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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NOT FOR PUBLICATION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.	AZ-07-1384-MoDC
		)		
7	THOMAS MICHAEL CAGNEY,	)	Bk. No.	04-18134
		)		
8	Debtor.	)	Adv. No.	04-01266
		)		
9	_____	)		
		)		
10	THOMAS MICHAEL CAGNEY,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM</b>	<sup>1</sup>
		)		
13	ANDREA J. SMITH,	)		
		)		
14	Appellee.	)		
		)		

Argued by Video Conference  
and Submitted on June 20, 2008

Filed - July 25, 2008

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: MONTALI, DUNN and CARROLL,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Peter H. Carroll, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Debtor-Appellant, Thomas M. Cagney ("Cagney"), appeals from  
2 a summary judgment entered in favor of Appellee, Andrea J. Smith  
3 ("Smith"), former wife of Cagney and plaintiff in the underlying  
4 adversary proceeding. The judgment declared three state court  
5 judgments in favor of Smith non-dischargeable pursuant to 11  
6 U.S.C. §§ 523(a)(5), (a)(6), and (a)(7).<sup>3</sup> Because the record  
7 does not support giving preclusive effect to one of the  
8 judgments, we AFFIRM in part, REVERSE in part, and REMAND for  
9 further proceedings.

#### 10 **FACTS**

11 Cagney filed a voluntary bankruptcy petition under Chapter 7  
12 on October 15, 2004, in the District of Arizona. On December 21,  
13 2004, Smith filed a non-dischargeability action against Cagney,  
14 seeking to except from discharge three state court judgments  
15 issued by the Maricopa County Superior Court ("State Court"): 1)  
16 a judgment in favor of Smith for child support ("Child Support  
17 Judgment"); 2) a criminal restitution order in favor of Smith  
18 arising out of an aggravated assault by Cagney against Smith  
19 ("Restitution Award"); and 3) a civil judgment ("Civil Judgment")  
20 in favor of Smith and Katy A. Cagney ("Katy"), Smith and Cagney's  
21 then-minor child.<sup>4</sup> Smith's complaint alleged that each of the  
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23 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
26 enacted and promulgated prior to the effective date of The  
27 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
28 Pub. L. 109-8, 119 Stat. 23.

<sup>4</sup> Katy was initially a co-plaintiff in the state civil  
action against Cagney but on April 10, 2007, she assigned all of  
(continued...)

1 three judgments was non-dischargeable pursuant to either section  
2 523(a) (5) or (a) (6).

3 **A. Facts Underlying the State Court Judgments.**

4 On August 20, 2002, the State Court entered an order  
5 dissolving the marriage of Cagney and Smith. In that dissolution  
6 proceeding, the court awarded the Child Support Judgment to  
7 Smith, which she sought to except from discharge under section  
8 523(a) (5).<sup>5</sup>

9 On September 16, 2001 ("the September 16 incident"), Cagney  
10 assaulted Smith and Katy with a shotgun.<sup>6</sup> Despite the lack of  
11 records before us to know exactly what charges were brought  
12 against Cagney, he did plead guilty to aggravated assault and  
13 disorderly conduct, a class 3 and class 6 felony, respectively.  
14 As a result of that criminal incident, on June 7, 2002, the State  
15 Court granted Smith the Restitution Award of \$4,260.38 for her  
16 economic loss, which she sought to except from discharge under  
17 section 523(a) (6).

18 Also on April 25, 2002, Smith, for herself and on behalf of  
19 Katy, filed a civil complaint against Cagney alleging, inter  
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21 <sup>4</sup>(...continued)  
22 her right, title and interest in the subsequent judgment to  
Smith.

23 <sup>5</sup> The record does not reflect the total amount of the Child  
24 Support Judgment, however, since Cagney does not contest its non-  
25 dischargeability, the actual amount is not important in this  
appeal.

26 <sup>6</sup> Since neither Cagney nor Smith included any criminal  
27 indictment or court transcript relating thereto, leaving the  
28 facts of the criminal matter unclear, any information regarding  
the assault incident was derived from Smith's civil complaint and  
the criminal judgment entered on April 25, 2002.

1 alia, that on September 16, 2001, he assaulted them with a  
2 shotgun, thereby inflicting emotional distress. Smith further  
3 alleged several other non-assault-related claims asserting that  
4 Cagney: 1) purchased a handgun with the intent to kill Smith; 2)  
5 engaged in a course of conduct consisting of stalking Smith; 3)  
6 intentionally destroyed, concealed or otherwise deprived Smith of  
7 her property; 4) conspired with others, including his parents, to  
8 assert false charges against Smith; 5) intentionally changed  
9 accounts, made unauthorized charges to accounts, cancelled  
10 insurance coverage, designed to harm or destroy Smith's credit  
11 rating and/or expose her to potential liabilities that were not  
12 hers; 6) attempted to interfere with the relationship between  
13 Smith and her attorney through false statements, threats, and a  
14 course of harassment; and 7) threatened and intimidated relatives  
15 of Smith. In addition to compensatory damages of no less than  
16 \$50,000, Smith prayed for punitive damages and related costs. We  
17 do not know whether Cagney responded to the complaint, but since  
18 there appears to be no default, we presume he did.

19 Furthermore, at some point, Smith must have filed a motion,  
20 or motions, for partial summary judgment on the state civil  
21 complaint because on September 2, 2002, the State Court entered a  
22 Minute Entry in her favor as to Cagney's liability.

23 Unfortunately, none of those documents nor related transcripts  
24 are before us, so we have no way to determine on which of Smith's  
25 several claims Cagney was found liable. Moreover, the record  
26 does not disclose whether such documents were presented to the  
27 bankruptcy court. All that either party provided is the two-  
28 sentence Minute Entry stating that "Plaintiff's Motions for

1 Partial Summary Judgment are granted," leaving open the issue of  
2 whether plaintiff sustained any damages.

3 We glean from page 6 of Smith's "Appellee's Answering Brief"  
4 that the State Court held a trial on damages. However, she  
5 provided no court transcripts on that matter to review.  
6 Nevertheless, on November 3, 2004, the State Court entered the  
7 Civil Judgment, awarding \$25,000 to Smith, \$15,000 to Katy, both  
8 with interest thereon, and \$395.00 for costs. Although the Civil  
9 Judgment did not state specifically which claim(s) supported the  
10 awards to Smith and Katy, Smith sought to except the entire award  
11 from discharge under section 523(a)(6) as conduct consisting of  
12 "willful and malicious injury by the debtor to another entity or  
13 to the property of another entity."

14 **B. Adversary Proceeding Facts.**

15 After Smith filed her non-dischargeability action, on  
16 various dates in January, 2007, Cagney filed three motions - a  
17 "Motion to Dismiss the Adversary Proceeding," a "Motion to  
18 Dismiss Katy Cagney from the Complaint and Clarification  
19 Thereto," and a "Motion for Information from Plaintiff Regarding  
20 Medical Issues." A hearing on his three motions was held on  
21 March 15, 2007. Cagney did not appear. All three of his motions  
22 were denied. However, since Katy was not a party to the non-  
23 dischargeability action, the bankruptcy court noted that Smith  
24 had to convince it as to how any non-dischargeability judgment  
25 could be entered in Katy's favor. It appears Smith did include  
26 evidence of Katy's assignment as an exhibit in her later-filed  
27 Motion for Summary Judgment.

28

1           On April 30, 2007, the bankruptcy court entered a Minute  
2 Entry/Order to respond to a letter drafted by Cagney entitled  
3 "Motions Before the Court" in which he stated there were "two  
4 unanswerd motions" still pending and requiring resolution.<sup>7</sup> In  
5 the first motion, Cagney sought Smith's medical records because  
6 he believed she alleged a claim for "mental trauma" in her non-  
7 dischargeability action. In response, the bankruptcy court  
8 stated that Smith's complaint was based on orders and judgments  
9 entered in State Court and did not include a claim for mental  
10 trauma. Presumably, and both Cagney and Smith assert as much in  
11 this appeal, Cagney was attempting to "retry" the merits of  
12 Smith's civil complaint as to her emotional distress, which  
13 prompted the medical record request. The request for medical  
14 records was denied. The second motion requested that the court  
15 "separate" the two plaintiffs in the non-dischargeability action.  
16 Since Smith was the only plaintiff to the action, no relief could  
17 be granted.

18           On June 20, 2007, Smith filed a Motion for Summary Judgment  
19 seeking to except the three State Court judgments from discharge  
20 under sections 523(a)(5) and (a)(6) because she believed there  
21 were no material facts in dispute as to their dischargeability.  
22 Smith alleged that the Child Support Judgment was a non-

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24           <sup>7</sup> Although Cagney filed no formal motions but rather sent a  
25 letter to the bankruptcy court, the court treated them as motions  
26 nonetheless. Furthermore, even though the requests in the  
27 letter/motions had already been resolved in the hearing on March  
28 15, 2007, the court still entered a separate Minute Entry/Order,  
apparently in an attempt to further clarify the issues for  
Cagney, who was, and has been throughout this adversary  
proceeding, appearing pro se.

1 dischargeable domestic support obligation under section  
2 523(a)(5). She alleged the Restitution Award was non-  
3 dischargeable under section 523(a)(6) as a "willful and malicious  
4 injury caused by the debtor." Finally, for the Civil Judgment,  
5 Smith alleged that Cagney had used a shotgun to assault, harass  
6 and inflict emotional distress on Smith and Katy, and since  
7 Cagney had pled guilty to two crimes arising from the same acts,  
8 the State Court entered judgment in favor of Smith and Katy. For  
9 non-dischargeability of that judgment, Smith alleged that  
10 "assault with a shotgun" falls within the "willful and malicious"  
11 provision of section 523(a)(6) and argued that Cagney's guilty  
12 plea to aggravated assault and disturbing the peace<sup>8</sup> with a  
13 shotgun should estop him from denying that the Civil Judgment  
14 arose out of a willful and malicious injury.

15 Cagney responded to Smith's Motion for Summary Judgment on  
16 June 28, 2007, with a 2-page document entitled "Motion for  
17 Summary Judgment." He argued that Smith's Motion for Summary  
18 Judgment was asking "the court to rush to judgement [sic] in this  
19 case and preclude the defendant from offering a defense." It is  
20 clear by these remarks and others, including that he was entitled  
21 to a "fair hearing as guaranteed by the U.S. Constitution,"  
22 Cagney does not understand the function of a summary judgment.  
23 Nonetheless, in his response he argued that Katy's assignment to  
24 Smith should be disallowed, and contended that Smith's motion was  
25 improperly stripping the bankruptcy court's authority to

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26  
27 <sup>8</sup> This is incorrect. Cagney pled guilty to "Disorderly  
28 Conduct." We refer to it as disorderly conduct throughout the  
memorandum.

1 determine whether his "actions were either wilful or malicious."<sup>9</sup>  
2 Cagney then went on to discuss the merits of the assault and  
3 stated that "witnesses will attest to the nature of [Smith's]  
4 claims." Finally, Cagney asserted he will never have any money  
5 to pay the judgments, so this procedure was a waste of  
6 "everyone's time and the taxpayer's money."

7 On July 16, 2007, Smith, treating Cagney's response as his  
8 own Motion for Summary Judgment, filed a "Combined Reply in  
9 Support of Motion for Summary Judgment and Response to Cross-  
10 Motion for Summary Judgment." Smith noted that Cagney's response  
11 was merely an attempt to relitigate the merits of the underlying  
12 judgments or the debts at issue because Cagney has no assets.

13 A hearing on Smith's Motion for Summary Judgment was held on  
14 September 11, 2007. The bankruptcy court determined that because  
15 Cagney failed to meet his burden of providing evidence that any  
16 genuine issues of material fact were in dispute, summary judgment  
17 was entered in Smith's favor in a Minute Entry/Order on September  
18 24, 2007, with a final judgment declaring the three State Court  
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21 <sup>9</sup> Since Katy assigned her interest in the award to Smith,  
22 her portion of the award legally belonged to Smith to pursue in  
23 her motion.

24 Given that Cagney questions the constitutionality of the  
25 process he received, we feel the Panel should respond. The Ninth  
26 Circuit in Sigma Micro Corp. v. Healthcentral.com (In re  
27 Healthcentral.com), 504 F.3d 775, 787 (9th Cir. 2007), held that  
28 since summary judgment motions merely involve legal issues as to  
whether any trial is necessary, granting one does not deprive a  
party of a right to a trial. See City Fire Equip. Co., Inc. v.  
Ansul Fire Prot. Wormald U.S., Inc., 125 B.R. 645, 649 (N.D. Ala.  
1989).



1 judgments non-dischargeable pursuant to section 523 entered on  
2 November 13, 2007.

3 For the Child Support Judgment, the bankruptcy court  
4 determined it non-dischargeable as a "domestic support  
5 obligation" pursuant to section 523(a)(5). Cagney does not  
6 dispute or appeal that decision, and accepts the bankruptcy  
7 court's ruling. Whether or not disputed by Cagney, we AFFIRM the  
8 bankruptcy court's ruling that the Child Support Judgment is a  
9 non-dischargeable debt under section 523(a)(5).

10 As to the Restitution Award, the court deemed it to be a  
11 non-dischargeable "fine" pursuant to section 523(a)(7) (even  
12 though Smith incorrectly asked for relief under section  
13 523(a)(6)), and cited Kelly v. Robinson, 479 U.S. 36 (1986),  
14 which held that restitution debts are non-dischargeable even  
15 though payment is directed to the plaintiff rather than a  
16 governmental unit. On the scant record, we are unclear if Cagney  
17 ever disputed the non-dischargeability of the Restitution Award,  
18 as he did not dispute it at the summary judgment hearing and does  
19 not appear to be raising the issue on appeal. In any event,  
20 whether or not Cagney disputes the bankruptcy court's ruling as  
21 to the Restitution Award, we AFFIRM its decision that it is a  
22 non-dischargeable debt under section 523(a)(7) and Kelly.

23 Therefore, the crux of this appeal centers on the non-  
24 dischargeability of the Civil Judgment. With respect to that  
25 issue, the bankruptcy court applied the principles of issue  
26 preclusion and determined that all of the elements were met, thus  
27 precluding that judgment from relitigation by the bankruptcy  
28

1 court and rendering it as a non-dischargeable debt under section  
2 523(a)(6).

3 Cagney filed a premature Notice of Appeal on October 10,  
4 2007, that was deemed timely upon entry of the judgment, pursuant  
5 to Rule 8002(a).

#### 6 JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C.  
8 §§ 157(b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C.  
9 § 158.

#### 10 ISSUE

11 Did the bankruptcy court err when, after applying the  
12 principles of issue preclusion, it determined that the Civil  
13 Judgment was non-dischargeable under section 523(a)(6)?

#### 14 STANDARD OF REVIEW

15 We review summary judgment orders de novo. Tobin v. San  
16 Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP  
17 2001). Viewing the evidence in the light most favorable to the  
18 non-moving party, we must determine "whether there are any  
19 genuine issues of material fact and whether the trial court  
20 correctly applied relevant substantive law." Id. See New Falls  
21 Corp v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th Cir.  
22 BAP 2007).

23 We review de novo the preclusive effect of a judgment;  
24 whether collateral estoppel applies is a mixed question of law  
25 and fact in which the legal questions predominate. The Alary  
26 Corp. v. Sims (In re Associated Vintage Group, Inc.), 283 B.R.  
27 549, 554 (9th Cir. BAP 2002); Molina v. Seror et. al. (In re  
28 Molina), 228 B.R. 248, 250 (9th Cir. BAP 1998).



1 Thus, by a preponderance, the creditor must prove that the  
2 debtor's conduct in causing the claimant's injuries was both  
3 willful and malicious. Carrillo v. Su (In re Su), 290 F.3d 1140,  
4 1146-47 (9th Cir. 2002). "Wilfulness" requires proof that the  
5 debtor deliberately or intentionally injured the creditor, and  
6 that in doing so, the debtor intended the consequences of his  
7 act, not just the act itself. Kawaauhau v. Geiger, 523 U.S. 57,  
8 60-61 (1998). For there to be a "malicious injury," the creditor  
9 must prove that the debtor: (1) committed a wrongful act; (2)  
10 done intentionally; (3) which necessarily causes injury; and (4)  
11 was done without just cause or excuse. Su, 290 F.3d at 1146-47.

### 12 **C. Issue Preclusion.**

13 Issue preclusion, often called collateral estoppel, applies  
14 in dischargeability actions. Grogan v. Garner, 498 U.S. 279, 284  
15 n.11 (1991). The purpose of issue preclusion is to foreclose  
16 relitigation of issues that have already been decided. Paine v.  
17 Griffin (In re Paine), 283 B.R. 33, 39 (9th Cir. BAP 2002).  
18 Because the creditor is asserting that the state court judgment  
19 is preclusive in the underlying non-dischargeability action, he  
20 or she "must introduce a record sufficient to reveal the  
21 controlling facts and pinpoint exact issues litigated [in the  
22 state court action]." Kelly v. Okoye (In re Kelly), 182 B.R.  
23 255, 258 (9th Cir. BAP 1995) (emphasis added).

24 In order to analyze whether issue preclusion applies, the  
25 federal court must look to the law of the state in which the  
26 judgment was entered. In re Molina, 228 B.R. at 250 (citing  
27 Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798 (9th Cir.  
28 1995)). The elements necessary to invoke issue preclusion under

1 Arizona law are:

- 2 (1) the issue was actually litigated in a previous proceeding;
- 3 (2) there was a full and fair opportunity to litigate the issue;
- 4 (3) resolution of the issue was essential to the judgment;
- 5 (4) a final decision was entered on the merits; and
- 6 (5) there is a common identity of the parties.

7 Hullet v. Cousin, 63 P.3d 1029, 1035-36 (Ariz. 2003).

8 The bankruptcy court, in applying these five elements to the  
9 Civil Judgment, concluded that all were met:

10 In the state court the defendant, while represented by  
11 counsel, fully litigated the issue, the judgment is  
12 final, valid on the merits, the issue was essential to  
13 the judgment and the parties are the same. Thus, the  
November 2, 2004, judgment is non-dischargeable under  
Section 523(a)(6) given the preclusive effect of the  
state court ruling.

#### 14 **DISPOSITION OF THE ISSUE**

15 Cagney appeals the bankruptcy court's grant of summary  
16 judgment in favor of Smith with respect to the non-  
17 dischargeability of the Civil Judgment that Smith asserts arose  
18 strictly out of the September 16, 2001, aggravated  
19 assault/disorderly conduct incident. In particular, he disputes  
20 the court's ruling that the Civil Judgment deserved preclusive  
21 effect as a non-dischargeable debt for a "willful and malicious  
22 injury by the debtor to another entity or to the property of  
23 another entity" pursuant to section 523(a)(6). He also argues  
24 that the court "denied him his right to a fair hearing"  
25 guaranteed under Tinker v. Colwell, 193 U.S. 473 (1904), which he  
26 believes requires the court to hear evidence in his defense as to  
27 his "willful and malicious intent."

1 Smith argues on appeal that the Civil Judgment must be given  
2 preclusive effect because it arose from Cagney's willful and  
3 malicious conduct on September 16, 2001, it caused her injury,  
4 and, combined with his guilty plea, establishes the proof  
5 necessary to render it non-dischargeable under section 523(a)(6).  
6 Smith further argues that since Cagney presented no genuine  
7 issues of material fact as to the non-dischargeability of the  
8 Civil Judgment, or the Restitution Award and the Child Support  
9 Judgment, the bankruptcy court did not err in granting her  
10 summary judgment.

11 Based upon the record before us, which is presumably the  
12 same one before the bankruptcy court, there is no doubt that  
13 elements (2), (4) and (5), as set forth in Hullet, have been met.  
14 However, the bankruptcy court incorrectly concluded elements (1)  
15 and (3) were satisfied, and we therefore REVERSE its  
16 determination of the Civil Judgment as non-dischargeable.

17 **A. Element (1): The Issue Was Actually Litigated in a Previous**  
18 **Proceeding.**

19 In a recent en banc decision of the Arizona Supreme Court,  
20 the Court noted that it had before it an issue of first  
21 impression as to whether a guilty plea has preclusive effect in a  
22 later civil proceeding. Picaso v. Tucson Unified School Dist.,  
23 171 P.3d 1219, 1222-23 (Ariz. 2007). In particular, the question  
24 before it, but not decided, was whether a guilty plea is an issue  
25 that has actually been litigated:

26 As the court of appeals noted, this issue has  
27 divided commentators and the courts. A number of  
28 opinions and authorities have adopted the position of the  
Restatement (Second) of Judgments that guilty pleas have  
no issue preclusive effect in later civil litigation

1 because no issues have actually been litigated. Other  
2 courts and commentators, however, have rejected the  
3 Restatement rule, generally taking the view that the  
4 safeguards surrounding the entry of a guilty plea, which  
5 are designed to make the conviction reliable enough to  
6 deprive a defendant of his freedom, make the conviction  
7 preclusive as to the elements of the offense in a civil  
8 context.

9 Although we granted review to address this  
10 interesting issue, our review of the record reveals that  
11 this is not the appropriate case in which to do so.

12 . . . .

13 . . . We therefore leave for another day the  
14 preclusive effect of guilty pleas on subsequent civil  
15 proceedings.

16 Id. at 1221-22 (internal citations omitted).

17 Thus, in Arizona, the issue of whether a guilty plea is  
18 considered an "issue that was actually litigated in a previous  
19 proceeding" has not been determined. On the other hand, the  
20 Picaso court did note that a guilty plea can be properly  
21 submitted as an evidentiary admission. Id. at n.5.

22 Here, it is unclear on what claims or why the State Court  
23 granted Smith's Motion for Partial Summary Judgment with respect  
24 to Cagney's liability. However, Smith asserted in her bankruptcy  
25 Motion for Summary Judgment that "because Cagney had previously  
26 pled guilty and been convicted of two criminal charges arising  
27 from the same acts, the Superior Court granted partial summary  
28 judgment as to liability." If that is true, in light of Picaso,  
which was not decided until December 3, 2007, the bankruptcy  
court erred if it determined that Cagney's guilty plea provided  
preclusive effect of the Civil Judgment under element (1) as an  
"issue [that] was actually litigated in a previous proceeding, "  
thus rendering it non-dischargeable under section 523(a)(6).

1 In its decision on the preclusive effect of the Civil  
2 Judgment, which Smith asserts arose strictly out of the September  
3 16 incident, the bankruptcy court concluded that the issue was  
4 "fully litigated" but provided no explanation on why it reached  
5 that conclusion.

6 Without more detailed findings, we can only assume the court  
7 erroneously believed Cagney's guilty plea rendered the issue  
8 "actually litigated," thus meeting element (1) for giving the  
9 Civil Judgment preclusive effect.

10 Consequently, since there was a genuine issue of material  
11 fact regarding element (1), the bankruptcy court erred in  
12 granting Smith summary judgment as to the Civil Judgment.

13 **B. Element (3): Resolution of the Issue Was Essential to the**  
14 **Judgment.**

15 We also disagree with the bankruptcy court's conclusion on  
16 element (3) that "resolution of the issue was essential to the  
17 judgment" based upon the record Smith provided.

18 An issue is essential to the judgment for purposes of issue  
19 preclusion if, in absence of a determination of the issue, the  
20 judgment could not have been validly rendered. 47 Am. Jur. 2d.  
21 Judgments § 496 (2008). In other words, could Smith have been  
22 awarded damages in the Civil Judgment for something other than  
23 her claims for injuries arising out of the September 16 incident,  
24 and, if so, do those injuries meet the "willful and malicious  
25 injury" element necessary for non-dischargeability under section  
26 523(a)(6)?

27 Here, along with the September 16 incident claims, in her  
28 State Court complaint Smith also alleged other acts by Cagney on



1 other dates, causing different and additional injuries to Smith.  
2 Yet, Smith claimed in her bankruptcy Motion for Summary Judgment  
3 that the Civil Judgment was based exclusively upon Cagney's two  
4 criminal acts of September 16, to which he pled guilty, thus  
5 rendering it non-dischargeable under section 523(a)(6). The  
6 record does not support her contention.

7         The Civil Judgment consists of one page, granting an award  
8 of \$25,000 to Smith and \$15,000 to Katy, plus interest and court  
9 costs. It does not address specifically whether the judgment was  
10 based upon the September 16 incident and the injuries arising  
11 therefrom, or for other alleged conduct by Cagney on other dates  
12 that she claims caused her further and different injury, which  
13 may or may not meet the requirements for a non-dischargeability  
14 claim under section 523(a)(6).

15         Although the bankruptcy court determined element (3) had  
16 been met, it provided no further explanation. However, if the  
17 bankruptcy court relied only on Smith's assertion that the Civil  
18 Judgment arose exclusively from the September 16 incident to  
19 conclude that "resolution of the issue was essential to the  
20 judgment," since the Civil Judgment is non-specific and could  
21 have been for claims other than the September 16 incident and  
22 resulting injury, the court erred when it determined that the  
23 September 16 incident claims were essential to the judgment,  
24 thereby meeting element (3) for giving the Civil Judgment  
25 preclusive effect. 47 Am. Jur. 2d. Judgments § 496.

26         Because of the incomplete record before us, which lacks any  
27 written findings or a transcript of any oral proceedings from the  
28 State Court, it is impossible for the Panel to determine exactly

1 what issues were essential to the judgment because we do not know  
2 what the judgment specifically was for. Without more, neither  
3 this Panel nor the bankruptcy court could reach the conclusion  
4 Smith suggests.

5 In sum, it is plaintiff who bears the burden of establishing  
6 the necessary elements for issue preclusion. In re Khaligh, 338  
7 B.R. 817, 825 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir.  
8 2007). Smith has not met her burden on this record. Under the  
9 circumstances, without transcripts or some other form of findings  
10 by the State Court, the Panel and the bankruptcy court cannot  
11 conclude that the Civil Judgment should have been given  
12 preclusive effect, and thereby rendered non-dischargeable.

13 Consequently, since there was a genuine issue of material  
14 fact regarding element (3), the bankruptcy court erred in  
15 granting Smith summary judgment as to the Civil Judgment.

16 **CONCLUSION**

17 Based on the foregoing reasons, we AFFIRM the granting of  
18 Smith's Motion for Summary Judgment as to the Child Support  
19 Judgment and Restitution Award, but since there were genuine  
20 issues of material fact regarding the Civil Judgment, we REVERSE  
21 that portion of Smith's Motion for Summary Judgment and REMAND  
22 for further proceedings.

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