

JUL 18 2016

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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-15-1033-JuD ^T a
)	
GLENN FRED HAGELE, JR.,)	Bk. No. 14-23470
)	
Debtor.)	Adv. No. 14-02200
)	
-----)	
GLENN FRED HAGELE, JR.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
LAURANELL BURCH,)	
)	
Appellee.)	
)	
-----)	

Argued and Submitted on June 23, 2016
at Sacramento, California

Filed - July 18, 2016

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Appearances: Emry J. Allen appeared for appellant Glenn Fred
Hagele, Jr.; Appellee Lauranell Burch appeared
pro se.

Before: JURY, DUNN, and TAYLOR, Bankruptcy Judges.

Memorandum by Judge Jury
Concurrence by Judge Dunn

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 Appellant Glenn Hagele (Debtor) appeals from the bankruptcy
2 court's judgment holding that his debt to Appellee Lauranell
3 Burch (Burch) is nondischargeable under § 523(a)(6).² The
4 bankruptcy court held that the state court prepetition judgment
5 entered in favor of Burch and against Debtor for defamation and
6 unfair trade practices established "willful and malicious
7 injury" under § 523(a)(6). For the reasons stated below, we
8 AFFIRM.

9 **I. FACTS**

10 The instant dispute arises out of a prepetition state court
11 action in which Debtor was found to have published defamatory
12 statements against Burch. Burch is a medical research
13 scientist, employed at the National Institute of Environmental
14 Health Scientists in North Carolina, who holds a PhD in
15 molecular biology and genetics. In 2004, Burch's eyes were
16 seriously damaged after she underwent Lasik surgery and, as a
17 result of this incident, she suffers from permanent eye damage.
18 As such, since the surgery, Burch has applied her science
19 background to the study of medical literature relating to the
20 complications that can arise from refractive eye surgeries.³
21 Burch has been on numerous television programs devoted to the
22 risks associated with Lasik surgery and generally cautions about

24 ² Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
26 All "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure and "Civil Rule" references are to the Federal Rules of
28 Civil Procedure.

³ "Refractive surgery" is a term used to describe surgical
procedures that correct common vision problems.

1 the dangers involved. Debtor founded and directs the Council
2 for Refractive Surgery Quality Assurance (CRSQA), which is a
3 patient advocacy group. This organization monitors all internet
4 bulletin boards, newsgroups, and other public forums that
5 pertain to refractive eye surgery, such as Lasik. The principal
6 function of CRSQA is to provide a "balanced response" if an
7 anti-refractive surgery advocate makes inflammatory statements.

8 On December 10, 2007, Debtor filed a defamation complaint
9 against Burch in the Superior Court of Wake County, North
10 Carolina, alleging that Burch was publishing documents
11 containing Debtor's personal information in violation of N.C.
12 Gen. Stat. § 75-66 (State Court Action). On that same day,
13 Debtor obtained an ex parte temporary restraining order. At the
14 preliminary injunction hearing, on December 21, 2007, the
15 superior court denied Debtor's motion for a further injunction
16 and dissolved the temporary restraining order. On April 28,
17 2008, Burch filed her first amended answer denying all
18 liability, and asserted two counterclaims against Debtor for
19 defamation and unfair trade practices in violation of N.C. Gen.
20 Stat. § 75-1.1 (collectively, the Defamation Claims). On
21 July 13, 2010, Debtor voluntarily dismissed all of his claims
22 against Burch; however, Burch's Defamation Claims remained.

23 On August 16, 2012, Burch filed a motion for partial
24 summary judgment asking the court to determine liability on the
25 Defamation Claims, leaving the issue of damages to a jury
26 determination at a later time.

27 On December 2, 2012, the superior court issued an order
28 granting partial summary judgment in favor of Burch (Summary

1 Judgment Order), finding:

2 1. The evidence in the record establishes that there is no
3 genuine issue of material fact that Hagele made a number of
4 statements about Burch after May 3, 2007 to Burch's
5 employer, in press releases, and over the Internet that
6 were false, including statements that falsely accused her
7 of publishing personal information on the Internet.

8 2. The evidence in the record establishes that there is no
9 genuine issue of material fact these statements were of and
10 concerning Burch, published to others, and were defamatory
11 per se because they impeached her in her trade or
12 profession and tended to subject her to ridicule, contempt,
13 or disgrace. Accordingly, these statements constitute
14 actionable defamation as a matter of law. . . .

15 3. Further, the case law of North Carolina establishes that
16 defamation 'impeaching a party in its business activities'
17 amounts to a violation of N.C. Gen. § 75-1.1.

18 On February 26, 2013, a jury unanimously determined that
19 Burch was entitled to compensatory damages in the amount of
20 \$150,000.00 and punitive damages in the amount of \$200,000.00
21 (collectively, the Jury Award). On August 9, 2013, the court
22 (1) entered judgment confirming the findings of the Summary
23 Judgment Order and the Jury Award; (2) determined that Burch was
24 entitled to post-judgment interest at the legal rate of 8%; and
25 (3) allowed Burch to recover attorneys' fees incurred in
26 defending against Debtor's claims.

27 Due to the malicious nature of Debtor's conduct, on
28 August 15, 2013, the court issued a permanent injunction
requiring Debtor to cease publishing defamatory statements and
to remove any statements which had been published (Permanent
Injunction Order). The court based the Permanent Injunction
Order's findings and conclusions on the same evidence that was
found in the Summary Judgment Order and Jury Award. The
Permanent Injunction Order contained findings that:

1 1. The evidence at trial in this matter established that
2 Hagele's conduct toward [Burch] was malicious. In
3 particular, his defamation of [Burch] was substantial and
4 included a large number of false statements made over an
5 extended period of time directly to [Burch]'s employer and
6 on numerous forums and websites on the Internet. The
7 evidence at trial further established that Mr. Hagele's
8 defamation of [Dr. Burch] has caused, and is causing,
9 [Burch] to suffer substantial harm. Finally, the evidence
10 at trial established that Mr. Hagele intended [Burch] to be
11 harmed by his conduct.

12 2. Given the widespread nature of Mr. Hagele's defamation
13 of [Burch] on the Internet, [Burch] is substantially likely
14 to suffer additional harm in the future absent injunctive
15 relief directing Mr. Hagele to remove such defamation. The
16 Court finds and concludes based on the evidence introduced
17 at trial that such additional harm would be substantial and
18 irreparable absent injunctive relief requiring the removal
19 of Mr. Hagele's defamation of her on the Internet.

20 3. The evidence adduced at trial also established that
21 Mr. Hagele continues to threaten to contact the employers
22 of certain critics of the Lasik procedure, and he continues
23 to threaten to disseminate information about [Burch]. The
24 Court finds and concludes based on the evidence introduced
25 at trial that [Burch] faces a substantial risk of
26 additional harm, and that such additional harm would be
27 substantial and irreparable, absent injunctive relief
28 enjoining Mr. Hagele from further contact with her current
employer.

1 4. The record also evidences further inequitable conduct on
2 Mr. Hagele's part, including his engagement of a purported
3 private investigator who informed Mr. Hagele that he had
4 'complete access' to the home of a critic of the Lasik
5 procedure who passed along to Mr. Hagele emails that he
6 indicated he had 'intercepted,' including emails both to
7 and from [Burch]. This inequitable conduct, in addition to
8 intentional and malicious nature of Hagele's conduct in
9 engaging in the defamation at issue in this case, further
10 warrants entry of injunctive relief.

11 On April 3, 2014, Debtor filed a chapter 7 bankruptcy case.
12 Thereafter, Burch filed a timely adversary proceeding seeking to
13 except the Defamation Claims from discharge under § 523(a)(6).
14 On December 5, 2015, Burch filed a summary judgment motion,
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 arguing that collateral estoppel⁴ precluded relitigation of the
2 issues decided by the superior court in the Summary Judgment
3 Order, Jury Award, and Permanent Injunction Order (collectively,
4 the Superior Court Judgments). Burch contended that the
5 Superior Court Judgments determined that Debtor caused "willful
6 and malicious injury" to her under § 523(a)(6).

7 On January 15, 2016, the bankruptcy court granted Burch's
8 motion for summary judgment, finding the debt to be
9 nondischargeable under § 523(a)(6). In doing so, the court
10 relied heavily on Jett v. Sicroff (In re Sicroff), 401 F.3d 1101
11 (9th Cir. 2005), for the notion that, in a defamation suit,
12 there can be no "just cause or excuse" for an intentional lie.
13 Debtor timely appeals to this court.

14 **II. JURISDICTION**

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

18 **III. ISSUE**

19 Whether the bankruptcy court erred in granting summary
20 judgment for Burch on the basis of issue preclusion.

21 **IV. STANDARDS OF REVIEW**

22 We review summary judgment motions de novo. Gertsch v.
23 Johnson & Johnson (In re Gertsch), 237 B.R. 160, 165 (9th Cir.
24 BAP 1999). De novo review requires the Panel to independently
25

26 ⁴ Although Burch premised her arguments on the application
27 of "collateral estoppel" this Panel, following the trend of most
28 federal courts, uses the more precise term "issue preclusion"
when considering the preclusive effect of a prior court judgment.

1 review an issue, without giving deference to the bankruptcy
2 court's conclusions. First Ave. W. Bldg., LLC v. James
3 (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006).

4 "We review rulings regarding rules of res judicata,
5 including claim and issue preclusion, de novo as mixed questions
6 of law and fact in which legal questions predominate." Khaligh
7 v. Hadaegh (In Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006),
8 aff'd, 506 F.3d 956 (9th Cir. 2007) (citing Robi v. Five
9 Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988)). "Once it is
10 determined that preclusion doctrines are available to be
11 applied, the actual decision to apply them is left to the trial
12 court's discretion." Id. Such discretion is exercised in
13 accordance with state law, when state preclusion law controls.
14 Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th
15 Cir. 1995).

16 Under the abuse of discretion standard of review, we first
17 "determine de novo whether the [bankruptcy] court identified the
18 correct legal rule to apply to the relief requested." United
19 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
20 If the bankruptcy court identified the correct legal rule, we
21 then determine under the clearly erroneous standard whether its
22 factual findings and its application of the facts to the
23 relevant law were: "(1) illogical, (2) implausible, or
24 (3) without support in inferences that may be drawn from the
25 facts in the record." Id. (internal quotation marks omitted).

26 V. DISCUSSION

27 A. Summary Judgment Standards

28 A trial court will appropriately grant summary judgment "if

1 the pleadings, the discovery and disclosure materials on file,
2 and any affidavits show that there is no genuine issue as to any
3 material fact and that the movant is entitled to judgment as a
4 matter of law." Civil Rule 56(c)(2), as incorporated by
5 Rule 7056. The trial court does not weigh evidence but merely
6 determines whether material facts remain in dispute. Covey v.
7 Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997).
8 A dispute is genuine if there is sufficient evidence for a
9 reasonable fact finder to hold in favor of the non-moving party,
10 and a fact is "material" if it might affect the outcome of the
11 case. Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th
12 Cir. 1997).

13 The plaintiff carries the initial burden of production and
14 the ultimate burden of persuasion that there is "no genuine
15 issue as to any material fact." Civil Rule 56(c). To meet this
16 burden, the plaintiff must provide conclusive evidence of "a
17 showing sufficient for the court to hold that no reasonable
18 trier of fact could find other than for the moving party."
19 S. Cal. Gas Co. v. City of Santa Ana, 336 F. 3d 885, 888 (9th
20 Cir. 2003). The burden can shift to the non-moving party, who
21 must "go beyond the pleadings" and by his or her own affidavits,
22 depositions, answers to interrogatories, or admissions on file,
23 designate specific facts to demonstrate that there is a genuine
24 issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323
25 (1986).

26 **B. Willful and Malicious Injury: § 523(a)(6)**

27 Section 523(a)(6) provides in relevant part: "(a) A
28 discharge under section 727 . . . of this title does not

1 discharge an individual debtor from any debt - . . . (6) for
2 willful and malicious injury by the debtor to another entity or
3 to the property of another entity[.]”

4 In the Ninth Circuit, willfulness and malice are analyzed
5 separately and are not to be conflated. See Carrillo v. Su
6 (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002). Willful injury
7 requires an inquiry into the subjective state of mind of the
8 debtor. In re Su, 290 F.3d at 1145. The standard is met when
9 it is shown that the debtor either had a subjective motive to
10 inflict injury or the debtor believed that injury was
11 substantially certain to occur. Id. However, it is not enough
12 to merely prove that the debtor acted intentionally and caused
13 an injury. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).
14 Malicious injury requires: (1) a wrongful act, (2) done
15 intentionally, (3) which necessarily causes injury, and (4) is
16 done without just cause or excuse. Petralia v. Jercich
17 (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001).

18 It is well established that issue preclusion may be applied
19 in exception to discharge proceedings. Grogan v. Garner,
20 498 U.S. 279, 284 (1991). “Issue preclusion ‘bars successive
21 litigation of an issue of fact or law actually litigated and
22 resolved in a valid court determination essential to the prior
23 judgment, even if the issue recurs in the context of a different
24 claim.’” New Hampshire v. Maine, 532 U.S. 742, 748 (2001)
25 (quoting Hasnain v. Chadd (In re Hasnain), 2012 WL 5471453, at
26 *7 (9th Cir. BAP Nov. 9, 2012).

27 **C. Preclusion law of North Carolina**

28 Federal Courts must refer to the preclusion law of the

1 state in which the judgment was rendered in order to determine
2 the preclusive effect of a state court judgment. Marrese v. Am.
3 Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); Diruzza
4 v. Cty. of Tehama, 323 F.3d 1147, 1152 (9th Cir. 2003).

5 Therefore, North Carolina law on issue preclusion applies. The
6 elements for issue preclusion under North Carolina law are:

7 (a) a prior suit resulting in a final judgment on the
8 merits; (b) identical issues involved; (c) the issue
9 was actually litigated in the prior suit and necessary
to the judgment; and (d) the issue was actually
determined.

10 Royster v. McNamara, 218 N.C.App. 520, 525-26 (2012); McDonald
11 v. Skeen, 152 N.C.App. 228, 230 (2002).

12 **1. Prior suit resulting in a final judgment on the merits**

13 The first prong of issue preclusion requires a final
14 judgment on the merits. Under North Carolina law, a final
15 judgment is one that determines the entire controversy between
16 the parties, leaving nothing to be decided in the trial court.

17 Ratchford v. C.C. Mangum, Inc., 150 N.C.App. 197, 199 (2002).

18 The parties in the present case do not dispute that a final
19 judgment on the merits was entered in the state court. Thus,
20 the first element is satisfied.

21 **2. Identical issues involved**

22 The next and most critical prong requires comparison of the
23 issue presented in the prior state court action that resulted in
24 the defamation judgment with the issues presented in the current
25 case, whether Debtor acted willfully and maliciously. Under
26 North Carolina law, the term defamation applies to the two
27 distinct torts of libel and slander. A claim of libel per se
28 that defames a party in its business activities may be the basis

1 of a claim for unfair and deceptive trade practices under N.C.
2 G.S. 75-1.1. See Ellis v. N. Star Co., 326 N.C. 219, 225-26
3 (1990). Therefore, the proof required for each claim is
4 identical. Libel per se is a publication which, when considered
5 alone without explanatory circumstances, tends to impeach a
6 person in that person's trade or profession, or otherwise tends
7 to subject one to ridicule, contempt or disgrace. Renwick v.
8 News and Observer Pub. Co., 310 N.C. 312 (1984).

9 In the Summary Judgment Order the North Carolina court
10 found that statements made by Debtor about Burch were defamatory
11 per se because the "statements published by [Debtor] impeached
12 Burch in her trade or profession and tended to subject her to
13 ridicule, contempt, or disgrace." To give this conclusion
14 preclusive effect, however, we must find that the state court
15 specifically made a finding that Debtor acted both willfully and
16 maliciously under federal law when publishing the defamatory
17 statements for a determination that the debt is nondischargeable
18 under § 523(a)(6).

19 **3. The willful element**

20 As laid out above, the "willful" prong requires an inquiry
21 into the subjective state of mind of the debtor; the standard is
22 met when the debtor either had a subjective motive to inflict
23 injury or believed that injury was substantially certain to
24 occur. In re Su, 290 F.3d at 1145. Considering together the
25 Summary Judgment Order, Permanent Injunction Order, and Jury
26 Award, we find the "willful" requirement satisfied.

27 The Summary Judgment Order included findings that Debtor
28 made a number of statements about Burch to Burch's employer in

1 press releases and over the Internet that were false, including
2 statements that falsely accused her of publishing his personal
3 information on the Internet. Moreover, the Permanent Injunction
4 Order found that: (a) Debtor's conduct toward Burch was
5 malicious; (b) Debtor's defamation was substantial and included
6 a large number of false statements made over an extended period
7 of time directly to Burch's employer and on numerous forums and
8 websites on the Internet; (c) Debtor threatened to contact the
9 employers of certain critics of the Lasik procedure, and
10 threatened to disseminate information about Burch; (d) Debtor
11 has caused, and is causing, Burch to suffer substantial harm and
12 that Debtor intended Burch to be harmed by his conduct; and,
13 most significantly, (e) ". . . the evidence at trial established
14 that [Debtor] intended [Burch] to be harmed by his conduct."

15 These findings show that Debtor intended to harm Burch as
16 required by the willful prong in In re Su. Therefore, because
17 Debtor knowingly published defamatory statements against Burch
18 with the actual intent to cause injury to her, Debtor's conduct
19 was "willful" as that term is contemplated by § 523(a)(6).

20 **4. The malicious element**

21 As defined above, malicious injury requires (a) a wrongful
22 act, (b) done intentionally, (c) which necessarily causes
23 injury, and (d) done without just cause or excuse.

24 In re Jercich, 238 F.3d 1208. Because the Summary Judgment
25 Order found Debtor committed defamation, the first two prongs
26 are satisfied as a matter of law. See Jeff v. Sicroff
27 (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005) ("A
28 libelous act, by its nature, is self-evidently wrongful and is

1 committed by an intentional act of publication.”). The third
2 prong is likewise satisfied because Debtor’s statements were
3 directed at Burch’s professional reputation, which would
4 substantially harm her in her occupation. Indeed, the Permanent
5 Injunction Order was issued based on the harm caused by the
6 statements being “substantial and irreparable.” Therefore, the
7 first three elements of malice are directly provided by the
8 libel determination. The fourth element, “without just cause or
9 excuse,” is less straightforward since by its nature the lack of
10 good cause or excuse is not proved by the plaintiff with
11 affirmative evidence; just cause or excuse is a defense for the
12 debtor.

13 In opposing the summary judgment, Debtor asserted that
14 there exists a triable issue of material fact on whether the
15 state court necessarily decided the “just cause or excuse”
16 element. Debtor first claimed that the burden of proof was on
17 Burch to show just cause or excuse.⁵ Next, Debtor asserted
18 Burch failed to prove that there was neither a just cause nor an
19 excuse for Debtor’s conduct. In ruling on the motion, the
20 bankruptcy court relied on In re Sicroff for the conclusion that
21 all defamation would be without just cause or excuse because
22 there can be no just cause or excuse for an intentional lie;
23 thus, the bankruptcy court held that Burch was entitled to
24 judgment as a matter of law.

25 We do not read In re Sicroff so broadly, nor do we need to
26

27
28 ⁵ This argument is nonsensical since Burch could never have
the burden to prove Debtor’s defense.

1 rely on it to reach a decision in this case. In In re Sicroff,
2 the Ninth Circuit was presented with the issue of whether to
3 give the state court libel judgment preclusive effect under
4 § 523(a)(6). The court found the first three elements of
5 "maliciousness" easily satisfied where a university professor
6 was defamed by an intentional act of publication that was
7 directed at the professor's professional reputation. Id. at
8 1106. Based on an analysis of the record of that case the
9 circuit court ruled there could be no just cause or excuse
10 because the actions were taken to injure the professor's
11 reputation. Id. at 1107. The bankruptcy court here took this
12 conclusion as a per se rule that there could never be just cause
13 or excuse for defamation. On our record, we need not rely on a
14 per se rule.

15 Although in general a plaintiff has the burden to prove by
16 a preponderance of the evidence that the debt arose from willful
17 and malicious conduct, In re Jercich, 238 F.3d at 1208, just
18 cause or excuse is in the nature of an affirmative defense.
19 Jercich by implication supports the position that a debtor must
20 first put forth the just cause or excuse. In In re Jercich, the
21 Ninth Circuit was presented with the issue of giving a pre-
22 petition state court judgment for unpaid wages preclusive effect
23 under § 523(a)(6). Id. at 1209. After the court concluded that
24 the debtor's conduct was "malicious," the court stated that the
25 debtor "pointed to" no just cause or excuse. Id. This
26 statement implies that a debtor carries the burden of going
27 forward on the final element of malice which may be satisfied by
28 the debtor affirmatively asserting "cause or excuse." Debtor

1 here did not meet this burden.

2 In his responding papers, Debtor argued that he had just
3 cause to file the state court complaint against Burch because he
4 believed his allegations to be true. Therefore, he asserts a
5 material disputed fact as to that issue to defeat summary
6 judgment. This argument misses the mark. The defamation
7 judgment was not premised on his state court complaint, but
8 rather the independent defamatory statements alleged by Burch in
9 her cross-complaint. Nowhere in his opposition does Debtor
10 assert a just cause or excuse for those defamatory statements.
11 This failure by Debtor to put forth the necessary evidence of
12 just cause or excuse makes determination of the summary judgment
13 motion against him proper. With this final prong in place, the
14 malicious element is met.

15 **5. The issue was actually litigated in the prior suit and**
16 **necessary to the judgment.**

17 The third prong requires the matter to be "actually
18 litigated," or stated another way, the parties must have
19 litigated whether Debtor engaged in willful and malicious
20 conduct against Burch. Matters are typically "actually
21 litigated" in North Carolina when the parties must have "enjoyed
22 a full and fair opportunity to litigate that issue in the
23 earlier proceeding." Hillsboro Partners, LLC v. City of
24 Fayetteville, 738 S.E.2d 819 (2013).

25 There is no doubt that this issue has been actually
26 litigated and the parties had a full and fair hearing. The
27 issues before the bankruptcy court were the central issues that
28 were litigated and evaluated by the state court jury and judge

1 in order to determine whether Hagele was liable for the
2 Defamation Claims and whether Burch should be entitled to
3 punitive damages. Thus, this requirements is established.

4 **6. The issue was actually determined.**

5 As to the last prong, the Summary Judgment Order,
6 Injunction Order, and Jury Award all establish that the court
7 made detailed findings on the issues at hand. Thus, this
8 requirement is established.

9 In sum, the bankruptcy court did not err in applying issue
10 preclusion to the Superior Court judgment with regard to all the
11 elements of willful and to a finding of malice except for the
12 just cause or excuse defense of malicious. Because Debtor
13 failed to raise a material issue of disputed fact on this last
14 element, summary judgment for Burch ruling that the Superior
15 Court Judgment was nondischargeable under § 523(a)(6) was
16 proper.

17 **D. Attorneys' fees as a measure of nondischargeable damage**

18 Debtor asserts that because the attorneys' fees awarded
19 were based on the unfair competition claim, they are not
20 nondischargeable as based on willful and malicious conduct.

21 We disagree. Under North Carolina law, a claim of libel
22 per se that defames a party in its business activities may be
23 the basis of a claim for unfair and deceptive trade practices.
24 See Ellis v. N. Star Co., 326 N.C. at 225-26. The record shows
25 that the basis for the unfair and deceptive trade practices
26 violation was the very same libel per se that we concluded was
27 willful and malicious. Section 75-16 of the North Carolina
28 deceptive trade practices statute provides for an award of

1 attorney fees to a plaintiff who prevails on an unfair trade
2 practice claim, as did Burch here. Under the holding of Cohen
3 v. de la Cruz, 523 U.S. 213 (1998), fees are nondischargeable if
4 they are recoverable as an element of damages in a non-
5 bankruptcy court for the claim which is found to be
6 nondischargeable. Therefore, because North Carolina law allows
7 the fees, they are properly included in the nondischargeable
8 judgment.

9 **VI. CONCLUSION**

10 For the reasons stated above, we AFFIRM.

11
12
13
14 Concurrence begins on next page.
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 DUNN, Bankruptcy Judge, Concurring:

2 I join in the disposition of this appeal by the Panel but
3 write separately to point out my limited disagreement with where
4 the majority goes in Part C.4. of the Discussion concerning the
5 burden of proof to establish the fourth element of "malice,"
6 i.e., "without just cause or excuse" for purposes of
7 § 523(a)(6).

8 This Panel has held that a creditor seeking to except a
9 debt from a debtor's discharge bears the burden of proof by a
10 preponderance of the evidence to establish "each element of the
11 exception to dischargeability." See, e.g., First Del. Life Ins.
12 Co. v. Wada (In re Wada), 210 B.R. 572, 575 (9th Cir. BAP 1997),
13 citing Grogan v. Garner, 498 U.S. 279 (1991). In Jett v.
14 Sicroff (In re Sicroff), 401 F.3d 1101 (9th Cir. 2005), the
15 Ninth Circuit reversed the bankruptcy court's judgment, affirmed
16 on appeal by the district court, determining that a creditor's
17 libel judgment against the debtor was dischargeable. In
18 analyzing the record with respect to malice, the circuit
19 concluded that, "Having satisfied the first three elements of
20 'malicious injury' [for § 523(a)(6) purposes], to prevail, Jett
21 [the creditor claimant] **must demonstrate by a preponderance of**
22 **the evidence that Sicroff [the debtor] published his statements**
23 **'without just cause or excuse.'**" Id. at 1106 (emphasis added).
24 It concluded that Jett had met that burden. Id. at 1106-07.

25 I recognize the force of the majority's argument that by
26 its nature, "just cause or excuse" should not be the plaintiff
27 creditor's burden to bear, as it is in the nature of an
28 affirmative defense to be raised by the debtor defendant.

1 However, in this appeal I don't think that we need to reach that
2 legal conclusion. In the Summary Judgment Order, the North
3 Carolina superior court held that there was no genuine issue of
4 material fact in the record before it that Debtor made a number
5 of false statements "to Burch's employer, in press releases, and
6 over the Internet" that falsely accused Burch of publishing his
7 personal information on the Internet. At oral argument, counsel
8 for the Debtor admitted that the Debtor did not submit any
9 evidence of a "just cause or excuse" for his behavior during the
10 course of the North Carolina legal proceedings. On the record
11 before us, I conclude that Burch satisfied any burden of proof
12 she had to meet to establish that Debtor's conduct that resulted
13 in her claim against him was not absolved by any "just cause or
14 excuse," and I join my colleagues in affirming the bankruptcy
15 court's decision.