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NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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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.)	MEMORANDUM¹	
)		
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 KAUFMAN², Bankruptcy Judges.

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

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

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

8
9 **FACTS**³

10 Chapter 13⁴ Debtor John P. Keahey ("Keahey") purchased a home
11 from Oscar Newkerk ("Newkerk") on July 30, 1999. Keahey paid
12 Newkerk a down payment of \$20,000, and gave him a Promissory Note
13 (the "Note") for the \$180,000 balance, payable in monthly
14 payments, secured by a deed of trust on Keahey's home. Keahey
15 agreed to make separate monthly payments into an escrow account at
16 a law firm to pay property taxes and insurance.

17 Keahey failed to make two monthly Note payments, and in
18 January 2001, Jeff E. Jared ("Jared"), Newkerk's attorney, sent
19 Keahey a letter demanding payment of \$2,200.00 for the missed loan
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21

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

24 ⁴ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
26 enacted and promulgated prior to the effective date (October 17,
27 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.

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

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

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

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

25
26 ⁵ The Note permitted Newkerk to recover attorney's fees, but
27 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.

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

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

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24 ⁶ Jared would later testify that his plan was to serve
25 coffee and croissants to those attending the sale and, in his
26 words, to "boutiquify it." The bankruptcy court observed that
27 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.

1 \$12,096.88, noting that the tax and utility bills mentioned in
2 Jared's letter had been or would be paid separately and that
3 Keahey reserved his rights to challenge the legality of the bill.

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

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

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

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

1 stay and dismissed the bankruptcy case.

2 Jared thereupon revived the foreclosure process, now
3 demanding that Keahey pay \$10,758 in trustee and attorney's fees.
4 Keahey filed a second chapter 13 case on January 28, 2004. In May
5 2004, Jared provided Keahey a statement of amount owed on the
6 Note, with the accelerated balance due of \$254,000; Keahey
7 believed it should have been \$174,000. The statement also
8 demanded \$12,786 in attorney and trustee's fees and \$36,000 as a
9 ten percent interest charge. The bankruptcy court later
10 determined this interest demand was "flat-out wrong."

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

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

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

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

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

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

19 Trial began on October 6, 2005, and continued on October 18,
20 2005. Keahey was represented by counsel Melissa Huelsman
21 ("Huelsman"), and Jared appeared pro se. After the second day of
22 trial, Jared retained counsel to represent him. The bankruptcy

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24 ⁸ The settlement agreement between Newkerk and Keahey
25 apparently failed and the trial was continued against Newkerk
26 alone on September 21 and October 3, 2006. As a result of the
27 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.

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

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

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

24
25 ⁹ Unless otherwise noted, all references to the trial
transcript are to the proceedings occurring on February 2, 2006.

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

1 Keahey as damages: (1) "any and all amounts that [Keahey] has paid
2 relating to Mr. Jared's services, including any amounts already
3 paid or to be paid." Trial Tr. 36:13-16; (2) all bankruptcy
4 filing fees, Trial Tr. 36:21; (3) fees and expenses paid by Keahey
5 to his attorney in the third bankruptcy case, to be determined at
6 a later hearing where "Jared will be given an opportunity to
7 object to those fees." Trial Tr. 37:11-23.¹¹

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

19 Finally, the bankruptcy court indicated that Keahey could,
20 via separate motion, recover the attorney's fees and costs
21 incurred in connection with the adversary proceeding pursuant to
22 R.C.W. 61.24.09(02). Trial Tr. 39:13-17. On April 18, 2007, the
23

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

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

1 bankruptcy court conducted a hearing in the adversary proceeding
2 to evaluate the fee application filed by Keahey's attorney in the
3 adversary proceeding. The bankruptcy court awarded Keahey
4 \$54,044.34 in attorney's fees and costs for the adversary
5 proceeding, and indicated that it would charge that amount against
6 Jared.

7 The bankruptcy court entered a judgment for Keahey against
8 Jared on May 4, 2007. In it, the court awarded the following
9 damages, finding that they were all proximately caused by Jared's
10 conduct: (1) \$60,000 for the tort of outrage; and (2) \$38,876.01
11 for breach of fiduciary duties. The court also awarded Keahey
12 attorney's fees of \$51,287.50 and costs of \$2,756.84 incurred in
13 the prosecution of the adversary proceeding pursuant to R.C.W.
14 61.24.090(2).

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

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1 **JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
3 and 157(b)(1).¹² The Panel has jurisdiction pursuant to 28 U.S.C.
4 § 158.

5
6 **ISSUES**

- 7 1. Whether the bankruptcy court erred in deciding Jared was
8 liable to Keahey for the tort of outrage.
9 2. Whether the bankruptcy court erred in awarding attorney's

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11 ¹² As authorized in 28 U.S.C. § 157(a), the district court in
12 Western Washington has referred to the bankruptcy court "all cases
13 under Title 11, and all proceedings arising under Title 11 or
14 arising in or related to cases under Title 11." United States
15 District Court for the Western District of Washington, General
16 Rule 7 ¶ 1.01. To the extent that some of Keahey's claims against
17 Newkerk and Jared were for "personal injury torts," under 28
18 U.S.C. § 157(b)(5), the parties could have requested that they be
19 tried by the district court. In addition, if some of Keahey's
20 claims were "non-core" under 28 U.S.C. § 157(c)(1), the parties
21 could have required the bankruptcy court, after trial, to submit
22 its proposed findings and conclusions to the district court for de
23 novo review and entry of a final judgment. No such requests were
24 made. Moreover, in a Pre-Trial Order entered in this action on
25 October 6, 2005, the bankruptcy court determined that it had
26 jurisdiction of the adversary proceeding, that it was a core
27 proceeding, and that it could adjudicate the "state law claims
28 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).

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

4 3. Whether the bankruptcy court was biased against Jared.

5
6 **STANDARDS OF REVIEW**

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

14 We review a bankruptcy court's interpretation of state law de
15 novo. Rabkin v. Ore. Health Sciences Univ., 350 F.3d 967, 971
16 (9th Cir. 2003). The trial court's interpretation of a state
17 statute regarding attorney's fees is reviewed de novo. Jorgensen
18 v. Cassaday, 320 F.3d 906, 918 (9th Cir. 2003).

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

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

1 1237, 1252 (9th Cir. 2000).

2 **DISCUSSION**

3 I.

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

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

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

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

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

20 The tort of outrage is explored in depth by the Washington
21

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

25 ¹⁴ Objective symptomatology means that the plaintiff's
26 emotional distress must be such that it is susceptible to medical
27 diagnosis and must be proven through medical evidence. Kloepfel,
28 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).

1 Supreme Court in Kloepfel. As the Washington court summarized:

2 The tort of outrage requires the proof of three
3 elements: (1) extreme and outrageous conduct, (2)
4 intentional or reckless infliction of emotional
5 distress, and (3) actual result to plaintiff of severe
6 emotional distress. Reid v. Pierce County, 136 Wn.2d
7 195, 202, 961 P.2d 333 (1998) (citing Dicomes v. State,
8 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting Rice
9 v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987))).
10 These elements were adopted from the Restatement
11 (Second) of Torts § 46 (1965) by this court in Grimsby
12 v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

13 Kloepfel, 66 P.3d at 631.

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

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

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

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

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

- 1 • Jared had no idea how to conduct a nonjudicial foreclosure
2 sale and did "just about everything wrong. All of his
3 conduct signaled to Mr. Keahey with each and every
4 communication that Mr. Keahey would never be able to keep his
5 house." Trial Tr. 30:1-6.
- 6 • At one point, Jared demanded a 10 percent per annum interest
7 charge, amounting to first \$36,000, then \$42,000, that was
8 not justified under the Note. Such a large sum would be
9 enormously burdensome to a person of Keahey's resources.
10 Trial Tr. 30:19-23.
- 11 • In what is a truly bizarre approach to conducting a
12 foreclosure, Jared had scheduled the trustee's sale in the
13 parking lot of his condominium, rather than the public
14 location required by the statute. Trial Tr. 30:14-15.
- 15 • Jared did not appreciate or even understand the importance of
16 his various duties as attorney for the lender and deed of
17 trust trustee, as is especially apparent from the universal
18 inaccuracy of his demand letters. Jared characterized the
19 requirement of accuracy as "no big deal." Trial Tr. 31:3.
- 20 • Even when Keahey cured a noticed default, Jared then
21 incorrectly claimed new defaults entitling him to restart the
22 foreclosure process and allegedly entitling him and his
23 client to charge additional fees and costs, many of which
24 inured to Jared's personal benefit. This pattern of behavior
25 was constantly repeated over a three-year period. Trial Tr.
26 30:8-10.
- 27 • "But for Mr. Jared's intentional acts and violations of his
28 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:

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.

- 1 • Jared prevented Keahey from exercising his cure rights by
2 changing the various numbers stated in demand letters and
3 default notices for amounts required to cure the defaults "at
4 every point in the process." Trial Tr. 32:6-8.
- 5 • Jared failed to check the accuracy of numbers in his demand
6 letters and foreclosure notices. Trial Tr. 32:16-17.
- 7 • Jared charged Keahey for tax and insurance payments, which he
8 would have found to have been paid if he had checked with his
9 own client's escrow company. Trial Tr. 32:17-20.

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

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

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

27 Regarding the second element, requiring an intentional or
28 reckless act, Jared repeatedly asserts that he never intended to
29 inflict emotional distress on Keahey. However, as Kloepfel
30 cautions, the bankruptcy court was not required to focus upon
31 whether Jared intended his conduct and actions to cause Keahey
32 emotional distress, but instead, need only consider whether
33 Jared's acts were intentional or recklessly undertaken. Kloepfel,
34 66 P.3d at 632. Measured against this standard, clearly, Jared's

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

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

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

24 Jared's Opening Br. at 21.

25 Contrary to Jared's suggestion, the courts of Washington have
26 held that the test for the tort of outrage in Washington is not
27 measured by the reaction of "an average member of the community,"
28 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

1 explicitly ruled that a trial judge may determine whether conduct
2 is outrageous. Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash.
3 2002) (“[W]e believe that reasonable minds (such as the one
4 exercised by the trial judge) could conclude that, in light of the
5 severity and context of the conduct, it was 'beyond all possible
6 bounds of decency, . . . atrocious, and utterly intolerable in a
7 civilized community[.]’”). Indeed, where a jury acts as trier of
8 fact, Washington requires the court to determine, before
9 submitting the question of outrageous conduct to the jury, “in the
10 first instance that reasonable minds could differ on whether the
11 conduct has been sufficiently extreme and outrageous to result in
12 liability.” Philips v. Hardwick, 628 P.2d 506, 510 (Wash. Ct. App.
13 1981).

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

28 Jared persisted in his ham-handed approach to collection from

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

11
12 II.

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

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

1 A.

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

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

23 R.C.W. 61.24.090(2). Because it found that the amounts demanded
24 by Jared in the default notices to cure Keahey's defaults under
25 the Newkerk deed of trust were wrong, the bankruptcy court awarded
26 Keahey, as the prevailing party, \$54,044.34, representing a
27 portion of the attorney's fees he incurred with Huelsman to
28 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...)

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

9 Although we have located no cases in which R.C.W.
10 61.24.090(2) has been applied in the context of a bankruptcy
11 proceeding, to the extent that there is any ambiguity in the
12 statute, Washington case law is clear that, whenever possible, the
13 DOTA should be interpreted in favor of the borrower:

14 We must construe [DOTA] to further three objectives.
15 First, the statutory nonjudicial foreclosure process
16 should remain efficient and inexpensive. Second, it
should provide an adequate opportunity for interested
parties to prevent wrongful foreclosure. Third, it
17 should promote the stability of land titles. Cox v.
Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In
18 addition, because nonjudicial foreclosures lack the
19 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.
20 App. 108, 111, 752 P.2d 385, review denied, 111 Wn.2d
1004 (1988).

21 Udall v. T.D. Escrow Servs, Inc., 130 P.3d 908, 911 (Wash. Ct.
22 App. 2006) rev'd on other grounds, 154 P.3d 882 (Wash. 2007)
23 (emphasis added); see also Amresco v. SPS Props., 119 P.3d 884,
24 886 (Wash. Ct. App. 2005) ("Because [DOTA] removes many

25 _____
26 ¹⁶(...continued)

27 nor to the finding by the bankruptcy court that his actions
28 proximately caused damages which included this fee. Apparently,
his sole objection is to the court's authority to award fees under
this statute.

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

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

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

15
16 ¹⁷ Washington case law interpreting the DOTA statute aligns
17 closely with the facts of this case. DOTA has frequently been
18 invoked against trustees who, as here, breach their fiduciary
19 duties to borrowers. For example, in Cox v. Helenius, 693 P.2d
20 683 (Wash. 1985), a case cited by the Udall court, the court
21 explained,

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

28 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.

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

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

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

18 B.

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

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

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

26 ¹⁹ Jared has also raised a technical objection to Huelsman's
27 fee application because it did not make specific reference to the
28 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.

1 adversary proceeding, the bankruptcy court took notice of the fees
2 and costs Keahey had incurred in his three bankruptcy cases,
3 including "any amounts already paid or to be paid." Trial Tr.
4 36:15-16. Specifically noting that Jared could be charged with
5 the attorney's fees of Tax Attorneys, the court observed: "In
6 addition, there is currently a fee application pending for nearly
7 \$20,000 in [Tax Attorneys' fees in the main bankruptcy case]. . .
8 . A hearing on that fee application will be set, and Mr. Jared
9 will be given an opportunity to object to those fees." Trial Tr.
10 37:15-23.

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

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

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

24 First, Keahey, not the bankruptcy judge, requested judicial
25 notice be taken of amounts allowed to Tax Attorneys. Trial Tr.
26 155:13-14 (January 5, 2006). Second, there is no indication in
27 the record of either the adversary proceeding or the bankruptcy
28 case that Jared objected to Tax Attorneys' fees, though the court

1 explicitly offered him the opportunity to object and his attorney
2 was given notice of the fee application hearing. Third, there was
3 a discussion on the third day of trial involving the court,
4 counsel for Jared and counsel for Keahey, regarding judicial
5 notice of Tax Attorneys' fees. Trial Tr. 147:21 - 155:22 (January
6 5, 2006).

7 A trial court may take judicial notice of its own records,
8 even in unrelated cases, provided the court complies with Fed. R.
9 Evid. 201. United States v. Wilson, 631 F.2d 118, 119 (9th Cir.
10 1980); Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re
11 Blumer), 95 B.R. 143, 146 (9th Cir. BAP 1988) ("It is well
12 established that a bankruptcy court may take judicial notice of
13 its own records."); see also In re Applin, 108 B.R. 253 (Bankr.
14 E.D. Cal. 1989) (holding that judicial notice of filings in a
15 bankruptcy case is permissible to fill in gaps in the evidentiary
16 record of a specific adversary proceeding or contested matter);
17 Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 201.5, 706 (West 2007)
18 ("It is generally accepted that a bankruptcy judge may take
19 judicial notice of the bankruptcy court's records").

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

22 Rule 201. Judicial Notice of Adjudicative Facts.

23 . . .

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

28 . . .

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

5 In this case, the bankruptcy court complied with the
6 requirements of FED. R. EVID. 201(b) and (e). Jared was heard at
7 the trial court concerning judicial notice of Tax Attorneys' fees.
8 Trial Tr. 147:21 - 155:22 (January 5, 2006). Then, on February 3,
9 2006, the day after the bankruptcy court announced its decision
10 awarding damages against Jared and that it would take notice of
11 any fees allowed in the bankruptcy case to Tax Attorneys, Jared's
12 trial counsel was notified that a fee application hearing on Tax
13 Attorneys' fees would be held in the bankruptcy case on April 7,
14 2006.²⁰ At that hearing, the attorney's fees were approved without
15 objection. Neither Jared nor his attorney objected to the fee
16 application or attended the hearing. The amount of fees awarded
17 to Tax Attorneys by the bankruptcy court was incorporated in an
18 order filed in the bankruptcy case. In other words, the fee award
19 was a fact capable of accurate and ready determination by resort
20 by the bankruptcy court to its own records, a source whose
21 accuracy could not under these circumstances reasonably be
22 questioned.

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

26
27

28 ²⁰ Bankr. Dkt. entry following no. 96.

1 III.

2 The bankruptcy court was not biased against Jared.

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

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

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

26 Before addressing the merits of this argument, we note that
27 Jared's use of ellipses omitted some material content from the
28 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."

1 Hr'g Tr. 5:10-12 (November 18, 2005). Interpreted in the proper
2 context, the judge was therefore expressing only a tentative
3 opinion that some damages had already been shown, and she was
4 cautioning counsel that "Mr. Jared needs to be aware of the fact
5 that the more time the plaintiff's lawyer spends on other things
6 and at trial, potentially, the higher those damages go." Hr'g Tr.
7 5:2-5 (emphasis represents text omitted from Jared's quotation).
8 In other words, when her full statement is considered, the
9 bankruptcy judge was expressing concern that additional costs,
10 which are "potential" damages, may be incurred if the trial were
11 delayed and a mediation conducted in the middle of that trial.

12 Additionally, the bankruptcy judge's observation that "as far
13 as I'm concerned, we're almost done" does not indicate that the
14 bankruptcy judge had made up her mind about the issues, but simply
15 that the trial had proceeded so far that, she presumed, it was
16 nearly concluded. Again, the judge's complete statement was: "But
17 I did not want to have you go off doing that [mediation], spending
18 more money, without knowing where I am so far in this case.

19 Because as far as I'm concerned, we're almost done." Again, when
20 the omitted words are restored, the statements by the court amount
21 to an expression of concern that further delays in a trial may
22 consume the resources of the parties. Such a comment appears
23 appropriate in this context.

24 In general, comments made by a court in the course of
25 judicial proceedings are rarely sufficient to establish bias
26 requiring recusal. Pau v. Yosemite Park & Curry Co., 928 F.2d
27 880, 885 (9th Cir. 1991) (although district judge was "gruff," he
28 accorded heavy-handed treatment to all parties equally); United

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

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

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

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

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

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

18 12 MOORE'S FED. PRAC.- CIV. § 63.21[5] (Matthew Bender, 3d ed. 2007)
19 (emphasis added); accord In re Huntington Commons Assocs., 21 F.3d
20 157, 158 (7th Cir. 1994) (judge does not have to be impervious to
21 impressions about litigants; impatience, admonishments to
22 defendant, adverse rulings, and vague references to possible
23 predisposition not remotely sufficient to meet requirement of
24 deep-seated and unequivocal antagonism that would render fair
25 judgment impossible).

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

26 ²¹ Indeed, the bankruptcy court had earlier granted a partial
27 summary judgment in favor of Jared, dismissing Keahey's claims
28 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.

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

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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.