UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-08-1151-PaJuKa
JOHN PATRICK KEAHEY,	Bk. No. 04-25122-KAO
Debtor.	Adv. No. 05-01153-KAO
JEFF E. JARED,	
Appellant,	
v.	**M E M O R A N D U M**[1]
JOHN P. KEAHEY	
Appellee.	

Argued and submitted on October 17, 2008
at Seattle, Washington

Filed - November 3, 2008

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Karen A. Overstreet, Chief Bankruptcy Judge, Presiding.

Before: PAPPAS, JURY and KAUFMAN[2], Bankruptcy Judges.

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[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.

[2] The Honorable Victoria Kaufman, United States Bankruptcy Judge for the Central District of California, sitting by designation.

In this appeal, the Panel reviews a decision by the bankruptcy court finding that a creditor's attorney committed the tort of outrage and violated his fiduciary duties as a deed of trust trustee in connection with his repeated, abusive attempts to collect a debt secured by the debtor's home. The bankruptcy court awarded the debtor money damages, together with attorney's fees and costs. Perceiving no error, we AFFIRM.

FACTS[3]

Chapter 13[4] Debtor John P. Keahey ("Keahey") purchased a home from Oscar Newkerk ("Newkerk") on July 30, 1999. Keahey paid Newkerk a down payment of $20,000, and gave him a Promissory Note (the "Note") for the $180,000 balance, payable in monthly payments, secured by a deed of trust on Keahey's home. Keahey agreed to make separate monthly payments into an escrow account at a law firm to pay property taxes and insurance.

Keahey failed to make two monthly Note payments, and in January 2001, Jeff E. Jared ("Jared"), Newkerk's attorney, sent Keahey a letter demanding payment of $2,200.00 for the missed loan

[3] Most of these facts are not disputed. We identify those to which either party objects.

[4] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

payments and $1,100 in attorney's fees.[5] Keahey paid the amounts demanded.

Keahey defaulted again, failing to pay the December 2001 and January 2002 monthly installments. Jared sent him another demand letter on January 7, 2002, this time requiring payment of $500 in attorney's fees and $800 in property taxes, but failing to mention the two missed mortgage payments. The bankruptcy court would later find that this demand was improper, not only because of its omission of the delinquent monthly payments, but because Keahey had, with Newkerk's approval, been paying the taxes into an escrow account.

Jared thereafter became successor trustee under the deed of trust, and on January 29, 2002, he prepared, recorded and posted a Notice of Default on the front door of Keahey's home. The bankruptcy court later determined that none of the numbers in the Notice of Default were correct: it included the two monthly payments as in default, even though they had been made to Newkerk four days earlier; $800 in property taxes, even though they had already been paid into escrow; $1,200 in legal fees; and $1,350 in other estimated fees and costs. Moreover, as the bankruptcy court later observed, Jared apparently did not understand the difference between a Notice of Default that, under Washington law, need not be recorded, and a Notice of Sale, that should be.

On March 12, 2002, Jared sent Keahey a Notice of Foreclosure

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[5] The Note permitted Newkerk to recover attorney's fees, but only in the "event an action was initiated on the deed of trust." The bankruptcy court would later determine that Jared was not entitled to recover these legal fees.

and a Notice of Trustee's Sale, also containing serious errors. The property tax numbers in the sale notice were off by $100. The sale notice sought collection of $2,400 in trustee and attorney's fees, and demanded that Keahey pay a delinquent sewer and water bill, even though neither the Note nor deed of trust required Keahey to pay utility bills. Finally, in what can only be regarded as a very curious maneuver, Jared's notice scheduled the foreclosure sale to occur in the parking lot of Jared's condominium, rather than at Kirkland City Hall as required by statute.[6]

Upon receipt of the sale notice, Keahey retained Greg Home ("Home") as his attorney. Home wrote to Jared on June 4, 2002, informing him that Keahey had sufficient funds to bring all legitimate amounts due under the Note current. He also informed Jared that as the trustee under a deed of trust, under Washington case law, Jared owed fiduciary duties to Keahey. Jared responded indicating that he was not acquainted with the Washington case cited in Home's letter, that he owed no duties to Keahey and considered himself as only acting as attorney for Newkerk, and that, in spite of Keahey's offer to cure, he was proceeding with the foreclosure sale. In response to Jared's demand that Keahey pay $14,911.14 to avoid foreclosure, Keahey tendered a check for

[6] Jared would later testify that his plan was to serve coffee and croissants to those attending the sale and, in his words, to "boutiquify it." The bankruptcy court observed that Jared's ill-considered decision to conduct a foreclosure sale in this fashion was compelling evidence of his "incompetence" to serve as the trustee under a deed of trust. When contacted by Keahey's attorney, Jared agreed to change the sale location to the city hall.

$12,096.88, noting that the tax and utility bills mentioned in Jared's letter had been or would be paid separately and that Keahey reserved his rights to challenge the legality of the bill.

The same day he received Keahey's check, Jared sent Home a letter stating that he still lacked proof that the taxes had been paid.[7] Further, he added new charges of $326.85. He sent Home another letter a few days later increasing the charges to $560, indicating that the foreclosure sale would occur unless that sum was paid. Keahey paid the $560 and Jared canceled the foreclosure sale on July 17, 2002.

Just a few days later, on August 7, 2002, Jared sent Keahey a new Notice of Default, alleging that Keahey had failed to pay property taxes of $200 and $60 for homeowners insurance. In fact, both of these numbers were incorrect, and Jared later testified that he had just rounded them.

Over the following months, Jared continued with the foreclosure process, demanding that Keahey pay increasing legal fees of $1,200 on October 3, 2002, and $2,300 on January 3, 2003. Faced with the prospect of the loss of his home to foreclosure, Keahey filed the first of three chapter 13 bankruptcy cases on February 13, 2003. Newkerk moved for stay relief and the bankruptcy court entered an order that Newkerk would have stay relief if Keahey missed any mortgage payments. Jared, acting as attorney for Newkerk, later informed the bankruptcy court that Keahey had missed a payment, and the court granted relief from

[7] The bankruptcy court later found that Jared had not checked with the escrow agent who had indeed received the payment.

stay and dismissed the bankruptcy case.

Jared thereupon revived the foreclosure process, now demanding that Keahey pay $10,758 in trustee and attorney's fees. Keahey filed a second chapter 13 case on January 28, 2004. In May 2004, Jared provided Keahey a statement of amount owed on the Note, with the accelerated balance due of $254,000; Keahey believed it should have been $174,000. The statement also demanded $12,786 in attorney and trustee's fees and $36,000 as a ten percent interest charge. The bankruptcy court later determined this interest demand was "flat-out wrong."

The bankruptcy court approved a settlement agreement between Keahey and Newkerk on July 21, 2004, fixing the principal of Newkerk's claim at $174,505 and a total net claim of $198,250 including interest, fees, and costs less pre-confirmation payments. The court's order included a provision that if Keahey completed a refinance of the property before August 31, 2004, no additional costs and fees would be allowed to Newkerk.

Keahey's refinancing attempts failed. On August 31, 2004, Keahey tendered to Jared a check for $23,745.01, which he believed was sufficient to cure the total delinquency on the Note. Jared rejected the check, as well as the September monthly payment, contending that because the refinancing had fallen through, all the fees and costs that had been compromised in the July 21, 2004 settlement agreement were now reinstated and immediately due and payable.

In September 2004, Jared again began the foreclosure proceeding; due to his errors in the filing process, it had to be

restarted again in October 2004. In the meantime, Keahey failed to file delinquent tax returns, and the IRS obtained an order dismissing the second bankruptcy case.

Keahey filed a third chapter 13 case on November 24, 2004. But this time, in April, 2005, Keahey commenced an adversary proceeding against Newkerk and Jared. His complaint stated joint claims against them for, inter alia, intentional and negligent infliction of emotional distress, fraud, breach of fiduciary duty, slander of title, and violations of the Fair Debt Collection Practices Act ("FDCPA") and the Washington State Consumer Protection Act ("CPA").

On September 16, 2005, the bankruptcy court granted Jared a partial summary judgment, dismissing the claims against him for violations of FDCPA and CPA. The court also granted a partial summary judgment in Newkerk's favor on all claims based on acts committed before entry of the settlement order. Before trial, Newkerk and Keahey entered into a tentative settlement agreement and trial proceeded against Jared alone.[8]

Trial began on October 6, 2005, and continued on October 18, 2005. Keahey was represented by counsel Melissa Huelsman ("Huelsman"), and Jared appeared pro se. After the second day of trial, Jared retained counsel to represent him. The bankruptcy

[8] The settlement agreement between Newkerk and Keahey apparently failed and the trial was continued against Newkerk alone on September 21 and October 3, 2006. As a result of the trial, the bankruptcy court dismissed all claims against Newkerk, allowed his secured claim against Keahey in the amount of $192,664.69 plus accruing interest, and awarded Newkerk attorney's fees of $38,875.00. Jared was not involved in this phase of the trial and the attorney's fees were not charged against him.

court conducted a telephonic hearing on November 18, 2005, to set additional trial dates and consider the request of counsel to allow the parties to attempt mediation. The court expressed its concerns about allowing a lengthy period to mediate in light of the advanced state of the trial and the dwindling resources of the estate. The parties and the court agreed that a short time would be allowed for mediation.

No mediation was held, settlement discussions failed, and the trial resumed on January 5, 2006. Jared stipulated to liability to Keahey on the claim for breach of fiduciary duty. Trial was concluded that day, and the bankruptcy court announced its decision in open court on February 2, 2006.

The bankruptcy court stated extensive findings of fact and conclusions of law on the record. Among them the court found, consistent with his stipulation, that Jared had breached his fiduciary duties as a foreclosing trustee under the Washington Deed of Trust Act, R.C.W. 61.24 et seq. ("DOTA"), and was liable to Keahey for damages for that breach. Trial Tr. 28:9-11 (February 2, 2006).[9] The court determined that, "but for Mr. Jared's intentional acts and violations of his duties as the trustee under the deed of trust, Mr. Keahey would not have had to file three bankruptcy proceedings." Trial Tr. 35:2-5. For breach of fiduciary duty,[10] the court announced its intention to award

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[9] Unless otherwise noted, all references to the trial transcript are to the proceedings occurring on February 2, 2006.

[10] The measure of damages in Washington for breach of fiduciary duty is "the actual loss resulting from the breach." (continued...)

Keahey as damages: (1) "any and all amounts that [Keahey] has paid relating to Mr. Jared's services, including any amounts already paid or to be paid." Trial Tr. 36:13-16; (2) all bankruptcy filing fees, Trial Tr. 36:21; (3) fees and expenses paid by Keahey to his attorney in the third bankruptcy case, to be determined at a later hearing where "Jared will be given an opportunity to object to those fees." Trial Tr. 37:11-23.[11]

The bankruptcy court also found that Jared had committed the tort of outrage in his conduct toward Keahey, made findings related to the three elements of that tort, and awarded Keahey damages of $60,000. Trial Tr. 28:12-34:6. As to Keahey's claim that Jared had committed the tort of negligent infliction of emotional distress, the bankruptcy court found that Keahey had not presented proof necessary for one element of that tort, objective symptomatology, and thus dismissed that claim. Trial Tr. 34:6-12. In light of its ruling in Keahey's favor on the outrage claim, the bankruptcy court decided it was unnecessary to rule on Keahey's claim that Jared engaged in fraud. Trial Tr. 34:13-17.

Finally, the bankruptcy court indicated that Keahey could, via separate motion, recover the attorney's fees and costs incurred in connection with the adversary proceeding pursuant to R.C.W. 61.24.09(02). Trial Tr. 39:13-17. On April 18, 2007, the

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[10](...continued)
Patnode v. Edward N. Getoor & Assocs., 613 P.2d 804, 804 (Wash. Ct. App. 1980).

[11] The bankruptcy court declined to award Keahey any amounts he had paid to his attorneys in the first two bankruptcy cases because it had been given no evidence of those payments.

bankruptcy court conducted a hearing in the adversary proceeding to evaluate the fee application filed by Keahey's attorney in the adversary proceeding. The bankruptcy court awarded Keahey $54,044.34 in attorney's fees and costs for the adversary proceeding, and indicated that it would charge that amount against Jared.

The bankruptcy court entered a judgment for Keahey against Jared on May 4, 2007. In it, the court awarded the following damages, finding that they were all proximately caused by Jared's conduct: (1) $60,000 for the tort of outrage; and (2) $38,876.01 for breach of fiduciary duties. The court also awarded Keahey attorney's fees of $51,287.50 and costs of $2,756.84 incurred in the prosecution of the adversary proceeding pursuant to R.C.W. 61.24.090(2).

Jared filed a notice of appeal on May 14, 2007. On the same day, Jared filed a motion for reconsideration with the bankruptcy court, which was dismissed by the bankruptcy court for lack of jurisdiction because of the pending appeal. At Jared's request, the Panel dismissed the appeal as interlocutory. Jared v. Keahey (In re Keahey), No. WW-07-1198 (9th Cir. BAP February 8, 2008). On June 4, 2008, the bankruptcy court entered an order denying the motion for reconsideration and an amended judgment for damages in the same amount as in the original judgment. Jared filed a timely notice of appeal of the amended judgment on June 12, 2008.

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JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(1).[12] The Panel has jurisdiction pursuant to 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court erred in deciding Jared was liable to Keahey for the tort of outrage.

2. Whether the bankruptcy court erred in awarding attorney's

[12] As authorized in 28 U.S.C. § 157(a), the district court in Western Washington has referred to the bankruptcy court "all cases under Title 11, and all proceedings arising under Title 11 or arising in or related to cases under Title 11." United States District Court for the Western District of Washington, General Rule 7 ¶ 1.01. To the extent that some of Keahey's claims against Newkerk and Jared were for "personal injury torts," under 28 U.S.C. § 157(b)(5), the parties could have requested that they be tried by the district court. In addition, if some of Keahey's claims were "non-core" under 28 U.S.C. § 157(c)(1), the parties could have required the bankruptcy court, after trial, to submit its proposed findings and conclusions to the district court for de novo review and entry of a final judgment. No such requests were made. Moreover, in a Pre-Trial Order entered in this action on October 6, 2005, the bankruptcy court determined that it had jurisdiction of the adversary proceeding, that it was a core proceeding, and that it could adjudicate the "state law claims because they are based upon the same facts and allegations that underlie the core claims and are, therefore, within the Court's supplemental jurisdiction." Adv. Dkt. No. 48 at 2. Counsel for Keahey and Newkirk, and Jared individually, approved this Pretrial Order. Under these circumstances, we deem the parties to have impliedly consented to the bankruptcy court's exercise of jurisdiction and entry of judgment such that we need not examine it here. See Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir. 1990) (holding that parties' failure to raise objection that bankruptcy court was hearing a non-core proceeding and entering judgment constitutes consent); Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP 2005) (party cannot challenge bankruptcy court's entry of final judgment in non-core proceeding if not raised before the bankruptcy court); Adelson v. Smith (In re Smith), 389 B.R. 902, 913-914 (Bankr. D. Nev. 2008) (holding that a party, by failure to timely request it, may waive right under 28 U.S.C. § 157(b)(5) to have trial of personal injury tort conducted by district court).

fees to Keahey under R.C.W. § 61.24.090(2) or abused its discretion in taking judicial notice of fees awarded in the main bankruptcy case.

3. Whether the bankruptcy court was biased against Jared.

STANDARDS OF REVIEW

We review a court's findings of fact for clear error. United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). Due regard must be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Rule 8013. Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." Easely v. Cromartie, 532 U.S. 234, 242 (2001).

We review a bankruptcy court's interpretation of state law de novo. Rabkin v. Ore. Health Sciences Univ., 350 F.3d 967, 971 (9th Cir. 2003). The trial court's interpretation of a state statute regarding attorney's fees is reviewed de novo. Jorgensen v. Cassaday, 320 F.3d 906, 918 (9th Cir. 2003).

A trial court's decision whether to take judicial notice is reviewed for abuse of discretion. Madeja v. Olympic Packers, 310 F.3d 628, 639 (9th Cir. 2002). No error in the admission or exclusion of evidence is ground for disturbing a judgment unless the refusal to take such action appears to the court inconsistent with substantial justice. FED. R. CIV. P. 61, as incorporated by Rule 9005.

"Federal judges are granted broad discretion in supervising trials, and a judge's behavior during trial justifies reversal only if he abuses that discretion." Price v. Kramer, 200 F.3d

1237, 1252 (9th Cir. 2000).

DISCUSSION

I.

The bankruptcy court did not err in deciding that Jared was liable to Keahey for the tort of outrage and awarding general damages.

Jared does not challenge the bankruptcy court's finding that he breached the fiduciary duties he owed to Keahey as a statutory deed of trust trustee, nor the award of damages made against him by the bankruptcy court proximately caused by his breach. Instead, the principal issue raised by Jared in this appeal is embodied in his argument that "[t]he trial court erred when it held that Defendant's conduct was intentional or outrageous rising to the level of outrage, when it was really only negligent infliction of emotional distress." Jared's Opening Br. at 21. Based upon this contention, Jared asks the Panel to reverse the bankruptcy court's conclusion that he committed the tort of outrage and remand with instructions that its judgment be "replaced with an order finding [that Jared committed] the tort of negligent infliction of emotional distress." Id. In so doing, Jared also seeks relief from the $60,000 in damages awarded to Keahey as a result of his alleged intentional conduct. We reject Jared's position.

Jared argues the bankruptcy court erred when it found facts existed to justify its conclusion that Jared had committed the tort of outrage, also known as intentional infliction of emotional distress. Under Washington case law, intentional and negligent infliction of emotional distress are independent and distinct

torts, each requiring proof of different factual elements.[13] Kloepfel v. Bokor, 66 P.3d 630, 634 (Wash. 2003). Jared insists that, at worst, his acts amounted to a series of negligent mistakes, and therefore, his conduct could not be considered to have been intentional. Jared then points out that the bankruptcy court dismissed Keahey's claim against him for negligent infliction because it found that Keahey had not provided required medical evidence showing "objective symptomatology"[14] of distress, a required element for the tort of negligent infliction. Trial Tr. 34:6-12. As a result, Jared argues, since he was guilty of, at most, negligent infliction of emotional distress, the money damage award against him must be reversed "because no medical proof was supplied at trial." Jared's Opening Br. at 22.

Jared's argument is based upon a faulty premise: that the bankruptcy court erred when it found that he acted intentionally in committing the tort of outrage. To the contrary, the bankruptcy court's findings are amply supported by competent evidence submitted at trial, and its legal conclusions are consistent with the binding case law of the State of Washington.

The tort of outrage is explored in depth by the Washington

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[13] We reject Jared's suggestion that negligent infliction constitutes a "lesser included" charge of outrage. Jared's Opening Br. at 22. This criminal law principle has no application in civil litigation.

[14] Objective symptomatology means that the plaintiff's emotional distress must be such that it is susceptible to medical diagnosis and must be proven through medical evidence. Kloepfel, 66 P.3d at 633. This is one of the five required elements to be proven in the tort of negligent infliction of emotional distress. Snyder v. Med. Serv. Corp., 35 P.3d 1158, 1164 (Wash. 2001) (holding that elements of this tort include duty, breach, proximate cause, damage or injury and objective symptomatology).

Supreme Court in Kloepfel. As the Washington court summarized:

> The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987))). These elements were adopted from the Restatement (Second) of Torts § 46 (1965) by this court in Grimsby v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

Kloepfel, 66 P.3d at 631.

The Grimsby court had earlier described the proof required for these three elements:

> First, the emotional distress must be inflicted intentionally or recklessly; mere negligence is not enough. Second, the conduct of the defendant must be outrageous and extreme. . . . Liability exists "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." . . . Third, the conduct must result in severe emotional distress to the plaintiff (comment j). Resulting bodily harm would, of course, be an indication of severe emotional distress, but a showing of bodily harm is not necessary.

Grimsby, 530 P.2d at 295 (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965) and comments to that Restatement).

The bankruptcy court's findings of fact and conclusions of law explicitly tracked the case law. Trial Tr. 28:19-20 ("I have been guided in my opinion by the case of Kloepfel v. Bokor, 149 Wn.2d 192.").

With regard to the first element, that the subject conduct must be extreme and outrageous, the bankruptcy court found by clear and convincing evidence that Jared engaged in extreme and outrageous conduct. Trial Tr. 29:25. Among the court's findings were that:

- Jared had no idea how to conduct a nonjudicial foreclosure sale and did "just about everything wrong. All of his conduct signaled to Mr. Keahey with each and every communication that Mr. Keahey would never be able to keep his house." Trial Tr. 30:1-6.

- At one point, Jared demanded a 10 percent per annum interest charge, amounting to first $36,000, then $42,000, that was not justified under the Note. Such a large sum would be enormously burdensome to a person of Keahey's resources. Trial Tr. 30:19-23.

- In what is a truly bizarre approach to conducting a foreclosure, Jared had scheduled the trustee's sale in the parking lot of his condominium, rather than the public location required by the statute. Trial Tr. 30:14-15.

- Jared did not appreciate or even understand the importance of his various duties as attorney for the lender and deed of trust trustee, as is especially apparent from the universal inaccuracy of his demand letters. Jared characterized the requirement of accuracy as "no big deal." Trial Tr. 31:3.

- Even when Keahey cured a noticed default, Jared then incorrectly claimed new defaults entitling him to restart the foreclosure process and allegedly entitling him and his client to charge additional fees and costs, many of which inured to Jared's personal benefit. This pattern of behavior was constantly repeated over a three-year period. Trial Tr. 30:8-10.

- "But for Mr. Jared's intentional acts and violations of his duties as the trustee under the deed of trust, Mr. Keahey would not have had to file three bankruptcy proceedings." Trial Tr. 35:2-5.[15]

The bankruptcy court next concluded that the second element of the tort of outrage, that the infliction was intentional or reckless, had also been proven by clear and convincing evidence. Trial Tr. 32:16. The court found:

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[15] Elaborating, the bankruptcy court found that Jared's conduct had forced Keahey without justification to file three bankruptcy cases to save his home. The court determined that Keahey had only minor unsecured debts during this time, and that the IRS was not pressuring Keahey to pay an alleged claim. The only real cause of the bankruptcy filings was, according to the court, the need to stop the improper foreclosure actions initiated by Jared. Trial Tr. 35:6-18.

- Jared prevented Keahey from exercising his cure rights by changing the various numbers stated in demand letters and default notices for amounts required to cure the defaults "at every point in the process." Trial Tr. 32:6-8.

- Jared failed to check the accuracy of numbers in his demand letters and foreclosure notices. Trial Tr. 32:16-17.

- Jared charged Keahey for tax and insurance payments, which he would have found to have been paid if he had checked with his own client's escrow company. Trial Tr. 32:17-20.

Finally, the bankruptcy court determined that the third element of the tort of outrage, that Keahey suffered extreme emotional distress as a result of Jared's conduct, was proven by clear and convincing evidence. Trial Tr. 33:8-10. In particular, the court noted that:

> Mr. Keahey testified that he had experienced the same kind of conditions described in the Kloepfel case: lost sleep, cyclical vomiting, anger, fear, worry, distress and disappointment over the potential loss of his home, and over the bankruptcy filings, embarrassment, humiliation and shame. Moreover, the court observed that this testimony was credible, and none of it was refuted.

Trial Tr. 33:10-17. In his Opening Brief, Jared concedes that this third element, that Keahey suffered extreme emotional distress as a result of Jared's conduct, was satisfied. Jared's Opening Br. at 22 ("only the third element is met here").

Regarding the second element, requiring an intentional or reckless act, Jared repeatedly asserts that he never intended to inflict emotional distress on Keahey. However, as Kloepfel cautions, the bankruptcy court was not required to focus upon whether Jared intended his conduct and actions to cause Keahey emotional distress, but instead, need only consider whether Jared's acts were intentional or recklessly undertaken. Kloepfel, 66 P.3d at 632. Measured against this standard, clearly, Jared's

grossly unconventional and overreaching attempts to collect what were, repeatedly, inaccurate or excessive amounts from Keahey were all intentional, or at least, committed without any regard to their inevitable consequences.

Jared also challenges the bankruptcy court's finding that the first element of outrage was proven, that is, whether his conduct was extreme or outrageous. Jared argues that he engaged in no conduct amounting to outrage in this case because none of his actions were "atrocious," "beyond all bounds of decency" or "shocking to the conscience." Jared's Opening Br. at 21. Jared bases this argument on Kloepfel's citation to Browning v. Slenderella Sys., 341 P.2d 859, 864 (Wash. 1959), which in turn quotes the Restatement of Torts, § 46(g) (Supp. 1948): "[The conduct amounting to outrage must be such that] the recitation of the facts to an average member of the community would arouse his resentment against the actor to lead him to exclaim 'outrageous.'" Relying upon this quotation, Jared posits:

> The trial Court may have felt that [Jared's] actions were outrageous, but an average member of the community would not. And clearly, a U.S. Bankruptcy Court Judge is not an average member of the community. Therefore, the finding of outrage below is in error and should be vacated[.]

Jared's Opening Br. at 21.

Contrary to Jared's suggestion, the courts of Washington have held that the test for the tort of outrage in Washington is not measured by the reaction of "an average member of the community," but instead is based on the understanding of a reasonable mind applied to the three elements of the tort. Reid v. Pierce County, 961 P.2d 333, 337 (Wash. 1998). The Washington Supreme Court has

explicitly ruled that a trial judge may determine whether conduct is outrageous. Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002) ("[W]e believe that reasonable minds (such as the one exercised by the trial judge) could conclude that, in light of the severity and context of the conduct, it was 'beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community[.]'"). Indeed, where a jury acts as trier of fact, Washington requires the court to determine, before submitting the question of outrageous conduct to the jury, "in the first instance that reasonable minds could differ on whether the conduct has been sufficiently extreme and outrageous to result in liability." Philips v. Hardwick, 628 P.2d 506, 510 (Wash. Ct. App. 1981).

Measured against this standard, we conclude that the bankruptcy court did not err when it found and concluded that Jared acted intentionally and outrageously, such that the tort of outrage had been proven. Viewed fairly, Jared cavalierly disregarded the fiduciary duties he owed to Keahey as trustee under the deed of trust. He repeatedly failed to verify the accuracy of the information he included in the many demands for payment he served on Keahey. And in most instances, those demands were not just inaccurate, they sought to collect charges that were excessive, unreasonable, and in some instances, just plain illegal. Moreover, given his incessant and repeated attempts to collect unjustified sums from Keahey, the bankruptcy court was justified in concluding that Jared's motives were suspect, and that his miscues not merely "mistakes."

Jared persisted in his ham-handed approach to collection from

Keahey for several years, forcing him to file three bankruptcy cases, to incur thousands of dollars in attorney's fees and costs, and rendering Keahey emotionally upset and physically ill. Jared's conduct in relentlessly pursuing Keahey under threat of foreclosure on Keahey's home, and his incessant demands for payment of incorrect and, in some instances, illegal charges, can reasonably be characterized as outrageous as that term is explained in the Washington cases. For these reasons, we conclude the bankruptcy court did not err in finding that Jared had committed the tort of outrage.

II.

The bankruptcy court did not err in awarding attorney's fees to Keahey under R.C.W. 61.24.090(2), and did not abuse its discretion in taking judicial notice of attorney's fees in the main bankruptcy case.

Jared objects to the award of attorney's fees made by the bankruptcy court to Keahey as damages against Jared. In that award, the bankruptcy court included amounts paid by Keahey to his bankruptcy counsel, Tax Attorneys, Inc. ("Tax Attorneys"), and to Huelsman, his adversary proceeding counsel. However, in challenging this award, Jared cites but two narrow issues: (1) whether the bankruptcy court erred in awarding attorney's fees based on R.C.W. 61.24.090(2); and (2) whether the bankruptcy court abused its discretion in taking judicial notice of fees awarded to Tax Attorneys in the bankruptcy case. Based upon a review of this record, we conclude that the bankruptcy court did not err in either respect.

A.

Like many state statutory schemes, the Washington DOTA prescribes a nonjudicial process for the enforcement of deeds of trust whereby foreclosure is accomplished by a private sale conducted by the trustee under a deed of trust. R.C.W. 61.24.20 et seq. Under this system, after the process has been initiated by the deed of trust trustee, a borrower may cause the process to be discontinued by curing the defaults set forth in the notice initiating the process. R.C.W. 61.24.090(1). In connection with this process,

> Any person entitled to cause a discontinuance of the sale proceedings shall have the right, before or after reinstatement, to request any court, excluding a small claims court, for disputes within the jurisdictional limits of that court, to determine the reasonableness of any fees demanded or paid as a condition of reinstatement. The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorney's fees, and render judgment accordingly. An action to determine fees shall not forestall any sale or affect its validity.

R.C.W. 61.24.090(2). Because it found that the amounts demanded by Jared in the default notices to cure Keahey's defaults under the Newkerk deed of trust were wrong, the bankruptcy court awarded Keahey, as the prevailing party, $54,044.34, representing a portion of the attorney's fees he incurred with Huelsman to prosecute the adversary proceeding.

Jared objects to this award, contending that the statute does not apply once a foreclosure sale has been stopped.[16] Jared notes

[16] Jared has not objected to the reasonableness of the fees claimed, even though he was offered that opportunity by the court, (continued...)

that Keahey effectively stopped the foreclosure process when he commenced his third bankruptcy case on November 24, 2004, and that the adversary proceeding, in which the attorney's fees and costs were incurred, was not filed until four months later. Because in all the time Huelsman worked on Keahey's case there never was a pending foreclosure sale, Jared contends the attorney's fees and costs incurred in the adversary proceeding cannot be recovered under R.C.W. 61.24.090(2).

Although we have located no cases in which R.C.W. 61.24.090(2) has been applied in the context of a bankruptcy proceeding, to the extent that there is any ambiguity in the statute, Washington case law is clear that, whenever possible, the DOTA should be interpreted in favor of the borrower:

> We must construe [DOTA] to further three objectives. First, the statutory nonjudicial foreclosure process should remain efficient and inexpensive. Second, it should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, it should promote the stability of land titles. Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In addition, because nonjudicial foreclosures lack the judicial oversight inherent in judicial foreclosures, we strictly apply and interpret the Act in favor of the borrower. Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111, 752 P.2d 385, review denied, 111 Wn.2d 1004 (1988).

Udall v. T.D. Escrow Servs, Inc., 130 P.3d 908, 911 (Wash. Ct. App. 2006) rev'd on other grounds, 154 P.3d 882 (Wash. 2007) (emphasis added); see also Amresco v. SPS Props., 119 P.3d 884, 886 (Wash. Ct. App. 2005) ("Because [DOTA] removes many

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[16](...continued)
nor to the finding by the bankruptcy court that his actions proximately caused damages which included this fee. Apparently, his sole objection is to the court's authority to award fees under this statute.

protections borrowers have under a mortgage, . . . courts must strictly construe [DOTA] in the borrower's favor.").[17]

The requirements of the statute, R.C.W. 61.24.090(2), are straightforward. As we read it, a borrower, as a person entitled to cause the discontinuance of a trustee's sale proceeding under R.C.W. 61.24.090(1), may ask a court "to determine the reasonableness or any fees demanded or paid as a condition of reinstatement of the deed of trust obligation." (Emphasis added.) In connection with that determination, the court may award the prevailing party costs and reasonable attorney's fees "and render judgment accordingly."

Contrary to Jared's position, the statute does not require that the proceedings to determine the propriety of the amounts demanded to reinstate the loan occur before the sale process is

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[17] Washington case law interpreting the DOTA statute aligns closely with the facts of this case. DOTA has frequently been invoked against trustees who, as here, breach their fiduciary duties to borrowers. For example, in Cox v. Helenius, 693 P.2d 683 (Wash. 1985), a case cited by the Udall court, the court explained,

> The [deed of trust] trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike.

Id. at 685 (citations omitted). The Cox case is particularly apt here because the particular breach in that case arose from the trustee serving also as attorney for the grantor of the deed, and the Washington Supreme Court's finding that the dual representation was at the root of the fiduciary breaches. Indeed, early in this case, Keahey's attorneys reminded Jared about his responsibilities as a fiduciary to the borrower, and specifically referenced the Cox case, DOTA, and the consequences of a fiduciary breach under Washington law. Jared elected to ignore this information and instead sought to demand payment of inappropriate sums.

discontinued. To be precise, as can be seen from the last sentence of the statute, the statute does not require that the sale be stopped: "An action to determine fees shall not forestall any sale or affect its validity."

Here, Keahey, the borrower, asked "a court," the bankruptcy court,[18] to find that the charges Jared demanded he pay to stop the foreclosure sale on his home were unreasonable, inaccurate, and inappropriate. The bankruptcy court found in favor of Keahey on this issue. As a result, the bankruptcy court was authorized by R.C.W. 61.24.090(2) to award Keahey, the prevailing party in this contest, reasonable attorney's fees and costs. By shifting the costs of this proceeding from Keahey to Jared, the bankruptcy court properly embraced the purpose of the statute by providing Keahey an opportunity to challenge a wrongful foreclosure proceeding.

The bankruptcy court did not err in awarding Keahey attorney's fees and costs.[19]

B.

The bankruptcy court did not abuse its discretion by taking judicial notice of fees awarded in the main bankruptcy case.

Tax Attorneys served as Keahey's counsel in his third bankruptcy case. At the hearing on February 2, 2006, in the

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[18] Only small claims courts are not authorized to act under R.C.W. 61.24.090.

[19] Jared has also raised a technical objection to Huelsman's fee application because it did not make specific reference to the DOTA as the grounds for award of fees and appears to have used a format appropriate for an interim fee application under § 331. Like the bankruptcy court, we do not consider this omission material.

adversary proceeding, the bankruptcy court took notice of the fees and costs Keahey had incurred in his three bankruptcy cases, including "any amounts already paid or to be paid." Trial Tr. 36:15-16. Specifically noting that Jared could be charged with the attorney's fees of Tax Attorneys, the court observed: "In addition, there is currently a fee application pending for nearly $20,000 in [Tax Attorneys' fees in the main bankruptcy case]. . . . A hearing on that fee application will be set, and Mr. Jared will be given an opportunity to object to those fees." Trial Tr. 37:15-23.

On April 26, 2006, the bankruptcy court approved, without objection, $15,689.80 in fees and costs for Tax Attorneys. Then, in its May 4, 2007 judgment, the bankruptcy court awarded the same amount as damages in favor of Keahey against Jared. This amount was also included in the bankruptcy court's June 4, 2008 amended judgment.

Jared argues that the bankruptcy court erred in taking judicial notice of attorney's fees awarded by the bankruptcy court in the main bankruptcy case because it was done on the judge's own motion, the fees were in dispute, and there was only fleeting discussion between the court and Jared's counsel concerning the propriety of taking judicial notice.

Neither the facts nor the law support Jared's position.

First, Keahey, not the bankruptcy judge, requested judicial notice be taken of amounts allowed to Tax Attorneys. Trial Tr. 155:13-14 (January 5, 2006). Second, there is no indication in the record of either the adversary proceeding or the bankruptcy case that Jared objected to Tax Attorneys' fees, though the court

explicitly offered him the opportunity to object and his attorney was given notice of the fee application hearing. Third, there was a discussion on the third day of trial involving the court, counsel for Jared and counsel for Keahey, regarding judicial notice of Tax Attorneys' fees. Trial Tr. 147:21 – 155:22 (January 5, 2006).

A trial court may take judicial notice of its own records, even in unrelated cases, provided the court complies with Fed. R. Evid. 201. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer), 95 B.R. 143, 146 (9th Cir. BAP 1988) ("It is well established that a bankruptcy court may take judicial notice of its own records."); see also In re Applin, 108 B.R. 253 (Bankr. E.D. Cal. 1989) (holding that judicial notice of filings in a bankruptcy case is permissible to fill in gaps in the evidentiary record of a specific adversary proceeding or contested matter); Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 201.5, 706 (West 2007) ("It is generally accepted that a bankruptcy judge may take judicial notice of the bankruptcy court's records.").

Judicial notice of such adjudicative facts is governed by Fed. R. Evid. 201:

> Rule 201. Judicial Notice of Adjudicative Facts.
>
> . . .
>
> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . .

> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In this case, the bankruptcy court complied with the requirements of FED. R. EVID. 201(b) and (e). Jared was heard at the trial court concerning judicial notice of Tax Attorneys' fees. Trial Tr. 147:21 – 155:22 (January 5, 2006). Then, on February 3, 2006, the day after the bankruptcy court announced its decision awarding damages against Jared and that it would take notice of any fees allowed in the bankruptcy case to Tax Attorneys, Jared's trial counsel was notified that a fee application hearing on Tax Attorneys' fees would be held in the bankruptcy case on April 7, 2006.[20] At that hearing, the attorney's fees were approved without objection. Neither Jared nor his attorney objected to the fee application or attended the hearing. The amount of fees awarded to Tax Attorneys by the bankruptcy court was incorporated in an order filed in the bankruptcy case. In other words, the fee award was a fact capable of accurate and ready determination by resort by the bankruptcy court to its own records, a source whose accuracy could not under these circumstances reasonably be questioned.

It was not an abuse of discretion for the bankruptcy court to take judicial notice of the amounts it awarded to Tax Attorneys for serving as Keahey's counsel in the bankruptcy case.

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[20] Bankr. Dkt. entry following no. 96.

III.

The bankruptcy court was not biased against Jared.

Finally, Jared alleges that the bankruptcy judge exhibited bias against him, and therefore, should not have presided over the trial nor entered judgment against him. He supports this allegation of bias by quoting from statements made by the bankruptcy judge on November 18, 2005, during the course of a telephonic hearing with counsel to discuss scheduling additional trial dates, where the judge states:

> It is going to be very hard for Mr. Jared to convince me that he did not commit, at a minimum, negligence. And he is about ready to put on his case. . . damages that I believe have already been shown. . . . [T]he more time the plaintiff's lawyer spends . . . at trial, . . . the higher those damages go. Mr. Jared has a long way to go to provide me with an explanation of all the mistakes and what I believe to be the negligent conduct in which he has engaged. . . . Because as far as I'm concerned, we're almost done.

Jared's Opening Br. at 33 (ellipses in Jared's brief). To Jared, this snippet selected from the judge's comments shows that the court was biased against him because, in his words, the bankruptcy judge had reached "a preliminary opinion and ruling on liability, damages and Ms. Huelsman's attorney's fees, before the defendant's case had even started." Id.

Before addressing the merits of this argument, we note that Jared's use of ellipses omitted some material content from the court's statements. As noted above, the hearing was convened by the court because of its concern that a mediation proposed by the parties would unduly delay the trial and, in the judge's words, "I cannot allow you just to go blindly off expending legal fees when substantial proceedings have already occurred in front of me."

Hr'g Tr. 5:10-12 (November 18, 2005). Interpreted in the proper context, the judge was therefore expressing only a tentative opinion that some damages had already been shown, and she was cautioning counsel that "Mr. Jared needs to be aware of the fact that the more time the plaintiff's lawyer spends on other things and at trial, potentially, the higher those damages go." Hr'g Tr. 5:2-5 (emphasis represents text omitted from Jared's quotation). In other words, when her full statement is considered, the bankruptcy judge was expressing concern that additional costs, which are "potential" damages, may be incurred if the trial were delayed and a mediation conducted in the middle of that trial.

Additionally, the bankruptcy judge's observation that "as far as I'm concerned, we're almost done" does not indicate that the bankruptcy judge had made up her mind about the issues, but simply that the trial had proceeded so far that, she presumed, it was nearly concluded. Again, the judge's complete statement was: "But I did not want to have you go off doing that [mediation], spending more money, without knowing where I am so far in this case. Because as far as I'm concerned, we're almost done." Again, when the omitted words are restored, the statements by the court amount to an expression of concern that further delays in a trial may consume the resources of the parties. Such a comment appears appropriate in this context.

In general, comments made by a court in the course of judicial proceedings are rarely sufficient to establish bias requiring recusal. Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 885 (9th Cir. 1991) (although district judge was "gruff," he accorded heavy-handed treatment to all parties equally); United

States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (court's comments on insufficiency of evidence before completion of evidentiary hearing insufficient to find bias and require recusal). A finding of judicial bias must usually stem from some personal interest in the case or an extrajudicial source. Liteky v. United States, 510 U.S. 540, 552-53 (1994).

There is no evidence in the record before us that the bankruptcy judge had any personal interest, financial or otherwise, in this case, nor does Jared make any such assertion.

The "extrajudicial source" rule is implicated when bias originates outside the courtroom. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (explaining that the "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976) ("unjudicious" remarks such as referring to counsel's comments as ridiculous, or describing a witness as pathetic are not extrajudicial, but "reflected the judge's attitude and reactions to specific incidents occurring at trial"). There is no indication in the record that the bankruptcy judge's opinions, expressed during a hearing in the case, were based on any information or events originating outside the bankruptcy court proceedings.

Jared's claim of judicial bias, if it is valid at all, must fall within a narrow exception to the rule that bias must arise either personally or extrajudicially. This is the so-called "pervasive bias" exception. The United States Supreme Court

instructs that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555 (emphasis added). As one treatise explains:

> This pervasive bias exception to the extrajudicial source factor arises when a judge's favorable or unfavorable disposition toward a party, although stemming solely from the facts adduced or the events occurring at trial, nonetheless becomes so extreme as to indicate the judge's clear inability to render fair judgment. However, the exception is construed narrowly; bias stemming solely from facts gleaned during judicial proceedings must be particularly strong in order to merit recusal.

12 MOORE'S FED. PRAC.- CIV. § 63.21[5] (Matthew Bender, 3d ed. 2007) (emphasis added); accord In re Huntington Commons Assocs., 21 F.3d 157, 158 (7th Cir. 1994) (judge does not have to be impervious to impressions about litigants; impatience, admonishments to defendant, adverse rulings, and vague references to possible predisposition not remotely sufficient to meet requirement of deep-seated and unequivocal antagonism that would render fair judgment impossible).

We have carefully examined the record in this appeal and can find no evidence of any "deep-seated antagonism" shown by the bankruptcy court against Jared.[21] Instead, when the bankruptcy

[21] Indeed, the bankruptcy court had earlier granted a partial summary judgment in favor of Jared, dismissing Keahey's claims against him for violations of FDCPA and CPA. It also dismissed Keahey's claim against Jared for negligent infliction of emotional distress and ruled that it need not address Keahey's claim against Jared for fraud.

judge's comments at the November 18, 2005 telephonic hearing are viewed in context, and completely, they merely reflected the court's concern that further delays in the proceedings to conduct a mediation may increase Keahey's claim for damages, and provided suggestions to Jared as to how he might continue his evidentiary presentation.

CONCLUSION

The bankruptcy court did not err in finding that Jared committed the tort of outrage, nor in awarding Keahey his adversary proceeding attorney's fees and costs. The bankruptcy court also did not abuse its discretion in taking judicial notice of its own record in the bankruptcy case to determine the amount Keahey incurred for attorney's fees and costs for his bankruptcy counsel to be included as part of the damage award. Finally, Jared has not shown the bankruptcy judge was biased against him.

The judgment of the bankruptcy court is AFFIRMED.