UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

CHARLES ROBERT NIELSEN and
LEANN JEAN NIELSEN, BKY 96-47257

Debtors.

DLC INVESTMENTS AND LARRY PAUL,

Plaintiffs, ADV 98-4114

-v.-

CHARLES ROBERT NIELSEN and
LEANN JEAN NIELSEN, MEMORANDUM ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Defendants.

At Minneapolis, Minnesota, July 9, 1998.

The above-entitled matter came on for hearing before the undersigned on July 8, 1998, on a motion by Plaintiffs, DLC Investments and Larry Paul (DLC) for summary judgment. Joel Anderson appeared for Plaintiffs, DLC; Defendants Charles Nielsen and Leann Nielsen (Debtors) represented themselves pro se. After hearing the arguments and studying the record, the Court has determined to deny the motion:[1]

FINDINGS OF FACT[2]

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[1] As indicated in footnote 3, I am convinced that neither side in this case has clearly focused on the legal standards to be applied. As a consequence, rather than simply denying the motion I am providing the parties with a lengthy memorandum which I hope (perhaps in vain) will provide enough guidance to allow the trial to be conducted in a somewhat sensible manner.

[2] The facts recited are undisputed. Pursuant to Fed. R. Bankr. P. 7056(d) these recited facts will be deemed to exist

On April 8, 1993, Debtors and DLC entered into a contingent purchase agreement concerning property located at 16409 Crosstown Boulevard, City of Andover, Anoka County, Minnesota. The terms of the purchase agreement included a sale price of $188,000 to be paid as $1,000 earnest money, $135,000 financing, and $52,000 cash due on or before May 28, 1993, the date of closing. In addition, the purchase agreement specified that it was subject to a 48-hour contingency addendum which allowed DLC, the Seller, to continue to seek a noncontingent offer on the property.

The contingency addendum specified that the agreement was contingent on Debtors entering into a valid purchase agreement for the sale of their property located at 210 McCann, Anoka, Minnesota, on or before May 28, 1993. In the event such a valid purchase agreement was not signed by that date, the contingent purchase agreement for DLC's property was to be null and void and the earnest money refunded to Debtors. DLC had the right to insist on removal of the contingency by serving Debtors with a written demand. If Debtors could not comply with the requirement to remove the contingency within 48 hours of service, the Purchase Agreement was to be null and void and the earnest money refunded to Debtors. In order to remove the contingency, Debtors had to respond within 48 hours by furnishing a valid purchase agreement for sale of their current home. The purchase agreement

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without substantial controversy for purposes of trial.

contained further detailed requirements as to precisely what Debtors needed to show to remove the contingency.

On May 4, 1993, DLC received a noncontingent offer from a third party. On May 5, 1993, DLC served a "Request for Removal of Contingency" on Debtors. On May 6, 1993, Debtors served a "Notice of Intent to Remove Contingency." Accompanying their notice was a document entitled Guaranteed Sales Agreement, dated May 6, 1993, which provided that their agent, Counselor Realty, would purchase Debtors' property and a letter from the Individual Trustee of Deluxe Employees Retirement Plans stating that Plaintiff Charles Nielsen was qualified to withdraw approximately $50,000 from his retirement plan under the home purchase provision of the plan. The Guaranteed Sales Agreement provided that the closing date would be moved back to June 15, 1993.

Debtors delivered the Notice of Intent to Remove Contingency and accompanying documents to DLC's listing agent on May 6, 1993. He, however, told them and their real estate agent that he did not think the Guaranteed Sales Agreement was a valid purchase agreement. Debtors then stated that Debtors were willing to change the terms of the Guaranteed Sales Agreement before the contingency deadline expired on May 7, 1993, at 10:00 a.m., if DLC opposed any of the terms, including changing the closing date to June 15, 1993.

DLC determined that Debtors had not fulfilled the requirements for removing the contingency and rejected removal of the contingency on May 7, 1993, at 1:00 p.m. DLC then served notice of cancellation of the purchase agreement on Debtors, and offered to return Plaintiffs' earnest money deposit. Following notification of such rejection, DLC proceeded with the sale of the property to the noncontingency purchaser and a closing date of May 26, 1993 was set.

Debtors then brought an action against DLC in Anoka County District Court contending that DLC had improperly refused to accept their Notice of Intent to Remove Contingency. Fatefully for them, on May 25, 1993, the Debtors also filed a Notice of Lis Pendens against the property. The mortgage company for the third-party purchasers refused to close on the property because of the filing of the Notice of Lis Pendens. On June 2, 1993, DLC obtained a temporary restraining order which directed Debtors and the Anoka County Recorder's Office to remove the Lis Pendens on the property, and enjoined the refiling of a new Lis Pendens. In Paragraph 1, the Temporary Restraining Order specifically read, "Plaintiffs are directed to remove the Lis Pendens they have filed upon property located at 16409 Crosstown Boulevard, Andover, Anoka County, Minnesota, and are enjoined from refiling a new Lis Pendens on the property until further notice of this court." Paragraph 2 read, "The Anoka County Recorders Office is

to immediately remove the Lis Pendens which Plaintiffs have filed upon the property records for said realty." Debtors did not, however, remove the Lis Pendens and the sale with the third-party purchasers did not close. DLC then answered and counterclaimed, asserting a claim for slander of title against Debtors and seeking damages.

By order dated September 23, 1993, the Ramsey County District Court granted summary judgment against Debtors on their claim against DLC and again ordered Debtors to remove the Lis Pendens or be found in contempt of court. It also ordered the Anoka County Recorders Office to release the Lis Pendens upon Debtors' compliance with the order for removal. Debtors promptly complied with the order. Debtors unsuccessfully appealed the grant of summary judgment against them. This left for trial DLC's counterclaim for slander of title, which was tried to a jury for four days in April of 1996 in Anoka County District Court. Debtors were represented by counsel during the trial.

The case was submitted to the jury on a special verdict. The following questions of importance were asked and answered:

> 1. Did Plaintiffs' intentionally slander the title to the subject property by making false and malicious statements that slandered such title? Answer: Yes.
>
> 2. If your answer to question No. 1 was "Yes" then answer this question: Were the plaintiffs' actions a direct cause of defendants' harm? Answer: Yes.

3. What sum of money, if any, will compensate DLC Investments, Inc. as a result of the plaintiffs' actions? Answer: $30,000.

4. What sum of money, if any, will compensate Larry Paul as a result of the plaintiffs' actions? Answer: $5,000.

The court accepted these findings as its own and entered judgment against Debtors jointly and severally for $35,000. Still pending was DLC's motion for sanctions for bad faith litigation under M.S.A. § 549.21 and for violation of Rule 11, Minnesota Rules of Civil Procedure. In a later hearing, the court denied the request for sanctions based on Debtors' filing of the notice of lis pendens, the filing of the original complaint, the contesting of DLC's motion for summary judgment and the appeal from that order, and their defending on the counterclaim. These actions, the court held, did not meet the standards for imposition of sanctions set forth in M.S.A. § 549.21 or of Rule 11, Minnesota Rules of Civil Procedure. However, the court did hold that the Debtors had acted in "bad faith" under § 549.21 in their refusal to remove the Notice of Lis Pendens and that such "bad faith raised additional issues and damages for consideration at trial." The court then awarded sanctions of one-half of the $15,900 in attorneys' fees incurred by DLC in pursuing the slander of title portion of the lawsuit. The court ordered the Debtors to pay $7,950 to DLC under "the bad faith provision of Minn. Stat. § 549.21" and this amount was

added to the $35,000 judgment already entered against them. Debtors did not make post-trial motions and took no appeal from the judgment.

Subsequently, DLC pursued Debtors and Debtors filed for relief under Chapter 13 of the United States Bankruptcy Code. By Order dated October 23, 1997, I denied confirmation of their Chapter 13 Plan, found that Debtors would not be able to propose a feasible plan, and converted the case to one under Chapter 7. That order has not been appealed.

This adversary proceeding was commenced by DLC seeking to have Debtors' debt to them on the monetary judgment in the sum of $42,950 held nondischargeable under § 523(a)(6) of the Bankruptcy Code.[3] Plaintiffs contend that the prior state court proceedings

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[3] I cannot help but comment that this case has been exceptionally complicated by the fact that Plaintiffs' counsel is not versed in bankruptcy matters and Debtors have chosen to represent themselves. As a consequence, the Court had to treat Plaintiffs' "Objection to Discharge" as a complaint for determination of nondischargeability coupled with an objection to discharge and remind counsel that 1) such action cannot be achieved by motion but must be pursued by adversary proceeding; 2) the § 727 portion of the "objection" (complaint) was so dubious as to be frivolous, would not accomplish what Plaintiffs sought and should be dismissed; 3) dismissal could only be achieved by complying with Local Rules that clearly had not been read or, if read, understood by Plaintiffs' counsel; 4) the Plaintiffs had failed to even find the Geiger v. Kawaauhau (In re Geiger) decision, 113 F.3d 848 (8th Cir. 1997), the controlling authority on § 523(a)(6) in this Circuit at the time Plaintiffs made their first summary judgment motion, which was denied for procedural errors. Between the hearing on their first (denied) motion for summary judgment and a subsequent hearing, Geiger was affirmed by the Supreme Court of the United States, see Kawaauhau v. Geiger, 118 S. Ct. 974 (1998), but Plaintiffs' counsel had not

should be given res judicata, or, alternatively, collateral estoppel effect, precluding Debtors from defending this § 523(a)(6) case.

CONCLUSIONS OF LAW

I. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is governed by Federal Rule of Civil Procedure 56, which is made applicable to this adversary proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

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read that case either. Counsel for Plaintiffs clearly does not understand the distinction between res judicata and collateral estoppel in the context of a § 523(a)(6) action. Nor does Plaintiffs' counsel know much about how to establish a collateral estoppel case. The only record he originally made with respect to collateral estoppel is to furnish the Court with a copy of 1) the Order for Judgment; 2) the Order Amending the Judgment to Include Sanctions, accompanied by the state court's Memorandum of Law; 3) the temporary restraining order dated June 2, 1993 (with pages misplaced); and 4) the Order of August 12, 1993 (with pages in reverse order and without the attached Memorandum Order). Plaintiffs did not furnish this Court with the pleadings or transcript or, most importantly, the jury instructions. Debtors, apparently obliging counsel for Plaintiffs so as to rectify part of his errors, appended additional portions of the record, including specifically the Memorandum attached to the August 12, 1993 Order. Both parties appended irrelevant material (including the transcript of Debtors' testimony on supplementary proceedings and an order allowing amendment to the complaint to add a third-party defendant). Debtors, representing themselves, have little understanding of this process. At one point, they objected to Plaintiffs' motion to dismiss the § 727 claim even though the Court pointed out that granting the motion was to their benefit, rather than to their detriment. Debtor's pro se argument at the original hearing on the motion consisted of nothing more than reargument of the facts as he viewed them, even though the jury may have decided the contrary. The case is riddled with procedural errors on both sides, some of which this Court has had to correct itself. Neither side made any attempt to discern precisely the state of Minnesota law on slander of title.

> The judgment sought 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 judgment as a matter of law.

FED. R. CIV. P. 56(c). The moving party on summary judgment bears the initial burden of showing 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 the moving party is the plaintiff, it carries the additional burden of presenting evidence that establishes all elements of the claim. Id. at 324; United Mortg. Corp. v. Mathern (In re Mathern), 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The burden then shifts to the nonmoving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Because the material facts of the present case are undisputed, there exists no genuine issue of material fact and all that remains to be determined is whether the Plaintiffs are entitled to judgment as a matter of law.

II. THE ELEMENTS OF PROOF UNDER § 523(A)(6)

Section 523(a)(6) of the Bankruptcy Code excepts from a debtor's discharge "any debt . . . for willful and malicious

injury by the debtor to another entity or to the property of another entity." In the recent decision of Kawaauhau v. Geiger, 118 S. Ct. 974 (1998), the United States Supreme Court indicated that § 523(a)(6) "triggers in the lawyer's mind the category [of] 'intentional torts,' as distinguished from negligent or reckless torts." Stating that intentional torts "generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself,'" the Court held that the word "willful" in § 523(a)(6) means "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Id. at 977 (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a, at 15 (1964)) (emphasis in original).

As demonstrated by Judge Kressel's recent opinion in Allstate Ins. v. Dziuk (In re Dziuk), 218 B.R. 485 (Bankr. D. Minn. 1998), the word "malicious" in § 523(a)(6) has a separate meaning from the word "willful." The Eighth Circuit has stated that, for a debtor's conduct to be considered "malicious" under § 523(a)(6), such conduct must have been "targeted at the creditor." Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848, 854 (8th Cir. 1997); Johnson v. Miera (In re Miera), 926 F.2d 741, 743-44 (8th Cir. 1991); Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 881 (8th Cir. 1985) (defining the word "malicious" in § 523(a)(6) to mean "targeted at the creditor

. . . at least in the sense that the conduct is certain or almost certain to cause financial harm").

Thus, in Dziuk, Judge Kressel concluded that, in order for a creditor to prevail under § 523(a)(6), the creditor must demonstrate: (1) that it suffered injury as a result of an intentional tort by the debtor ("willful"); and (2) that the debtor's actions were targeted at the creditor ("malicious"). See Dziuk, 218 B.R. at 488.

III. "SLANDER OF TITLE" UNDER MINNESOTA LAW

In Kelly v. First State Bank, 145 Minn. 331 (1920), the Supreme Court of Minnesota described the tort of slander of title as follows:

> Utterance of false and malicious statements disparaging the title to property in which one has an estate or interest, if the statements are untrue and cause damage, constitutes slander of title. Filing for record an instrument known to be inoperative is a false statement within the rule, and if done maliciously it is regarded as slander of title. It is clear, however, that if a man does no more than file for record an instrument which he has a right to file, he commits no wrong.

Id. at 332 (citations omitted). In Smith v. Toomey, 1997 WL 526316, the Minnesota Court of Appeals stated that, in a slander of title case, a finding of "malice" requires "that the disparaging statements be made without a good faith belief in their truth" and distinguished the definition of malice applicable in defamation cases ("actual ill will or a design

causelessly and wantonly to injure plaintiff"). Id. at *1. See also Quevli Farms, Inc. v. Union Sav. Bank & Trust Co., 178 Minn. 27, 30 (1929) ("The action for slander of title . . . is not an action for defamation in any proper sense, but an action to recover as damages the pecuniary loss sustained in consequence of a malicious and groundless disparagement of the plaintiff's title or property. . . . Among the particulars in which this action differs from actions for libel or slander are that . . . the plaintiff has the burden of proving not only that the statements were false and caused him actual pecuniary loss, but also that they were made without probable cause. . . ."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 966 (5th ed. 1984) ("The gist of the tort is the interference with the prospect of sale or some other advantageous relation . . . ."); RESTATEMENT (SECOND) OF TORTS § 623A cmt. c (1965) ("The strict liability as to the issue of falsity imposed by the common law of defamation was never applied to injurious falsehood. Nor was liability imposed when the publisher was merely negligent . . . .").

Thus, in accordance with the Minnesota courts' most recent statement on this rather arcane tort cause of action, in Minnesota in order to prove a case for slander of title the plaintiff must show 1) the statement regarding the title to property was made; 2) the statement was false and malicious; and 3) damages flowed from the statement. The plaintiff need not

prove that the defendant made the statement with the intent to do harm, but merely that the statement was made "without a good faith belief" in the truth or "without probable cause," in which case the "malicious" requirement is met. While the act must be intentional (i.e., not merely negligent), it need not be established that there was "ill will" or "a design to injure."

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

The Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, directs that state judicial proceedings shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1994). This statute requires a federal court to refer to the preclusion law of the state in which judgment was rendered when determining the preclusive effect of a state court judgment. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608-09 (B.A.P. 8th Cir. 1997).

As a preliminary matter, it is clear that a claim of res judicata (claim preclusion) does not apply in this case. Under Minnesota law, the doctrine of res judicata is designed to prevent relitigation of causes of action already determined in a prior action. Beutz v. A.O. Smith Harvestore Prods., Inc., 431 N.W.2d 528, 531 (Minn. 1988); In re George A. Hormel Trusts, 543

N.W.2d 668, 671 (Minn. Ct. App. 1996); Beck v. American Sharecom, Inc., 514 N.W.2d 584, 588 (Minn. Ct. App. 1994). To reach the conclusion that res judicata is applicable, a trial court must be presented with: (1) a final judgment on the merits; (2) a second suit involving the same cause of action; and (3) identical parties or parties in privity. Sautter v. Interstate Power Co., 567 N.W.2d 755, 759 (Minn. Ct. App. 1997); Hormel, 543 N.W.2d at 671-72; Beck, 514 N.W.2d at 588. In this case, the state court lawsuit occurred prior to the filing of the Nielsens' bankruptcy petition, and DLC's § 523(a)(6) claim therefore did not yet exist at the time of the state court litigation. As a result, there can be little question that DLC's claim of nondischargeability under 11 U.S.C. § 523(a)(6) and its claim of slander of title under Minnesota law are distinct claims that do not constitute the same cause of action. See Brown v. Felsen, 442 U.S. 127, 135 (1979). Moreover, a determination of dischargeability under § 523(a)(6) could not have been made by the state court in this case because such a determination is within the exclusive jurisdiction of the federal bankruptcy courts. See 11 U.S.C. § 523(c)(1) (1994). Thus, under the test articulated above, the Court concludes that the principle of res judicata does not apply in this case. Nevertheless, the state court did make certain factual determinations, and relitigation of these determinations may be barred by the principle of collateral estoppel.

Under Minnesota law, collateral estoppel (issue preclusion) precludes the relitigation of factual issues which are both identical to issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment. Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). Collateral estoppel applies when: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Care Inst., Inc. v. County of Ramsey, 576 N.W.2d 734, 737 (Minn. 1998); Northwestern Nat'l Life Ins. Co. v. County of Hennepin, 572 N.W.2d 51, 53-54 (Minn. 1997).

Three of these elements have been met in this case. *First*, the jury's verdict finding that Debtor "intentionally" slandered the title of the subject property by "making false and malicious statements" constituted a final judgment on the merits. *Second*, the estopped parties are identical. *Third*, Debtors were represented by counsel and tried the case to conclusion for four days, which clearly provided a full and fair opportunity for hearing. They did not appeal and they have never made post-trial motions.[4]

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[4] Debtors argued that they have new evidence that witnesses lied at the trial. They have not supported this assertion with any supporting affidavits. I could not retry the

The record before me is insufficient to make the necessary fourth finding, however. The prior judgment fails on the most critical element: that the fact issue determined in the prior proceeding be both identical and necessary to the prior determination. To succeed in a nondischargeability suit under § 523(a)(6), the plaintiff must show intent to do the act (slandering the title) and intent to cause harm, not merely intent to do an act that does in fact cause harm. To succeed in the state court action the jury specifically did not need to find an intent to cause harm. It merely needed to find an intent to do the act without a good faith belief in the truth of the statements or without probable cause. This is the classic distinction between a tort which is intentional and one which is "negligent or merely reckless." Therefore, because the "willful" prong of an (a)(6) case has not been satisfied by the prior action in this case, the Plaintiffs' motion for summary judgment fails. To conclude, I do find that the "maliciousness" aspect of § 523(a)(6) case has been established since the jury found that the Debtors' conduct was clearly targeted at the Plaintiffs.

Thus, I conclude that, as a matter of law on the record before me, Debtors are not collaterally estopped from relitigating the issue of whether they acted "willfully" when

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state court case, open it up, or alter the judgment, however, even if these allegations were true.

committing the intentional act of slander of title causing $35,000 in damage to DLC.

V. AWARD OF SANCTIONS

The conclusion with respect to the sanctions award is the same.[5] The state court awarded sanctions to DLC under Minn. Stat. § 549.21, subd. 2, which reads in relevant part:

> . . . Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court. . . . .

MINN. STAT. § 549.21, subd. 2 (repealed 1997). In awarding sanctions under this provision, the state court concluded that the Nielsens acted in "bad faith" in refusing to remove the lis pendens from the subject property, notwithstanding a temporary restraining Order specifically ordering them to do so.

The Court concludes that the state court's award of sanctions should not have collateral estoppel effect under § 523(a)(6) because such bad faith conduct under Minn. Stat. § 549.21, subd. 2, is not necessarily "willful and malicious" and the state court made no such finding.

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[5] Here, too, counsel for the Plaintiff was clueless. When I asked whether he was arguing that the finding on sanctions was based on willful and malicious conduct, he looked confused, apparently not having thought much about the issue at all.

ORDER FOR JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for summary judgment against the Defendants seeking to have the $35,000 damage award entered in state court declared nondischargeable is DENIED.

2. Plaintiffs' motion for summary judgment against the Defendants seeking to have the $7,950 sanctions award entered in state court declared nondischargeable is DENIED.

3. The case shall proceed to trial on the single issue of whether Defendants' actions were willful within the meaning of 11 U.S.C. § 523(a)(6).[6]

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Nancy C. Dreher
United States Bankruptcy Judge

[6] This litigation has dragged on forever. It has clearly taxed the parties to their limits. The transcript of the earlier trial is not controlling on the issue of intent. Defendants would be free in this case to testify afresh, subject only to impeachment by use of the transcript. An alternative is suggested. Both parties could agree to submit the fact question on the record before me, including the transcript, thereby saving themselves additional expense. If they choose to do so, they shall jointly advise the Court by no later than July 31, in which case I will decide the case without a trial.