

JAN 05 2011

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. EC-10-1025-JuMkzi
)
 THOMAS M. HERNANDEZ and) Bk. No. 09-23940
 DEBORAH I. HERNANDEZ,)
)
 Debtors.) Adv. No. 09-02271
)
 _____)
 THOMAS M. HERNANDEZ;)
 DEBORAH I. HERNANDEZ,)
)
 Appellants,)
)
 v.) M E M O R A N D U M *
)
 POWERS & EFFLER INSURANCE)
 BROKERS, dba POWERS & COMPANY)
 INSURANCE BROKERS and AGENTS,)
)
 Appellee.)
 _____)

Argued and Submitted on November 18, 2010
at Sacramento, California

Filed - January 5, 2011

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding.

Appearances: Walter R. Dahl, Esq., Dahl & Dahl, argued for
 Appellants Thomas M. Hernandez and Deborah I.
 Hernandez
 Louis J. Anapolsky, Esq., Knox, Lemmon,
 Sanapolsky & Schrimp, LLP argued for Appellee
 Powers & Effler Insurance Brokers, dba Powers &
 Company Insurance Brokers and Agents

* 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.

1 Before: JURY, MARKELL, and ZIVE,¹ Bankruptcy Judges.

2 Appellants Thomas M. Hernandez and Deborah I. Hernandez
3 (collectively, "Debtors") appeal the judgment of the bankruptcy
4 court granting summary judgment to Powers & Effler Insurance
5 Brokers, dba Powers & Company Insurance Brokers and Agents
6 ("Powers"). Applying the doctrine of issue preclusion, the
7 bankruptcy court determined that Powers' state court judgment
8 debt was nondischargeable under § 523(a)(6).²

9 For the reasons stated below, we AFFIRM the bankruptcy
10 court's decision that the state court judgment conclusively
11 determined all the elements necessary for the
12 nondischargeability of the judgment debt related to lost profit
13 damages awarded by the state court jury based on Debtors'
14 misappropriation of Powers' trade secrets and other business
15 torts. However, we REVERSE the bankruptcy court's decision that
16 the state court judgment conclusively determined all the
17 elements necessary for the nondischargeability of the award of
18 attorney's fees against Deborah and REMAND for the factual
19 determination of whether that debt was based on Deborah's
20 willful and malicious injury to Powers.

21 I. FACTS

22 Powers is an insurance brokerage firm that sells primarily
23 workers' compensation and general liability policies to general
24

25 ¹ Hon. Gregg W. Zive, Bankruptcy Judge for the District
of Nevada, sitting by designation.

26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037.

1 and artisan contractors throughout California. Powers employed
2 both Debtors. As a condition of their employment, Debtors
3 severally executed multiple confidentiality agreements and
4 agreed to be bound by the confidentiality provisions in Powers'
5 Employee Handbook.³

6 In early 2006, Deborah resigned her position as Vice
7 President for Powers, but continued her employment. Shortly
8 after, Debtors began working for Powers from a home office.
9 Thomas sold insurance to new clients and renewed policies for
10 existing clients with Deborah's assistance. In March 2006,
11 Powers provided Thomas with an "Expiration Report," which was a
12 list of over 400 clients assigned to Thomas's book of business.
13 Powers originally refused Thomas's request for the report, but
14 eventually did provide it so that Thomas could use the list to
15 cross-sell other types of policies to the clients.

16 In September 2006, Deborah resigned her employment with
17 Powers and, three days later, Thomas resigned.

18 In mid-November 2006, Debtors formed Western Contractors
19 Insurance Services ("Western"), an insurance brokerage company.
20 Through Western, Debtors began selling insurance policies to
21 contractors involved in the construction industry. In December
22 2006, Debtors sent 1,000 announcements to contractors throughout
23 California. Many of the names on Debtors' mailing lists were

24
25 ³ Debtors commenced employment with Powers at different
26 times and held different positions. For this reason, they
27 executed different employment agreements with Powers, a
28 distinction which becomes significant when we discuss the state
court's award for attorney's fees against Deborah later in this
memorandum.

1 names that were in Powers' Expiration Report.

2 On February 9, 2007, Powers filed a complaint against
3 Debtors in the Superior Court of California, Placer County, Case
4 No. SCV 20588, alleging six causes of action: (1) Breach of
5 Contract/Specific Performance; (2) Misappropriation of Trade
6 Secrets in Violation of the Uniform Trade Secrets Act;
7 (3) Interference with Prospective Economic Advantage;
8 (4) Interference with Contractual Relations; (5) Conversion; and
9 (6) Unfair Competition in Violation of Business & Professions
10 Code section 17200, 17203, et seq.⁴ Following a nine-day trial,
11 the jury returned a special verdict for Powers on all causes of
12 action except for the sixth – Unfair Competition.⁵ The jury
13 awarded Powers compensatory damages of \$178,585 (representing
14 lost profits) and costs of \$12,443.57.

15 Powers also prevailed, against Deborah only, on its request
16 for \$252,162 in attorney's fees based on Cal. Civ. Code § 1717,
17 which authorizes attorney's fees to the prevailing party based
18 on contract. In a separate memorandum, the state court judge
19 determined that Powers was the prevailing party on its breach of
20 contract cause of action against both Debtors. However, the
21 judge awarded the fees only against Deborah based on the
22 attorney's fee provision in her employment contract;⁶ Thomas's
23

24 ⁴ Powers also named Western as a defendant in the state
25 court lawsuit. Western is not a party to this appeal.

26 ⁵ No specific verdict or judgment was rendered on this
27 cause of action.

28 ⁶ The state court complaint alleged "the existence and
(continued...)

1 contract did not contain such a provision.

2 Powers also sought exemplary, or punitive, damages under
3 Cal. Civ. Code § 3423.3(c). This statute, entitled "Damages;
4 royalties; exemplary damages" provides:

5 If willful and malicious misappropriation exists, the
6 court may award exemplary damages in an amount not
7 exceeding twice any award made under subdivision (a)
8 or (b).

8 Under the clear and convincing standard of proof, the jury found
9 that Debtors' misappropriation of Powers' trade secrets was not
10 done with "malice, oppression or fraud." Accordingly, Powers
11 did not receive exemplary or punitive damages in the state court
12 action.

13 Due to Debtors' liability for misappropriation of trade
14 secrets, the state court granted Debtors' motion for a nonsuit
15 on the conversion cause of action because the California Uniform
16 Trade Secrets Act ("CUTSA") provided the exclusive civil remedy
17 for conduct falling within its terms, superseding other civil
18 remedies "based upon misappropriation of a trade secret."

19 _____
20 ⁶(...continued)
21 breach of an 'Addendum to Independent Insurance Salesman/Captive
22 Agent Agreement' entered into by plaintiff and Deborah"
The Addendum contained the following provision:

23 If any legal action arises under this Agreement or
24 because of any asserted breach of it, the prevailing
25 party shall be entitled to recover all costs and
26 expenses, including reasonable attorney fees, incurred
27 in enforcing or attempting to enforce any of the terms,
28 covenants, or conditions, including costs incurred
prior to commencement of legal action, and all costs
and expenses, including reasonable attorney fees,
incurred in any appeal from an action brought to
enforce any of the terms, covenants, or conditions.

1 Silvaco Data Sys. v. Intel, 184 Cal. App. 4th 210, 236 (Cal. Ct.
2 App. 2010) (citing Cal. Civ. Code § 3426.7, subds. (a), (b)).

3 The state court entered judgment for Powers and against Debtors
4 on January 5, 2008. The judgment was not appealed and therefore
5 became final.

6 On March 6, 2009, Debtors filed their voluntary Chapter 7
7 petition. Powers filed a complaint against Debtors seeking a
8 determination that the judgment debt was nondischargeable under
9 § 523(a)(6)⁷ and subsequently moved for summary judgment based
10 on issue preclusion. Powers argued that the factual allegations
11 and jury findings in the state court proceeding encompassed the
12 necessary elements for a willful and malicious injury under
13 § 523(a)(6). Powers asserted, however, that the jury's finding
14 that Debtors' conduct was not done with malice, oppression or
15 fraud for purposes of awarding punitive damages under Cal. Civ.
16 Code § 3423.3(c) was not preclusive on the federal definitions
17 of willful and malicious for § 523(a)(6). On this last point,
18 Debtors asserted that the jury's failure to find malice created
19 a triable issue of fact.

20 At a November 2009 hearing, the bankruptcy court found
21 that the willful and malicious elements under § 523(a)(6) were
22 satisfied by the facts as stated in the jury's findings, thereby
23 precluding Debtors from relitigating the issues in the
24 bankruptcy court. Accordingly, the court ruled that the
25 judgment debt was nondischargeable by judgment entered on

26 _____
27 ⁷ Powers also moved for summary judgment under
28 § 523(a)(2) and (4). The bankruptcy court denied summary
judgment on those grounds and Powers did not appeal that ruling.

1 November 20, 2009.

2 Debtors moved for a new trial or to alter or amend judgment
3 based on Fed. R. Civ. P. 59, incorporated by Rule 9023. They
4 asserted that they were entitled to a trial because Powers
5 failed to prove Debtors had acted willfully and maliciously
6 within the meaning of § 523(a)(6) in the state court action.
7 For the first time, they argued that the award of attorney's
8 fees against Deborah was based on contract and, therefore,
9 dischargeable.⁸ The bankruptcy court denied their motion. The
10 record shows that Debtors failed to demonstrate any of the
11 grounds for granting a new trial under Fed. R. Civ.
12 P. 59(a)(1)(B); viz., that there was a manifest error of law, a
13 manifest error of fact, or newly discovered evidence.

14 The bankruptcy court entered an amended judgment on
15 January 5, 2010.⁹ Debtors timely filed this appeal.

16 II. JURISDICTION

17 The bankruptcy court had jurisdiction over this proceeding
18 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
19 under 28 U.S.C. § 158.
20
21

22 ⁸ The record shows that the bankruptcy court made no
23 comments in reference to Powers' argument that Debtors had waived
24 this issue by raising it too late. However, we may address any
25 arguments on appeal that were raised and briefed by the opposing
26 party before the trial court. See Nghiem v. Ghazvini
(In re Nghiem), 264 B.R. 557, 560 n. 5 (9th Cir. BAP 2001),
aff'd, 53 Fed. Appx. 489 (9th Cir. 2002).

27 ⁹ The original judgment incorrectly stated that the
28 judgment debt was excepted from discharge under § 523(a)(2).
This amendment changed the erroneous (a)(2) to (a)(6).

1 Civ. P. 56(c)(2).¹⁰ The moving party bears the burden of
2 producing evidence showing that there is no genuine issue of
3 material fact and that it is entitled to judgment as a matter of
4 law. Celotex Corp. v. Catrett, U.S. 317, 322-23 (1986). Once
5 the moving party has met its initial burden, the non-moving
6 party must show specific facts establishing the existence of
7 genuine issues of fact for trial. Anderson v. Liberty Lobby,
8 Inc., 477 U.S. 242, 256 (1986). The substantive law determines
9 which facts are material. Id. at 248.

10 **A. Issue Preclusion**

11 The issue preclusion doctrine applies to dischargeability
12 proceedings to bar the relitigation of factual issues that were
13 determined in a prior state court action. Grogan v. Garner, 498
14 U.S. 279, 284-85 n.11 (1991). The party asserting the doctrine
15 has the burden of proving that all of the threshold requirements
16 have been met. Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258
17 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). To
18 meet this burden, the moving party must have pinpointed the
19 exact issues litigated in the prior action and introduced a
20 record revealing the controlling facts. Kelly, 182 B.R. at 258.
21 Reasonable doubts about what was decided in the prior action
22 should be resolved against the party seeking preclusion. Id.

23 When the parties previously litigated an issue in state
24 court, state law determines the preclusive effect of that
25 judgment. 28 U.S.C. § 1738; Gayden v. Nourbakhsh (In re
26 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). California's

27
28 ¹⁰ Rule 7056 incorporates Fed. R. Civ. P. 56.

1 doctrine of issue preclusion prevents relitigation of the
2 specific issues argued and decided in an earlier proceeding,
3 even where the second proceeding is held on a separate cause of
4 action. Lucido v. Sup. Ct., 51 Cal. 3d 335, 342 (Cal. 1990).
5 To successfully assert issue preclusion under California law, a
6 party must prove: (1) the issues in both proceedings are
7 identical; (2) the issues were actually litigated in the former
8 proceeding; (3) the issues were necessarily decided; (4) the
9 former proceeding must have resulted in a final judgment on the
10 merits; and (5) the party against whom preclusion is sought is
11 the same as, or in privity with, the party in the former
12 proceeding. Id. at 341.

13 Applying the standards for summary judgment, we decide
14 whether the jury findings were sufficient to support the
15 bankruptcy court's decision that the state court judgment debt
16 was nondischargeable as a matter of law.

17 **B. Elements for Section 523(a)(6)**

18 Section 523(a)(6) excepts from discharge any debt "for
19 willful and malicious injury by the debtor to another entity or
20 to the property of another entity." Both the willful and
21 malicious prongs must be proved to except a debt from discharge
22 under § 523(a)(6). Khaligh v. Hadaegh (In re Khaligh), 338 B.R.
23 817, 831 (9th Cir. BAP 2006).

24 Whether a debtor acted willfully is a subjective inquiry:
25 the "willful injury requirement is met only when the debtor has
26 a subjective motive to inflict injury or when the debtor
27 believes that injury is substantially certain to result from his
28 own conduct." Ormsby v. First Am. Title Co. of Nev. (In re

1 Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). Further, “[t]he
2 debtor is charged with the knowledge of the natural consequences
3 of his actions.” Id.

4 “‘A malicious injury involves (1) a wrongful act, (2) done
5 intentionally, (3) which necessarily causes injury, and (4) is
6 done without just cause or excuse.’” Id. at 1207. “Malice may
7 be inferred based on the nature of the wrongful act.” Id.

8 **C. Summary Judgment As To The Business Torts**

9 Debtors contend the bankruptcy court erred in granting
10 Powers’ motion for summary judgment as to the business torts
11 based on issue preclusion. Debtors do not contest that they
12 were parties to the state court action or that the state court
13 judgment was a final judgment on the merits. Rather, Debtors
14 contend that the issues in the state court action were not
15 identical to those for a willful and malicious injury under
16 § 523(a)(6) and therefore those issues were not actually
17 litigated or necessarily decided. Debtors’ argument is based
18 solely on the jury’s failure to find “malice” by clear and
19 convincing evidence for the purposes of awarding punitive
20 damages under state law.

21 **1. The Willful Injury Requirement**

22 The jury made no specific finding concerning the willful
23 nature of Debtors’ conduct, but found Debtors liable for
24 misappropriation of trade secrets, intentional interference with
25 contractual relations and intentional interference with
26 prospective economic advantage. We thus examine whether these
27 causes of action under California law encompass the same
28 elements as the willful requirement under § 523(a)(6) and

1 whether the jury's findings satisfy those elements.

2 Under California law, a trade secret is misappropriated if
3 a person (1) acquires a trade secret knowing or having reason to
4 know that the trade secret has been acquired by "improper
5 means," (2) discloses or uses a trade secret the person has
6 acquired by "improper means" or in violation of a nondisclosure
7 obligation, (3) discloses or uses a trade secret the person knew
8 or should have known was derived from another who had acquired
9 it by improper means or who had a nondisclosure obligation, or
10 (4) discloses or uses a trade secret after learning that it is a
11 trade secret but before a material change of position. Cal.
12 Civ. Code § 3426.1, subd. (b). "Improper means," includes
13 "theft, bribery, misrepresentation, breach or inducement of a
14 breach of a duty to maintain secrecy" Cal. Civ. Code
15 § 3426.1.

16 Regarding the mental state for an actionable acquisition of
17 a trade secret, one court observed that the term "acquired" as
18 used in the statute "implies more than passive reception; it
19 implies pointed conduct intended to secure dominion over the
20 thing, i.e., '[t]o gain, obtain, or get as one's own, to gain
21 the ownership of (by one's own exertions or qualities).'"
22 Silvaco Data Sys., 184 Cal. App. 4th at 234. In other words,
23 "one does not ordinarily 'acquire' a thing inadvertently; the
24 term implies conduct directed to that objective." Id.

25 Intentional interference with contractual relations
26 requires proof of (1) a valid contract between Powers and a
27 third party; (2) Debtors' knowledge of this contract;
28 (3) Debtors' intentional acts designed to induce a breach or

1 disruption of the contractual relationship; (4) actual breach or
2 disruption of the contractual relationship; and (5) resulting
3 damages. Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d
4 1118, 1126 (Cal. 1990).

5 The cause of action for intentional interference with
6 prospective economic advantage is similar and requires that
7 plaintiff plead and prove: (1) an economic relationship between
8 the plaintiff and a third party, with the probability of future
9 economic benefit to the plaintiff; (2) the defendant's knowledge
10 of the relationship; (3) intentional acts by the defendant
11 designed to disrupt the relationship; (4) defendant's conduct
12 which was wrongful by some legal measure other than the fact of
13 interference itself; (5) actual disruption of the relationship;
14 and (6) defendant's acts which proximately caused economic harm
15 to the plaintiff. Id. at 1126 n.2. For both torts, the intent
16 requirement is the same; the plaintiff must plead and prove that
17 the defendant "[knew] that the interference is certain or
18 substantially certain to occur as a result of his action."
19 Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134,
20 1157 (Cal. 2003).

21 Our examination of the elements for misappropriation of
22 trade secrets, intentional interference with contractual
23 relations and intentional interference with prospective economic
24 advantage reveals that the identical factual allegations were at
25 issue in the state court action as those for a willful injury
26 under § 523(a)(6); i.e., all causes of action required an
27 inquiry into whether Debtors acted either with an objective
28 substantial certainty of injury or whether Debtors acted with a

1 subjective motive to cause Powers' injury.

2 Moreover, the jury's findings in relation to the business
3 torts support the elements for a willful injury. The jury found
4 that Debtors intended to lure customers away from Powers for
5 their benefit and to the detriment of Powers. The jury also
6 found Debtors intentionally took possession of confidential
7 customer information for a significant period of time;
8 improperly acquired confidential customer information unjustly
9 enriching themselves while causing Powers harm; knew the
10 customer information they were using was confidential due to the
11 various agreements they had signed as a condition to their
12 employment; and knew that Powers had contracts with various
13 customers and intentionally sent out announcements regarding
14 their new business in an attempt to disrupt those contractual
15 relationships.

16 In sum, the issues essential to the willful injury
17 requirement under § 523(a)(6) were identical to those raised in
18 Powers's state court complaint. Moreover, those issues were
19 actually litigated and necessarily decided when they were
20 submitted to the jury and determined. Accordingly, there is no
21 genuine issue of material fact as to whether the state court
22 jury decided that Debtors' caused a willful injury within the
23 meaning of § 523(a)(6).

24 **2. The Malicious Injury Requirement**

25 Debtors argue that the denial of punitive damages in the
26 state court raises a triable issue of fact.¹¹ We squarely
27

28 ¹¹ Debtors rely heavily on the bankruptcy court's decision
(continued...)

1 addressed this same argument years ago in Branam v. Crowder (In
2 re Branam), 226 B.R. 45, 52-53 (9th Cir. BAP 1998), aff'd 205
3 F.3d 1350 (9th Cir. 1999). We held that the state court jury's
4 failure to find "malice" by clear and convincing evidence for
5 purposes of awarding punitive damages was irrelevant to a
6 nondischargeability proceeding under § 523(a)(6). We explained
7 that the question of whether a debtor acted maliciously for
8 purposes of awarding punitive damages under California law
9 involved both a different definition of malice and a different
10 standard of proof. Id. Thus, a bankruptcy court may consider
11 conclusive a state court jury verdict finding willful and
12 malicious intent even if the state court denies punitive damages
13 for willful and malicious misappropriation.

14 In essence, the jury's findings on the business tort causes
15 of action established that Debtors engaged in wrongful acts
16 which were done intentionally and that Debtors knew their
17 conduct was substantially certain to cause Powers' injury. The
18 jury's findings further established that Debtors' commission of

19
20 ¹¹(...continued)
21 in Jan Marini Skin Research Inc. v. Kohler (In re Kohler),
22 2008 WL 5753359, at *4 (Bankr. N.D. Cal. Nov. 6, 2008). Although
23 the facts in Kohler are substantially similar to those here, the
24 decision does not control the outcome in this appeal. In Kohler,
25 the bankruptcy court found the "willful" element under
26 § 523(a)(6) was met because the requisite knowledge for the torts
27 of misappropriation of trade secrets and intentional interference
28 with economic advantage was identical to, and satisfied, the
requirement of intent to inflict injury for a finding of
willfulness under § 523(a)(6). Id. at *3-4. The Kohler court
acknowledged that the doctrine of issue preclusion did not apply
to the jury's failure to find malice, and ultimately concluded
that there was a triable issue of fact regarding malice. Id. at
*5. Thus, the court reserved the issue for trial.

1 the wrongful acts were done without just cause or excuse.

2 The only "just cause or excuse" Debtors offer for their
3 actions is that they relied on legal counsel to avoid liability
4 to Powers for breach of contract or misappropriation of trade
5 secrets. We are not convinced by Debtors' excuse for their
6 conduct for two reasons.

7 First, Debtors did not raise this defense in the context of
8 the summary judgment motion in the bankruptcy court. Instead,
9 they submitted Deborah's declaration stating their reliance on
10 legal counsel with their motion for a new trial. At the summary
11 judgment stage, once Powers made a prima facie showing that
12 there was no just cause or excuse for Debtors' wrongful acts,
13 Debtors, as the non-moving parties, had the burden of producing
14 evidence that showed the existence of genuine issues of fact for
15 trial on this element. Anderson, 477 U.S. at 256. Debtors
16 failed to make such a showing and thus there was no proof
17 concerning an essential element of their case. And facts known
18 at the time of the motion but not presented with it cannot serve
19 as grounds for amending the judgment under Fed. R. Civ. P. 59.
20 "Evidence 'in the possession of the party before the judgment
21 was rendered is not newly discovered'" Feature Realty,
22 Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003)
23 (citing Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.,
24 Inc., 833 F.2d 208, 212 (9th Cir. 1987)).

25 Further, the "just cause or excuse" element presents a
26 mixed question of law and fact. Bammer, 131 F.3d at 791-92. In
27 Bammer, the Ninth Circuit explained:

28 A mixed question of law and fact occurs when the

1 historical facts are established; the rule of law is
2 undisputed, i.e., 'just cause or excuse'; and the
3 issue is whether the facts satisfy the legal rule.
4 Mixed questions presumptively are reviewed by us de
5 novo because they require consideration of legal
6 concepts and the exercise of judgment about the values
7 that animate legal principles. The question of
8 whether a cause is "just" is a textbook example of a
9 legal conclusion informed by historical facts.

6 Id. In conducting our de novo review, we cannot conclude that
7 Debtors' reliance on counsel amounts to "just cause or excuse."
8 Debtors cite no case law that allows us to disregard the jury's
9 finding that Debtors' intended injury to Powers and succeeded in
10 causing it merely because Debtors relied on legal counsel for
11 their wrongful acts.

12 Finally, we mention that there is nothing in the record
13 that shows Debtors presented this defense in the state court.
14 Allowing reliance on counsel as a defense at this late stage
15 "'would seriously undermine the doctrine of issue preclusion and
16 impose an unjust burden on prevailing litigants and the legal
17 system'". Rossi, McCreery and Assoc., Inc. v. Abbo (In re
18 Abbo), 192 B.R. 891, 898 (Bankr. N. D. Ohio 1996). Accordingly,
19 we conclude that the jury verdict which finds Debtors liable for
20 multiple business torts demonstrated their specific intent to
21 injure Powers, which negates just cause or excuse. Khaligh,
22 338 B.R. at 831; see Jett v. Sicroff (In re Sicroff), 401 F.3d
23 1101, 1107 (9th Cir. 2005) (finding a specific intent to injure
24 negated any proffered just cause or excuse offered by debtor).

25 In sum, the bankruptcy court considered both the willful
26 and malicious prongs under § 523(a)(6). Our de novo review
27 convinces us that the bankruptcy court correctly decided that
28 the jury's findings and state court judgment precluded Debtors

1 from relitigating the willful and malicious elements under
2 § 523(a)(6) with respect to the damages for lost profits arising
3 out of their liability for the business torts. Therefore, we
4 affirm the bankruptcy court's grant of summary judgment for
5 Powers, finding that the debt for lost profits was
6 nondischargeable under § 523(a)(6).

7 **D. Summary Judgment As To The Attorney's Fees Against Deborah**

8 Debtors challenge the bankruptcy court's application of
9 issue preclusion to the award of attorney's fees against Deborah
10 and contend that because the fees were based on contract, the
11 debt is dischargeable. The basis for which Powers was permitted
12 to recover attorney's fees from Deborah is Cal. Civ. Code § 1717
13 which provides in relevant part:

14 (a) In any action on a contract, where the contract
15 specifically provides that attorney's fees and costs,
16 which are incurred to enforce that contract, shall be
17 awarded either to one of the parties or to the
18 prevailing party, then the party who is determined to
19 be the party prevailing on the contract, whether he or
20 she is the party specified in the contract or not,
21 shall be entitled to reasonable attorney's fees in
22 addition to other costs.

23 . . .

24 Reasonable attorney's fees shall be fixed by the
25 court, and shall be an element of the costs of suit.

26 Cal. Civ. Code § 1717 authorizes attorney's fees to a party
27 prevailing "on a contract." Moreover, under California law,
28 attorney's fees are subsumed into costs. Moulin Elec. Corp. v.
Roach, 120 Cal. App. 3d 1067, 1069 (Cal. Ct. App. 1981).
Finally, as occurred here, the preferred method for seeking such
fees is a post-trial motion. Beneficial Standard Props., Inc.
v. Scharps, 67 Cal. App. 3d 227, 232 n.3 (Cal. Ct. App. 1977)

1 (statutory attorney's fees are not damages and need not be
2 specially averred).

3 Attorney's fees and costs awarded to a judgment creditor in
4 relation to a debtor's underlying willful and malicious
5 contemptuous conduct, even when no compensatory judgment debt
6 exists, constitute a nondischargeable debt under section
7 523(a)(6). Suarez v. Barrett (In re Suarez), 400 B.R. 732,
8 738-39 (9th Cir. BAP 2009). However, here the jury found
9 Deborah liable for breach of contract and it was that finding
10 that supported Powers' request for its attorney's fees under
11 Cal. Civ. Code § 1717. Notably, the jury made no findings from
12 which we could conclusively infer that the fees were imposed as
13 a direct, but-for result of Deborah's nondischargeable conduct.
14 See Kelly, 182 B.R. at 258 (reasonable doubts about what was
15 decided in the prior action should be resolved against the party
16 seeking to assert preclusion). Finally, although the state
17 court trial judge stated in his decision that all causes of
18 action arose from Debtors' misappropriation of trade secrets,
19 that language went beyond the findings of the jury and was
20 unnecessary to justify the award of fees under Cal. Civ. Code
21 § 1717, which was simply based on the breach of contract
22 finding. The jury's verdict does not specify the acts which
23 constituted the breach. Therefore, we construe the judge's
24 comment as non-binding dicta.

25 In short, we conclude that the issue as to whether the fees
26 were imposed as a direct, but-for result of Deborah's
27 nondischargeable conduct was not "necessarily decided" by the
28 jury in the previous trial. Accordingly, there exists a

1 question of fact concerning the proximate cause of the damage
2 Powers' suffered when it incurred attorney's fees to prosecute
3 the claims against Deborah. On this issue we reverse and remand
4 for determination of whether the debt for attorney's fees was
5 based on Deborah's willful and malicious injury to Powers.

6 **VI. CONCLUSION**

7 For the reasons stated above, we AFFIRM the bankruptcy
8 court's decision that Debtors were precluded from relitigating
9 the willful and malicious elements under § 523(a)(6) with
10 respect to the damages for lost profits arising out of their
11 liability for the business torts. We REVERSE the bankruptcy
12 court's decision to apply issue preclusion to Deborah's debt for
13 attorney's fees and REMAND for determination of whether that
14 debt was a direct, but-for result of her nondischargeable
15 conduct.