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NOT FOR PUBLICATION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 Nos.	CC-14-1186-DTaKu
	)		
JAMES ELLIS ARDEN,	)	Bk. No.	13-13879-VK
	)		
Debtor.	)	Adv. No.	13-01164-VK
	)		
_____	)		
JAMES ELLIS ARDEN,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
MARTINA A. SILAS,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on June 18, 2015  
at Pasadena, California

Filed - July 2, 2015

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Appellant James Ellis Arden and appellee Martina  
A. Silas argued pro se.

Before: DUNN, TAYLOR and KURTZ, 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 8024-1.

1 Prepetition, Martina Silas obtained a state court judgment  
2 against the debtor, James Arden, for malicious prosecution. One  
3 month after the debtor filed his chapter 7 bankruptcy petition,  
4 Ms. Silas initiated an adversary proceeding to except the state  
5 court judgment from discharge under § 523(a)(6). The debtor  
6 moved to dismiss the adversary proceeding under Civil  
7 Rule 12(b)(6).<sup>2</sup> Before responding to the motion to dismiss,  
8 Ms. Silas moved for summary judgment on her complaint ("summary  
9 judgment motion"). The bankruptcy court granted summary judgment  
10 in Ms. Silas's favor, giving issue preclusive effect to the state  
11 court judgment. It also denied the debtor's motion to dismiss.

12 The debtor appeals the bankruptcy court's orders granting  
13 Ms. Silas's summary judgment motion and denying his motion to  
14 dismiss.<sup>3</sup> We AFFIRM the bankruptcy court's denial of the  
15 debtor's motion to dismiss, but VACATE and REMAND the bankruptcy  
16 court's summary judgment decision for further proceedings  
17 consistent with this memorandum decision.

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21 <sup>2</sup> Unless otherwise indicated, all chapter and section  
22 references are to the federal Bankruptcy Code, 11 U.S.C.  
23 §§ 101-1532, and all "Rule" references are to the Federal Rules  
24 of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"  
references are to the Federal Rules of Civil Procedure,  
Rules 1-86.

25 <sup>3</sup> In his notice of appeal, the debtor neither listed nor  
26 included a copy of the bankruptcy court's order denying his  
27 motion to dismiss. However, in the statement of issues on  
28 appeal, he did disclose his contentions regarding the bankruptcy  
court's denial of his motion to dismiss. We thus address his  
related arguments here.

1 **FACTS**<sup>4</sup>

2 A. Ms. Silas as counsel in the personal injury action

3 Both Ms. Silas and the debtor are attorneys. Fifteen years  
4 ago, Ms. Silas represented Ross Gunnell in a personal injury  
5 action against his former employer, Metrocolor Laboratories, Inc.  
6 ("Metrocolor"), and others for injuries allegedly sustained from  
7 exposure to a hazardous chemical substance Metrocolor required  
8 Mr. Gunnell to use to clean its film processing laboratories.  
9 Although Ms. Silas alleged several causes of action on  
10 Mr. Gunnell's behalf, including battery, intentional infliction  
11 of emotional distress and fraud, only the battery cause of action  
12 was presented to the jury at trial.<sup>5</sup> Also, only Metrocolor  
13 remained as a defendant in the personal injury action at trial,  
14 as Ms. Silas had settled with the other defendants.

15 When conducting her legal research and factual  
16 investigations for the personal injury action, Ms. Silas knew  
17 that the California Workers' Compensation Act ("WCA") generally  
18 provided the exclusive remedy for employees who have sustained  
19 work-related injuries. That is, the WCA prohibited employees

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21 <sup>4</sup> We have taken some of the facts from the following state  
22 court decisions: 1) Gunnell v. Silas, 2006 WL 204610 (2006);  
23 2) Silas v. Arden, 2009 WL 5158842 (2009); 3) Gunnell v.  
24 Metrocolor Labs., Inc., 92 Cal. App. 4th 710 (2001); and 4) Silas  
v. Arden, 213 Cal. App. 4th 75 (2013).

25 <sup>5</sup> Although Ms. Silas filed the civil action on Mr. Gunnell's  
26 behalf, she did not file a worker's compensation claim for him.  
27 Apparently, Ms. Silas' retainer agreement provided that her legal  
28 services did not include the handling of any workers'  
compensation claims. See Gunnell v. Silas, 2006 WL 204610 (Cal.  
Ct. App. 2nd 2006).

1 from bringing civil actions for damages against their employers  
2 unless certain statutory exceptions applied. See Cal. Labor Code  
3 §§ 3600, 3602.

4 She also knew that there were statutory exceptions to  
5 exclusive application of the WCA, including the exception for  
6 fraudulent concealment under Cal. Labor Code § 3602(b)(2). This  
7 exception allowed an employee to bring a civil action against his  
8 employer where the employee's injury was aggravated by the  
9 employer's fraudulent concealment of the injury's existence and  
10 its connection with the employee's employment. Ms. Silas knew  
11 that the fraudulent concealment exception did not apply where the  
12 employer first learned of the injury from the employee.

13 Based on her discussions with Mr. Gunnell, Ms. Silas did not  
14 believe that his personal injury action fell within the  
15 fraudulent concealment exception. She nonetheless asserted it  
16 out of an abundance of caution.

17 Later, during pretrial discovery, Ms. Silas came across a  
18 medical insurance form showing that Mr. Gunnell had sought  
19 medical care for his hands a few days after he began working for  
20 Metrocolor and that he had blamed the cleaning solution for his  
21 hands' condition. Consequently, she abandoned her argument  
22 concerning the fraudulent concealment exception.

23 At trial, the jury returned a substantial verdict in  
24 Mr. Gunnell's favor. However, on Metrocolor's motion for  
25 judgment notwithstanding the verdict, the trial court overturned  
26 the verdict. It determined that the WCA's exclusive remedy  
27 provision barred Mr. Gunnell's personal injury action against  
28 Metrocolor, especially in light of Johns-Manville Prods. Corp. v.

1 Superior Court, 27 Cal. 3d 465 (1980), a California supreme court  
2 decision. (Johns-Manville held that the WCA provided the  
3 exclusive remedy for toxic exposure injuries in the workplace.)  
4 The trial court further determined that Mr. Gunnell's battery  
5 cause of action did not fall within the fraudulent concealment  
6 exception.

7 The appellate court affirmed the trial court's decision on  
8 substantially the same grounds as set forth by the trial court in  
9 its decision. See Gunnell v. Metrocolor Labs., Inc., 92 Cal.  
10 App. 4th 710 (2001).

11 B. Mr. Gunnell's legal malpractice action

12 Seven years later, acting pro se, Mr. Gunnell initiated a  
13 legal malpractice action against Ms. Silas. See Gunnell v.  
14 Silas, 2006 WL 204610 (2006); Gunnell v. Silas, 2009 WL 5158842  
15 (2009). He alleged that Ms. Silas erroneously had abandoned  
16 argument on the fraudulent concealment exception and had  
17 misappropriated settlement funds. The debtor later substituted  
18 in as counsel for Mr. Gunnell.

19 Moving for summary judgment, Ms. Silas argued that she did  
20 not commit legal malpractice by abandoning the fraudulent  
21 concealment exception argument because it did not apply as a  
22 matter of law. Ms. Silas also argued that she did not  
23 misappropriate settlement funds because: 1) Mr. Gunnell had  
24 agreed to apply any settlement funds due him to the costs of the  
25 personal injury action; and 2) he had signed the settlement  
26 documents in her presence before a notary public and had signed

1 the back of the settlement check, endorsing it over to her.<sup>6</sup>

2 The trial court agreed with Ms. Silas, granting summary  
3 judgment in her favor. The appellate court affirmed the trial  
4 court's decision.

5 C. Ms. Silas' malicious prosecution action

6 Ms. Silas then filed a complaint against the debtor for  
7 malicious prosecution of the legal malpractice action. As part  
8 of her malicious prosecution cause of action, she asserted that  
9 the debtor lacked probable cause in prosecuting the legal  
10 malpractice action and that he prosecuted it with malice.

11 Specifically, Ms. Silas contended that the debtor continued  
12 to prosecute Mr. Gunnell's claim for misappropriation of  
13 settlement funds even though the debtor was shown copies of the  
14 signed and notarized settlement agreement and the endorsed  
15 settlement check.

16 Ms. Silas moreover argued that she did not erroneously  
17 abandon the fraudulent concealment exception argument because she  
18 determined that it did not apply based on the facts of  
19 Mr. Gunnell's personal injury action and prevailing California  
20 case law. She presented portions of Mr. Gunnell's depositions  
21 and trial testimony regarding his statements as to his knowledge  
22 of his injuries over the years. She also pointed out that the  
23 debtor had represented Mr. Gunnell at the depositions and in the  
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25  
26 <sup>6</sup> Ms. Silas deposited the settlement check into her trust  
27 account. Once the settlement check cleared, she applied the  
28 settlement funds to the outstanding cost balance. As a courtesy,  
she also issued a \$2,500 check to Mr. Gunnell, even though the  
costs of the case exceeded the settlement amount.

1 legal malpractice action.

2         At trial in the malicious prosecution action, the debtor  
3 opined that he would be committing malpractice if he conceded  
4 that Mr. Gunnell's case lacked merit. He believed that he had to  
5 proceed with it, otherwise he would have breached his duty to his  
6 client, Mr. Gunnell.

7         The debtor testified that he based the legal malpractice  
8 action on his contention that Ms. Silas should not have abandoned  
9 the argument on the fraudulent concealment exception. He  
10 believed that Johns-Manville was not controlling law as to the  
11 application of the fraudulent concealment exception in  
12 Mr. Gunnell's personal injury action. He admitted that he did  
13 not read all of Mr. Gunnell's testimony in the personal injury  
14 action.

15         Despite Ms. Silas' repeated requests that he withdraw the  
16 claim for misappropriation of settlement funds, the debtor  
17 refused to do so. He continued to press forward with  
18 Mr. Gunnell's claim for misappropriation of settlement funds  
19 because: 1) he believed that Ms. Silas did not disburse the  
20 settlement funds pursuant to her fee agreement with Mr. Gunnell;  
21 and 2) he believed that the settlement documents were not  
22 properly authenticated as they did not indicate that the notary  
23 public witnessed Mr. Gunnell signing them. However, the debtor  
24 disclosed that he did not investigate Mr. Gunnell's allegations  
25 regarding Ms. Silas' alleged misappropriation of settlement funds  
26 because he was focusing on his contention concerning her  
27 abandonment of the fraudulent concealment exception argument. He  
28 further admitted that he recognized Mr. Gunnell's signatures on

1 the settlement documents and the settlement check.

2 The debtor denied harboring any malice towards Ms. Silas.  
3 He claimed that he did not harass her in any fashion as she had  
4 counsel representing her.

5 Following closing argument, the jury was given the following  
6 instructions:

7 Martina Silas claims that James Arden wrongfully  
8 brought a lawsuit against her. To establish this  
claim, Martina Silas must prove all of the following:

- 9 (1) That James Arden was actively involved in  
10 bringing or continuing the lawsuit;  
11 (2) That James Arden acted primarily for a  
purpose other than succeeding on the merits of the  
12 claim;  
13 (3) That Martina Silas was harmed; and  
14 (4) That James Arden's conduct was a substantial  
factor in causing Martina Silas's harm.

15 If you decide that James Arden's conduct caused Martina  
16 Silas harm, you must decide whether that conduct  
justifies an award of punitive damages. At this time,  
17 you must decide whether Martina Silas has proved by  
clear and convincing evidence that James Arden engaged  
18 in that conduct with malice or oppression. The amount  
of punitive damages, if any, will be decided later.

19 "Malice" means that James Arden acted with intent  
20 to cause injury or that James Arden's conduct was  
despicable and was done with a willful and knowing  
disregard of the rights or safety of another. A person  
acts with knowing disregard when he or she is aware of  
the probable consequences of his or her conduct and  
deliberately fails to avoid those consequences.

21 "Oppression" means that James Arden's conduct was  
despicable and subjected Martina Silas to cruel and  
unjust hardship in knowing disregard of her rights.

22 "Despicable conduct" is conduct that is so vile,  
23 base, or contemptible that it would be looked down on  
and despised by reasonable people.

24 The following additional instruction was given to the jury:

25 Suits with the hallmark of an improper purpose include,  
26 but are not necessarily limited to, those in which  
27 (1) the person initiating them does not believe that  
the claim may be held valid; or (2) the proceedings are  
begun primarily because of hostility or ill will.

28 The jury rendered a verdict in Ms. Silas' favor. In the verdict

1 form, the jury answered a number of questions. Among them, the  
2 jury answered "yes" to this question: "Did James Arden act  
3 primarily for a purpose other than succeeding on the merits of  
4 the claim?" It also answered "yes" to this question: "Do you  
5 find by clear and convincing evidence that James Arden engaged in  
6 the conduct with malice or oppression?"

7 The jury awarded Ms. Silas \$145,756 in legal fees and costs,  
8 \$30,000 in non-economic damages and \$125,000 in punitive damages.

9 The debtor moved for judgment notwithstanding the verdict,  
10 which the trial court denied. He appealed, but the appellate  
11 court affirmed the trial court's decision in a published opinion,  
12 Silas v. Arden, 213 Cal. App. 4th 75 (2013).

13 According to the appellate court,

14 [t]o establish a cause of action for malicious  
15 prosecution, a plaintiff must prove that the underlying  
16 action was (1) terminated in the plaintiff's favor,  
(2) prosecuted without probable cause, and  
(3) initiated with malice.

17 Id. at 89 (citations omitted).

18 With respect to the element of probable cause, the appellate  
19 court explained that a court must determine, "in light of the  
20 facts known to counsel, whether any reasonable attorney would  
21 have thought the claim tenable. This is an objective  
22 standard. . . . [I]f the underlying claims were objectively  
23 tenable, the malicious prosecution claim fails, regardless of any  
24 evidence of malice on the part of the defendant." Id. at 90,  
25 quoting Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 875  
26 (Cal. 1989).

27 The appellate court determined that there was sufficient  
28 evidence supporting the jury's verdict on the element of probable

1 cause. The debtor lacked probable cause in prosecuting the legal  
2 malpractice claim against Ms. Silas in that: 1) the fraudulent  
3 concealment exception did not apply as a matter of law based on  
4 the holding in Johns-Manville and the fact that Mr. Gunnell was  
5 aware of his condition and its cause, which Mr. Gunnell had  
6 disclosed to a Metrocolor supervisor; and 2) the debtor continued  
7 to prosecute the claim for misappropriation of settlement funds,  
8 even after he was presented with the settlement documents and  
9 settlement check, which bore Mr. Gunnell's signatures.

10 As for the element of malice, the appellate court noted that  
11 this element went to "the defendant's subjective intent," though  
12 it was "not limited to actual hostility or ill will toward the  
13 plaintiff." Silas v. Arden, 213 Cal. App. 4th at 90. The  
14 appellate court explained that malice could exist

15 where the proceedings are initiated for the purpose of  
16 forcing a settlement which has no relation to the  
17 merits of the claim. A lack of probable cause is a  
18 factor that may be considered in determining if the  
19 claim was prosecuted with malice . . . but the lack of  
20 probable cause must be supplemented by other,  
21 additional evidence. Since parties rarely admit an  
22 improper motive, malice is usually proven by  
23 circumstantial evidence. . . . [T]hat evidence must  
24 include proof of either actual hostility or ill will on  
25 the part of the defendant or a subjective intent to  
26 deliberately misuse the legal system for personal gain  
or satisfaction at the expense of the wrongfully sued  
defendant. Suits with the hallmark of an improper  
purpose are those where (1) the person initiating them  
does not believe that his claim may be held valid;  
(2) the proceedings are begun primarily because of  
hostility or ill will; (3) the proceedings are  
initiated solely for the purpose of depriving the  
person against whom they are initiated of a beneficial  
use of his property; (4) the proceedings are initiated  
for the purpose of forcing a settlement which has no  
relation to the merits of the claim.

27 Id. at 90-91 (citations omitted).

28 With respect to the element of malice, the appellate court

1 determined that sufficient evidence supported the jury's verdict.  
2 Id. at 92. According to the appellate court, the evidence  
3 demonstrated that the debtor had acted maliciously in instigating  
4 and continuing with the malicious prosecution action through  
5 [his] failure to investigate the merits of  
6 applicability of the fraudulent misrepresentation  
7 exception and his failure to withdraw allegations of  
8 misappropriation even when confronted with unequivocal  
9 evidence the allegations were not supported by the  
10 facts.

9 Id. at 92. Having concluded that the elements for malicious  
10 prosecution were met, the appellate court upheld the trial  
11 court's decision.

12 The debtor unsuccessfully petitioned the California supreme  
13 court to review the appellate court's decision. Ms. Silas'  
14 judgment in the malicious prosecution action against the debtor  
15 is final.

16 D. Ms. Silas' § 523(a)(6) complaint

17 A month after the debtor filed his chapter 7 bankruptcy  
18 petition on June 7, 2013, Ms. Silas filed a complaint seeking to  
19 except the state court judgment from discharge under  
20 § 523(a)(6).<sup>7</sup> She contended that the state court judgment must

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21  
22 <sup>7</sup> Ms. Silas also sought to except the state court judgment  
23 from discharge under § 523(a)(2) and to deny the debtor's  
24 discharge under §§ 707(b) and 727(a). The debtor moved to  
25 dismiss these claims under Civil Rule 12(b)(6).

26 The bankruptcy court held a hearing on both Ms. Silas'  
27 summary judgment motion and the debtor's motion to dismiss. As  
28 we describe more fully below, the bankruptcy court granted  
summary judgment as to Ms. Silas' claim under § 523(a)(6) only.  
It granted the debtor's motion to dismiss the claims under  
§§ 523(a)(2) and 707(b) with prejudice, and § 727(a) with leave  
(continued...)

1 be given issue preclusive effect because it was based on an  
2 intentional tort requiring proof of malice, which constituted a  
3 willful and malicious injury within the meaning of § 523(a)(6).

4 The debtor filed his motion to dismiss the complaint under  
5 Civil Rule 12(b)(6) on the ground that Ms. Silas failed to allege  
6 facts showing that he had maliciously and willfully injured her  
7 within the meaning of § 523(a)(6). He argued that the malice  
8 requirement for malicious prosecution was not the same as the  
9 malice and willful requirements for § 523(a)(6). According to  
10 the debtor, to establish malice for malicious prosecution, the  
11 plaintiff must show that the injurious conduct was intended to  
12 cause injury or was carried out with a willful and conscious  
13 disregard of the rights or safety of others. The level of intent  
14 required for malicious prosecution did not satisfy that required  
15 for willful and malicious injury under § 523(a)(6).

16 Before filing her opposition to the motion to dismiss,  
17 Ms. Silas filed her summary judgment motion. She maintained that  
18 the state court judgment had issue preclusive effect because the  
19 requirements for malicious prosecution were the same as those for  
20 willful and malicious injury under § 523(a)(6).

21 With respect to the willfulness requirement, Ms. Silas  
22 asserted that, in California, "malicious prosecution [was] deemed  
23 **a willful act as a matter of law.**" (Emphasis in original.) As  
24 for the malice requirement, she pointed out that the plaintiff  
25

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26 <sup>7</sup>(...continued)  
27 to amend.

28 To date, Ms. Silas has not amended her complaint as to her  
§ 727(a) claim.

1 must prove that the defendant either had actual hostility or ill  
2 will or a subjective intent to misuse the legal system  
3 deliberately for personal gain at the plaintiff's expense.

4 The bankruptcy court held a hearing on both the motion to  
5 dismiss and the summary judgment motion. The bankruptcy court  
6 granted summary judgment in Ms. Silas' favor and denied the  
7 debtor's motion to dismiss as to her claim under § 523(a)(6). It  
8 concluded that issue preclusion applied because the requirements  
9 for malicious prosecution in California satisfied the  
10 requirements for willful and malicious injury under § 523(a)(6).

11 The bankruptcy court determined that the test for malice  
12 under California law for malicious prosecution was the "same or  
13 equivalent to [the test for] malice under § 523(a)(6)." It found  
14 that the debtor acted with malice and abused the court system by  
15 maintaining the malpractice action as leverage against Ms. Silas.  
16 It further noted that "the jury was instructed on malice in a way  
17 that [met] the standards under [§] 523(a)(6) as defined in the  
18 Ninth Circuit case law." The bankruptcy court also determined  
19 that the debtor acted willfully because he continued the legal  
20 malpractice action against Ms. Silas, despite knowing that he  
21 could not prevail given that he lacked both legal and factual  
22 support for it. It thus declined to retry the issue as to  
23 whether the debtor was liable for malicious prosecution.

24 The bankruptcy court entered an order denying the debtor's  
25 motion to dismiss on January 15, 2014. Three months later, it  
26 entered an order granting Ms. Silas' summary judgment motion. On  
27 the same day, it entered judgment excepting the jury award from  
28 discharge under § 523(a)(6).

1 The debtor timely appealed.

2  
3 **JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.  
5 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.  
6 § 158.

7  
8 **ISSUES**

9 1) Did the bankruptcy court err in denying the debtor's  
10 motion to dismiss the complaint as to Ms. Silas's § 523(a) (6)  
11 claim?

12 2) Did the state court judgment for malicious prosecution  
13 satisfy the elements of malice and willfulness for an exception  
14 to discharge under § 523(a) (6)?

15 3) Did the bankruptcy court err in granting Ms. Silas's  
16 summary judgment motion by giving issue preclusive effect to the  
17 state court judgment?

18  
19 **STANDARDS OF REVIEW**

20 We review de novo the bankruptcy court's decisions to grant  
21 summary judgment, Szajer v. City of Los Angeles, 632 F.3d 607,  
22 610 (9th Cir. 2011), and to deny a motion to dismiss for failure  
23 to state a claim, S.E.C. v. Colello, 139 F.3d 674 (9th Cir.  
24 1998).

25 "We review de novo whether a particular type of debt is  
26 nondischargeable as a willful and malicious injury under  
27 § 523(a) (6)." Maaskant v. Peck (In re Peck), 295 B.R. 353, 360  
28 (9th Cir. BAP 2003), quoting Tsurukawa v. Nikon Precision, Inc.

1 (In re Tsurukawa), 258 B.R. 192, 195 (9th Cir. BAP 2001). See  
2 also Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir.  
3 2002) (“Whether a claim is nondischargeable presents mixed issues  
4 of law and fact and is reviewed de novo.”). We review the  
5 bankruptcy court’s conclusions of law and interpretation of  
6 provisions of the Bankruptcy Code de novo. Anwar v. Johnson,  
7 720 F.3d 1183, 1186 (9th Cir. 2013), quoting Greene v. Savage  
8 (In re Greene), 583 F.3d 614, 618 (9th Cir. 2009).

9 We review de novo the bankruptcy court’s determination that  
10 issue preclusion is available. See Miller v. County of Santa  
11 Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994). If we conclude that  
12 issue preclusion is available, we review for abuse of discretion  
13 the bankruptcy court’s application of issue preclusion to the  
14 state court judgment. Id. A bankruptcy court abuses its  
15 discretion if it applies the wrong legal standard, misapplies the  
16 correct legal standard or if it makes factual findings that are  
17 illogical, implausible or without support in inferences that may  
18 be drawn from the facts in the record. See TrafficSchool.com,  
19 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011), citing  
20 United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)  
21 (en banc).

## 22 **DISCUSSION**

23  
24 Before we launch into our analysis, we must set forth the  
25 legal standards that guide it.

### 26 A. Applicable legal standards

#### 27 1. Motion to dismiss

28 “In order to survive a motion to dismiss, a party must

1 allege 'sufficient factual matter, accepted as true, to state a  
2 claim to relief that is plausible on its face.'" In re Fitness  
3 Holdings, Intern., Inc., 714 F.3d 1141, 1144 (9th Cir. 2013)  
4 ("Fitness Holdings"), quoting Telesaurus VPC, LLC v. Power,  
5 623 F.3d 990, 1003 (9th Cir. 2010). See also Nordeen v. Bank of  
6 Am., N.A. (In re Nordeen), 495 B.R. 468, 477 (9th Cir. BAP 2013).  
7 "'A claim has facial plausibility when the plaintiff pleads  
8 factual content that allows the court to draw the reasonable  
9 inference that the defendant is liable for the misconduct  
10 alleged.'" Fitness Holdings, 714 F.3d at 1144, quoting Ashcroft  
11 v. Iqbal, 556 U.S. 662, 678 (2009). See also Nordeen, 495 B.R.  
12 at 477. In reviewing a denial of a motion to dismiss for failure  
13 to state a claim, we accept "'[a]ll well-pleaded allegations of  
14 material fact as true'" and construe them "'in the light most  
15 favorable to the non-moving party.'" Fitness Holdings, 714 F.3d  
16 at 1144, quoting Faulkner v. ADT Sec. Servs., Inc., 706 F.3d  
17 1017, 1019 (9th Cir. 2013).

18 After reviewing her complaint, we determine that Ms. Silas  
19 has alleged facts sufficient to plead that the judgment she  
20 obtained against the debtor in the malicious prosecution action  
21 may be excepted from discharge under § 523(a)(6). We thus  
22 conclude that the bankruptcy court did not err in denying the  
23 debtor's motion to dismiss.

24 2. Summary judgment may be based on the issue preclusive  
25 effect of a state court judgment

26 When reviewing its decision on a summary judgment motion, we  
27 apply the same standards for summary judgment as the bankruptcy  
28 court. Summary judgment is appropriate when the record shows

1 that no genuine dispute of material fact exists, and the moving  
2 party is entitled to judgment as a matter of law. Fresno Motors,  
3 LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir.  
4 2014). In making this determination, the bankruptcy court must  
5 view the evidence in the light most favorable to the non-moving  
6 party. Id. It must draw all justifiable inferences in the non-  
7 moving party's favor. Id.

8 A bankruptcy court may grant summary judgment based on the  
9 issue preclusive effect of an existing state court judgment. See  
10 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
11 2001). In doing so, it must apply the forum state's issue  
12 preclusion law. Id. See also 28 U.S.C. § 1738. Here,  
13 California preclusion law applies.

14 In California, issue preclusion bars relitigation of an  
15 issue when: 1) the issue sought to be precluded is identical to  
16 that decided in a prior proceeding; 2) the issue was actually  
17 litigated in the prior proceeding; 3) the issue was necessarily  
18 decided in the prior proceeding; and 4) the decision in the prior  
19 proceeding is final and on the merits. Lucido v. Superior Court,  
20 51 Cal. 3d 335, 341 (1990). Additionally, in California, issue  
21 preclusion may only be applied if it furthers underlying public  
22 policies. See id. at 343.

23 The party asserting issue preclusion bears the burden of  
24 establishing these requirements. Id. at 341. To do so, "[the]  
25 party must produce a record sufficient to reveal the controlling  
26 facts and pinpoint the exact issues litigated in the prior  
27 action. Any reasonable doubt as to what was decided by a prior  
28 judgment should be resolved against allowing [issue preclusive]

1 effect.” Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th  
2 Cir. BAP 1995), aff’d, 100 F.3d 110 (9th Cir. 1996).

3 3. The elements required to establish § 523(a)(6)

4 Section 523(a)(6) excepts from discharge debts arising from  
5 a debtor’s willful and malicious injury to another person.

6 Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th  
7 Cir. 2008). We must analyze the willful and malice requirements  
8 separately, Carillo v. Su (In re Su), 290 F.3d 1140, 1146-47  
9 (2002), and we must determine that both have been met, Ormsby v.  
10 First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206  
11 (9th Cir. 2010).

12 “A ‘willful’ injury is a deliberate or intentional injury,  
13 not merely a deliberate or intentional act that leads to injury.”  
14 Barboza, 545 F.3d at 706, quoting Kawaauhau v. Geiger, 523 U.S.  
15 57, 61 (1998). To satisfy the willfulness requirement, it must  
16 be shown that the debtor either had “a subjective intent to harm  
17 or a subjective belief that harm is substantially certain.” Su,  
18 290 F.3d at 1144. When determining the debtor’s intent under  
19 § 523(a)(6), there is a presumption that the debtor knows the  
20 natural consequences of his actions. Ormsby, 591 F.3d at 1206.

21 “A malicious injury involves ‘(1) a wrongful act, (2) done  
22 intentionally, (3) which necessarily causes injury, and (4) is  
23 done without just cause or excuse.’” Su, 290 F.3d at 1146-47,  
24 quoting Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209  
25 (9th Cir. 2001). “Within the plain meaning of this definition,  
26 it is the wrongful act that must be committed intentionally  
27 rather than the injury itself.” Jett v. Sicroff (In re Sicroff),  
28 401 F.3d 1101, 1106 (9th Cir. 2005), citing Murray v. Bammer

1 (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part  
2 definition does **not** require a showing of biblical malice, i.e.,  
3 personal hatred, spite, or ill will. Nor does it require a  
4 showing of an intent to injure, but rather it requires only an  
5 intentional act which causes injury."). "Malice may be inferred  
6 based on the nature of the wrongful act." Ormsby, 591 F.3d at  
7 1206, citing Transamerica Comm. Fin. Corp. v. Littleton  
8 (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991) (determining  
9 that, in the case of conversion, malice may be inferred).

10 4. The elements required to establish malicious  
11 prosecution

12 In California, the common law tort of malicious prosecution  
13 provides a remedy for individuals subjected to maliciously  
14 instituted criminal and civil proceedings. See Sheldon Appel Co.  
15 v. Albert Oliker, 47 Cal. 3d 863, 871-72 (1989). To establish a  
16 cause of action for malicious prosecution of a civil proceeding,  
17 the plaintiff must show "that the prior action (1) was commenced  
18 [or continued] by or at the direction of the defendant and was  
19 pursued to a legal termination in his [or her], plaintiff's,  
20 favor; (2) was brought without probable cause; and (3) was  
21 initiated [or continued] with malice." Id., quoting Bertero v.  
22 Nat'l Gen. Corp., 13 Cal. 3d 43, 50 (1974) (internal quotation  
23 marks omitted).

24 "Probable cause . . . is a question of law that turns on  
25 whether the underlying claim was 'legally tenable, as determined  
26 on an objective basis.'" Tucker, 515 F.3d at 1031, quoting  
27 Padres L.P. v. Henderson, 114 Cal. App. 4th 495, 517 (2004).  
28 Probable cause "is measured by the state of the defendant's

1 knowledge, not by his intent." Sheldon Appel Co., 47 Cal. 3d at  
2 881, quoting Dir. Gen. v. Kastenbaum, 263 U.S. 25, 27-28 (1923)  
3 ("Kastenbaum"). The question ultimately is not whether the  
4 defendant believed the facts to constitute probable cause, but  
5 whether the court believes they did, an objective standard.  
6 Sheldon Appel Co., 47 Cal. 3d at 881, quoting Kastenbaum,  
7 263 U.S. at 27-28.

8 "The 'malice' element of the malicious prosecution tort  
9 relates to the subjective intent or purpose with which the  
10 defendant acted in initiating the prior action." Estate of C.  
11 Delores Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1030  
12 (9th Cir. 2008) ("Tucker"), quoting Sheldon Appel Co., 47 Cal. 3d  
13 at 874 (internal quotation marks omitted). However, the malice  
14 required in malicious prosecution "is not limited to actual  
15 hostility or ill will toward [the] plaintiff but exists when the  
16 proceedings are instituted primarily for an improper purpose."  
17 Albertson v. Raboff, 46 Cal. 2d 375, 383 (Cal. 1956). See also  
18 Tucker, 515 F.3d at 1030, quoting Sierra Club Found. v. Graham,  
19 72 Cal. App. 4th 1135, 1147 (1999) ("Sierra Club").

20 The California Supreme Court has explained:

21 [T]he principal situations in which the civil  
22 proceedings are initiated for an improper purpose are  
23 those in which (1) the person instituting them does not  
24 believe that his claim may be held valid; (2) the  
25 proceedings are begun primarily because of hostility or  
26 ill will; (3) the proceedings are initiated solely for  
the purpose of depriving the person against whom they  
are instituted of a beneficial use of his property;  
[or] (4) the proceedings are initiated for the purpose  
of forcing a settlement which has no relation to the  
merits of the claim.

27 Albertson, 46 Cal. 2d at 383, quoting Rest., Torts § 676.

28 Accordingly, in a malicious prosecution action, the proof **may or**

1 **may not** establish a willful intent to injure on the part of the  
2 defendant.

3 B. Summary judgment in this appeal

4 On appeal, the debtor contends that the bankruptcy court  
5 erred in granting summary judgment in Ms. Silas' favor on her  
6 § 523(a) (6) claim based on issue preclusion. He challenges the  
7 bankruptcy court's application of the first and third California  
8 elements for issue preclusion: 1) that the issue sought to be  
9 precluded is identical to that decided in the prior proceeding;  
10 and 2) that the issue was necessarily decided in the prior  
11 proceeding.<sup>8</sup>

12 With respect to the first issue preclusion element, he

13  
14 <sup>8</sup> The debtor advances two additional arguments. First, he  
15 contends that the bankruptcy court erred in relying on the  
16 determinations made by the state appellate court in its opinion,  
17 Silas v. Arden, 213 Cal. App. 4th 75 (2013), "in lieu of [the]  
18 proof of what happened at trial." Reading the transcript of the  
19 hearing, we do not get a sense that the bankruptcy court relied  
20 on the background facts discussed in the state appellate court's  
21 opinion in making its determination. In fact, the bankruptcy  
22 court told the debtor that it "relied on the materials submitted  
23 with them - with the briefs," which included not only the state  
24 appellate court's opinion, but also the jury instructions. The  
25 bankruptcy court moreover indicated that it mostly relied on the  
26 jury instructions and Ms. Silas' brief.

27 The bankruptcy court also explained to the debtor that it  
28 was not a state appellate court. If it looked behind the state  
court's decision, it would "be assuming that the state court was  
wrong."

Second, the debtor argues that the bankruptcy court merged  
issue preclusion with the Rooker-Feldman doctrine. At the  
hearing, the bankruptcy court explicitly stated that it was not a  
state appellate court and could not review a state appellate  
court's decisions. The bankruptcy court did not err in  
considering the state appellate court's analysis of California  
state law issues in this case.

1 argues that the state court judgment did not have issue  
2 preclusive effect because the malice requirement for malicious  
3 prosecution is not the same as the willful requirement for  
4 § 523(a)(6).

5 With respect to the second issue preclusion element, the  
6 debtor maintains that the bankruptcy court erred in refusing to  
7 consider evidence as to the debtor's subjective intent at the  
8 time he continued the legal malpractice action on Mr. Gunnell's  
9 behalf. He claims that the evidence would show that he did not  
10 intend to harm Ms. Silas in prosecuting the malicious prosecution  
11 action on Mr. Gunnell's behalf. Rather, he simply sought to  
12 carry out his duty as counsel to his client, Mr. Gunnell. He  
13 also believed that Mr. Gunnell had a meritorious malpractice  
14 claim against Ms. Silas.

15 He moreover argues that "it was impossible to know" from the  
16 jury instructions and the verdict whether the jury actually found  
17 that he had intended to cause Ms. Silas injury in filing the  
18 malicious prosecution action. In fact, the only instruction  
19 given to the jury concerning malice defined "malice" as either  
20 that "(1) [the debtor] intended to cause injury to [Ms.] Silas  
21 when he represented Mr. Gunnell or (2) [his] representation of  
22 [Mr.] Gunnell was despicable and done with knowing disregard of  
23 [Ms.] Silas' rights." Appellant's Opening Brief at 37. Also,  
24 the jury finding that the debtor had acted for a purpose "other  
25 than succeeding on the merits" did not describe what that purpose  
26 might have been. Appellant's Opening Brief at 38.

27 Comparing the elements of the California intentional tort of  
28 malicious prosecution with the requirements to establish a

1 willful and malicious injury excepted from the debtor's discharge  
2 under § 523(a)(6), we have no quarrel with the bankruptcy court's  
3 conclusion that the "malicious" element was established, but  
4 although we acknowledge that it is a very close question, we  
5 disagree that the "willful" standard was necessarily met. We  
6 thus conclude that the bankruptcy court erred in granting summary  
7 judgment in Ms. Silas' favor based on the issue preclusive  
8 effects of the state court judgment with respect to the  
9 § 523(a)(6) "willful injury" element.

10 As we explained above, in order to except a debt from  
11 discharge as a willful and malicious injury under § 523(a)(6), we  
12 must analyze the elements of willfulness and maliciousness  
13 separately, Su, 290 F.3d at 1146-47, and determine that **both** have  
14 been met, Ormsby, 591 F.3d at 1206. The § 523(a)(6) willfulness  
15 requirement involves **a deliberate or intentional injury**.

16 Willfulness is not a separate and distinct element of the  
17 tort of malicious prosecution, though it may be inferred from the  
18 debtor's intent in commencing or continuing litigation.  
19 Moreover, "[m]erely because a tort is classified as intentional  
20 does not mean that any injury caused by the tortfeasor is  
21 willful.'" Ditto v. McCurdy, 510 F.3d 1070, 1078 (9th Cir.  
22 2007), quoting Miller v. J.D. Abrams Inc. (In re Miller),  
23 156 F.3d 598, 604 (5th Cir. 1998).

24 The state court judgment did not necessarily include  
25 findings of willfulness within the meaning of § 523(a)(6). The  
26 instructions to the jury did not ask specifically that the jury  
27 find that the debtor continued the legal malpractice action  
28 against Ms. Silas with a subjective intent to harm her. Rather,

1 the jury instructions asked the jury to determine whether the  
2 debtor "acted primarily for a purpose other than succeeding on  
3 the merits of the claim." The additional jury instructions did  
4 not require the jury to specify this purpose. Moreover, the  
5 verdict form merely repeated this instruction in the form of a  
6 question, to which the jury answered "yes."

7 One of the jury instructions stated that Ms. Silas must  
8 prove that the debtor's conduct was a substantial factor in  
9 causing her harm. But this instruction does not indicate whether  
10 the conduct was wrongful and was done intentionally. Moreover,  
11 the question in the verdict form asking if the jury found that  
12 the debtor "engaged in the conduct with malice or oppression" was  
13 in the disjunctive. The jury's simple "yes" did not determine  
14 definitely whether the debtor acted willfully.

15 The punitive damages instructions to the jury required the  
16 jury to determine whether the debtor's conduct was so  
17 reprehensible as to support a determination by clear and  
18 convincing evidence that the debtor acted with "malice or  
19 oppression," referencing "despicable conduct" as an applicable  
20 standard. As described in the instructions, "despicable conduct"  
21 is "conduct that is so vile, base, or contemptible that it would  
22 be looked down on and despised by reasonable people." Even so,  
23 as the Panel recently discussed at length in Plyam v. Precision  
24 Dev't, LLC, 530 B.R. 456, 464-70 (BAP 9th Cir. 2015), a  
25 California punitive damages award does not necessarily establish  
26 "willfulness" for § 523(a)(6) purposes. We conclude, on the  
27 record before us, that the issue of whether the debtor willfully  
28 injured Ms. Silas was not necessarily decided in the malicious

1 prosecution action.

2  
3 **CONCLUSION<sup>9</sup>**

4 Based on our review of the record, Ms. Silas alleged facts  
5 sufficient to support her claim under § 523(a)(6). The  
6 bankruptcy court did not err in denying the debtor's motion to  
7 dismiss. We AFFIRM the bankruptcy court's order denying the  
8 debtor's motion to dismiss.

9 However, we VACATE and REMAND the bankruptcy court's order  
10 granting Ms. Silas' motion for summary judgment. Because the  
11 results in the malicious prosecution action did not establish the  
12 element of "willfulness" for § 523(a)(6) purposes, the state  
13 court judgment lacked issue preclusive effect. The bankruptcy  
14 court thus erred in granting summary judgment in Ms. Silas' favor  
15 on her § 523(a)(6) claim.

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26 <sup>9</sup> While this appeal was pending, Ms. Silas filed a motion to  
27 sanction the debtor and his counsel for filing a frivolous appeal  
28 ("sanctions motion"). Because we conclude that the bankruptcy  
court erred in granting Ms. Silas' summary judgment motion, the  
debtor's appeal is not frivolous. We thus deny Ms. Silas'  
sanctions motion.