NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-09-1221-PaDuJu
KRISTEN NAWROCKI,	Bk. No. 08-10671-CGC
Debtor.	Adv. No. 08-0870-CGC
JOAN KILBEY,	**M E M O R A N D U M**[1]
Appellant,	
v.	
KRISTEN NAWROCKI,	
Appellee.	

Argued and Submitted on February 17, 2010
at Tucson, Arizona

Filed - March 3, 2010

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

Honorable Charles G. Case, Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and JURY, Bankruptcy Judges

Creditor Joan Kilbey ("Kilbey") appeals the decision of the bankruptcy court awarding attorney's fees under 11 U.S.C.

[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.

§ 523(d)[2] to debtor Kristen A. Nawrocki ("Nawrocki"). We AFFIRM.

FACTS

In September, 2006, Nawrocki and Kilbey entered into an agreement in which Kilbey leased a residence to Nawrocki in Phoenix (the "Agreement"). At some point not clear in the record, Nawrocki fell delinquent on her rent payments, and Kilbey sued Nawrocki to recover past due rent. On April 29, 2008, the state court entered a default judgment in favor of Kilbey and against Nawrocki for $8,937, plus court costs of $100, and reasonable attorney's fees of $3,550, for a total judgment of $12,587.

On August 18, 2008, Nawrocki filed a petition for relief under chapter 7 of the Bankruptcy Code. On her Schedule F, she listed a disputed debt to Kilbey of $12,587 related to the judgment.

Kilbey commenced an adversary proceeding against Nawrocki in the bankruptcy case on November 24, 2008. Kilbey alleged in the complaint that, prior to signing the Agreement, Nawrocki made fraudulent representations to Kilbey about her finances "as an inducement to [Kilbey] to rent the property to [Nawrocki]." Kilbey further alleged that she relied on Nawrocki's representations and, as a result, was damaged. For her claim, Kilbey sought "exemplary damages in an amount to be proven at trial" and a determination that Nawrocki's debt to Kilbey was

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

nondischargeable under § 523(a)(2)(A) and (B).[3]

Nawrocki moved to dismiss the adversary proceeding under Rule 7012 on December 24, 2008. Specifically, she challenged Kilbey's demand to retry Kilbey's claim since a final judgment already had been rendered on that claim in state court; that Kilbey's complaint failed to comply with the requirements of § 523(a)(2)(B) that it be based on a statement in writing concerning the debtor's financial condition; and that Kilbey had failed to state a claim upon which exemplary damages could be lawfully awarded.

Kilbey replied on January 12, 2009, generally rejecting the arguments in Nawrocki's motion to dismiss. Regarding the suggestion that Kilbey failed to meet the "statement in writing" requirement of § 523(a)(2)(B), Kilbey argued that Nawrocki's allegedly fraudulent oral statements became a part of the parties' written Agreement under Arizona law, which allowed Kilbey to assert a claim under § 523(a)(2)(B).

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[3] Kilbey's complaint was captioned "Adversary Proceeding to Determine Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A) and (B)." The complaint contains several references to "fraud" perpetrated on Kilbey, but does not specify what aspects of the alleged fraud are actionable under either subsection (A) or (B) of § 523(a)(2).

Except for the complaint itself, there is nothing in the record on appeal or in the bankruptcy court's docket wherein the parties or the bankruptcy court address Kilbey's claim under subsection (A). Instead, it appears all disputes have centered on alleged statements made by Nawrocki to Kilbey relating solely to Nawrocki's financial condition, and whether or not those statements were incorporated in a statement in writing. Such disputes relate only to subsection (B).

Since the bankruptcy court dismissed the complaint for lack of a written statement used to make the false statements, and Kilbey has not raised any subsection (A) issues in this appeal, we will treat this appeal as one in which the adversary proceeding was prosecuted solely under § 523(a)(2)(B).

Nawrocki responded that the Agreement was not a statement of financial condition for purposes of § 523(a)(2)(B).

The bankruptcy court conducted a hearing on Nawrocki's motion to dismiss on March 10, 2009. There is no transcript of this hearing in either the record or the bankruptcy court's docket. According to the court's minute entry in the docket, Nawrocki and Kilbey were represented by counsel who were heard at the hearing. The minute entry contains three notations: (1) Nawrocki argued "the complaint is frivolous and the adversary should be dismissed;" (2) Kilbey placed her "objection to dismissal on the record and discussed the lease arrangement between the parties as an option to purchase;" and (3) the court "ordered granting the motion to dismiss." The bankruptcy court entered an order dismissing the adversary proceeding on March 13, 2009, providing only that the dismissal was "for reasons stated on the record." This order was not appealed.[4]

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[4] Although we do not have the transcript of the hearing at which the bankruptcy court stated its reasons on the record for dismissing the case, at a subsequent hearing on an award of fees to Nawrocki pursuant to § 523(d), counsel for Kilbey discussed the court's reasons for dismissal:

> We had essentially argued that there had been verbal representations that had been made by the Debtor to my client in order to get a lease. That ultimately was put in writing.
>
> When the motion to dismiss was filed, we argued in response, "We have a written lease. We have negotiations." Albeit they were verbal, but they were incorporated and merged into the written document and therefore the Court should construe those as being written communications.
>
> The Court simply disagreed with us. And basically said the statute says what it says. If they're going to be representations in particular about a Debtor's financial position, those need to be in writing,

(continued...)

On March 12, 2009, Nawrocki filed an "Application for an Award of Attorneys' Fees Pursuant to 11 U.S.C. § 523(d)" arguing that she was entitled to recover from Kilbey the attorney's fees and costs that she had incurred in obtaining the dismissal of the adversary proceeding. Kilbey responded to the Application on March 27, 2009, arguing that: (1) in its dismissal order, the bankruptcy court made no finding that Kilbey's position was "not substantially justified, frivolous or brought in bad faith;" (2) "it would add insult to injury to Ms. Kilbey's injury, and would result in an inequitable result, given that she is now without significant funds, due to the debtor's default;" and (3) the fees sought were unreasonable.

Nawrocki submitted a Reply Memorandum on March 31, 2009. In response to Kilbey's arguments, Nawrocki noted that: (1) a finding of not substantially justified, frivolous, or not filed in good faith need not be express; (2) the judgment was not inequitable; and (3) the requested fees were reasonable.

The hearing on the Application occurred on June 15, 2009. Nawrocki and Kilbey were represented by counsel at the hearing. The bankruptcy court granted the Application and explained its reasons for doing so on the record:

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[4](...continued)
separate and independent from the ultimate writing that happened in this case.

Hr'g Tr. 6:14—7:2 (June 15, 2009). As discussed below, these comments of counsel regarding the court's earlier reasons for dismissing the complaint are consistent with the court's own comments at the June 15, 2009 hearing, explaining why it did not consider Kilbey's complaint substantially justified or that special circumstances would make an award under § 523(d) unjust.

> [Counsel for Kilbey] would have me decide that . . . the requirement under 523(a)(2) of fraudulent statements . . . concerning a debtor's financial condition [be] in writing can be in fact incorporated into the ultimate document.
>
> And I don't think that is correct. . . . [F]rom the beginning § 523(a)(2)(B) has made it clear that . . . a false or fraudulent statement respecting the debtor [or] an insider's financial condition [] must be made in writing. . . . [T]here was no such writing in this case. As a result there was no basis to pursue the claim [and it cannot] be substantially justified if in fact there was never any basis to pursue the claim.

Hr'g Tr. 9:24—10:16.

The bankruptcy court rejected Kilbey's argument that the court was required to make the necessary findings to support an award under § 523(d) at the time the adversary proceeding was dismissed. The court held that there was nothing in the statute dictating the timing of such determination, and that it could make those findings at the time of the fee application, which in this case it did. Hr'g Tr. 10:19-24.

Finally, the bankruptcy court determined that Kilbey's argument that it would be unjust to add a fee award to Kilbey's loss of the promised rent payments in this case did not amount to special circumstances and, in fact, such an argument would never be applicable because it would "essentially read the teeth out of the statute." Hr'g Tr. 11:2-6.

After determining that Nawrocki's requested fees of $3,200 were reasonable, the bankruptcy court granted the Application. It entered judgment in favor of Nawrocki and against Kilbey on June 24, 2009. Kilbey filed a timely appeal of the judgment on July 6, 2009.

JURISDICTION

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

ISSUE

Whether the bankruptcy court abused its discretion in awarding attorney's fees to Nawrocki under § 523(d).

STANDARD OF REVIEW

A bankruptcy court's award of attorney's fees under § 523(d) is reviewed for abuse of discretion. First Card v. Hunt (In re Hunt), 238 F.3d 1098, 1101 (9th Cir. 2001) (adopting the BAP's standard in First Card v. Carolan (In re Carolan), 204 B.R. 980, 984 (9th Cir. BAP 1996)). In applying an abuse of discretion test, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2)implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion. Id.

DISCUSSION

I.

Section 523(a)(2)(B) provides that:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by . . . (B) use of a statement in writing — (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive[.]

If a creditor prosecutes an action for an exception to discharge of a debt under § 523(a)(2), and that debt is then ordered discharged by the bankruptcy court, § 523(d) is implicated. That statute provides:

> (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

In order to recover attorney's fees under § 523(d) a debtor must prove that: (1) the creditor requested a determination of the dischargeability of the debt under § 523(a)(2); (2) the debt was a consumer debt; and (3) the debt was discharged. Am. Savings Bank v. Harvey (In re Harvey), 172 B.R. 314, 317 (9th Cir. BAP 1994) (citing In re Kullgren, 109 B.R. 949, 953 (Bankr. C.D. Cal. 1990)).

Each of the elements required for an award of attorney's fees has been satisfied in this appeal. Unquestionably, Kilbey's complaint initiating the adversary proceeding was a request for a

determination by the bankruptcy court excepting her claim against Nawrocki from discharge under § 523(a)(2). Moreover, as the bankruptcy court noted, it was not disputed that the alleged debt was for a household purpose – for unpaid rent for Nawrocki's residence. See § 101(8) ("The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose."). Finally, the bankruptcy court dismissed Kilbey's adversary proceeding and ordered that Nawrocki's debt to Kilbey was therefore subject to discharge in her bankruptcy case. Kilbey did not appeal that order, and the bankruptcy court's conclusions are final.

Once the three § 523(d) elements are satisfied, the burden shifts to the creditor to demonstrate its position was substantially justified. Stine v. Flynn (In re Stine), 254 B.R. 244, 249 (9th Cir. BAP 2000) ("Once the debtor establishes these elements, the burden shifts to the creditor to prove that its actions were substantially justified."); In re Harvey, 172 B.R. at 317 (same).[5] Citing favorably to the In re Harvey decision, our court of appeals has ruled, "The

[5] This Panel's decisions on this shifting burden are in accord with those of other BAPs and bankruptcy courts. See AT&T Universal Card Servs. Corp. v. Williams (In re Williams), 224 B.R. 523, 529 (2d Cir. BAP 1998) ("Under § 523(d), the debtor must prove that a creditor unsuccessfully sued for the discharge of a consumer debt. . . . Then, the burden shifts to the creditor to show that its position was 'substantially justified.'"); Crowe v. Moran (In re Moran), 413 B.R. 168, 190 (Bankr. D. Del. 2009); Swartz v. Strausbaugh (In re Strausbaugh), 376 B.R. 631, 636 (Bankr. S.D. Ohio 2007); Brattleboro Hous. Auth. v. Stoltz (In re Stoltz), 392 B.R. 87 (Bankr. D. Vt. 2001); Bank of N.Y. v. Thien Le (In re Thien Le), 222 B.R. 366, 369 (Bankr. W.D. Okla. 1998); Am. Express Travel Rel. Servs v. Baker (In re Baker), 206 B.R. 507, 509 (Bankr. N.D. Ill. 1997); FCC Nat'l Bank v. Dobbins, 141 B.R. 509, 511 (Bankr. W.D. Mo. 1992). Indeed, we are unable to locate any decisions expressing a different view.

creditor bears the [ultimate] burden of proving that its position is substantially justified." In re Hunt, 238 F.3d at 1103.

The requirement that there be "substantial justification" for a creditor's position under § 523(d) was modeled on the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). In re Hunt, 238 F.3d at 1102; S. REP. No. 98-65, at 9 (1983) (describing S.445, the forerunner of § 523(d), as "incorporating the standard for award of attorney's fees contained in the Equal Access to Justice Act"). In turn, the Supreme Court has interpreted the "substantially justified" standard in the EAJA as requiring that a claim have a "reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 558-59 (1988) (a formulation that the Supreme Court adopted from the Ninth Circuit's decision in Foster v. Tourtelotte, 704 F.2d 1109, 1112 (9th Cir. 1983)); accord S. REP. No. 98-65, at 59 (1983) (commenting on fee awards under proposed § 523(d), "To avoid a fee award, the creditor must show that its challenge had a reasonable basis both in law and in fact.").

II.

In this appeal, the bankruptcy court dismissed Kilbey's claim under Civil Rule 12(b)(6) for failure to state a claim upon which relief could be granted.[6] Because the court found that any

[6] The order dismissing the adversary proceeding states that the motion to dismiss was granted for reasons stated on the record, and does not provide any specific statutory authority for dismissal. As noted above, we do not have a transcript of the dismissal hearing. However, both the motion to dismiss with supporting memorandum and Kilbey's response memorandum discuss dismissal under Civil Rule 12(b)(6), and the parties' briefs in this appeal refer to the dismissal as under Civil Rule 12(b)(6). In its comments during the § 523(d) fee award hearing, the (continued...)

allegedly fraudulent representations made by Nawrocki to Kilbey were not in a writing, it concluded the debt was not excepted from discharge. Hr'g Tr. 10:18. Simply put, we understand this ruling to mean that the bankruptcy court concluded that there was no basis, reasonable or otherwise, in law or fact for Kilbey's position that Nawrocki's debt to Kilbey was excepted from discharge under § 523(a)(2)(B). We agree with the bankruptcy court's analysis.

The bankruptcy court applied hornbook law to the resolution of this dispute. The essential element for an exception to discharge under § 523(a)(2)(B), as opposed to claims under subsection (a)(2)(A),[7] is that the false representations made by the debtor to the creditor be in the form of a written statement concerning the debtor's financial condition. Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 68 (9th Cir. BAP 1998); accord Engler v. Van Steinburg, 744 F.2d 1060 (4th Cir. 1984); 4 COLLIER ON BANKRUPTCY ¶ 523.08[2][c] (Alan J. Resnick & Henry J. Sommer, eds., 16th ed., 2009) ("The requirement of a writing is a basic precondition to nondischargeability under section 523(a)(2)(B)."). None of the allegedly fraudulent representations made by Nawrocki upon which Kilbey allegedly relied to support her claim for fraud

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[6](...continued)
bankruptcy court referred to its reasons for dismissal, stating: "And from the beginning there was no such writing in this case. As a result there was no basis to pursue the claim." Hr'g Tr. 10: 12-13 (emphasis added). Therefore, we comfortably infer that the bankruptcy court's dismissal of Kilbey's complaint was under Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

[7] As discussed in footnote 4, Kilbey has not raised any issues relating to § 523(a)(2)(A) in this appeal.

are found in the text of the Agreement. Instead, Kilbey argues that Nawrocki's allegedly false, misleading oral statements made to her may be considered when interpreting the Agreement between the parties, and that implied terms are as much a part of a contract as written ones. Kilbey cites to two Arizona Supreme Court decisions to support this argument. Neither helps Kilbey.

In Smith v. Melson, 659 P.2d 1264 (Ariz. 1983), the Arizona Supreme Court interpreted a contract for the purchase of a ranch. One apparently ambiguous phrase in the contract was at the center of the dispute: "the Exchange." The contest concerned whether this phrase referred to any exchange or, instead, to a specific exchange described in an application pending before the State Land Department. The Supreme Court considered the history of the transaction and concluded that the only "exchange" that the parties contemplated or discussed was a particular exchange sought under application no. 61-14. Id. at 1266.

Gates v. Ariz. Brewing Co., 95 P.2d 49 (Ariz. 1939), involved a dispute over the meaning of a labor contract between a union and an employer. One of the issues was whether there were sufficient mutual promises, express or implied, to support the contract. The Arizona court carefully considered all the terms of the contract and concluded that there were implied terms. In its conclusion, the court stated, "implied terms are as much a part of a contract as written ones." Id. at 53. Seizing on this point, Kilbey argues that "the Debtor's fraudulent statements became implied terms of the parties' written Agreement by operation of law, and the trial court should have considered the Debtor's verbal statements about her financial status as 'part and parcel' of the

parties' written Agreement."[8]

Kilbey's argument fails to reflect the full opinion of the court. Although Gates does conclude with the statement, "implied terms are as much a part of a contract as written ones," the court completed that sentence with "and the implications which we have drawn from the contract are legitimate and enough to sustain it on the ground of mutuality." Id. In short, the Arizona Supreme Court does allow implied terms to be read into a contract, but only where the terms are used to explain other parts of the contract.

While the Arizona courts may, in some instances, consult the parties' oral negotiations to explain the meaning of a contract's ambiguous terms, neither case cited by Kilbey supports the principle that statements made before a contract is formed should be treated by a court as implied terms in the contract, where they are unrelated to the other provisions of the contract. In other words, here Kilbey does not assert that there is any part of the Agreement, other than her "implied terms," that she relied on in leasing her property to Nawrocki. Therefore, there are no parts of the contract which the oral representations might explain. To the contrary, as seemingly recognized in her brief, Kilbey relied on the oral representations, not any written statement:

> Prior to signing the Agreement, the Debtor represented to Ms. Kilbey that she came from a wealthy family, she was due to have a sizeable disbursement from a family trust fund, in January 2007, and was planning to use the disbursement as her down payment toward purchase of the Property, once she exercised her option to purchase the Property. The Debtor also represented that she had a Master's Degree in Business and was the top sales person

[8] Kilbey's Open. Br. at 7.

> for her current and past company. Based on these representations, Ms. Kilbey entered into the Agreement with the Debtor. . . . Ms. Kilbey later discovered that the Debtor's representations made prior to entering into the Agreement were false. . . . Ms. Kilbey believed these statements to be true, and was justified in relying on these statements.

Kilbey Open. Br. at 4 (emphasis added). In short, Kilbey admits that she entered into the Agreement based on the oral representations allegedly made to her before Kilbey signed the written Agreement. Kilbey never argues that she relied on the written Agreement.

In distinguishing §§ 523(a)(2)(A) and (a)(2)(B), Justice Souter has observed:

> The sum of all this history is two close statutory companions barring discharge. One applies expressly when the debt follows a transfer of value or extension of credit induced by falsity or fraud (not going to financial condition), the other when the debt follows a transfer or extension induced by a materially false and intentionally deceptive written statement of financial condition upon which the creditor reasonably relied.

Field v. Mans, 516 U.S. 59, 63 (1995). The Tenth Circuit later cited this distinction in its decision in Bellco First Fed. Credit Union v. Kaspar (In re Kaspar), 125 F.3d 1358 (10th Cir. 1997). In Bellco, a debtor applied for a credit card over the phone. The debtor was asked questions concerning her financial condition and the responses were recorded electronically. The debtor was not aware nor informed that her answers were recorded. The credit card company later alleged that some answers were fraudulent and that the recorded answers, which were later printed, were a statement in writing sufficient to satisfy §§ 523(a)(2)(B) and 523 (d).

The Tenth Circuit rejected this argument, holding that oral statements, even recorded and reduced to writing, did not satisfy the requirements of § 523(a)(2)(B). The debtors never wrote, signed or adopted the written statement. Further, the Tenth Circuit reasoned that, based on Justice Souter's analysis in Field v. Mans, Congress intended that reliance should be based on a written document, not oral statements later converted into a written document:

> Justice Souter pointed out § 523(a)(2)(B) devolves from an amendment of the Bankruptcy Act of 1898 which was adopted in its original form in 1903. Except for some narrowing of its scope, the section has existed for over ninety-four years[9] without change. . . . It takes no imagination whatever, then, to assume when Congress adopted the language, "statement in writing" it meant a statement in a written document.

In re Kaspar, 125 F.3d at 1441.

Finally, in addition to her arguments that there was a writing that satisfied § 523(a)(2)(B), Kilbey stresses that she filed the adversary proceeding in good faith and that her complaint was not frivolous. For authority, Kilbey cites to the Senate Report on the Bankruptcy Reform Act of 1978: "The debtor may be awarded costs and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the court finds that the proceeding was frivolous or not brought by its creditor in good faith." S. REP. NO. 989, 95th Cong., 1st Sess. 80, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5866 (emphasis added in Kilbey's brief). Unfortunately for Kilbey's position, this statement was not a

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[9] As of 2010, the section has existed in roughly its current format for 103 years.

Senate commentary on the statute, but the actual proposed language in the Senate version of the bill. However, the final version of § 523(d) changed the language of the Senate version "may be awarded" to "the court shall grant judgment" and completely dropped the "frivolous" and "good faith" standards. As a result, courts have subsequently ruled that the "frivolous" and "good faith" standards were eliminated from the final version of the Bankruptcy Code and are thus not relevant when considering an exception to the award of attorney's fees under § 523(d). In re Carmen, 723 F.2d 16, 17-18 (6th Cir. 1983).[10] Indeed, the Ninth Circuit has instructed that § 523(d) attorney's fees may be awarded against a creditor even if the creditor pursued the adversary proceeding in good faith. In re Hunt, 238 F.3d at 1104 n.6 ("Because fees are to be awarded under § 523(d) whenever the creditor's position is not substantially justified (subject to the special circumstances exception), § 523(d) certainly does aim to chill some actions that are brought in good faith, namely, those that do not have a reasonable basis in law and in fact.").

We conclude that the bankruptcy court applied the correct rule of law in determining that Kilbey was not substantially justified in the position alleged in her adversary complaint.

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[10] The Panel has previously noted the Sixth Circuit's ruling in In re Carmen. The Panel recognized that the 1984 amendments to the Bankruptcy Code changed the standard for exception to an award of fees under § 523(d) from "such a granting of judgment would be clearly inequitable," the standard applicable at the time of the In re Carmen decision, to the substantial justification/special circumstances of the current Code. Nevertheless, the Panel observed, "the 1984 amendment did not reintroduce the frivolous/lack of good faith standard omitted from the Senate version of § 523(d)." In re Harvey, 172 B.R. at 318.

III.

In addition to a showing of "substantial justification" for its action under § 523(d), a creditor may also escape liability for attorney's fees if special circumstances would make such an award unjust. The bankruptcy court again correctly identified the rule of law applicable to determining if special circumstances are present: the application of "traditional equitable principles." In re Hunt, 238 F.3d at 1104 (citing In re Hingson, 954 F.2d 428, 429 (7th Cir. 1992).[11]

Kilbey argues that special circumstances exist in this case because taxing her with an award of attorney's fees would merely add insult to injury, and be unjust, given the losses she otherwise suffered in the transaction with Nawrocki. The bankruptcy court correctly ruled that the circumstances Kilbey described in this case were not "special" in this context. Indeed, we agree with the bankruptcy court that most creditors that prosecute unwarranted challenges to the discharge of consumer debts do so to avoid losses inherent in the debtor's failure or inability to repay a debt. Congress in enacting § 523(d) intended

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[11] The courts of appeals appear to use the term "traditional equitable principles" to refer to circumstances suggesting unfair dealing or an abuse of the legal process. In re Hunt suggests that "special circumstances" would exist if the debtor was found somehow to have procured or tricked the creditor into a groundless claim of fraud. 238 F.3d at 1104. In re Hingson observes that bringing a charge of fraud against a former son-in-law to express displeasure over a divorce would be an abuse of process. 954 F.2d at 429. Two other circuit cases cited by Hingson suggest the same. Oquachuba v. INS, 706 F.2d 93, 98-99 (2d Cir. 1983) portrayed a vexatious litigant who had failed in several cases against a party and finally won on a technicality. And in Taylor v. United States,815 F.2d 249 (3d Cir. 1987), the plaintiff was implicated in the same fraudulent conduct he challenged. We find nothing in Nawrocki's conduct that could be considered such unfair dealing or an abuse of process.

to deter such challenges. See S. REP. NO. 98-65, at 9-10 (1983).

The bankruptcy court properly concluded that accepting Kilbey's definition of special circumstances would effectively emasculate § 523(d).

IV.

Finally, the bankruptcy court ruled that it was not required to make a finding concerning substantial justification or special circumstances at the time of entering the order granting the motion to dismiss. The bankruptcy court's conclusion is correct because there is nothing in the statute that requires the requisite findings to be made at that time, and its ruling is also consistent with Ninth Circuit case law.

In In re Harvey, the bankruptcy court dismissed the creditor's claim that a debt was nondischargeable under Rule 7052 at trial at the conclusion of the creditor's case because the creditor failed to establish a prima facie claim for an exception to discharge under § 523(a)(2). The bankruptcy court did not consider the substantial justification question until the debtor applied for an award of attorney's fees under § 523(d). The Panel affirmed the decision of the bankruptcy court. 172 B.R. at 320.

Our court of appeals also has observed that consideration of the issues relating to attorney's fees in § 523(d) should be deferred until a fee application is filed. In re Hunt, 238 F.3d at 1102 ("This approach makes sense – it conserves judicial resources by freeing a debtor from any obligation to submit evidence of attorney's fees until after the creditor's claim against the debtor has failed[.]").

CONCLUSION

Once Nawrocki established the prima facie right to attorney's fees under § 523(d), the burden shifted to Kilbey to show her claim was substantially justified or that special circumstances were present. Kilbey did not meet that burden. Therefore, we conclude that the bankruptcy court identified the correct legal rules to resolve this dispute, and that its application of the facts was neither illogical, implausible nor without support in inferences that may be drawn from the facts in the record. Simply put, the bankruptcy court did not abuse its discretion in awarding attorney's fees under § 523(d) to Nawrocki, and we AFFIRM its order.