

MAR 25 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. EC-10-1159-MoDH  
 )  
 CHRISTINE M. EMMERSON, ) Bk. No. 09-36284  
 )  
 ) Adv. No. 09-02626  
 Debtor. )  
 )  
 )  
 CHRISTINE M. EMMERSON, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM**<sup>1</sup>  
 )  
 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,<sup>2</sup> DUNN and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Dennis Montali, Bankruptcy Judge for the Northern District of California, sitting by designation.

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

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

## 21 I. FACTS

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

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25  
26 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 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")).

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

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

21 The state civil court scheduled a jury trial in the  
22

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

27 <sup>5</sup> Plaintiff alleged that Debtor made negative remarks about  
28 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.

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

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

13 As to [Plaintiff's] second cause of action on this  
14 cross-complainant [sic] pursuant to Civil Code section  
15 49 for the abduction and enticement by [Debtor] of the  
16 party's minor child . . . [t]he court awards the  
17 following amount of damages in favor of [Plaintiff] and  
18 against [Debtor]:

17	A. General damages for the loss of his 18 relationship with Breanna for a period 19 of eight years and extreme and severe 20 emotional distress suffered by that loss 21 [\$50,000 per year]:	\$400,000 <sup>[7]</sup>
22	B. Punitive Damages:	\$ 50,000
23	Total Damages:	\$450,000

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22 <sup>6</sup> The court valued the house at \$190,000, and ordered that  
23 Plaintiff was entitled to an offset of \$250,000 in damages for  
24 malicious prosecution of molestation charges. Because these  
25 damages exceeded the value of the house, the court awarded full  
26 and sole ownership of the house to Plaintiff. This portion of  
27 the state court action is not at issue in the underlying  
28 nondischargeability action.

26 <sup>7</sup> Plaintiff alleged in his cross-complaint that starting in  
27 2004, Debtor "abducted and enticed" Breanna from him. The trial  
28 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.

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

6 After Debtor filed her chapter 7 case, Plaintiff filed a  
7 timely complaint to except the entire state court judgment amount  
8 of \$473,500 (including the breach of contract "net credit" of  
9 \$23,550) from discharge. Plaintiff thereafter filed a motion for  
10 summary judgment invoking issue preclusion and requesting the  
11 bankruptcy court "to deem the judgment debt in the amount of  
12 \$473,225 [sic] to be non-dischargeable pursuant to [section]  
13 523(a) (6) ."<sup>8</sup>

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

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

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25  
26 <sup>8</sup> At the hearing on the motion for summary judgment, the  
27 bankruptcy court indicated a willingness to except the entire  
28 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.

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

6 The bankruptcy court held a hearing on Plaintiff's motion  
7 for summary judgment on April 27, 2010,<sup>9</sup> and concluded that the  
8 doctrine of issue preclusion applies in this case. In reciting  
9 the history of the Partition Action and the resulting state court  
10 findings and judgment, the bankruptcy court did not mention the  
11 existence of the pre-existing (and seemingly contradictory)  
12 family court custody order. The transcript does not reflect  
13 whether the bankruptcy court took that order into account when  
14 deciding whether to apply the doctrine of issue preclusion,  
15 particularly in deciding whether imposition of the doctrine would  
16 be "fair and consistent with sound public policy" and California  
17 law. Khaligh v. Hadeqh (In re Khaligh), 338 B.R. 817, 824-25  
18 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007).

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

23  
24  
25 <sup>9</sup> Both the judgment and the court's civil minutes indicated  
26 that a hearing occurred, but Debtor did not provide a copy of the  
27 transcript. On January 6, 2011, we issued an order vacating  
28 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.

1 **II. ISSUES**

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

5 **III. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.  
7 § 157(b)(2)(I) and § 1334. We have jurisdiction under 28 U.S.C.  
8 § 158. As noted previously, Plaintiff's adversary complaint  
9 requested that the amount of \$473,550 be excepted from discharge,  
10 but the judgment excepts only the state court judgment amount of  
11 \$450,000. Based on the dialogue between counsel and the court at  
12 the hearing, we will treat the judgment as final, as it "clearly  
13 evidences the judge's intention that it be the court's final act  
14 in the matter." Brown v. Wilshire Credit Corp. (In re Brown),  
15 484 F.3d 1116, 1120 (9th Cir. 2007).

16 **IV. STANDARDS OF REVIEW**

17 We review de novo the bankruptcy court's grant of summary  
18 judgment. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1221  
19 (9th Cir. 2010); Cutter v. Seror (In re Cutter), 398 B.R. 6, 16  
20 (9th Cir. BAP 2008). We review de novo a bankruptcy court's  
21 determination that issue preclusion is available. Lopez v.  
22 Emerg. Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103  
23 (9th Cir. BAP 2007); Khaligh, 338 B.R. at 823.

24 Once we determine that issue preclusion is available, we  
25 review the decision to apply it for abuse of discretion.<sup>10</sup>

26 \_\_\_\_\_  
27 <sup>10</sup> As noted later, we follow California law in determining  
28 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  
(continued...)

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

7 In applying an abuse of discretion test, we first  
8 "determine de novo whether the [bankruptcy] court  
9 identified the correct legal rule to apply to the  
10 relief requested." United States v. Hinkson, 585 F.3d  
11 1247, 1262 (9th Cir. 2009). If the bankruptcy court  
12 identified the correct legal rule, we then determine  
13 whether its "application of the correct legal standard  
14 [to the facts] was (1) illogical, (2) implausible, or  
15 (3) without support in inferences that may be drawn  
16 from the facts in the record." Id. (internal quotation  
17 marks omitted). Only if the bankruptcy court did not  
18 identify the correct legal rule, or if its application  
19 of the correct legal standard to the facts was  
20 illogical, implausible, or without support in  
21 inferences that may be drawn from facts in the record,  
22 is it appropriate to conclude that the bankruptcy court  
23 abused its discretion.

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

## 26 V. DISCUSSION

### 27 A. Governing Law

28 Issue preclusion<sup>11</sup> applies in nondischargeability

29 \_\_\_\_\_  
30 <sup>10</sup> (...continued)  
31 nov. Smith v. Exxon Mobil Oil Corp., 153 Cal. App. 4th 1407,  
32 1415, 64 Cal. Rptr. 3d 69 (2007) (rejecting appellee's request to  
33 apply abuse of discretion standard in reviewing a trial court's  
34 determination of "fairness" of applying issue preclusion); see  
35 also Johnson v. GlaxoSmithKline, Inc., 166 Cal. App. 4th 1497,  
36 1507, 83 Cal. Rptr. 3d 607 (2008) (trial court's application of  
37 issue preclusion is a question of law subject to de novo review).

38 <sup>11</sup> Although the parties refer to the collateral estoppel or  
39 res judicata effect of the state court's rulings, the Supreme  
40 Court now generally uses the term "issue preclusion" instead of  
41 "collateral estoppel." Taylor v. Sturgell, 553 U.S. 880, 892 n.5  
42 (2008) ("issue preclusion encompasses the doctrines once known as  
43 (continued...)



1 proceedings. Grogan v. Garner, 498 U.S. 279, 284-85 (1991). To  
2 determine the issue-preclusive effect of a California state  
3 court's judgment, we apply California preclusion law. 28 U.S.C.  
4 § 1738 (the Full Faith and Credit Statute); Marrese v. Am. Acad.  
5 of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). When state  
6 preclusion law controls, the discretion to apply the doctrine is  
7 exercised in accordance with state law. Khaligh, 338 B.R. at  
8 823.

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

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

22 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
23 2001); Lopez, 367 B.R. at 104.

24 Even if these five threshold requirements are met,  
25 application of issue preclusion requires a "mandatory  
26 'additional' inquiry into whether imposition of issue preclusion  
27 would be fair and consistent with sound public policy." Khaligh,  
28 338 B.R. at 824-25. "Collateral estoppel [issue preclusion] is  
not an inflexible, universally applicable principle; policy

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27 <sup>11</sup> (...continued)  
28 '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).

1 considerations may limit its use where the limitation on  
2 relitigation underpinnings of the doctrine are outweighed by  
3 other factors.” Jackson v. City of Sacramento, 117 Cal. App. 3d  
4 596, 603, 172 Cal. Rptr. 826 (1981). As stated by the California  
5 Supreme Court in Lucido v. Superior Ct., 51 Cal. 3d 335, 341-43,  
6 272 Cal. Rptr. 767, 795 P.2d 1223, 1225-27 (1990):

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

14 Lucido v. Superior Ct., 51 Cal. 3d at 341-43.<sup>12</sup>

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

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25           <sup>12</sup> Our panel has also recognized the need for flexibility  
26 in applying issue preclusion, acknowledging that in California,  
27 the principle is “not applied automatically or rigidly, and  
28 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.

1 B. Existence of Five Threshold Elements

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

8 Debtor, citing non-California cases, contends that the state  
9 court "default" judgment was not "actually litigated" and thus  
10 has no preclusive effect. This argument is not only factually  
11 incorrect (the judgment was not a default judgment and was  
12 entered in an action commenced by Debtor), but also legally  
13 incorrect. California law accords preclusive effect to default  
14 judgments. Green v. Kennedy (In re Green), 198 B.R. 564, 566  
15 (9th Cir. BAP 1996) ("California law also provides that default  
16 judgments are entitled to collateral estoppel effect. . . . Thus,  
17 the bankruptcy court properly concluded that a California default  
18 judgment is entitled to collateral estoppel effect.").  
19 Therefore, this threshold element (requiring the matter to be  
20 "actually litigated") is present here.

21 The more difficult question is whether the issues decided by  
22 the state court are "identical" to those raised in the underlying  
23 adversary proceeding, viz., whether Debtor inflicted a "willful  
24 and malicious injury" on Plaintiff. Section 523(a)(6) excepts  
25 from discharge a debt "for willful and malicious injury by the  
26 debtor to another entity or to the property of another entity."  
27 11 U.S.C. § 523(a)(6). The "willful" requirement is separate and  
28 distinct from the "malicious" requirement. See Barboza v. New

1 Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008).  
2 Willfulness requires a "deliberate or intentional injury, not  
3 merely a deliberate or intentional act that leads to injury."  
4 Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Ditto v. McCurdy,  
5 510 F.3d 1070 (9th Cir. 2007). "A 'malicious' injury involves  
6 '(1) a wrongful act, (2) done intentionally, (3) which  
7 necessarily causes injury, and (4) is done without just cause or  
8 excuse.'" Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th  
9 Cir. 2002) (quoting Petralia v. Jercich (In re Jercich), 238 F.3d  
10 1202, 1209 (9th Cir. 2001)).

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

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17  
18 <sup>13</sup> The state court made a specific finding of malice only  
19 as to the malicious prosecution claim, which was not a subject of  
20 the nondischargeability action: "[Debtor's] institution of the  
21 criminal law proceedings was done with malice, in that her  
22 statements to police investigators were made by her knowing them  
23 to be false, were made in bad faith and were made with the actual  
24 intent was [sic] to punish [Plaintiff] for issues having to do  
25 with the fallout in their relationship." The state court made no  
26 such finding with respect to the child abduction/enticement  
27 claim; rather, the state court simply awarded punitive damages in  
28 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.

<sup>14</sup> 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...)

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

3 A finding of liability under CC § 49 does not require a  
4 showing of malice; motive is immaterial. The statute is designed  
5 to protect a parent's right to custody and control of his or her  
6 minor child. Thus, it is of no consequence to the claim that the  
7 person who wrongfully "snatched" or withheld the child might have  
8 been motivated by "kindness or affection." Surina, 168 Cal. App.  
9 at 543. In contrast, a finding that a debtor acted with "just  
10 cause or excuse" would prevent a court from determining that the  
11 debtor's conduct was malicious for the purposes of section  
12 523(a)(6). Su, 290 F.3d at 1146-47.

13 Therefore, an award of general damages under CC § 49 would  
14 not in and of itself be preclusive in a section 523(a)(6) action,  
15 as the elements for recovery are not identical. That said,  
16 punitive damages can be awarded on a CC § 49 claim when the  
17 defendant's conduct "was actuated by malice." Surina, 168 Cal.  
18 App. 3d at 543. Subsection (a) of CC § 3294 of the California  
19

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20 <sup>14</sup>(...continued)

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

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

26 Cal. Civ. Code § 49.

27 This section permits parents to recover damages from a  
28 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).

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

8  
9 (1) "Malice" means conduct which is intended by the  
10 defendant to cause injury to the plaintiff or  
11 despicable conduct which is carried on by the defendant  
12 with a willful and conscious disregard of the rights or  
13 safety of others.

14 (2) "Oppression" means despicable conduct that subjects  
15 a person to cruel and unjust hardship in conscious  
16 disregard of that person's rights.

17 (3) "Fraud" means an intentional misrepresentation,  
18 deceit, or concealment of a material fact known to the  
19 defendant with the intention on the part of the  
20 defendant of thereby depriving a person of property or  
21 legal rights or otherwise causing injury.

22 Cal. Civ. Code § 3294(c).

23 Plaintiff sought punitive damages under CC § 3294, alleging  
24 that Debtor had acted maliciously or oppressively in abducting or  
25 enticing Breanna from him. We have held that punitive damage  
26 awards under CC § 3294 "can only properly be made in response to  
27 wrongful acts that would, by definition, also violate 11 U.S.C.  
28 § 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"

1 under section 523(a)(6). Jercich, 238 F.3d at 1209. Aubrey v.  
2 Thomas (In re Thomas), 111 B.R. 268, 275 (9th Cir. BAP 1990)  
3 (California's "statutory definition of oppression comports with  
4 the construction of 'willful and malicious injury' applied by the  
5 Ninth Circuit") (applies the overruled case of Impulsora Del  
6 Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440,  
7 1443 (9th Cir. 1986)).

8 We have therefore concluded that an award of punitive  
9 damages, even absent specific findings of malice or oppression or  
10 fraud, is entitled to preclusive effect in a nondischargeability  
11 action. Roussos v. Michaelides (In re Roussos), 251 B.R. 86, 94  
12 (9th Cir. BAP 2000), aff'd, 33 Fed. Appx. 365 (9th Cir. 2002)  
13 ("We have also affirmed a bankruptcy court's decision to apply  
14 collateral estoppel to an award for punitive damages, in a  
15 § 523(a)(6) adversary proceeding, even though the state court did  
16 not make specific findings on which to predicate the award."),  
17 citing Molina v. Seror (In re Molina), 228 B.R. 248, 250-51 (9th  
18 Cir. BAP 1998). See also Cal-Micro, Inc. v. Cantrell (In re  
19 Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003) (observing in a  
20 section 523(a)(4) action that state court's punitive damages  
21 could have only been based on claims of fraudulent conduct and  
22 thus applying collateral estoppel to state court judgment).

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

1 C. Fairness and Public Policy Inquiry

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

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

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



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

3 In a case remarkably similar to this one, the California  
4 Court of Appeals held that a parent's interference with another  
5 parent's visitation (as opposed to outright child abduction and  
6 concealment) must be redressed in the family law court and not by  
7 the state civil court. An emotional damages suit is not  
8 actionable under such circumstances. In re Marriage of Segel,  
9 179 Cal. App. 3d 602, 608-09, 224 Cal. Rptr. 591 (1986).  
10 Allowing a cause of action for such damages as an alternative to  
11 family law court remedies would undermine the purpose of the  
12 family law statutes.<sup>15</sup> Id. As noted in Neal v. Superior Court,  
13 90 Cal. App. 4th 22, 25, 108 Cal. Rptr. 2d 262 (2001), California  
14 courts disfavor "civil actions which are really nothing more  
15 than reruns of a family law case."

16 [F]amily law cases should not be allowed to spill over  
17 into civil law, regardless of whether the family law  
18 matter may be characterized as an action for fraud . .  
19 ., malicious prosecution . . ., or securities law  
20 violations. . . . Almost all events in family law  
21 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."

22 Id.

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

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26 <sup>15</sup> Similarly, the California Court of Appeals has held that  
27 malicious prosecution actions (even those arising from false  
28 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).

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

5 **VI. CONCLUSION**

6 For the foregoing reasons, we VACATE and REMAND.