

**OCT 10 2006**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
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.	CC-06-1011-PaLB
	)		
TINA CROSBY-SIMMONDS,	)	Bk. No.	LA 05-31106-VZ
	)		
Debtor.	)		
_____	)		
	)		
TINA CROSBY-SIMMONDS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
TIMOTHY M. CAMPBELL,	)		
	)		
Appellee.	)		
_____	)		

Submitted Without Oral Argument  
on September 22, 2006

Filed - October 10, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

The Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: PAPPAS, LEE and BRANDT,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> The Honorable W. Richard Lee, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Appellant, Chapter 13<sup>3</sup> debtor Tina Crosby-Simmonds, appeals  
2 an order of the bankruptcy court denying her objection to the  
3 proof of claim filed by Appellee Timothy Campbell. We AFFIRM.  
4

#### 5 **FACTS**

6 On February 5, 1997, Joseph Simmonds ("Joseph") commenced a  
7 state civil action in Superior Court, Los Angeles County, against  
8 his former business partner, Appellee. The complaint pleaded  
9 various tort claims, including breach of fiduciary duty and  
10 conversion of personal property (the "Fiduciary Action").  
11 Approximately five weeks later, on March 14, 1997, Joseph married  
12 Appellant. On November 18, 1998, judgment was entered in favor of  
13 Appellee and against Joseph in the Fiduciary Action.

14 On August 12, 1999, Appellee commenced a civil action for  
15 malicious prosecution against Joseph in Superior Court, Los  
16 Angeles County (the "Malicious Prosecution Action"). After a jury  
17 trial, on May 31, 2001, judgment was entered in the Malicious  
18 Prosecution Action in favor of Appellee and against Joseph in the  
19 amount of \$36,471.80.

20 On June 1, 2001, Joseph filed a chapter 7 bankruptcy  
21 petition. He was granted a discharge on September 10, 2001.  
22 However, in an adversary proceeding, the bankruptcy court ruled  
23 that the judgment debt Joseph owed Appellee arising from the  
24 Malicious Prosecution Action was excepted from discharge under  
25 § 523(a)(6). No appeal was taken.

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26  
27 <sup>3</sup> Unless otherwise indicated, all chapter, section, and  
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
1330 and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9036, prior to the effective date of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.  
L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

1           On March 26, 2004, in the Malicious Prosecution Action, the  
2 state court granted Appellee's motion for entry of an order  
3 garnishing Appellant's wages as spouse of the judgment debtor  
4 Joseph (the "Wage Garnishment Order"). The reason for the state  
5 court's decision appears in its hearing minutes:

6           The court finds that Tina Crosby Simmonds was  
7 married to the judgment debtor at the time the  
8 debt to the judgment creditor was incurred and  
9 therefore the earnings of Tina Crosby Simmonds  
10 are subject to a wage garnishment pursuant to  
11 Code of Civil Procedure section 706.109.  
12 Family Law Code section 903 provides that in  
13 the case of a tort, a debt is incurred at the  
14 time the tort occurs. . . . The tort occurred  
15 on 11/18/98 when the judgment was entered in  
16 favor of the judgment creditor and against the  
17 judgment debtor in case number BC165328. Tina  
18 Crosby Simmonds is not a judgment debtor, but  
19 her community property earnings are subject to  
20 garnishment.

21           Appellant appealed the Wage Garnishment Order to the  
22 California Court of Appeals. On April 19, 2005, the appeals court  
23 affirmed the Wage Garnishment Order. In response to Appellant's  
24 principal argument that the tortious conduct of her husband  
25 occurred before marriage, and thus she should not be liable for  
26 his debts, the appeals court ruled that:

27           A malicious prosecution action accrues at the  
28 time of entry of judgment on the underlying  
action in the trial court. . . . The prior  
proceeding in which Joseph sued Campbell  
terminated with a judgment in favor of  
Campbell on November 18, 1998. As appellant  
and Joseph were married on March 14, 1997, the  
tort of malicious prosecution accrued after  
their marriage. Accordingly, the court's  
order was proper.

Appellant did not appeal from the California Court of Appeals'  
order.

1 Appellant filed her own bankruptcy petition under chapter 13  
2 on September 13, 2005. Her schedule F, submitted on September  
3 27, 2005, lists a disputed unsecured debt of \$52,000 in favor of  
4 Appellee arising from the judgment against her husband, Joseph.

5 On October 17, 2005, Appellee filed a proof of claim in  
6 Appellant's bankruptcy case for \$52,043.51. The claim was in two  
7 parts: \$51,931.89 for the Malicious Prosecution Action and  
8 \$111.62 as a personal debt for the attorney fees awarded to  
9 Appellee against Appellant in the State Appeal.

10 On November 3, 2005, Appellant objected to Appellee's proof  
11 of claim, arguing that she was not responsible for her husband's  
12 debt. She cited this Panel's decision in In re Tsurukawa, 258  
13 B.R. 192 (9th Cir. BAP 2001), in support of her position.  
14 Appellee opposed her objection.

15 The bankruptcy court conducted a hearing on Appellant's  
16 objection to Appellee's claim on December 12, 2005. The court  
17 overruled Appellant's objection, reasoning:

18 Under California Family Code Section 910 the  
19 community estate is indeed liable for debts  
20 incurred during the marriage. This debt, the  
21 judgment was indeed entered and the debt was  
22 accrued while the marriage was in existence  
23 and it is not disputed. And under Section  
24 542, property of the community estate comes  
25 into the bankruptcy estate and this would  
26 include the wages of the spouse who is a  
27 debtor in this bankruptcy case. . . .  
28 Therefore, there is not a basis under law to  
disallow the claim. The motion is denied.

Tr. Hr'g 4:9-20.

26 The bankruptcy court entered an order denying Appellant's  
27 objection to Appellee's Proof of Claim on December 22, 2005. A  
28

1 timely appeal of that order was filed on December 29, 2005.<sup>4</sup>

2  
3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
5 §§ 1334 and 157(b)(2)(B). This Panel has jurisdiction pursuant to  
6 28 U.S.C. § 158(b).

7  
8 **ISSUE ON APPEAL**

9 Whether the bankruptcy court erred in denying the debtor's  
10 objection to Appellee's proof of claim.<sup>5</sup>

11  
12 **STANDARD OF REVIEW**

13 No factual issues are presented in this appeal. We review  
14 the bankruptcy court's interpretation and application of the  
15 provisions of the Bankruptcy Code de novo. In re Deville, 361  
16 F.3d 539, 547 (9th Cir. 2004). The same de novo standard applies  
17 to the bankruptcy court's interpretation and application of state  
18 law. Rabkin v. Ore. Health Sciences Univ., 350 F.3d 967, 971 (9th  
19 Cir. 2003).

20 \_\_\_\_\_  
21 <sup>4</sup> Appellant's Third Amended Chapter 13 Plan was filed on  
22 February 8, 2006. It does not contain any express provision for  
23 payments to Appellee. Presumably, Appellee could share in any  
distributions to be made to unsecured creditors under that plan.  
This plan was confirmed by the court on March 7, 2006.

24 <sup>5</sup> Appellant frames the issues on appeal as whether the  
25 bankruptcy court properly applied this Panel's holding in In re  
26 Tsurukawa, and whether the Supremacy Clause of the United States  
27 Constitution, in effect, overruled the provisions of California  
28 law relied upon by the bankruptcy court. As discussed below, we  
need not reach any constitutional questions because Appellant  
raises them for the first time on appeal, and her presentation of  
these arguments is simply inadequate to allow us to review them.  
We do, however, examine the relation of our decision in In re  
Tsurukawa to the issue on appeal.

1 **DISCUSSION**

2 A properly filed proof of claim constitutes prima facie  
3 evidence of the validity and amount of the claim. FED. R. BANKR. P.  
4 3001(f). See Heath v. Am. Express Travel Related Services Co.,  
5 Inc. (In re Heath), 331 B.R. 424, 437 (9th Cir. BAP 2005). A  
6 claim, proof of which is properly filed, is deemed allowed unless  
7 a party in interest, including the debtor, objects. § 502(a). See  
8 Campbell v. Verizon Wireless S-CA (In re Campbell), 336 B.R. 430,  
9 436 (9th Cir. BAP 2005). Under § 502(b)(1), upon objection, the  
10 bankruptcy court shall allow the claim unless it is unenforceable  
11 against the debtor or her property under applicable law. In re  
12 Heath, 331 B.R. at 432. In this context, applicable law is state  
13 law. Durkin v. Bendor Corp. (In re G.I. Indus., Inc.), 204 F.3d  
14 1276, 1281 (9th Cir. 2000), citing Johnson v. Righetti (In re  
15 Johnson), 756 F.2d 738, 741 (9th Cir. 1985) (“In proof of claim  
16 litigation under 11 U.S.C. § 502(b)(1), the validity of the claim  
17 is determined under state law.”)

18 In the bankruptcy court and in this appeal, Appellant  
19 presented no evidence to dispute the amount of Appellee’s judgment  
20 debt, nor its validity as against Joseph. Rather, Appellant  
21 argues the judgment debt is unenforceable against her and her  
22 property.

23 The bankruptcy court determined that Appellant’s wages could  
24 be reached to satisfy Appellee’s judgment debt. As a result, it  
25 allowed Appellee’s proof of claim in the bankruptcy case. The  
26 bankruptcy court determined that, under California law, the  
27 marital community of Appellant and Joseph was liable for debts  
28 incurred during their marriage; that Appellee’s debt was incurred

1 upon entry of the judgment in the Malicious Prosecution Action,  
2 after Appellant and Joseph were married; that Appellant's  
3 bankruptcy estate included her interest in any community property,  
4 such as her wages; and, therefore, Appellee's claim should be  
5 allowed. In other words, the bankruptcy court concluded that  
6 there was no basis to decide that Appellee's claim was  
7 unenforceable against Appellant's property so as to justify  
8 disallowance of Appellee's claim. § 502(b)(1). See also  
9 § 102(2).

10 In her bankruptcy case, Appellant challenged Appellee's claim  
11 on the basis of bankruptcy law, arguing that she was an "innocent  
12 spouse" and not liable for her husband's debts under our ruling in  
13 In re Tsurukawa. We examine Appellant's contention below.

14 However, Appellant also persists in arguing that Appellee's  
15 claim against her is unenforceable under state law and that  
16 Appellee's claim is a debt of her husband Joseph alone.<sup>6</sup>  
17 Appellant is precluded from this approach since her argument  
18 amounts to an improper collateral attack on the Wage Garnishment  
19 Order.

20 Under the doctrine of issue preclusion, Appellant is  
21 prohibited from arguing that the Wage Garnishment Order was  
22 incorrectly entered or is invalid. Issue preclusion bars  
23 relitigation of an issue of fact or law that was actually decided  
24 by a court in an earlier action, in which that issue was necessary

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26 <sup>6</sup> Appellant contends that "Debtor cannot be legally bound by  
27 a State Court's order against her husband when she had no  
28 participation or inkling of the transaction" and "[s]ince Tina  
Crosby Simmonds was not a named defendant/new party, therefore she  
could not be named as a judgment debtor and only as a judgment  
debtor can she be subjected to wage garnishment."

1 to the judgment in such action, and a valid and final judgment was  
2 entered.<sup>7</sup> The Wage Garnishment Order was entered against the  
3 Appellant (not her husband) by the California superior court. She  
4 challenged the propriety of that order by appealing to the  
5 California Court of Appeals, which affirmed. The Appeals Court's  
6 decision was not appealed and, thus, is a "final judgment."

7 The state courts of California give preclusive effect to  
8 issues decided in another court of that state under the following  
9 circumstances:

10 First, the issue sought to be precluded from  
11 relitigation must be identical to that decided  
12 in a former proceeding. Second, this issue  
13 must have been actually litigated in the  
14 former proceeding. Third, it must have been  
15 necessarily decided in the former proceeding.  
16 Fourth, the decision in the former proceeding  
17 must be final and on the merits. Finally, the  
18 party against whom preclusion is sought must  
19 be the same as, or in privity with, the party  
20 in the former proceeding.

21 Lucido v. Superior Ct., 795 P.2d 1223, 1226 (Cal., 1990).

22 All the elements of issue preclusion are present here. The  
23 issue litigated by Appellant in state court was whether  
24 Appellant's wages could be garnished by Appellee to satisfy the  
25 judgment debt against Joseph. Appellant raises the identical  
26 issue in this appeal. That issue was fully litigated in the state  
27 superior court and court of appeals. That issue was necessarily  
28 decided in that the state appeal, and the decision of the court of  
29 appeals constitutes a final judgment. Finally, Appellant is the

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30 <sup>7</sup> For an excellent discussion of the operation of this  
31 doctrine in the context of bankruptcy proceedings, see Christopher  
32 Klein, Lawrence Ponoroff & Sarah Borrey, Principles of Preclusion  
33 and Estoppel in Bankruptcy Cases, 79 AM. BANKR. L.J. 839, 852-58  
34 (2005).



1 same party as that involved in the state proceedings. Because  
2 California state courts are required to give preclusive effect to  
3 the Wage Garnishment Order, the Full Faith and Credit Act, 28  
4 U.S.C. § 1738, imposes the same obligation on federal courts,  
5 including this Panel. McDonald v. City of W. Branch, Mich., 466  
6 U.S. 284, 287 (1984). Appellant is therefore precluded from  
7 asserting that the Wage Garnishment Order is not valid or  
8 enforceable as a claim against her in her bankruptcy case.

9 But even were Appellant not precluded from challenging the  
10 validity of Appellee's claim, the bankruptcy court's decision  
11 allowing the claim is amply supported by California law. The  
12 courts have long held that, in California, the community estate of  
13 husband and wife may be reached to satisfy community debts.  
14 Hannan v. Swift, 61 F.2d 307, 310 (9th Cir. 1932). This imputed  
15 liability is codified in Cal. Code Civ. P. § 910(a), which  
16 provides that "[t]he community estate is liable for a debt  
17 incurred by either spouse before or during marriage, regardless of  
18 which spouse has the management and control of the property and  
19 regardless of whether one or both spouses are parties to the debt  
20 or to a judgment for the debt."

21 The debt represented by Appellee's judgment was incurred at  
22 the time the tort of malicious prosecution occurred. Cal. Family  
23 Code § 903(b). The tort occurred at the "time of entry of  
24 judgment on the underlying action in the court trial, i.e., at the  
25 time of successful termination of the prior proceeding." Ray v.  
26 First Fed. Bank, 61 Cal. App.4th 315, 320 (Cal. Ct. App. 1998).  
27 It is uncontroverted that Appellant and Joseph were married on  
28 March 14, 1997, and that the judgment in the Malicious Prosecution

1 Action was entered on November 11, 1998. There is no evidence in  
2 the record to suggest that Appellant and Joseph were not, at all  
3 times relevant, husband and wife. Consequently, Cal. Code Civ. P.  
4 § 910(a) dictates that the community property of Appellant and  
5 Joseph is liable for Appellee's judgment debt. Because  
6 Appellant's community property wages could be reached to satisfy  
7 Appellee's judgment, Appellee held a claim enforceable against  
8 "property of the debtor" which was subject to allowance in her  
9 bankruptcy case under § 502(a).

10 Appellant argues that she is an innocent spouse, and  
11 therefore, should not be liable for Appellee's judgment in her  
12 bankruptcy case. For support, Appellant cites this Panel's  
13 opinion in In re Tsurukawa, 258 B.R. 192 (9th Cir. BAP 2001).  
14 According to Appellant, Tsurukawa holds that the existence of the  
15 marital relationship alone is insufficient to impute liability to  
16 her for her husband's fraud.

17 In Tsurukawa, a husband defrauded his employer by diverting  
18 his employer's business to himself. The employer discovered the  
19 fraud, fired the husband, sued both the husband and his wife for  
20 fraud and deceit, and obtained a stipulated judgment against them  
21 for approximately \$2 million. The husband and wife filed separate  
22 bankruptcy cases. The bankruptcy court determined that the  
23 judgment debt was nondischargeable in the husband's case, a ruling  
24 which he did not appeal. However, the bankruptcy court also  
25 determined the debt was excepted from discharge in the wife's  
26 case, and she appealed. This Panel held that the fact that  
27 debtors were married was not alone a sufficient basis to render  
28 the debt nondischargeable in the "innocent" spouse's bankruptcy

1 case unless an agency relationship existed between them. Id. at  
2 198. The Panel therefore remanded the wife's case to the  
3 bankruptcy court to determine if the wife was an agent of the  
4 husband such that the fraud of the husband could be imputed to the  
5 wife for purposes of a § 523(a) exception to discharge.

6 Tsurukawa involved a determination of dischargeability of  
7 debt under § 523(a). The limited basis of the holding was made  
8 clear in our comments in the subsequent appeal of the order  
9 entered in the remanded action: "We reversed and remanded  
10 [Tsurukawa], clarifying that the wrongful conduct of one spouse  
11 could not be attributed to the other spouse for purposes of  
12 nondischargeability of debt under section 523(a)." Tsurukawa v.  
13 Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 519 (9th  
14 Cir. BAP 2002) (emphasis added). The Panel, in its first opinion  
15 in Tsurukawa, simply did not address the question of whether the  
16 judgment creditor's debt could be allowed as a claim in the wife's  
17 bankruptcy case. Consequently, the holding in Tsurukawa is of no  
18 import, nor is it of value, to Appellant here.

19 In addition to her reliance upon Tsurukawa, Appellant  
20 asserts a general argument that the Supremacy Clause of the United  
21 States Constitution somehow invalidates those sections of the  
22 California Family Code relied on by the bankruptcy judge as the  
23 basis to allow Appellee's claim. Appellant's argument was not  
24 raised in the bankruptcy court. This Panel and the Court of  
25 Appeals have discretion whether to consider arguments raised for  
26 the first time on appeal. Spurlock v. F.B.I., 69 F.3d 1010, 1017  
27 (9th Cir. 1995); Alcock v. Small Bus. Admin. (In re Alcock), 157  
28 B.R. 23 (9th Cir. BAP 1993). This is not "an exceptional case in

1 which review is necessary to prevent a miscarriage of justice or  
2 to preserve the integrity of the judicial process," nor is this a  
3 situation in which "a new issue arose because of a change in the  
4 law while an appeal [was] pending[.]" Spurlock, 69 F.3d at 1017.  
5 Further, Appellant presents no coherent legal analysis supported  
6 by relevant case and statutory law for her constitutional  
7 challenge.<sup>8</sup> We are especially reluctant to consider a  
8 constitutional challenge to a state family code, an area of law  
9 where the federal government traditionally defers to the states.  
10 "The whole subject of the domestic relations of husband and wife,  
11 parent and child, belongs to the laws of the States and not to the  
12 laws of the United States." Ex Parte Burrus, 136 U.S. 586, 593  
13 (1890). The Panel therefore declines to consider Appellant's  
14 constitutional argument raised for the first time on appeal.<sup>9</sup>

#### 15 CONCLUSION

16 For these reasons, we AFFIRM the decision of the bankruptcy  
17 court.

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19 <sup>8</sup> The one case Appellant cites to support her argument is  
20 Stone v. City & County of San Francisco, 968 F.2d 850, 862 (9th  
21 Cir. 1992). That decision does not involve a conflict of  
22 statutes, but rather holds that a federal court's remedial scheme  
to cure overcrowding in state prisons will temporarily override  
state prison regulations. The holding has no application to the  
instant appeal.

23 <sup>9</sup> In addition to her constitutional challenge, Appellant  
24 introduced three other new arguments on appeal. She argues that  
25 (1) Cal. Code Civ. P. § 473 does not allow naming of a new party,  
26 (2) Cal. Code Civ. P. § 367 requires that every action must be  
27 prosecuted in the name of the real parties in interest and (3)  
28 Cal. Code Civ. P. § 1908(2) requires that non-parties have actual  
or constructive notice of the pendency of the action. She simply  
states these arguments without legal analysis or citation to  
authority. Indeed, she does not coherently explain their  
relevance in this appeal. The Panel declines to consider these  
"arguments".