NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-10-1159-MoDH
CHRISTINE M. EMMERSON,	Bk. No. 09-36284
	Adv. No. 09-02626
Debtor.	
CHRISTINE M. EMMERSON,	
Appellant,	
v.	**M E M O R A N D U M**[1]
TONY D. REGIS,	
Appellee.	

Argued on November 18, 2010,
at Sacramento, California

Submission Vacated on January 6, 2011, and
Resubmitted February 4, 2011

Filed - March 25, 2011

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

Hon. Christopher M. Klein, Bankruptcy Judge, Presiding.

Appearances: Mark J. Hannon, Esq., argued for Appellant Christine M. Emmerson. Herman Franck, Esq., argued for Appellee Tony D. Regis.

Before: MONTALI,[2] DUNN and HOLLOWELL, Bankruptcy Judges.

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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. Dennis Montali, Bankruptcy Judge for the Northern District of California, sitting by designation.

Prior to filing her chapter 7[3] case, the appellant debtor (represented by counsel who withdrew three weeks prior to trial) filed a state court partition action against the appellee creditor (her former boyfriend and father of her child). The creditor filed several cross-claims against the debtor, including one for abduction/enticement of the child. Following a trial at which the debtor did not appear, the state court entered a judgment in favor of the creditor, awarding him general damages in the amount of $400,000 for "the loss of his relationship" with the child and punitive damages in the amount of $50,000. Before entry of this state court judgment (and following years of litigation and court-ordered counseling), the family court had awarded legal custody of the child to debtor and denied visitation rights to the creditor (unless the child initiated and sought such visitation).

The debtor thereafter filed her bankruptcy case and the creditor appellee filed a nondischargeability complaint against her. The bankruptcy court granted summary judgment in favor of creditor, excepting from discharge the $450,000 state court judgment. The debtor appealed. We VACATE and REMAND.

I. FACTS

Appellant Christine M. Emmerson (previously known as Christine Lara) ("Debtor") and appellee Tony D. Regis ("Plaintiff") are the parents of a minor daughter, Breanna.

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[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, as enacted and promulgated after October 17, 2005 (the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")).

Their relationship ended acrimoniously, prompting (among other actions) a multi-year custody battle in family court. While family court custody litigation was pending, Debtor commenced an action in state civil court for partition of a residence she and Plaintiff jointly owned (the "Partition Action"). Plaintiff filed an answer asserting an "affirmative defense" of offset for, "abduction and enticement [of Breanna]"[4] and filed a cross-complaint setting forth a child abduction/child enticement cause of action under California Civil Code section 49 ("CC § 49").[5] Plaintiff requested punitive damages under California Civil Code section 3294 ("CC § 3294"), alleging that Debtor had acted with malice or oppression.

Before and while the Partition Action was pending, numerous orders had been entered in state family court granting interim custody to Debtor, mandating family counseling, appointing counsel to represent Breanna's interests, and appointing a family counselor. In August 2008 -- before the trial date in the Partition Action -- the family court awarded full legal custody of Breanna to Debtor, with no visitation rights granted to Plaintiff unless initiated and sought by Breanna.

The state civil court scheduled a jury trial in the

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[4] Plaintiff also asserted other "affirmative defenses" for offsets "to be deducted from [Debtor's] interest in the house," including damages for malicious prosecution of a "criminal action for molesting the parties' daughter."

[5] Plaintiff alleged that Debtor made negative remarks about him to Breanna, that Debtor (with Breanna) moved out of Sacramento County to San Joaquin County "in violation of a court order" and that Debtor refused to allow any kind of visits or contact by Plaintiff with Breanna. We could not locate in the record any order that required Debtor to stay in Sacramento County.

Partition Action for October 6, 2008. Debtor did not appear despite several notices of the trial date, including one contained in an order relieving her counsel from representation in the action approximately three weeks prior to the trial date. In light of Debtor's non-appearance, the state court converted the trial to a non-jury matter. To the extent Plaintiff's testimony and evidence was uncontroverted, the trial was essentially a default prove-up hearing.

On February 5, 2009, the state civil court entered an Order Following Trial in the partition action.[6] Of significance in this appeal is the award of damages in favor of Plaintiff on his cross-complaint alleging "abduction and enticement" of Breanna:

> As to [Plaintiff's] second cause of action on this cross-complainant [sic] pursuant to Civil Code section 49 for the abduction and enticement by [Debtor] of the party's minor child . . . [t]he court awards the following amount of damages in favor of [Plaintiff] and against [Debtor]:
>
> A. General damages for the loss of his relationship with Breanna for a period of eight years and extreme and severe emotional distress suffered by that loss [$50,000 per year]: $400,000[7]
>
> B. Punitive Damages: $ 50,000
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> Total Damages: $450,000

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[6] The court valued the house at $190,000, and ordered that Plaintiff was entitled to an offset of $250,000 in damages for malicious prosecution of molestation charges. Because these damages exceeded the value of the house, the court awarded full and sole ownership of the house to Plaintiff. This portion of the state court action is not at issue in the underlying nondischargeability action.

[7] Plaintiff alleged in his cross-complaint that starting in 2004, Debtor "abducted and enticed" Breanna from him. The trial occurred in 2008, and the order was entered in 2009. Thus, when the order was entered, Plaintiff had allegedly been denied access for only five years, although the state court awarded him $50,000 a year (total of eight years) for the time that he suffered a "loss of relationship" with Breanna.

The state court also indicated in its Order Following Trial that it would award Plaintiff $23,550 on his cross-claim for breach of contract, but the judgment appears to award Plaintiff a "net credit" in that amount against the value of the house, instead of actual damages.

After Debtor filed her chapter 7 case, Plaintiff filed a timely complaint to except the entire state court judgment amount of $473,500 (including the breach of contract "net credit" of $23,550) from discharge. Plaintiff thereafter filed a motion for summary judgment invoking issue preclusion and requesting the bankruptcy court "to deem the judgment debt in the amount of $473,225 [sic] to be non-dischargeable pursuant to [section] 523(a)(6)."[8]

Debtor opposed the motion for summary judgment, contending that the state court did not make a finding regarding her subjective intent with respect to the claim abduction cause of action. In her opposition, Debtor referred to the state court judgment as a "default" judgment, even though Debtor commenced the Partition Action in 2006 and was represented by counsel from the commencement of that action through September 2008.

In support of her opposition, Debtor filed a certified copy of the Findings and Order After Hearing wherein the family court awarded her sole custody of Breanna and denied visitation to Plaintiff. That family court order predated the trial and

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[8] At the hearing on the motion for summary judgment, the bankruptcy court indicated a willingness to except the entire judgment amount from discharge, stating that the amount exceeding $450,000 would be nondischargeable under section 523(a)(15). Debtor's counsel noted that the state court had not awarded damages in excess of $450,000, and Plaintiff's counsel did not disagree. Transcript of Hearing on April 27, 2010 at pages 13-14.

judgment in the Partition Action. Debtor also filed certified copies of other family court orders showing that the custody battle had been ongoing for years. See exhibit to Declaration of Hark H. Hannon filed on March 29, 2010; see also Declaration of Debtor filed on March 29, 2010.

The bankruptcy court held a hearing on Plaintiff's motion for summary judgment on April 27, 2010,[9] and concluded that the doctrine of issue preclusion applies in this case. In reciting the history of the Partition Action and the resulting state court findings and judgment, the bankruptcy court did not mention the existence of the pre-existing (and seemingly contradictory) family court custody order. The transcript does not reflect whether the bankruptcy court took that order into account when deciding whether to apply the doctrine of issue preclusion, particularly in deciding whether imposition of the doctrine would be "fair and consistent with sound public policy" and California law. Khaligh v. Hadegh (In re Khaligh), 338 B.R. 817, 824-25 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007).

The bankruptcy court entered a judgment on April 29, 2010, declaring that the amount of $450,000 awarded by the state court to Plaintiff was nondischargeable. Debtor filed a timely notice of appeal on May 5, 2010.

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[9] Both the judgment and the court's civil minutes indicated that a hearing occurred, but Debtor did not provide a copy of the transcript. On January 6, 2011, we issued an order vacating submission of the appeal and requiring Debtor to file a copy of the transcript of the hearing on the motion for summary judgment. Debtor did not file the transcript by the deadline, so we issued an order deeming the matter submitted as of February 1, 2011. Debtor thereafter sought an extension of time to file the transcript, which we granted. Debtor filed the transcript on February 4, 2011.

II. ISSUES

Did the bankruptcy court err in granting summary judgment excepting from discharge the $450,000 in damages awarded by the state court?

III. 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. As noted previously, Plaintiff's adversary complaint requested that the amount of $473,550 be excepted from discharge, but the judgment excepts only the state court judgment amount of $450,000. Based on the dialogue between counsel and the court at the hearing, we will treat the judgment as final, as it "clearly evidences the judge's intention that it be the court's final act in the matter." Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007).

IV. STANDARDS OF REVIEW

We review de novo the bankruptcy court's grant of summary judgment. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1221 (9th Cir. 2010); Cutter v. Seror (In re Cutter), 398 B.R. 6, 16 (9th Cir. BAP 2008). We review de novo a bankruptcy court's determination that issue preclusion is available. Lopez v. Emerg. Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007); Khaligh, 338 B.R. at 823.

Once we determine that issue preclusion is available, we review the decision to apply it for abuse of discretion.[10]

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[10] As noted later, we follow California law in determining the preclusive effect of the state court judgment. California law requires an inquiry into whether imposition of issue preclusion would be fair and consistent with sound public policy. California appellate courts review such a fairness inquiry de

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Lopez, 367 B.R. at 103; Khaligh, 338 B.R. at 823; Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994) ("If we determine that collateral estoppel is available, we review for abuse of discretion the district court's decision to accord preclusion to the agency's decision."); Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988).

> 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). Only if the bankruptcy court did not identify the correct legal rule, or if its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from facts in the record, is it appropriate to conclude that the bankruptcy court abused its discretion.

People's Capital and Leasing Corp. v. Big3D, Inc. (In re Big 3D, Inc.), 438 B.R. 214, 219-220 (9th Cir. BAP 2010).

V. DISCUSSION

A. Governing Law

Issue preclusion[11] applies in nondischargeability

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[10](...continued)
novo. Smith v. Exxon Mobil Oil Corp., 153 Cal. App. 4th 1407, 1415, 64 Cal. Rptr. 3d 69 (2007) (rejecting appellee's request to apply abuse of discretion standard in reviewing a trial court's determination of "fairness" of applying issue preclusion); see also Johnson v. GlaxoSmithKline, Inc., 166 Cal. App. 4th 1497, 1507, 83 Cal. Rptr. 3d 607 (2008) (trial court's application of issue preclusion is a question of law subject to de novo review).

[11] Although the parties refer to the collateral estoppel or res judicata effect of the state court's rulings, the Supreme Court now generally uses the term "issue preclusion" instead of "collateral estoppel." Taylor v. Sturgell, 553 U.S. 880, 892 n.5 (2008) ("issue preclusion encompasses the doctrines once known as (continued...)

proceedings. Grogan v. Garner, 498 U.S. 279, 284-85 (1991). To determine the issue-preclusive effect of a California state court's judgment, we apply California preclusion law. 28 U.S.C. § 1738 (the Full Faith and Credit Statute); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). When state preclusion law controls, the discretion to apply the doctrine is exercised in accordance with state law. Khaligh, 338 B.R. at 823.

Under California law, the party asserting issue preclusion has the burden of establishing the following "threshold" requirements:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Lopez, 367 B.R. at 104.

Even if these five threshold requirements are met, application of issue preclusion requires a "mandatory 'additional' inquiry into whether imposition of issue preclusion would be fair and consistent with sound public policy." Khaligh, 338 B.R. at 824-25. "Collateral estoppel [issue preclusion] is not an inflexible, universally applicable principle; policy

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[11](...continued)
'collateral estoppel' and 'direct estoppel'"), citing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); see also Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002).

considerations may limit its use where the limitation on relitigation underpinnings of the doctrine are outweighed by other factors." Jackson v. City of Sacramento, 117 Cal. App. 3d 596, 603, 172 Cal. Rptr. 826 (1981). As stated by the California Supreme Court in Lucido v. Superior Ct., 51 Cal. 3d 335, 341-43, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225-27 (1990):

> Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. . . . Accordingly, the public policies underlying collateral estoppel - preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation - strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.

Lucido v. Superior Ct., 51 Cal. 3d at 341-43.[12]

California courts "have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be 'unfair' to the defendant as a matter of law." Roos v. Red, 130 Cal. App. 4th 870, 30 Cal. Rptr. 3d 446, 453 (2005). Such a circumstance may occur when "the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter." Id.

[12] Our panel has also recognized the need for flexibility in applying issue preclusion, acknowledging that in California, the principle is "not applied automatically or rigidly, and courts are permitted to decline to give issue preclusive effect to prior judgments in deference of countervailing considerations of fairness." Lopez, 367 B.R. at 108. "Thus, policy considerations may limit use of issue preclusion in any particular instance" and "the proponent of preclusion bears the persuasive burden and the risk of nonpersuasion." Id.

B. Existence of Five Threshold Elements

Here, three of the elements of issue preclusion are undisputably satisfied: (1) the parties in the Partition Action and in the nondischargeability action are the same, (2) the state court judgment is final and on the merits, and (3) the issues decided by the state court were necessary for entry of its judgment.

Debtor, citing non-California cases, contends that the state court "default" judgment was not "actually litigated" and thus has no preclusive effect. This argument is not only factually incorrect (the judgment was not a default judgment and was entered in an action commenced by Debtor), but also legally incorrect. California law accords preclusive effect to default judgments. Green v. Kennedy (In re Green), 198 B.R. 564, 566 (9th Cir. BAP 1996) ("California law also provides that default judgments are entitled to collateral estoppel effect. . . . Thus, the bankruptcy court properly concluded that a California default judgment is entitled to collateral estoppel effect."). Therefore, this threshold element (requiring the matter to be "actually litigated") is present here.

The more difficult question is whether the issues decided by the state court are "identical" to those raised in the underlying adversary proceeding, viz., whether Debtor inflicted a "willful and malicious injury" on Plaintiff. Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The "willful" requirement is separate and distinct from the "malicious" requirement. See Barboza v. New

Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). Willfulness requires a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Ditto v. McCurdy, 510 F.3d 1070 (9th Cir. 2007). "A 'malicious' injury involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (quoting Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001)).

In this case, the state court made no specific finding that Debtor's purported interference with Plaintiff's ability to maintain contact with Breanna was a "deliberate or intentional injury" and was done without just cause or excuse.[13] Instead, Plaintiff contends that by awarding punitive damages on his claim for "abduction or enticement" of a child under CC § 49,[14] the

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[13] The state court made a specific finding of malice only as to the malicious prosecution claim, which was not a subject of the nondischargeability action: "[Debtor's] institution of the criminal law proceedings was done with malice, in that her statements to police investigators were made by her knowing them to be false, were made in bad faith and were made with the actual intent was [sic] to punish [Plaintiff] for issues having to do with the fallout in their relationship." The state court made no such finding with respect to the child abduction/enticement claim; rather, the state court simply awarded punitive damages in the amount of $50,000. Given that the state court made specific findings as to intent with respect to the malicious prosecution claims, it could have fashioned similar findings on the child abduction/enticement claim. It did not.

[14] Section 49 of the California Civil Code states that the rights of personal relations forbid:

> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;

(continued...)

state court necessarily decided that Debtor's conduct was willful and malicious.

A finding of liability under CC § 49 does not require a showing of malice; motive is immaterial. The statute is designed to protect a parent's right to custody and control of his or her minor child. Thus, it is of no consequence to the claim that the person who wrongfully "snatched" or withheld the child might have been motivated by "kindness or affection." Surina, 168 Cal. App. at 543. In contrast, a finding that a debtor acted with "just cause or excuse" would prevent a court from determining that the debtor's conduct was malicious for the purposes of section 523(a)(6). Su, 290 F.3d at 1146-47.

Therefore, an award of general damages under CC § 49 would not in and of itself be preclusive in a section 523(a)(6) action, as the elements for recovery are not identical. That said, punitive damages can be awarded on a CC § 49 claim when the defendant's conduct "was actuated by malice." Surina, 168 Cal. App. 3d at 543. Subsection (a) of CC § 3294 of the California

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[14](...continued)

(b) The seduction of a person under the age of legal consent;

(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.

Cal. Civ. Code § 49.

This section permits parents to recover damages from a person "who by force abducts a child from its home or who, with knowledge that the parents have not consented, induces the child to leave home, or who, with knowledge that the child is away from home against the will of the parents, imprisons the child or induces it not to return home." Surina v. Lucey, 168 Cal. App. 3d 539, 543, 214 Cal. Rptr. 509 (1985).

Civil Code permits punitive (exemplary) damages in actions other than those for breach of contract "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Cal. Civ. Code § 3294(a). Subsection (c) of CC § 3294 defines "malice" and "oppression;"

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Cal. Civ. Code § 3294(c).

Plaintiff sought punitive damages under CC § 3294, alleging that Debtor had acted maliciously or oppressively in abducting or enticing Breanna from him. We have held that punitive damage awards under CC § 3294 "can only properly be made in response to wrongful acts that would, by definition, also violate 11 U.S.C. § 523(a)(6)." Krishnamurthy v. Nimmagadda (In re Krishnamurthy), 209 B.R. 714, 721-22 (9th Cir. BAP 1997), aff'd, 125 F.3d 858 (9th Cir. 1997) (quoting Newsom v. Moore (In re Moore), 186 B.R. 962, 973 (Bankr. N.D. Cal. 1995)). The Ninth Circuit has also held that an award of punitive damages for "oppressive" conduct is sufficient to show that an injury inflicted is "malicious"

under section 523(a)(6). Jercich, 238 F.3d at 1209. Aubrey v. Thomas (In re Thomas), 111 B.R. 268, 275 (9th Cir. BAP 1990) (California's "statutory definition of oppression comports with the construction of 'willful and malicious injury' applied by the Ninth Circuit") (applies the overruled case of Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440, 1443 (9th Cir. 1986)).

We have therefore concluded that an award of punitive damages, even absent specific findings of malice or oppression or fraud, is entitled to preclusive effect in a nondischargeability action. Rousssos v. Michaelides (In re Roussos), 251 B.R. 86, 94 (9th Cir. BAP 2000), aff'd, 33 Fed. Appx. 365 (9th Cir. 2002) ("We have also affirmed a bankruptcy court's decision to apply collateral estoppel to an award for punitive damages, in a § 523(a)(6) adversary proceeding, even though the state court did not make specific findings on which to predicate the award."), citing Molina v. Seror (In re Molina), 228 B.R. 248, 250-51 (9th Cir. BAP 1998). See also Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003) (observing in a section 523(a)(4) action that state court's punitive damages could have only been based on claims of fraudulent conduct and thus applying collateral estoppel to state court judgment).

In light of these holdings, we agree with Plaintiff and the bankruptcy court that this threshold element of issue preclusion exists here: the issue decided by the state court was identical to the one presented in the nondischargeability action. Consequently, we conclude that all five threshold elements have been satisfied.

C. Fairness and Public Policy Inquiry

As we observed in Khaligh, however, the trial court's decision to apply collateral estoppel does not end with an analysis of the five threshold elements. Rather, the court must conduct a "mandatory 'additional' inquiry into whether imposition of issue preclusion would be fair and consistent with sound public policy." Khaligh, 338 B.R. at 824. See also Roos, 30 Cal. Rptr. 3d at 458 ("Even where minimum requirements for collateral estoppel are established, the doctrine will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.'").

The underlying transcript and record do not reflect that the bankruptcy court conducted such a fairness/public policy inquiry. In particular, the court did not mention whether it had taken into account the prior judgment of the family court awarding full custody of Breanna to Plaintiff and denying Debtor visitation rights. As noted in Roos, the existence of such an inconsistent prior judgment may render application of the judgment "unfair" as a matter of law. Id. at 458.

Given that Debtor was awarded sole custody of Breanna after years of a contentious custody battle in family court, application of issue preclusion could conceivably result in injustice and not be in the public interest. In the Partition Action, Plaintiff's claim for emotional distress damages were based on allegations that Debtor had blocked his access to Breanna and had turned Breanna against him with lies. California courts have held that such claims for emotional distress are against public policy; applying preclusive effect to a judgment

awarding damages on such claims may likewise be against public policy.

In a case remarkably similar to this one, the California Court of Appeals held that a parent's interference with another parent's visitation (as opposed to outright child abduction and concealment) must be redressed in the family law court and not by the state civil court. An emotional damages suit is not actionable under such circumstances. In re Marriage of Segel, 179 Cal. App. 3d 602, 608-09, 224 Cal. Rptr. 591 (1986). Allowing a cause of action for such damages as an alternative to family law court remedies would undermine the purpose of the family law statutes.[15] Id. As noted in Neal v. Superior Court, 90 Cal. App. 4th 22, 25, 108 Cal. Rptr. 2d 262 (2001), California courts disfavor "civil actions which are really nothing more than reruns of a family law case."

> [F]amily law cases should not be allowed to spill over into civil law, regardless of whether the family law matter may be characterized as an action for fraud . . ., malicious prosecution . . ., or securities law violations. . . . Almost all events in family law litigation can be reframed as civil law actions if a litigant wants to be creative with various causes of action. It is therefore incumbent on courts to examine the substance of claims, not just their nominal headings."

Id.

The record is devoid of any indication that the bankruptcy court conducted the mandatory fairness/public policy inquiry.

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[15] Similarly, the California Court of Appeals has held that malicious prosecution actions (even those arising from false accusations of child or sexual abuse) is not available with respect to family law matters. Begier v. Strom, 46 Cal. App. 4th 877, 887-88, 54 Cal. Rptr. 2d 158 (1996).

We therefore VACATE and REMAND so that the bankruptcy court can conduct such an inquiry, particularly in light of a family court order that is seemingly inconsistent with the later judgment to which Plaintiff seeks to apply issue preclusion.

VI. CONCLUSION

For the foregoing reasons, we VACATE and REMAND.