**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP Nos. WW-09-1020-MoPaR<br>WW-09-1030-MoPaR |
| MICHAEL J. LABABIT and MARICRIS C. RODRIGUES-LABABIT, | (Cross Appeals) |
| Debtors. | Bk. No. 07-12111-TTG |
| ROBERT ZAUPER, | Adv. No. 07-01227 |
| Appellant/ Cross-Appellee, | |
| v. | **M E M O R A N D U M**[1] |
| MICHAEL J. LABABIT; MARICRIS C. RODRIGUES-LABABIT, | |
| Appellees/ Cross-Appellants. | |

Argued and Submitted on July 31, 2009
at Pasadena, California

Filed - October 8, 2009

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

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

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Before: MONTALI, PAPPAS, and RIEGLE,[2] Bankruptcy Judges

Creditor-Appellant Robert Zauper ("Zauper") appeals the bankruptcy court's decision that his claim was nondischargeable

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

[2] Hon. Linda B. Riegle, Bankruptcy Judge for the District of Nevada, sitting by designation.

under section 523(a)(6)[3] in the amount of $1, when Zauper had an existing state court default judgment for $75,501.09 against Debtors Cross-Appellants, Michael Lababit and Maricris Rodrigues-Lababit ("Mr. Lababit" or "Ms. Lababit" or the "Lababits"). The Lababits cross-appeal the bankruptcy court's decision that their conduct was willful and malicious under section 523(a)(6). For the reasons stated below, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

## I. FACTS

### A. The State Court Default Judgment.

Zauper and the Lababits have been neighbors for several years, with one house separating them. On April 11, 2005, Pinoy, the Lababits' pit bull, entered Zauper's back yard and, without provocation, killed Zauper's seven-year-old companion cat, Milton. Zauper, witnessing the attack, attempted to intervene, chasing Pinoy (who still had Milton clenched in his mouth) back to the Lababits' yard and poking him with a stick. Zauper's rescue efforts were unavailing; Milton was deceased. Zauper approached Ms. Lababit, informing her that Pinoy had just killed his cat, but Ms. Lababit stated she did not own the dog and that she was watching it for someone else. Zauper called 911 and waited for police and Bremerton Animal Control ("BAC") to arrive. Meanwhile, Ms. Lababit again stated that the dog did not belong to her or her husband, yet she called Mr. Lababit at work to inform him of the event. After police, BAC, and Mr. Lababit

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

arrived, Mr. Lababit confirmed that it was his dog Pinoy who had killed Milton.

BAC cited Mr. Lababit for violating two local animal control ordinances: dog at-large and damaging property. Mr. Lababit told the BAC officer that he could not afford any more citations for Pinoy, so he opted to surrender Pinoy to BAC. After BAC left the scene, Zauper took Milton in for a necropsy and it was determined that he died from multiple puncture wounds to his skin and organs, a broken back, and torn stomach. Milton was privately cremated and his ashes remain in Zauper's home.

Prior to this incident, on September 26, 2003, Pinoy, while at-large, had killed another cat owned by the Lababits' next-door neighbor, Edmund Seifert ("Seifert"). For killing Seifert's cat, BAC cited the Lababits for animal at-large and failure to license as required by law, and declared Pinoy a Potentially Dangerous Animal ("PDA"). As the owners of a PDA, city code required the Lababits to muzzle, leash/collar, or confine Pinoy in a locked kennel at all times, as well as post warning notices about Pinoy at all entrances to their property. BAC informed Mr. Lababit that he could be prosecuted criminally for failing to comply with these conditions.

Ten months later, on July 16, 2004, a BAC officer contacted Mr. Lababit, reminding him to license Pinoy as a PDA. Mr. Lababit promised he would do so that day. He never did. As a result, BAC cited Mr. Lababit for the PDA licensing violation on July 23, 2004.

To recover for the loss of Milton, Zauper filed suit against the Lababits in state court on July 3, 2006, alleging claims of simple negligence, strict liability for injury of an animal, private and public nuisance, and gross negligence. Zauper's complaint sought at least $10,000, consisting of damages for Milton's intrinsic value, Zauper's emotional distress, special damages for loss of companionship, pre- and post-judgment interest, attorneys fees, and costs of suit. Zauper's complaint did not include any claims for willful and malicious conduct or injury.

Despite repeated attempts by Zauper's counsel to get a response from the Lababits, they failed to appear and the state court entered a clerk's default on August 3, 2006. On November 20, 2006, the state court entered a default judgment against the Lababits for $75,501.09, finding them liable for negligence, strict liability, private and public nuisance, and gross negligence. Specifically, the judgment granted the following damages:

- Intrinsic Value of Milton (including loss of use): $50,000;
- Emotional Distress: $25,000;
- Burial and Prejudgment Interest: $56.09;
- Attorneys Fees: $200; and
- Costs: $240.

**B. The Adversary Proceeding.**

The Lababits filed a chapter 7 petition on May 9, 2007. On August 10, 2007, Zauper filed a complaint seeking to declare his prepetition state court judgment nondischargeable as a willful

and malicious injury under section 523(a)(6).[4] The Lababits filed an answer and motion for summary judgment on September 10, 2007, seeking dismissal of Zauper's complaint and attorneys fees. The motion included a declaration from Mr. Lababit stating that he was not present at the time of the attack on Milton and did not know that Pinoy had escaped from their home. Zauper filed an opposition, and the bankruptcy court denied the Lababits' motion.

A trial was held on November 4, 2008. Witness Melody Pugh ("Pugh"), a pet detective and former police officer trained in investigation of dogfighting, who also did after-hours investigations for BAC, testified that she previously observed dogfighting apparatuses on the Lababits' property such as thick collars, ropes, and heavy chains, and specifically observed Pinoy hanging from a heavy rope and collar - the suffocation technique - utilized to strengthen the dog's neck muscles. She also testified that she observed Pinoy running loose at least two dozen times prior to September 26, 2003, the day Pinoy was declared a PDA, and at least two dozen times afterwards. Finally, she observed "classic" or "textbook" signs of dogfighting on Pinoy - numerous scars and bite wounds on his nose and chest - and further observed his very aggressive nature

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[4] Section 523(a)(6) provides in relevant part:

> (a) A discharge under 727 . . . does not discharge an individual debtor from any debt -
> ....
> (6) for willful and malicious injury by the debtor to . . . the property of another entity.

(growling, snarling, baring his teeth, even chasing her on one occasion), much unlike a normal dog.

Witness Teri Olson, a former veterinary technician and officer for BAC until 2000, also trained in dogfighting, confirmed the presence of dogfighting marks on Pinoy, the dogfighting apparatuses on the Lababits' property, and testified that on one occasion Pinoy tried to bite her as she approached the Lababits' property.

Finally, after Zauper testified about his relationship with the Lababits and the events surrounding Milton's death, he attempted to testify about Milton's "intrinsic" value. At that point, the Lababits objected, arguing such testimony was not appropriate for damages. Zauper's counsel made an offer of proof, informing the court that when property has no market value Washington law allows for damages based on its "intrinsic" value, whether it be household goods or pets, as long as such damages are not for unusual sentiment, and that Zauper's testimony would not cross that line. The bankruptcy court sustained the Lababits' objection and refused to allow Zauper's testimony.

Shortly thereafter, upon objection to another attempt by Zauper to testify as to Milton's intrinsic value, Zauper's counsel made an offer of proof stating that, if allowed, Zauper would testify about Milton's unique nature, the closeness and bond they shared, their interactions, and that Washington law permits evidence on the issue of unique or intrinsic value. The

court again sustained the Lababits' objection, and did not allow the testimony.[5]

Upon the Lababits' objection to Zauper's testimony as to his emotional distress, Zauper's counsel made an offer of proof asserting that Washington case law allows emotional distress damages for various intentional torts, including conversion and trespass to chattels. The bankruptcy court overruled the Lababits' objection and allowed Zauper to testify, stating:

> "I'm going to permit him to testify on this issue just because of the fact that, you know, intentional infliction of emotional distress more and more has been allowed as a theory of damages."

Zauper stated that he was very depressed over Milton's death, just like he was over his mother's death; time had not dulled the image of seeing Milton in Pinoy's mouth, but time marches on and he dealt with it as best as he could. Zauper further testified that he took off two days from work immediately after the incident. Finally, he stated that he is not one to seek therapy and he did not seek therapy, but because of the bond that he and Milton shared for seven years his experience of loss was the same that anyone would experience over losing a loved family member.

Prior to Zauper's emotional distress testimony, the bankruptcy court also allowed, over the Lababits' objection,

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[5] We have only a portion of the trial transcript, and both parties provided that same portion. The Lababits apparently testified, but did not include their testimony in their record on appeal. We are entitled to presume from the absence of support in their excerpts that the record does not support their position. Cogliano v. Anderson (In re Cogliano), 355 B.R. 792, 803 (9th Cir. BAP 2006).

Pugh, who is a friend of Zauper's and arrived at the scene after Milton's death, to testify about the impact Milton's death had on Zauper.

The bankruptcy court issued an oral ruling. As to the section 523(a)(6) issue, the court noted that Pugh's testimony confirmed that Pinoy, a PDA, was aggressive and that there was a good chance that Pinoy was being trained for fighting through suspension and collaring techniques used by the Lababits, which provided much of the basis for its affirmative finding under section 523(a)(6):

> [I]f the defendants are going to maintain a dangerous animal, they've got a very high duty with respect to the containment of that particular animal. . . . [I]f they don't meet that high duty, they would be guilty of a willful and malicious act if the animal were to get out and undertake any of the normal consequences of such an animal.
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> Well, the evidence is clear here . . . that's what happened. . . . [T]he defendants' animal wasn't properly restrained under lock and key . . . and it killed . . . the plaintiff's cat. It wasn't a normal kind of thing . . . because of the nature of the animal that we're talking about here, certified to be a dangerous animal.
>
> . . . [D]efendants knew that their animal was of the kind that it was seriously dangerous to other persons or property. And they ignored that totally. Both of the defendants have treated this dog very casually throughout the years.
>
> But I think that by maintaining a dangerous animal and not taking the proper steps to contain the dangerous animal, a willful act has been committed. Or willful omission is committed in light of a situation where there must be appropriate action taken. And the action is a malicious one. Because of the fact that this dog has to be restrained would clearly point this Court to conclude that the reason for that is if you don't restrain the animal, the actions of the animal will necessarily cause harm.

> And so I believe, and I therefore conclude, that the actions here violate Section 523(a)(6) of the Bankruptcy Code.

As to the amount of the nondischargeable debt, however, the court expressed its dismay over the damage award of the state court judgment, stated that Zauper paid nothing for Milton, that Zauper failed to prove any recoverable emotional distress damages, and that the court had no evidence before it "to allow anything of significance within an acceptable standard of damages." Consequently, it allowed damages in the amount of $1, plus $1,218.45 in costs and attorneys fees.

The bankruptcy court entered its Findings of Fact and Conclusions of Law and separate Judgment Summary and Order on January 13, 2009. Both timely appeals followed.

## II. JURISDICTION

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

## III. ISSUES

1. Did the bankruptcy court err in determining that the Lababits' conduct was willful and malicious under section 523(a)(6)?

2. Did the bankruptcy court err by not declaring the amount awarded in the state court default judgment nondischargeable based on its willful and malicious finding under section 523(a)(6)?

3. Did the bankruptcy court err in denying Zauper's testimony on intrinsic value and determining Zauper's debt was nondischargeable in the amount of $1?

4. Did the bankruptcy court err in denying Zauper damages for emotional distress?

## IV. STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law de novo. Harmon v. Korbin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). To reverse a court's finding of fact, we must have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007). The issue of dischargeability of a debt is a mixed question of fact and law that is reviewed de novo. Miller v. U.S., 363 F.3d 999, 1004 (9th Cir. 2004). "We review rulings regarding rules of res judicata, including claim and issue preclusion, de novo as mixed questions of law and fact in which legal questions predominate." Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007).

## V. DISCUSSION

### A. The Bankruptcy Court Did Not Err When It Determined That The Lababits' Conduct Was Willful And Malicious Under Section 523(a)(6).

On appeal, the Lababits contend that Zauper had to prove that either or both Lababits specifically intended to use Pinoy to kill Milton, and the evidence before the bankruptcy court did not support a finding that they acted in a willful and malicious manner according to Washington Pattern Jury Instructions defining "willful misconduct" and "wanton misconduct." Specifically, they contend that Mr. Lababit's summary judgment declaration established that he had latched Pinoy's kennel door shut and Pinoy was in his "jail" when he left that day. The Lababits

further contend that the facts that there were no other instances involving Pinoy during the 563 days between the killing of Seifert's cat and Milton, and that Zauper saw Pinoy at-large only once during that same time frame, show they intended to comply with BAC's requirements, and that, if anything, their conduct was negligent or reckless, which does not fall within the purview of section 523(a)(6). Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

A creditor bears the burden of proving that its claim against a debtor is excepted from discharge under section 523(a)(6) by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 284 (1991). Whether a particular debt is for willful and malicious injury by the debtor to another or the property of another under section 523(a)(6) requires application of a two-pronged test to the conduct giving rise to the injury. The creditor must prove that the debtor's conduct in causing the injuries was both willful and malicious. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702,711 (9th Cir. 2008) (reinforcing Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) and the application of a separate analysis in each prong of "willful" and "malicious").

Willfulness requires proof that the debtor deliberately or intentionally injured the creditor or the creditor's property, and that in doing so, the debtor intended the consequences of his act, not just the act itself. In re Su, 290 F.3d at 1143. The debtor must act with a subjective motive to inflict injury, or with a belief that injury is substantially certain to result from the conduct. Id.

For conduct to be malicious, the creditor must prove that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. Id.

Whether a debtor's conduct is willful and malicious under section 523(a)(6) is a fact determination reviewed for clear error. As noted, the Lababits did not provide us with a complete transcript of the trial. In order to review a factual finding for clear error, the record must include the entire transcript and all other relevant evidence considered by the bankruptcy court. Burkhart v. FDIC (In re Burkhart), 84 B.R. 658, 661 (9th Cir. BAP 1988); see also Cogliano, supra.

We are not convinced on this record that the bankruptcy court clearly erred in its findings. It carefully considered all of the evidence before it and determined that the Lababits' conduct of knowingly owning a dog declared a PDA, a dog they trained to fight with a propensity for aggression and which had killed at least one other cat, combined with their intentional and repeated breach of their duties to confine, muzzle, or leash Pinoy, or post warning signs, constituted a willful act or willful omission. To show their conduct was willful, Zauper need not prove that the Lababits intended to inflict injury on Milton; it was sufficient that they knew, based on Pinoy's history, that injury to Milton was substantially certain to result if they failed to perform their duties. In re Su, 290 F.3d at 1143. The Lababits' repeated intentional failure to comply with their duties, which necessarily caused Milton's death, without just

cause or excuse, provides a sufficient basis for the bankruptcy court's determination that their conduct was also malicious. Id.

We reject the Lababits' contentions on appeal for several reasons. First, dischargeability under section 523(a)(6) is a matter of federal bankruptcy law to which federal standards apply, not Washington Pattern Jury Instructions, and so it is of no moment whether the Lababits' conduct satisfied the willful and malicious standards articulated under Washington law. Second, Mr. Lababit's summary judgment declaration was not offered or admitted into evidence at the trial. Thus, we will not consider it on appeal. Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001)(evidence not before trial court will not generally be considered on appeal). Even if we did consider it, his declaration does not state that he latched the door shut or that Pinoy was in his kennel when he left.

Finally, the Lababits also cite to nothing in the record (nor do we find anything) to support their statement that since no other instances occurred in 563 days, this shows their intent to comply with BAC's requirements. Asserting "facts" not supported by the record violates Rule 8010(a)(1)(D). In contrast, there was substantial evidence before the court that the Lababits knowingly and repeatedly failed to comply with any or all of their statutory duties.

Therefore, on this record, we believe the bankruptcy court did not clearly err when it found that the Lababits' conduct was

willful and malicious under section 523(a)(6), and we AFFIRM that determination.

**B. The Bankruptcy Court Did Not Err When It Declined To Declare The Amount Of Damages Awarded In The State Court Default Judgment Nondischargeable.**

Zauper contends that although the bankruptcy court had exclusive jurisdiction to hold a trial de novo and determine nondischargeability, it had no discretion to modify the amount of the state court judgment once it made a finding of nondischargeability in Zauper's favor. In other words, he contends that the bankruptcy court was precluded from modifying the amount of the judgment predicated on those nondischargeable acts or omissions. We appreciate Zauper's well-reasoned contention, but we must reject it under both a res judicata (claim preclusion) and collateral estoppel (issue preclusion) theory, and because of our precedent in Stephens v. Bigelow (In re Bigelow), 271 B.R. 178 (9th Cir. BAP 2001).

**1. Claim Preclusion.**

The principle of claim preclusion, or res judicata, is to prevent relitigation of already determined claims or causes of action. Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373, 376 n.1 (1985). Generally, claim preclusion does not apply in nondischargeability proceedings. In re Bigelow, 271 B.R. at 184 (citing Brown v. Felsen, 442 U.S. 127, 138-39 (1979)). This is because in order for claim preclusion to apply, one of the requirements is that the second action must involve the same "claim" that was involved in the prior action. Blonder-Tongue

Labs. v. Univ. of Ill. Found., 402 U.S. 313, 323-324 (1971); Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993).

Although the subject matter of the state court action and the bankruptcy proceeding was identical, the prepetition state court default judgment was determined on claims of negligence, strict liability, nuisance, and gross negligence; it was not determined on any willful and malicious conduct as no allegations of such conduct were pled. Consequently, since no willful and malicious conduct or injury was pled or determined in the state court default judgment, claim preclusion did not apply and the bankruptcy court was free to make its own determinations on the facts and issues on dischargeability, including the amount of damages. See Hardacre v. DiNoto (In re DiNoto), 46 B.R. 489, 491-92 (9th Cir. BAP 1984)(holding that in cases where neither res judicata nor collateral estoppel apply, the bankruptcy court is free to make its own determinations on the facts and issues relevant to dischargeability); and see Gertsch v. Johnson & Johnson Fin. Group (In re Gertsch), 237 B.R. 160, 172 (9th Cir. BAP 1999)(holding that where the debt at issue has been reduced to judgment the bankruptcy court can determine the underlying debt nondischargeable in whole or in part (emphasis added)).

**2. Issue Preclusion.**

The doctrine of collateral estoppel, or issue preclusion, does apply in nondischargeability proceedings. Grogan, 498 U.S. 279, 284-85. Since the question here involves the issue-preclusive effect of a Washington state court's judgment,

we apply Washington preclusion law. 28 U.S.C. § 1738; Marrese, 470 U.S. at 380.

In order to invoke the doctrine of issue preclusion in Washington, a party must show that: (1) the issue decided in the prior adjudication was identical to the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice. MacGibbon v. MacGibbon (In re MacGibbon), 383 B.R. 749, 764 (Bankr. W.D. Wash. 2008)(citing Hadley v. Maxwell, 144 Wash.2d 306, 311, 27 P.3d 600, 602 (2001)).

Element (1) includes a requirement that the issues have been actually litigated. McDaniels v. Carlson, 108 Wash.2d 299, 305, 738 P.2d 254 (1987). This case involves a pure default judgment; the Lababits did not appear or participate in the state court suit. Therefore, the question is whether Washington gives issue preclusive effect to pure default judgments. Our review of Washington law shows that default judgments probably do not satisfy the "actually litigated" requirement. We say "probably" because it appears that while Washington has not conclusively determined this issue in the negative, it has generally taken a "conservative approach" to the "actually litigated" element. See Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Boyovich (In re Boyovich), 126 B.R. 348, 350 (Bankr. W.D. Wash. 1991) (court concluding that default judgments do not satisfy the

actually litigated requirement in Washington and denying issue preclusion). Zauper even conceded this at oral argument. Further, our precedent in In re Bigelow, supra, where we held that Washington law does not give issue preclusive effect to pure default judgments, forces us to reach the same result. Gaughan v. The Edward Dittlog Revocable Trust (In re Costas), 346 B.R. 198, 201 (9th Cir. BAP 2006)(absent a change in the law, we are bound by our precedent).

Even though the Lababits' deliberate choice not to defend the state court suit is inexcusable (Little v. King, 160 Wash.2d 696, 161 P.3d 345 (2007)) and could perhaps persuade a Washington court to determine this undecided issue in the affirmative, under the current law we cannot conclude that the bankruptcy court erred by not applying issue preclusion to the state court judgment award.

Accordingly, despite its willful and malicious finding under section 523(a)(6), the bankruptcy court did not err when it declined to declare the amount of damages awarded by the state court nondischargeable.[6]

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[6] Zauper cites Daghighfekr v. Mekhail (In re Daghighfekr), 161 B.R. 685 (9th Cir. BAP 1993) for the proposition that even though default judgments are not afforded preclusive effect under Washington law, once the bankruptcy court determined the Lababits' conduct was willful and malicious under section 523(a)(6) it had no discretion to modify the amount of the state court judgment. In Daghighfekr, we held that while a default judgment has no preclusive effect as to the issue of the willful and malicious nature of the injury on which the judgment is based, once this issue has been determined by the bankruptcy court the judgment itself is res judicata as to the amount of the judgment.

(continued...)

**C. The Bankruptcy Court Erred When It Denied Zauper's Testimony As To Milton's Intrinsic Value And Subsequently Erred When It Determined Zauper's Damages At $1.**

Zauper contends that the bankruptcy court erred when it refused to admit his testimony as to Milton's intrinsic value, and apparently allowed damages only for Milton's market or economic value, which it believed to be $1.[7] Zauper asserts that Washington law permits intrinsic value damages for loss of unique personal property items when such items either have no market value, or the market value is insufficient to fully compensate the owner for his or her loss. Specifically, Washington law, he

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[6](...continued)
Although compelling, Daghighfekr is unlike this case. There, the state court action consisted of claims only for assault and battery, which generally meet the willful and malicious requirements under section 523(a)(6), and so there was no question upon what theory the compensatory and punitive damages were based. Here, Zauper's claims were for negligence, nuisance, and strict liability, and thus none of the state court's damage award was based on willful and malicious injury necessary to satisfy the requirements under section 523(a)(6). Moreover, Mr. Daghighfekr's bankruptcy case was before a California bankruptcy court. We presume, although Daghighfekr does not say, that the default judgment was obtained from a California state court. California has determined that default judgments satisfy the "actually litigated" requirement and thus are afforded preclusive effect. Fitzgerald v. Herzer, 78 Cal. App. 2d. 127 (1947). If we are correct, the bankruptcy court had no need to revisit the nature of the injury or the amount of the judgment.
Regardless, our decision in Bigelow and the Washington authorities noted above prevent us from reaching any other result. Hence, the bankruptcy court was not barred by res judicata as to the amount of Zauper's state court judgment.

[7] The bankruptcy court's Finding of Fact #14 states that the court granted the Lababits' motion to limit Zauper's testimony as to Milton's intrinsic value and Zauper's emotional distress. If this was a formal motion, neither party included it in the record. Therefore, we assume this is referring to the oral objections the Lababits made at trial.

argues, allows for intrinsic value damages in the case of death or injury to a companion pet. The Lababits contend that Washington recognizes recovery only for economic loss; no emotional distress or other noneconomic damages are permitted.

We agree with Zauper. In Pickford v. Masion, 124 Wash. App. 257, 98 P.3d 1232 (2004), plaintiff's Pekinese/Chihuahua suffered severe injuries after being attacked on her front porch by two Rottweilers that had escaped from their owner's yard. Plaintiff alleged claims for negligent and malicious infliction of emotional distress, and loss of companionship. The court held that neither negligent emotional distress nor loss of companionship were recognized claims in Washington, and since defendant's conduct was only negligent, plaintiff's case did not support a claim for malicious infliction of emotional distress. Id., 124 Wash. App. at 261-62; 98 P.3d at 1234-35. However, the Pickford court did note that damages are recoverable for actual or intrinsic value in such a case. Id., 124 Wash. App. at 263; 98 P.3d at 1235 (citing Mieske v. Bartell Drug Co., 92 Wash.2d. 40, 45-46, 593 P.2d 1308, 1311 (1979)).

In Mieske, plaintiff delivered thirty-two reels of movie film, which contained years of family events, to the retailer defendant to be spliced into four reels. Defendant's agent, the film lab, lost all thirty-two reels. The court rejected defendants' argument that they were liable only for the cost of replacement film, and held that the measure of damages for the film, which was destroyed and could not be replaced or

reproduced, would be the "value to the owner," its intrinsic value, not to include unusual sentimental value. Id., 92 Wash.2d. at 44-45, 593 P.2d at 1311. Consequently, the appellate court upheld the jury's award of $7,500 against the retailer and film lab.

Here, upon counsel's first question to Zauper about Milton's intrinsic value, the Lababits' lodged an objection, after which Zauper's counsel made an offer of proof that Zauper's testimony was appropriate under Washington law and would not cross over into prohibited unusual sentiment. Without ever speaking on the issue, the bankruptcy court concluded that Zauper's testimony "ha[d] crossed the line," and refused any of his testimony on the subject. This was in error. Clearly Washington law, and specifically Pickford, allows intrinsic value damages for the malicious injury or death of companion pets, and the bankruptcy court should not have denied Zauper's admissible testimony. If or when his testimony began to "cross the line," the Lababits would have been free to object.

Since the bankruptcy court should have allowed Zauper's intrinsic value testimony, the denial of which led to its erroneous conclusion that it had no evidence before it "to allow anything of significance within an acceptable standard of damages," it erred when it determined that Zauper was entitled to damages in the amount of $1. We therefore REVERSE on this issue and REMAND for further proceedings.

**D. The Bankruptcy Court Did Not Err In Denying Zauper Damages For Emotional Distress.**

Zauper contends that the bankruptcy court erred when it denied him any emotional distress damages, which are allowable under Washington law, and further erred in refusing to allow Zauper to fully testify to the emotional distress he endured as a result of the willful and malicious killing of Milton.

In Womack v. Rardon, 133 Wash. App. 254, 135 P.3d 542 (2006), plaintiff's cat, Max, was abducted from plaintiff's porch by neighbor children, doused with gasoline and set on fire, resulting in Max's death. The Washington Court of Appeals held for the first time that malicious injury to a companion animal can support a claim for emotional distress damages, finding specifically that harm to a person's emotional well-being may be caused by malicious injury to his or her pet. Id., 133 Wash. App. at 263, 135 P.3d at 546. The Womack court also stated that such damages were consistent with actual and intrinsic value concepts as found in Pickford. Id.

After expressing its "shock" that Zauper would be entitled to recover $50,000 (referring to the intrinsic value damages) for a cat which cost him nothing, on the issue of emotional distress the bankruptcy court stated:

> The second [theory of recovery] is the intentional infliction of emotional distress. And I'm having great problems there with respect to causation, but even the fact that there is any demonstrable emotional distress. You know, the plaintiff was a very straightforward witness, and he was very candid about the situation. He was depressed about it for a while, but he had to go on. He didn't have to have any mental professionals assist him. It didn't seem to have affected other areas of life, possibly missed a couple of days of work. But

> nowhere am I seeing recoverable damages because of the act involved.

On this record, we are unclear as to how Zauper was not allowed to "fully" testify about his emotional distress. The bankruptcy court allowed a significant amount of testimony on the subject from both Zauper and Pugh, despite the Lababits' objections. Therefore, we see no error on that matter.

As to Zauper's contention that the bankruptcy court erred by denying him damages for emotional distress because it misapplied Washington law to reach its erroneous conclusion, the court's statements above indicate that it considered Zauper's theory of emotional distress under applicable Washington law but concluded that he did not prove any damages. Again, we see no error here.

## VI. CONCLUSION

Based on the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings. In particular, the bankruptcy court should allow Zauper an opportunity to submit evidence consistent with Washington case law regarding the intrinsic value of Milton. Based upon that evidence, the bankruptcy court should make further findings concerning the amount of Zauper's nondischargeable damages.