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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)	BAP Nos.	AZ-05-1360-KPaD
)		
ROBERT W. NICHOLS and MARY	)		AZ-06-1002-KPaD
ANN NICHOLS,	)		AZ-06-1013-KPaD
	)		(Consolidated)
Debtors.)		
_____	)	Bk. Nos.	02-02215-EWH
	)		05-02153-JMM
ROBERT W. NICHOLS; MARY ANN)		
NICHOLS,	)	Adv. No.	02-00089
)		
Appellants,)		
)		
v.	)	MEMORANDUM	
)		
LOUISE WHIPPLE,)		
)		
Appellee.)		
_____)		
LOUISE WHIPPLE; THE ESTATE)		
OF EDSON WHIPPLE,)		
)		
Appellants,)		
)		
v.)		
)		
ROBERT W. NICHOLS; MARY ANN)		
NICHOLS,)		
)		
Appellees.)		
_____)		

Argued and Submitted on October 19, 2006
at Phoenix, Arizona

Filed - January 3, 2007

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

Honorable Eileen W. Hollowell and James M. Marlar, Bankruptcy
Judges, Presiding

Before: KLEIN, PAPPAS, and DUNN, Bankruptcy Judges.

1 These appeals stem from a chapter 7 case and a subsequent
2 chapter 13 case filed by the same debtors.

3 In No. AZ-05-1360, the debtors challenge an order under
4 Federal Rule of Civil Procedure 60(b)(5) declining to revise an
5 adversary proceeding judgment excepting a prebankruptcy state-
6 court judgment debt against them from discharge by adding to that
7 declaration a money judgment redundant of the state-court
8 judgment and then reducing that judgment by half.

9 In Nos. AZ-06-1002 and 1013, creditors appeal orders
10 declining to dismiss the chapter 13 case on the basis of debt-
11 limit ineligibility and confirming a chapter 13 plan.

12 We AFFIRM the Rule 60(b)(5) order declining to add a money
13 judgment to the nondischargeability judgment, VACATE the order
14 confirming the chapter 13 plan, REVERSE the order denying the
15 motion to dismiss the chapter 13 case, and REMAND with
16 instructions to dismiss the chapter 13 case.

18 FACTS

19 Louise and (the late) Edson Whipple obtained an \$848,947.10
20 judgment in Pima County (Arizona) Superior Court against Robert
21 and Mary Ann Nichols and others in July 2001.

22 The Arizona court amended its judgment in January 2002 to
23 delete a fraud determination without altering the damages award.

24 The Nichols filed a chapter 7 case in May 2002, in which the
25 Whipples commenced an adversary proceeding ("Adv. No. 02-0089")
26 on July 29, 2002, seeking to except the Arizona judgment debt
27 from discharge and to deny discharge.

1 After a claims bar date was fixed in January 2003, the
2 Whipples timely filed a proof of claim for the full \$848,947.10
3 Arizona judgment debt. The chapter 7 trustee later concluded,
4 however, that there were no assets to distribute.

5 At the trial of Adv. No. 02-0089 on September 22, 2003, the
6 Whipples prosecuted only the fiduciary fraud count under 11
7 U.S.C. § 523(a)(4) and abandoned the other counts. The court
8 (Judge Hollowell) took the issues under submission for decision.

9 Four days after the trial, the Nichols filed in the main
10 bankruptcy case an objection to the \$848,947.10 Whipple claim to
11 the extent it exceeded \$424,473.55 on the theory that the
12 Whipples had assigned one-half of the claim to a third-party.¹

13 The court rendered findings of fact and conclusions of law
14 in Adv. No. 02-0089 in December 2003, ruling the Arizona judgment
15 debt to be nondischargeable under § 523(a)(4), but deferred entry
16 of judgment until the claim objection was resolved.

17 The Whipples, saying they were saving costs and having
18 prevailed in their nondischargeability action, elected not to
19
20

21 ¹The Nichols did not demonstrate why they had standing to
22 object to the claim in the chapter 7 case to the claim that was
23 based on the state court's judgment. In order for a debtor
24 acting in an individual capacity to have standing to object to a
25 claim in a chapter 7 case, the debtor must demonstrate "injury in
26 fact" by allowance of the claim. Cheng v. K & S Diversified
27 Invs., Inc. (In re Cheng), 308 B.R. 448, 454 (9th Cir. BAP 2004),
28 aff'd mem., 160 F. App'x 644 (9th Cir. 2005); see United Food &
Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S.
544, 551 (1996); Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101,
1108-09 (9th Cir. 2003); Dellamarggio v. B-Line, LLC (In re
Barker), 306 B.R. 339, 346-47 (Bankr. E.D. Cal. 2004); 4 ALAN N.
RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 502.02[2][c] (15th
ed. rev. 2006).

1 contest the claim objection. Hence, on March 25, 2004, an order
2 was entered allowing the Whipple claim in the sum of \$424,473.55.

3 Also on March 25, 2004, the bankruptcy court entered
4 judgment in Adv. No. 02-0089, declaring the Arizona judgment debt
5 to be nondischargeable and noting that the claim objection had no
6 effect on the judgment:

7 Based upon the reasoning as set out in the Memorandum
8 Decision filed herein on December 15, 2003, which
9 constitutes [t]he court's findings of fact and
10 conclusions of law and the further determination of the
11 court that the objection of the debtors to the
12 Whipple's claim in this bankruptcy has no effect on
13 this Judgment of Non-Dischargeability; it is hereby
14 judged and decreed that the judgment in the amount of
15 \$848,947.10, entered against debtors, Nichols, in Pima
16 County Superior Court, . . . is non-dischargeable,
17 pursuant to 11 U.S.C. § 523(a)(4).

18 J., Adv. No. 02-0089 (March 25, 2004) (emphasis added).

19 We ultimately dismissed the Nichols' appeal of this
20 judgment, which did not purport to constitute a money judgment
21 separate from the Arizona judgment. Dismissal Order, BAP No. AZ-
22 04-1180 (Aug. 2, 2005). Our dismissal order was not appealed.

23 Meanwhile, in August 2004, the Arizona court entered a
24 second amended judgment (prepared by the Nichols' bankruptcy
25 counsel) deleting its determination of joint and several
26 liability and reducing the judgment against the Nichols to
27 \$174,485.17. The Arizona court restated the judgment debt as
28 \$257,096.46, including \$82,308.29 in accrued interest as of July
18, 2001, with interest thereafter at an annual rate of 10
percent on \$174,485.17 (i.e., \$17,448.52/yr or \$47.804164/day).²

²The second amended judgment, prepared on the stationery of
the Nichols' bankruptcy counsel, provides, in part:

(continued...)

1 On September 14, 2004, the Nichols filed a motion to convert
2 their chapter 7 case to chapter 13. By that date, interest of
3 \$55,118.20³ had accrued in the 3-year, 48-day interval since July
4 18, 2001, raising the total debt to \$312,214.66. The bankruptcy
5 court denied the motion because the judgment debt exceeded the
6 \$290,525 chapter 13 debt limit⁴ imposed by 11 U.S.C. § 109(e) and
7 rendered the Nichols ineligible for chapter 13 relief.⁵ The

8
9 ²(...continued)

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be
11 entered in favor of Defendants/Counterclaimants, Louise
12 Whipple, in her individual capacity, and the Estate of Edson
13 L. Whipple, and against Plaintiffs/Counterdefendants, Robert
14 W. Nichols and Mary Ann Nichols, husband and wife
15 ("Nichols"), as follows:

16 (I) For the sum of One Hundred Seventy Four Thousand
17 Four Hundred Eighty Five and 17/100 Dollars (\$174,485.17),
18 representing the Defendants' share of the partnership
19 distributions received by Nichols (the "Nichols
20 Distribution");

21 (J) For interest on the Nichols Distribution through
22 July 18, 2001 in the sum of Eighty Two Thousand Three
23 Hundred Eight and 29/100 Dollars (\$82,308.29);

24 (K) For interest on the Nichols Distribution from and
25 after July 18, 2001, at the rate of 10% per annum, until
26 paid;

27 (L) For the sum of Three Hundred Sixty Nine and 00/100
28 (\$303.00) [sic] as and for punitive damages.

³\$55,118.20 = (3 yrs x \$17,448.52) + (48 days x \$47.804164).

⁴Although the chapter 13 debt limit rose to \$307,675
effective April 1, 2004, that adjustment did not affect pending
cases. The conversion of a case does not effect a change in the
date of the filing of the petition. 11 U.S.C. § 348(a).

⁵Judge Hollowell's memorandum decision contained a red
herring that the Nichols' counsel later exploited in the
subsequent chapter 13 case in a manner that became material.

The preambular portion of the memorandum decision misstates
the date of the second amended judgment as July 18, 2002, instead
of July 18, 2001. The error was immaterial at the time because
deleting one year's interest of \$17,448.52 from the \$312,214.66
as of September 14, 2004, nevertheless left the debtors over the

(continued...)

1 Nichols did not attempt to appeal this interlocutory order.

2 On April 13, 2005, the Nichols filed a motion under Federal
3 Rule of Civil Procedure 60(b)(5) requesting that Judge Hollowell
4 modify the § 523(a)(4) judgment in Adv. No. 02-0089 to reflect
5 the principal amount of the second amended state-court judgment,
6 \$174,485.17 and that the bankruptcy court make a monetary award
7 of 50 percent of the \$174,485.17 based on the order allowing the
8 Whipple claim at \$424,473.55. In other words, the Nichols wanted
9 to reduce the nondischargeable judgment debt to about \$87,243.

10 On April 21, 2005, after the chapter 13 debt limit had risen
11 to \$307,675 and with the chapter 7 case still open, the Nichols
12 filed a chapter 13 case that was assigned to Judge Marlar. In
13 Schedule F, they listed the second amended judgment debt to the
14 Whipples as \$147,234.00.

15 On August 10, 2005, Judge Hollowell entered the order that
16 became our No. AZ-05-1360. Acting on the Rule 60(b)(5) motion,
17 the court modified the § 523(a)(4) judgment in Adv. No. 02-0089
18 to recite that the second amended state-court judgment was in the
19 principal amount of \$174,485.17 but refused to enter a money
20 judgment and refused to order that the nondischargeable judgment
21 debt be reduced by 50 percent based on the claim allowance in the
22 chapter 7 case. The Nichols appealed.

23

24

25 ⁵(...continued)
26 \$290,525 limit, which is what the court held: "Even if somehow
27 the Debtors could establish that they are entitled to treat their
28 case as converted as of the September 14, 2004 date that they
filed their motion to convert ..., the accrual of interest on the
Amended Judgment would still exceed the \$290,575.00 limit of
§ 109(e)." Mem. Decision, at 5 (Nov. 30, 2004).

1 On August 17, 2005, the Whipples filed a motion to dismiss
2 the chapter 13 case and an objection to plan confirmation in
3 which they argued that the Nichols were ineligible for chapter 13
4 relief because the net judgment debt was (with post-judgment
5 interest, minus \$10,244 garnishment credit) \$312,587.90, which
6 exceeded the § 109(e) \$307,675 debt limitation.

7 As evidence to support their position, the Whipples filed
8 exhibits supplying: (1) all three versions of the state-court
9 judgment; (2) the § 523(a)(4) judgment rendered in the chapter 7
10 case; (3) Judge Hollowell's memorandum decision denying the
11 motion to convert to chapter 13; and (4) Judge Hollowell's order
12 on the Nichols' Rule 60(b)(5) motion.

13 The Nichols filed an opposition on September 16, 2005,
14 asserting they met the § 109(e) eligibility requirements.

15 In the opposition papers, the Nichols tried to exploit Judge
16 Hollowell's clerical misstatement of the date of the state court
17 judgment as July 18, 2002 (instead of 2001) that she made in the
18 memorandum decision denying the motion to convert the chapter 7
19 case to chapter 13. They contended it was issue preclusive, even
20 though it was plain to all that the correct date of the Arizona
21 court's judgment was July 18, 2001.

22 Specifically, without revealing to Judge Marlar that the
23 true measuring date for calculation of interest stated in the
24 state court judgment (which had been prepared by the Nichols'
25 bankruptcy counsel) was July 18, 2001, they presented an
26 affidavit by a certified public accountant calculating post-
27 judgment interest based on a July 18, 2002, judgment, instead of
28 a July 18, 2001, judgment. Thus, by ignoring \$17,448.52 in

1 interest, they contended that the net judgment debt as of the
2 date of the filing of the chapter 13 petition was \$302,706.49.⁶

3 Shortly thereafter, the Whipples filed a motion to have the
4 debt-limit eligibility question resolved separately from the
5 other issues they raised regarding chapter 13 plan confirmation.
6 In the motion, they pointed out the omission of one year of post-
7 judgment interest on the second amended judgment and explained
8 how it was based on the misstatement in Judge Hollowell's

9
10 ⁶The September 16, 2005, Nichols opposition to the motion to
11 dismiss the later-filed chapter 13 case asserted:

12 In denying the Motion to Convert, Judge Hollowell made
13 certain findings regarding the amount of the indebtedness
14 due to Whipple[s]. Those finding[s] are contained in a
15 Memorandum Decision dated November 30, 2004. In her
16 decision, Judge Hollowell, found that the principal amount
17 of the debt was \$174,485.17, with interest accrued through
18 July 18, 2002 [instead of 2001] of \$82,308.29. A copy of
19 the November 30, 2004 decision is attached hereto as Exhibit
20 "D". Attached hereto as Exhibit E is the Affidavit of Chris
21 Linscott, certified public accountant, who has calculated
22 the amount of the indebtedness due and owing to the Movant
23 through the date of the filing of the Debtors' chapter 13
24 petition herein, at \$309,505.71 [*i.e.*, ignoring \$17,448.52
for 7/18/01-7/18/02]. Attached hereto as Exhibit "F", is
the Affidavit of Robert W. Nichols, in which Mr. Nichols
states the amount of funds that were garnished from his
wages and those of his wife are [sic] pre-petition and
appl[ied] to the Whipple indebtedness. After reduction of
these payments, and including the other unsecured
indebtedness set forth in the Debtors' schedules, the total
amount of indebtedness held by the Debtors is \$302,706.49,
below the statutory maximum of \$307,6[75].00. Accordingly,
the Debtors qualify for chapter 13 relief within the meaning
of Bankruptcy Code § 109.

25 Resp. to Mot. to Dismiss & Objection, at 3-4 (emphasis supplied).

26 On October 30, 2005, the Whipples filed a motion in the
27 chapter 7 case seeking to correct the "clerical" error inherent
28 in Judge Hollowell's misstatement of the year of the second
amended judgment. At the hearing, the court confessed clerical
error as to the amount and explained that to correct the error,
the Whipples would first have to obtain relief from stay in the
subsequent chapter 13 case that had by then been filed.

1 memorandum decision denying the motion to convert. Thus, they
2 asserted that, with interest correctly calculated, the net due on
3 the second amended judgment (after deducting garnishment credit)
4 exceeded the \$307,675 limit imposed by § 109(e).

5 A comedy of scheduling errors ensued. The Whipples' counsel
6 had given notice of a September 26, 2005, hearing on the motion
7 to dismiss and objection to plan confirmation but erroneously
8 thought that it was not actually calendared and did not attend.

9 The result was that Judge Marlar entered an order denying
10 the Whipples' motion to dismiss and objection to confirmation:

11 The [Nichols] filed a written Response . . . , and included
12 therewith such information and affidavits establishing
13 eligibility of the [Nichols] for chapter 13 relief, and
14 responses to the objections to the [Nichols'] Chapter 13
15 Plan. The [Whipples] scheduled a hearing on its Motion and
16 Objection for September 26, 2005, however, it neither filed
17 any reply to the [Nichols'] Response, provided no
18 controverting evidence with respect to the affidavits filed
19 by the [Nichols], and failed to attend the hearing scheduled
20 for September 26, 2005.

21 Order Den. Mot. to Dismiss & Objection, at 1-2 (Oct. 24, 2005).

22 The Whipples, within ten days, filed a motion to alter or
23 amend and a supporting memorandum that focused on the erroneous
24 calculation of post-judgment interest on which the court had
25 relied in determining chapter 13 eligibility. Their non-Arizona
26 counsel also explained his theory of why his September 26 absence
27 resulted from misunderstanding or miscommunication regarding
28 local Arizona bankruptcy practice.

On November 28, 2005, at the time set for hearing on the
Whipples' motion to bifurcate the dismissal question, the court
set a December 12, 2005, hearing on the motion to alter or amend.

1 On December 12, the Whipple's counsel, who was trying to
2 appear by telephone, obtained telephonic contact with the
3 courtroom some minutes after the motion had been called for
4 hearing and decided.

5 The court entered an order (prepared by the Nichols'
6 counsel) denying the motion to alter or amend on the basis that
7 the Whipples "failed to appear" and for "good cause appearing."
8 On the same date, the court approved an order confirming the
9 Nichols' chapter 13 plan.

10 The Whipples timely appealed both orders, which are our Nos.
11 AZ-06-1002 and AZ-06-1013.

12 JURISDICTION

13 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
14 We have jurisdiction under 28 U.S.C. § 158(a)(1).
15

16 ISSUES

- 17 1. Whether it was error to decline to enter a money
18 judgment supplementary to a § 523(a) judgment of
19 nondischargeability.
20
- 21 2. Whether a bankruptcy court's erroneous statement of the
22 date of a prior state-court judgment is issue
23 preclusive as to the incorrect date.
- 24 3. Whether discretion is abused by refusing to dismiss a
25 chapter 13 case in the face of unambiguous evidence
26 that the debtors are not eligible for chapter 13
27 relief.
28

1 STANDARD OF REVIEW

2 Review of orders under Federal Rule of Civil Procedure
3 60(b) (5) is for abuse of discretion. A court abuses its
4 discretion if it applies incorrect law, rests its decision on a
5 clearly erroneous finding of material fact, or leaves an
6 appellate court with a definite and firm conviction that there
7 has been a clear error of judgment. SEC v. Coldicutt, 258 F.3d
8 939, 941 (9th Cir. 2001); Khachikyan v. Hahn (In re Khachikyan),
9 335 B.R. 121, 125 (9th Cir. BAP 2005). We review findings of
10 fact for clear error and conclusions of law de novo. Scovis v.
11 Henrichsen (In re Scovis), 249 F.3d 975, 980 (9th Cir. 2001).

12
13 DISCUSSION

14 We begin with the nondischargeability judgment and then
15 address the chapter 13 rulings.

16
17 I

18 In No. AZ-05-1360, the Nichols argue that the court erred
19 when it refused to reduce the nondischargeability judgment by 50
20 percent. This argument rests on two false premises – one of
21 procedure and one of law.

22
23 A

24 First, as a procedural matter, the nondischargeability
25 judgment entered in the adversary proceeding was not a money
26 judgment. Rather, it was a declaration that the money judgment
27 that had already been entered by the Arizona state court
28 represented a debt that was excepted from discharge under

1 § 523(a)(4). The fact that the bankruptcy court described the
2 state-court judgment by the amount of the state court's award
3 does not transform the bankruptcy adversary proceeding judgment
4 into a money judgment.

5 There is no merit to the Nichols' argument that the
6 bankruptcy court was required to enter a money judgment. The
7 Ninth Circuit recognized in Sasson v. Sokoloff, 424 F.3d 864, 868
8 (9th Cir. 2005), that a bankruptcy court has authority to enter a
9 separate money judgment. It explained, however, that a money
10 judgment is not needed in the ordinary case and that there needs
11 to be some justification for a redundant money judgment. The
12 Nichols' argument conflates authority with duty. It is one thing
13 to have the authority to do something; it is quite another thing
14 to do it. Here, there is no special justification for the
15 bankruptcy court to enter a money judgment, and it neither was
16 required, nor purported, to do so.

17 Although Sasson recognizes that a bankruptcy court has
18 authority to enter a money judgment in conjunction with its
19 nondischargeability judgment, that decision also makes clear that
20 such a duplicate judgment is neither required, nor appropriate,
21 except under unusual circumstances, such as where the state-court
22 judgment has become unenforceable by lapse of registration. Id.
23 at 874.

24 Here, the bankruptcy court's § 523(a)(4) judgment merely
25 stated that the state-court judgment was nondischargeable. It
26 did not enter a separate money judgment. The bankruptcy court's
27 judgment encompassed the amount contained in the state court
28 judgment, whatever amount that may be or may become.

1 The gravamen of the Nichols' Rule 60(b)(5) motion is that
2 they want the bankruptcy court to take the extraordinary step of
3 entering a money judgment, and then they want to quarrel with the
4 amount of that judgment.

5 Since the bankruptcy court did not have a duty to enter a
6 money judgment that duplicated the Arizona judgment, and since
7 the Arizona court's actions in twice adjusting its own judgment
8 at the requests of the Nichols confirm that the state court was
9 fully in control of the amount of the judgment, it cannot be said
10 that the bankruptcy court abused its discretion when it did not
11 perceive a basis for taking the extraordinary step of entering a
12 money judgment redundant of the Arizona court's judgment. Hence,
13 there is no procedural error.

14
15 B

16 Second, the argument regarding the nondischargeability
17 judgment rests on the false premise of substantive law that a
18 debt loses its nondischargeable status if a portion of it is
19 assigned by the creditor who is prosecuting the
20 nondischargeability action. It does not.

21 The Nichols contend that the Whipplles assigned to a third
22 party a 50 percent interest in any amounts to be collected under
23 the second amended judgment. They also contend that the
24 assignment was the basis for the objection to the Whipplles' proof
25 of claim, which was sustained by the court.

26 The Nichols contend that the combination of the sustained
27 objection to claim and the putative assignment of a 50 percent
28 interest in the proceeds to a third party, mean that the Whipplles

1 no longer had any "right to payment" beyond the remaining 50
2 percent interest. Hence, it is argued, the Whipples may not
3 assert more than a 50 percent interest in the second amended
4 state court judgment, and, in turn, only 50 percent of the
5 judgment should be deemed nondischargeable.

6 The Whipples counter that they did not make an assignment
7 and that their acquiescence in the claim objection in order to
8 save costs was not a concession to the contrary.

9 The canard is that the Nichols ignore the distinction
10 between a claim against the bankruptcy estate and a
11 nondischargeable debt. The rejection or adjustment of a claim,
12 which can be by summary procedure and liberally reconsidered,
13 does not necessarily affect the amount of a nondischargeable
14 debt. Cf. 11 U.S.C. § 502(j). We need not parse the variations,
15 however, because the acquiescence in a claim of \$424,473.55 is
16 not an acquiescence to a smaller sum. When the state court
17 reduced its judgment to less than \$424,473.55, the outcome of the
18 claim objection lost whatever materiality it may have had.

19 Furthermore, regardless of whether an assignment had been
20 made, it does not change the fact that the state court entered a
21 judgment in favor of the Whipples only. Any quarrel over the
22 assignment is between the Whipples and the assignee. The Nichols
23 owe the entire amount of the nondischargeability judgment to the
24 Whipples. If the Whipples then owe 50 percent to an assignee,
25 then that is a separate matter to be resolved by the state court,
26 and it does not involve the Nichols.

27 Thus, the argument that the nondischargeable amount should
28 be reduced by 50 percent lacks merit.

1 The bankruptcy court properly refused to grant the Nichols'
2 request to reduce the nondischargeable debt owed to the Whipples.

3
4 II

5 In Nos. AZ-06-1002 and AZ-06-1013, the Whipples argue that
6 the chapter 13 court erred when it denied their motion to
7 reconsider the denial of their motion to dismiss and objection to
8 confirmation. They contend that the Nichols had more debt than
9 the limits imposed by § 109(e) on chapter 13 eligibility. We
10 agree.

11 The Panel finds no merit in Nichols' contention that the
12 misstatement by the chapter 7 court of the year of the state-
13 court judgment in its memorandum denying their motion to convert
14 to chapter 13 is issue preclusive. The inaccuracy was not
15 material to the decision that was being made because, under
16 either the correct or the incorrect year, the Nichols were not
17 eligible for chapter 13 relief. Nor was the date actually
18 litigated. Each of these defects is sufficient to defeat
19 application of issue preclusion.

20 It is plain that the Nichols knowingly provided the chapter
21 13 court with incorrect calculations. If that court examined the
22 second amended state-court money judgment that was determined to
23 be nondischargeable by the chapter 7 bankruptcy court, a copy of
24 which was an exhibit to the Whipple motion and objection, the
25 chapter 13 court would have independently arrived at the proper
26 calculation. Instead, the chapter 13 court relied upon the
27 affidavit supplied by the Nichols that was based upon a stray and
28 immaterial misstatement in the chapter 7 court's memorandum

1 decision denying the Nichols' motion to convert, which
2 misstatement the Nichols and their counsel knew to be incorrect.

3 If the chapter 13 court had examined the second amended
4 state-court judgment, it could have calculated with certainty
5 that the debt amount of the judgment exceeded the limits of
6 § 109(e). Patently incorrect facts are never issue preclusive.
7 Hence, the chapter 13 court should have dismissed or converted
8 the case.

9
10 III

11 The Nichols argue that the chapter 13 court did not abuse
12 its discretion when it denied the motion for reconsideration
13 because of the Whipples' counsel's failure to appear at both the
14 September 26 hearing on the motion to dismiss and the December 12
15 hearing on the motion for reconsideration. Their theory is that
16 the Whipples effectively abandoned their objections when they
17 failed to appear at the hearings on both motions. While there is
18 much to support the view that the Whipples' counsel is his own
19 worst enemy, we are not persuaded that, in context, the motion
20 can correctly be viewed as having been abandoned.

21 The bankruptcy court has the inherent power to dismiss a
22 case if the debtor is ineligible for relief. Guastella, 341 B.R.
23 at 917. Section 109(e) states that: "[o]nly an individual with
24 regular income that owes, on the date of the filing of the
25 petition, noncontingent, liquidated, unsecured debts of less than
26 \$307,675 . . . may be a debtor under chapter 13 of this title."
27 11 U.S.C. § 109(e).

1 Bankruptcy courts generally rely on the chapter 13 debtor's
2 schedules to determine eligibility, unless a good faith objection
3 is made. Scovis, 249 F. 3d at 981.

4 If a good faith objection to the debtor's eligibility is
5 made, the bankruptcy court should look "past the schedules to
6 other evidence submitted." Id. (citation omitted).

7 In this case, the Nichols' schedule F stated that the amount
8 of the second amended state court judgment was only \$147,234.
9 The Nichols never explained where this amount came from, but it
10 is obvious that it does not square with the amount provided in
11 the second amended judgment, even if the credit for garnished
12 wages is considered.

13 After the Whipples did not appear in court on September 26,
14 the court acted on the motion on the merits. Those merits,
15 however, required consideration of the exhibits in support of the
16 motion, which contained unambiguous evidence that required the
17 opposite result. The Nichols' misleading response did not
18 overcome the evidence supporting the motion. It was clear error
19 to deny the motion.

20 The Whipples then filed a motion for reconsideration, and
21 again raised the § 109(e) eligibility issue to the court. The
22 Whipples provided the court with a comparison of the interest
23 calculation provided by the Nichols, which was based on admitted
24 clerical error, and an interest calculation based on the 2001
25 date stated in the second amended judgment.

26 The court set a hearing on the motion for reconsideration on
27 December 12. Again, the Whipples did not appear. The court
28

1 again denied the motion for reconsideration on its merits.⁷

2 Had the bankruptcy court looked "past the schedules," it
3 would have concluded that the amount of the second amended
4 judgment exceeds the debt limitation imposed by § 109(e).

5 The calculation, as of the date of the filing of the chapter
6 13 case, based on the admitted clerical error was:

7 \$174,485.17 (principal)
8 + \$82,308.29 (interest through July 18, **2002**)
9 + \$48,182.40 (post-judgment interest from July 19, **2002**
10 through April 21, 2005)
11 + \$369.00 (punitive damages)
12 = \$305,344.86
13 - \$10,848.51 (amount garnished)

14 **Total: \$294,496.35**

15 However, the calculation with the correct date contained in
16 the second amended judgment is as follows:

17 \$174,485.17 (principal)
18 + \$82,308.29 (interest through July 18, **2001**)
19 + \$65,629.40 (post-judgment interest from July 19, **2001**
20 through April 21, 2005)
21 + \$369.00 (punitive damages)
22 = \$322,791.86
23 - \$10,848.51 (amount garnished)

24 **Total: \$311,943.35**

25 ⁷The Whipples' attorney gave the following excuse for not
26 appearing at the December 12, 2005, hearing:

27 At the December 12, 2005, hearing, Whipple's counsel called
28 the judge's clerk and confirmed that he would be appearing
telephonically, but, after attempting to call the court he
was unsuccessful and calling the clerk was advised he had
called another clerk's number and then joined the hearing in
progress. The court informed counsel that the case had been
called a few minutes previous and since counsel was not on
the line the Court had denied Whipple's Motion to Alter or
Amend and also entered its Order confirming the Debtor's
Chapter 13 Plan.

Whipple Reply Brief, pg. 3.

1 Under § 109(e), the debt limitation for noncontingent,
2 liquidated, unsecured debt is \$307,675. The amount due on the
3 second amended judgment exceeds the statutory cap by \$4,268.35.

4 Because the chapter 13 court relied on inaccurate
5 information provided by the Nichols, and did not independently
6 examine the evidence provided by the Whipples with the correct
7 information, the court clearly erred when it denied the Whipples'
8 motion for reconsideration on the merits and confirmed the
9 Nichols' chapter 13 plan. As noted, it is an abuse of discretion
10 to rely upon a clearly erroneous view of material fact. It
11 follows that discretion was abused when the motions for
12 reconsideration and to dismiss the chapter 13 case were denied.

14 CONCLUSION

15 In the chapter 7 appeal, the court properly refused to grant
16 the Nichols' request to reduce the nondischargeable debt owed to
17 the Whipples. Neither the bankruptcy court's judgment, nor its
18 amended judgment purported to fix the amount of the debt, but
19 rather merely declared the state-court judgment debt to be
20 excepted from discharge. Moreover, the debt was owed by the
21 Nichols to the Whipples, and any dispute over a purported
22 assignment is between the Whipples and the assignee. Hence, we
23 AFFIRM the order on the Rule 60(b)(5) motion.

24 In the chapter 13 appeals, the court clearly erred by
25 ignoring the second amended state-court judgment that was in
26 evidence and, by relying on inaccurate information provided by
27 the Nichols' counsel (which counsel presumably knew to be
28 inaccurate), rested its decision on a clearly erroneous finding

1 of material fact. When correctly calculated, the amount of the
2 second amended state court judgment owed by the Nichols to the
3 Whipple exceeds the debt limitation imposed by § 109(e).
4 Because the Nichols are ineligible to be chapter 13 debtors, we
5 VACATE the order confirming the chapter 13 plan, REVERSE the
6 order denying the motion to dismiss the chapter 13 case, and
7 REMAND with instructions to dismiss the Nichols' chapter 13 case.

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10 KLEIN, Bankruptcy Judge, concurring:

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12 I endorse everything in the per curiam decision and am compelled
13 to add an observation out of a sense that professional
14 obligations occasionally warrant the type of candor that is
15 ordinarily omitted from judicial decisions. In my view, the
16 presentation by counsel for the Nichols of affidavits based on
17 Judge Hollowell's immaterial and plainly inadvertent typographic
18 error regarding the date of the state court judgment (the correct
19 date of which, as well as counsel's actual knowledge of which,
20 cannot be disputed) constituted an intentional effort by counsel
21 for the Nichols to mislead Judge Marljar in a manner that amounts
22 to an attempt to perpetrate a fraud on the court and that offends
23 every relevant canon of professional responsibility of which I am
24 aware. Similarly, his contention presented in the briefs to us
25 that Judge Hollowell's immaterial misstatement was issue
26 preclusive is, by any measure, frivolous. While we could impose
27 sanctions, the better course is to leave counsel to the mercy of
28 the bankruptcy court and the Arizona bar disciplinary

1 authorities. Nothing in our decision prevents appropriate
2 disciplinary action.

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