, they also seek sanctions against the Defendant for his present summary judgment motion. Additionally, the Defendant has raises a number of evidentiary objections in the 99-3160 case

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[1]A fifth Plaintiff, Chrystie Reid, was dismissed by this Court (in adversary proceeding 99-3160) by Order and Judgment filed on December 17, 1999.

against the admissibility of certain affidavit evidence.

This matter is a core proceeding and the court has jurisdiction pursuant to 28 U.S.C. §157 and 1334. Based upon the files, memoranda, and proceedings herein, and based upon the arguments of counsel, the court makes the following **ORDER** pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I. Background

The Plaintiffs in these adversary proceedings seek nondischargeability determinations under 11 U.S.C. §523(a)(6) for a series of alleged tortious acts by the Debtor Defendant Charles Fors. All of the claims arise out of Dr. Fors' conduct while a chiropractor.[2] Dr. Fors admits to a consensual sexual contact with two of the plaintiffs, Connie Johnson and Tamara Bird, but denies that anything about his conduct was tortious. Plaintiff Darrell Johnson's claims that the alleged tortious conduct against his wife Connie gives rise to his own tort claim for loss of consortium.[3] Tawna Schilling alleges that Dr. Fors engaged in inappropriate touching during a chiropractic exam.

Dr. Fors concedes willfulness as to at least two Plaintiffs, but argues that his conduct toward each and every Plaintiff fails to reach the malicious standard under 11 U.S.C. §523(a)(6). In their arguments to establish the malicious character of Dr. Fors' actions the Plaintiffs point to an alleged pattern of behavior in which Dr. Fors identified vulnerable women to deliberately target them as sexual partners.

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[2]Dr. Fors was forced to surrender his licence to practice Chiropractic Medicine for inappropriate sexual contact with his patients.

[3]The precise nature of Mr. Johnson's nondischargeability claim is not pled in the complaint.

II. Evidentiary Issues

Dr Fors raises a number of evidentiary objections to affidavit evidence provided by Plaintiffs Johnson, Johnson, Reid, and Schilling. The Defendant's motion in Limine and accompanying memorandum of law argues for the exclusion of the affidavit of Timothy Favor, deposition transcript of Rebecca Hoffman, Affidavit of John Brady, and the Affidavit of Dr. Consiorek[4]. Plaintiffs' counsel argued against the motion in Limine at the January 5th hearing.

The Affidavit of Timothy Favor

Dr. Fors objects to the offer, by Plaintiffs Johnson, Johnson, and Schilling, of the affidavit of Timothy Faver, Beltrami County Attorney. Mr. Faver's affidavit details his investigation and charging of Dr. Fors for criminal matters related to the conduct alleged in this lawsuit. Mr. Faver's affidavit concedes that there are no outstanding criminal complaints against Dr. Fors. Instead, it suggests that the dismissal of charges against Dr. Fors were for reasons having nothing to do with the merits of the charges. Put succinctly, Mr. Favor believes Dr. Fors guilty of crimes for which he is not currently charged. While evidence of a criminal conviction would be relevant to the Plaintiffs' theory of this case, Mr. Faver's opinion concerning Dr. Fors' guilt is not relevant. In this circumstance, a conviction is the only evidence admissible to establish criminal guilt. Mr. Faver's affidavit is silent on the subject of any convictions he was able to win against Dr. Fors. Defendant's motion to exclude the affidavit of Timothy Favor is granted.

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[4]Defendant's Motion in Limine seeks relief on an expedited basis. The affidavits in question were filed with the Court on the morning of the January 5, 2000 hearing. Dr. Fors sought their exclusion by notice of motion and motion filed and argued the same day.

The Affidavit of John Gonsiorek, PhD

Defendant Fors also objects to the admission of an affidavit from John C. Gonsiorek, PhD, a licenced psychologist with claimed expertise in the evaluation and regulation of professional improprieties involving sexual exploitation. The bulk of Dr. Gonsiorek's affidavit is legal arguments: first, why Dr. Fors was a psychotherapist under Minnesota Statute §148A.01; second, why recent decisions of the Minnesota Court of Appeals and Supreme Court misinterpret the applicability of this statute. Legal arguments belong in briefs to the Court and oral arguments, not in the affidavits of medical experts. Dr. Gonsiorek qualifications as a medical expert aside, assisting in understanding factual and evidentiary issues, not legal analysis, is the purpose of expert testimony. Dr. Gonsiorek's affidavit is excluded as it fails to "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Fed R. Evid. 702.

Affidavit of John Brady

John Brady is a Chiropractic Doctor who teaches on the faculty of the Northwest College of Chiropractic. Defendant Fors objects to the admission of Mr. Brady's affidavit for the purpose of establishing a per se violation of Minnesota Statute §148.10. As in the case of John Gonsiorek's affidavit above, the opinions of a medical professional as to conclusions of law are irrelevant. Mr. Brady's conclusions about the applicability of §148.10 to defining the standard of care for Chiropractors are also excluded. Mr. Brady's testimony on the training received by chiropractors, and the profession's prohibition of sexual contact between practitioners and patients, could be admissible if it is based on Mr. Brady's professional experience as a Doctor of Chiropractic and faculty member at the Northwest College of Chiropractic.

Deposition Transcript of Rebecca Hoffman

The final evidentiary objection raised by Dr. Fors is to the admission of a deposition transcript from Ms. Hoffman. The deposition was taken during a Minnesota civil case which was stayed by the filing of Dr. Fors' bankruptcy. Dr. Fors argues that her deposition is inadmissible because Ms. Hoffman is not a party to this nondischargeability action. The Court does not agree.

As discussed in greater detail below, the competing summary judgment motions before this Court present irreconcilable descriptions of Dr. Fors' contact with and behavior toward these Plaintiffs. Dr. Fors denies any non-consensual contact with any of the Plaintiffs. The Plaintiffs describe a trusted medical professional to whom they came for treatment and help who betrayed that trust. They allege that Dr. Fors used his position of authority to manipulated and probe their vulnerabilities as part of a scheme to establish sexual relationships. All of the Plaintiffs describe a pattern of behavior that began with questioning and physical contact during treatment that made the women uncomfortable, and which, with the benefit of hindsight, they believe was designed to break down important professional-patient boundaries. They claim that breaking down these boundaries was the first step in Dr. Fors' plan to engage them in exploitive sexual relationships. The deposition testimony of Rebecca Hoffman is offered to support the pattern of behavior argued by the Plaintiffs. While not a party to these proceedings, her testimony is limited to her own experiences and observations, and as such her live testimony would be admissible at trial. *See Miller v. Solem*, 728 F.2d 1020, 1026 (8th Cir.1984). The testimony is relevant to the Plaintiffs' theory of the case, and she could testify at trial. The motion to exclude this evidence is denied.

III. Summary Judgment Motions

Debtor Defendant Fors seeks summary judgment against the remaining four Plaintiffs in these companion cases on the remaining issue of nondischargeability under 11 U.S.C. §523(a)(6). Plaintiffs Johnson, Johnson, and Schilling brought cross motions for summary judgment alleging that Dr. Fors' alleged violation of Minn. Stat. §148.10 entitles them to a per se determination of willful and malicious injury.

Summary Judgment Standard

Bankruptcy Rule 7056 incorporates Federal Rule of Civil Procedure 56(C) to require that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Bankr. P. 7056(c). For summary judgment determinations "the [c]ourt views the facts in a light most favorable to the nonmoving party and allows that party the benefit of all reasonable inferences to be drawn from the evidence." *Prudential Ins. Co. v. Hinkel*, 121 F.3rd 364, 366 (8th Cir. 1997).

The court does not consider evidence which would be inadmissible at trial. *See Miller v. Solem*, 728 F.2d 1020 at 1026 (8th Cir. 1984). Nor does the court "weigh evidence and make credibility determinations, or attempt to determine the truth of the matter, but is, rather, solely 'to determine whether there is a genuine issue for trial." *Ries v. Wintz Properties (In re Wintz Companies)*, 230 B.R. 838, 857 (8th Cir. BAP 1999), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Summary judgment proceedings place the initial burden of proof on the moving party to

demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If this burden is met, the nonmoving party must "go beyond the pleadings" (*Id.*) and "do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial." *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp*. 106 S. Ct. 1348, 1356 (1986), *quoting* Fed.Rule Civ.Proc. 56(e).

Connie Johnson and Tamara Bird

Section 523(a)(6) excepts from discharge debts owed: "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). To prevail, the plaintiff must establish both elements of the §523(a)(6) claim:

> In *In re Long*, 774 F.2d 875, 880-81 (8th Cir.1985), we recognized that the elements of "willfulness" and "malice" differed under section 523(a)(6). We stated that malice must apply to a heightened level of culpability which goes beyond recklessness if it is to have a meaning independent of willful. *Id.* at 881. We then defined "willful" as "headstrong and knowing" conduct and "malicious" as conduct "targeted at the creditor ... at least in the sense that the conduct is certain or almost certain to cause ... harm." *Id.* We also held that circumstantial evidence of the debtor's state of mind could be used to ascertain whether malice existed. *Johnson v. Miera*, 926 F.2d 741, 743-744 (8th Cir 1991)

The Defendant concedes that his sexual conduct was willful in this case. He argues that however ill advised and unprofessional his conduct may have been, it was not intended to harm these Plaintiffs. He argues that the evidence shows a consensual sexual relationship with both Ms. Johnson and Ms. Bird.

The Plaintiffs characterize the sex between the Defendant and these two Plaintiffs as sexual

battery. There is little doubt that in the Eighth Circuit sexual battery, and even sexual harassment, are intentional torts of the kind excepted from discharge under §523(a)(6):

> In the Eighth Circuit, "willful" and "malicious" are separate elements of the Section 523(a)(6) exception to discharge. *In re Halverson*, 226 B.R. 22, 26 (Bankr.D.Minn.1998). The Supreme Court has clarified the definition of willfulness by stating that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of Section 523(a)(6)." *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). "[T]he (a)(6) formulation triggers ... the category 'intentional torts,' as distinguished from negligent or reckless torts." *Id.* affirming the Eighth Circuit's opinion in *In re Geiger*, 113 F.3d 848, 852 (8th Cir.1997). Intentional torts constitute a "legal category" of personal injury that is based on "the consequences of an act rather than the act itself." *See Geiger*, 113 F.3d at 852, citing Restatement (Second) of Torts § 8A, Comment a, at 15 (1965). An intentional tort requires that the actor "desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from [his act]." *Id. Thompson v. Kelly (In re Kelly)*, 238 B.R. 156 at 160 (Bankr. ED Mo. 1999).

While the law may be clear, the facts in this case are not. After the finder of fact has the opportunity to gauge the candor and truthfulness of the witnesses, Dr. Fors' characterization of his sexual conduct with Ms. Johnson and Ms. Bird may prevail at trial. Or it may be determined that both Plaintiffs were targeted to become the victims of deliberate and calculated sexual exploitation. Summary judgment where such fundamental facts are in dispute is impossible. Dr. Fors' motion for summary judgment against Ms. Johnson and Ms. Bird is denied.

Ms. Johnson notes that Dr. Fors had his licence revoked violated under Minn. Stat. 148.10(11) for the forbidden conduct of "[e]ngaging in conduct with a patient that is sexual or may reasonably be interpreted by the patient as sexual, or in any verbal behavior that is seductive or sexually demeaning to a patient." Minn Stat. 148.10(21)(b). But the sexual nature of Dr. Fors' conduct is not in dispute. A determination by a professional board that he would lose his chiropractic licence, for sexual contact

with a patient, has no res judicata effect on the issue of malice in this proceeding. In order to prevail on summary judgment the Plaintiff must establish that Dr. Fors intended the harm alleged:

> The bankruptcy courts have frequently attempted to define this level of culpability by speaking in terms of intentional harm. Malice is thus being given a meaning more nearly coinciding with common usage. One perceptive case turns to the Restatement (Second) of Torts, § 8A, Comment b, and uses intentional harm as a requirement for the bar to discharge, with the qualification that the expected harm must be "certain or substantially certain" to occur. *In re Fercho*, 39 B.R. 764, 766 (Bkrtcy.D.N.D.1984). The Restatement observes that this is a stricter test of fault than the standard of recklessness. It is also consistent with the previously quoted *Tinker* language, allowing a finding of malice when conduct "necessarily causes injury." 193 U.S. at 487, 24 S.Ct. at 509. *Barclays American/Business Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 881 (8th Cir. 1985).

Ms. Johnson's reliance on *Johnson v. Miera* in her argument for summary judgment is misplaced. While the Minnesota Board on Judicial Standards did discipline and suspend Judge Miera for his conduct, it was not the Board's determination that formed the basis of the bankruptcy court's determination that the debt owed to Mr. Johnson was nondischargeable under 11 U.S.C.§523(a)(6). It was instead the determination made by a state court jury that Judge Miera had committed civil battery. "We conclude that the district court properly affirmed the bankruptcy court's holding that the state court judgment against Miera implicitly contained a finding of malice." *Johnson v. Miera*, 926 F.2d 741, 744 (8th Cir 1991).

If Dr. Fors' sexual contact with the Plaintiff was in dispute, there would be a colorable argument that the Board's determination should be res judicata as to that issue. But, the Board's action does not determine the issue of malice with regard to Dr. Fors' sexual contact and relationships with the Plaintiffs. Plaintiffs' motion for summary judgment is denied and the case will proceed to trial to

determine if Dr. Fors knew, or should have known, that his actions would cause injury to Ms. Johnson and Ms. Bird.

Tawna Schilling

Dr. Fors characterizes Ms. Schilling's claims as an attempt to assign dark and improper motives to proper chiropractic procedures. He argues that what Ms. Schilling describes as inappropriate sexual touching was in fact acceptable chiropractic technique. Notwithstanding the expert affidavits provided by the Defendant, a determination of the appropriateness of Dr. Fors' contact cannot be resolved by a review of deposition testimony or chiropractic training materials. It will require a trier of fact reviewing both parties' credibility and veracity on the stand, in person, and subject to cross examination. The Defendant's motion for summary judgment is denied.

Plaintiff's motion for summary judgment alleges no unique facts or legal considerations from the motion brought by Ms. Johnson. For the same reasons articulated in the analysis of Ms. Johnson's motion above, Ms. Schilling's motion for summary judgment is denied.

Darrell Johnson

Mr. Johnson seeks a judgment of nondischargeability on his derivative claim of loss of consortium with his wife.[5] At the hearing Mr. Johnson's attorney conceded that the failure of Ms.

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[5]Despite the extensive filings in this case, and the benefit of two summary judgment hearings, the legal basis of Mr. Johnson's nondischargeability claim remains unclear. The only specific reference in the complaint filed with this Court states: "That on February 7, 1997 the Creditors Connie Johnson and Darrell Johnson, her husband served a summons a summons and complaint upon Dr. Fors alleging claims of malpractice, breach of fiduciary duty, negligence, negligent infliction of emotional distress, breach of contract and sexual battery." Compl. #2. During arguments the Plaintiff conceded that negligent infliction of emotional distress would not support a finding of nondischargeability under §523(a)(6), but argued that deliberate, or tortious infliction of emotional distress would. The

Johnson's claim would necessitate the dismissal of Mr. Johnson's claim. By the same token, this Court's denial of Ms. Johnson's motion for summary judgment necessitates the denial of Mr. Johnson's motion for summary judgement. Summary judgment in his favor would be inappropriate.

Mr. Johnson has failed to articulate any theory under which Mr. For's alleged tortious behavior toward his wife was targeted deliberately at Mr. Johnson. Instead, Mr. Johnson's deposition testimony was that he was unaware of any facts that would lead him to believe that Dr. Fors intended to cause him any injury. *See* Dep. of Darrell Johnson, 11/4/99, pp. 9-10.

In Minnesota, "Consortium" includes rights inherent in the marital relationship, such as comfort, companionship, and most importantly, sexual relationship." *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W2d 686 (Minn. 1980), *citing Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969). Mr. Johnson's deposition indicates no basis for this claim. Instead, Mr. Johnson testified that he sought recovery against Dr. Fors for "violat[ing] the sanctity of a marriage and a family, of a trust between a doctor and a patient and the patient's spouse." Dep. Of Darrell Johnson, 11/4/99, p. 11.

Dr. Fors has met his initial burden "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Mr. Johnson has failed to provide any "specific facts showing that there is a genuine issue for trial." *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.* 106 S. Ct. 1348, 1356 (1986), *quoting*

Defendant has characterized Mr. Johnson's claim as one for loss of consortium, a characterization that was unchallenged at the hearing on this motion. The court will assume Mr. Johnson claim is for a loss of consortium resulting from a tortious act, as in *per quod consortium amisit*.

Fed.Rule Civ.Proc. 56(e). The Defendant's motion for summary judgment against this Plaintiff is granted.

IV. Motion for Sanctions

Plaintiffs Johnson, Johnson, and Schilling also seek an award of attorney's fees as part of their motion. While the moving papers cite no legal basis for this request, attorney Carter argued at the hearing that sanctions, in the form of attorney fees, are appropriate in this proceeding because the Defendant's motion is the second summary judgment motion brought in this case.[6] The Court is unaware of any legal basis for sanctions in a case like this where after completing discovery the Defendant seeks summary judgment on a last remaining count of the Plaintiffs' claim.

Sanctions, including attorney fees, are available to a party bringing a successful motion under Rule 9011 of the Federal Rules of Bankruptcy Procedure (which incorporates the provisions of Rule 11 of the Federal Rules of Civil Procedure). Under that Rule the attorney or unrepresented party must certify to the court that each filing:

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so

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[6]Defendant Fors' earlier motion for summary judgment was heard by this Court on September 28, 1999. The motion was granted in part, by an Order of October 1, 1999, which dismissed these Plaintiffs' causes of action under both 11 U.S.C. § 727, and all provisions of 11 U.S.C. § 523(a), except (a)(6).

> identified, are reasonably based on a lack of information or belief. Fed.R. Bankr. P. 9011(b).

The Plaintiffs fail to specify any defect in Dr. Fors' motion or argument which would subject the Defendant to sanctions under this Rule. Even if a substantive argument for sanctions had been advanced, the Plaintiffs have failed to comply with the procedural requirements of the Rule which requires:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). Fed.R. Bankr. P. 9011(c)(1)(A).

The Plaintiffs' motion here is contained in the response and cross-motion for summary judgment, not in a separate motion as required by the rule. The motion was not served on the Defendant prior to filing with the Court, nor was the Defendant given 21 days to correct the alleged sanctionable behavior. Given the motion's failure to specify any sanctionable behavior and glaring procedural deficiencies, it fails. The motion for attorney fees is denied.

V. Disposition

Based upon the proceedings and upon all of the files and records herein, **IT IS HEREBY ORDERED THAT:**

1) The affidavit of Timothy Favor, dated January 3, 2000, is not properly admissible evidence in this summary judgment proceeding, and is hereby excluded from the record and the proceedings herein.

2) The affidavit of John C. Gonsiorek, Ph.D., dated December 30, 1999, is not properly admissible evidence in this summary judgment proceeding, and is hereby excluded from the record and the proceedings herein.

3) The affidavit of John Brady, D.C., dated December 31, 1999, is not properly admissible evidence in this summary judgment proceeding, and is hereby excluded from the record and the proceedings herein.

4) The deposition transcript of Rebecca Hoffman, amended as Exhibit 1 to the affidavit of Darrell Carter, Dated January 3, 2000, is admitted.

5) The foregoing relief is hereby granted on an expedited basis, and the Defendant's notice of motion is approved as given.

6) The Defendant's motion for summary judgment against Connie Johnson, in Adversary Proceeding 99-3160, is denied in its entirety.

7) The Defendant's motion for summary judgment against Darrell Johnson, in Adversary Proceeding 99-3160, is granted in its entirety.

8) The Defendant's motion for summary judgment against Tawna Schilling, in Adversary Proceeding 99-3160, is denied in its entirety.

9) The Defendant's motion for summary judgment against Tamara Bird, in Adversary Proceeding 99-3163, is denied in its entirety.

10) The motion for summary judgment by Plaintiffs Connie Johnson, Darrell Johnson, and Tawna Schilling, in Adversary Proceeding 99-3160, is denied in its entirety.

11) The motion for attorney's fees brought by Plaintiffs Connie Johnson, Darrell Johnson, and Tawna Schilling, in Adversary Proceeding 99-3160, is denied in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 17, 2000

By the Court:

/e/ Dennis D. O'Brien
Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 03/20/00
Patrick G. De Wane, By SKM