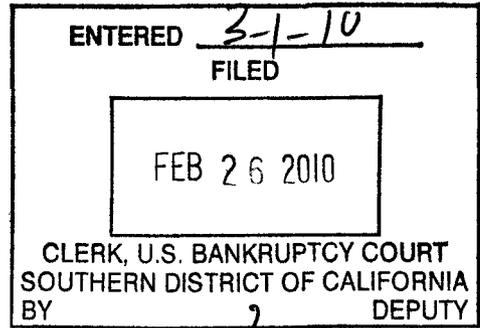


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re:</p> <p>Damacio L. Vigil</p> <p style="text-align: right;">Debtor.</p> <hr/> <p>Briena S. Casares</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>Damacio L. Vigil</p> <p style="text-align: right;">Defendant.</p>	<p>} Bankruptcy No. 08-06539-LT7</p> <p>} Adversary No. 08-90413-LT</p> <p>} MEMORANDUM DECISION</p>
--	---

Plaintiff Briena Casares ("Casares") filed a Motion for Summary Judgment (the "Motion", docket #16) seeking a determination that her claim against debtor Damacio L. Vigil ("Debtor"), based on a personal injury state court default judgment (the "Judgment"), is non-dischargeable under 11 U.S.C. § 523(a)(6).<sup>1</sup> After consideration of all evidence and argument, and for the reasons discussed in this Memorandum Decision, the Court will grant

<sup>1</sup> Unless otherwise indicated, all references to chapter and code sections are to Title 11 of the United States Code, also referred to as the Bankruptcy Code, and all references to "Rules" are to the Federal Rules of Bankruptcy Procedure. References to the transcript of the hearing on the Motion shall be cited as "Tr. \_\_\_:\_\_\_-\_\_\_".

1 summary judgment in favor of Casares and against Debtor in the full amount of the  
2 Judgment.

3  
4 **BACKGROUND**

5  
6 Casares filed a Complaint for Damages (the "State Court Complaint") against  
7 Leroy D. Virgil [sic], Jr. in the Superior Court for the State of California, County of Orange  
8 ("State Court") on April 30, 2007 and asserted claims based on alleged assault and battery,  
9 false imprisonment, and negligence (the "State Court Action"). Declaration of I. Donald  
10 Weissman (docket #13-1) ("Weissman Decl.") Ex. A. Casares subsequently amended the  
11 State Court Complaint to re-name the defendant as Leroy D. Vigil, Jr.<sup>2</sup> Weissman Decl.  
12 Ex. B.

13 The State Court Complaint alleged, among other things, that Debtor intentionally and  
14 unlawfully hit Casares several times about her face and body causing physical and mental  
15 pain and suffering. Weissman Decl. Ex. A ¶¶9-10. The State Court Complaint also alleged  
16 that Debtor's "conduct was willful, wanton, malicious and oppression [sic]" justifying "an  
17 award of exemplary and punitive damages in amount to be proved at trial." *Id.* at ¶12. In  
18 addition, the State Court Complaint asserted claims for false imprisonment<sup>3</sup> and  
19 negligence.<sup>4</sup>

20 Casares unsuccessfully attempted to serve the State Court Complaint during May and  
21 June of 2007. As a result of her lack of success, Casares filed an Affidavit of Reasonable  
22

---

23 <sup>2</sup> Debtor states that he "goes by the name Damacio Vigil"(Memorandum of Points and  
24 Authorities in Opposition to Plaintiff's Motion for Summary Judgment (Docket #16-1)  
("Opposition") 10:11-12), but does not argue that Leroy D. Vigil, Jr. is not his legal name.

25 <sup>3</sup> Casares alleged in the State Court Complaint that she was "seized and held against her will"  
26 and "was beaten and battered before being [released]." Weissman Decl. Ex. A ¶14.

27 <sup>4</sup> The negligence claim alleged that Debtor, as owner and/or operator of the vehicle in which  
28 Casares was a passenger during the alleged assault and battery, either "failed to protect . . . or was  
careless and or negligent in [ ] operation thereof . . ." Weissman Decl. Ex. A ¶17.

1 Diligence by Dean A. Bell of Amstar Express (the "Personal Service Affidavit") which  
2 listed the dates and times of the nine unsuccessful attempts to accomplish personal service  
3 of the summons at Debtor's home address in San Marcos, California (the "Home Address").<sup>5</sup>  
4 Weissman Decl. Ex C.

5 Based on the evidence contained in the Personal Service Affidavit, Judge James P.  
6 Gray signed an Order for Publication of Summons ("Publication Order") ordering service of  
7 the State Court Complaint by publication in the Los Angeles Daily Journal ("LA Journal").  
8 Weissman Decl. Ex D. The Publication Order also provided for service by mail: ". . . if  
9 [Debtor's] address is ascertained before expiration of the [publication notice period.]" *Id.*  
10 The Publication Order did not expressly require mail service at the Home Address. As  
11 directed by the Publication Order, Casares served the State Court Complaint by publication  
12 in the LA Journal and filed a Proof of [service by] Publication on October 29, 2007.  
13 Weissman Decl. Ex. E. Casares' publication notice referred in the caption to Casares vs.  
14 Virgil, but also stated in the body of the notice that the State Court Complaint was amended  
15 to correctly name Debtor. *Id.*

16 Debtor did not answer the State Court Complaint, and, as a result, Casares filed a  
17 Request for Entry of Default ("Default Entry Request") on January 17, 2008. Weissman  
18 Decl. Ex. F. Casares did not serve the Default Entry Request on Debtor and checked box  
19 "(a)" indicating that Debtor's address was not known. *Id.* Thereafter, however, Casares  
20 served Debtor with a Notice of Ruling and Prove-Up Hearing (the "Notice of Default Prove-  
21 Up") by mail directed to the Home Address. Debtor admits receipt of this document in  
22 February of 2008. Debtor Decl. ¶6. Debtor does not dispute that the Notice of Default  
23 Prove Up provided Debtor with Notice of the March 13, 2008 hearing thereon.

24 On March 28, 2008, the Superior Court entered the Judgment by default in the total  
25 amount of \$1,560,512. Weissman Decl. Ex. I. The Judgment includes damages of  
26 \$560,000, costs of \$512, and punitive damages of \$1,000,000. *Id.* The State Court based  
27

28 <sup>5</sup> Debtor admits that this San Marcos address is, and was then, his residence address. *See*  
Debtor's Declaration in Support of Opposition (docket #16-2) ("Debtor Decl.") ¶¶2, 4, and 12.

1 the Judgment on the extensive evidence provided in Casares' Application and Declarations  
2 in Support of Default Prove-Up Damages. Weissman Decl. Ex. G. Casares served a Notice  
3 of Entry of Judgment ("Notice of Entry") by mail directed to the Home Address on  
4 March 31, 2008 and filed it with the State Court on April 8, 2008. Weissman Decl. Ex. J.  
5 Debtor did not timely appeal from the Judgment.<sup>6</sup>

6 Debtor admits that he did not promptly respond to the Notice of Default Prove-Up as  
7 he: "did not see or learn of the summons and complaint in this matter until [he] looked at  
8 the court clerk's file on March 25, 2008." Debtor Decl. at ¶7. He provides no other  
9 evidence explaining or justifying his failure to attend the default prove-up hearing, to file  
10 papers in connection therewith, or to monitor the litigation in any manner prior to or after  
11 review of the State Court file. He obliquely denies receipt of the service copy of the Notice  
12 of Entry as he states that he did not know about the Judgment until the initiation of this  
13 adversary proceeding. Debtor Decl. ¶9. This assertion even if accepted as true, however,  
14 does not require that the Court assume that Casares failed to serve the Notice of Entry by  
15 mail directed to the Home Address.

16 Debtor filed his chapter 7 petition on July 16, 2008. Casares filed her complaint in  
17 this adversary proceeding on September 19, 2008. Debtor received his discharge, except as  
18 to Casares' pending claim, on October 15, 2008. On October 20, 2008, the Court closed  
19 Debtor's bankruptcy case.

20 On or about April 9, 2009, Debtor filed a motion in the State Court Action to set  
21 aside the default judgment (the "Set Aside Motion"). Weissman Decl. Ex. K. Debtor based  
22 the Set Aside Motion on the allegation that he did not have actual notice of the State Court  
23 Complaint in time to defend and that publication in the LA Journal was not appropriate  
24 given that Debtor lived in San Diego County. Thus, he argued that service of the summons  
25 and complaint were insufficient and, therefore, that the Judgment was void. On May 15,  
26

27 <sup>6</sup> For California state court actions, the normal time to file notice of appeal is the earlier of  
28 60 days after service of a Notice of Entry (by clerk of the court or a party) or 180 days after entry of  
judgment. See Cal. Rule Ct. 8.104.

1 2009, the State Court denied the Set Aside Motion as untimely under California Code of  
2 Civil Procedure § 473.5 (hereinafter CCP § 473.5). Weissman Decl. Ex. P.

3  
4 **DISCUSSION**

5  
6 In the documents supporting the Motion, Casares argues that this Court must give full  
7 faith and credit to the Judgment, that issue preclusion bars Debtor from challenging the  
8 Judgment as a result of the denial of the Set Aside Motion, and that Debtor fails to present  
9 any evidence to support the argument that the Judgment is subject to attack based on  
10 extrinsic fraud. Casares also argues that her claim based on the compensatory and punitive  
11 damages awarded in the Judgment arises from willful and malicious injury by Debtor and,  
12 thus, that her claim is excepted from discharge pursuant to section 523(a)(6).

13 Debtor argues in opposition that this Court should not apply issue preclusion because  
14 the Judgment is void as he was denied a full and fair opportunity to defend himself in the  
15 State Court Action. In particular, Debtor argues that Casares' service by publication was  
16 improper, that he never received service of the summons and complaint, and that extrinsic  
17 fraud by Casares renders the judgment void and not entitled to preclusive effect in this  
18 adversary proceeding.

19 Thus, in summary, the Court must first determine the validity of the Judgment and  
20 then determine whether it forms an adequate basis for summary judgment in this non-  
21 dischargeability action.

22  
23 **A. Applicable Summary Judgment Standard.**

24 The Court here resolves disputes in the context of summary judgment. Federal Rule  
25 of Civil Procedure 56(c) (incorporated into the Federal Rules of Bankruptcy Procedure by  
26 Rule 7056) provides that a party correctly seeks summary judgment when there is no  
27 genuine issue as to a material fact and the moving party is entitled to judgment as a matter  
28 of law. A "genuine issue" is one where, based on the evidence presented, a fair-minded jury

1 could return a verdict in favor of the nonmoving party on the issue in question. *Anderson v.*  
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Lang v. Retirement Living Pub. Co.*,  
3 949 F.2d 576, 580 (2d Cir. 1991).

4 Summary judgment analysis requires that all justifiable inferences be drawn in favor  
5 of the non-moving party. *Anderson v. Liberty Lobby, supra*, at 255. Likewise, a court must  
6 review all evidence in the light most favorable to the non-moving party. *Lake Nacimiento*  
7 *Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 875 (9<sup>th</sup> Cir. 1987). A party  
8 responding to a summary judgment motion, however, may not rest upon mere allegations or  
9 denials in its pleadings. Rather the party must present admissible evidence showing that  
10 there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

11  
12 **B. Issue Preclusion Can Form The Basis For Summary Judgment And California**  
13 **Principals Of Issue Preclusion Apply Here.**

14 Casares bases the Motion on the argument that the Judgment preclusively establishes  
15 that Debtor willfully and maliciously injured Casares and, that, as a result discharge of her  
16 claim is inappropriate pursuant to section 523(a)(6). Principles of issue preclusion<sup>7</sup> apply to  
17 proceedings seeking exceptions from discharge brought under 11 U.S.C. § 523(a).  
18 *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001), citing *Grogan v.*  
19 *Garner*, 498 U.S. 279, 284 (1991). Further, Federal courts must give full faith and credit to  
20 judgments of state courts. 28 U.S.C. § 1738. Thus, a court determining the preclusive  
21 effect of a state court judgment in a subsequent bankruptcy proceeding must do so pursuant  
22 to the preclusion law of the state in which the judgment was issued. *Harmon*, 250 F.3d at  
23 1245. Here, the relevant preclusion law is as follows:

24  
25 In California, "collateral estoppel precludes relitigation of  
26 issues argued and decided in prior proceedings." [] California  
27 courts will apply collateral estoppel only if certain threshold

28 <sup>7</sup> The Court utilizes the term issue preclusion while recognizing that courts in the past most frequently utilized the equivalent term collateral estoppel.

1 requirements are met, and then only if application of preclusion  
2 furthers the public policies underlying the doctrine. There are  
3 five threshold requirements:

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

14 *Id.* (internal citations omitted).

15 The fact that a judgment is obtained by default does not, in itself, foreclose the  
16 possibility that the resolution of some issues in the litigation would later have preclusive  
17 effect. *Id.* at 1246. A default judgment is an estoppel as to all issues necessarily litigated  
18 therein and determined thereby exactly like any other judgment. *Williams v. Williams (In re*  
19 *Williams' Estate)*, 36 Cal. 2d 289, 293 (Cal. 1950), quoting *Horton v. Horton*, 18 Cal.2d  
20 579, 585 (1941). As articulated by the Ninth Circuit in *Cal-Micro, Inc. v. Cantrell (In re*  
21 *Cantrell)*, 329 F.3d 1119 (9th Cir. 2003), however, there are two limitations under  
22 California law to this general principle:

23 The first is that collateral estoppel applies only if the defendant  
24 "has been personally served with summons or has actual  
25 knowledge of the existence of the litigation." Collateral  
26 estoppel, therefore, only applies to a default judgment to the  
27 extent that the defendant had actual notice of the proceedings  
28 and a "full and fair opportunity to litigate."

The second limitation in the context of a default judgment, is  
that a decision has a preclusive effect in later proceedings "only  
where the record shows an express finding upon the allegation"  
for which preclusion is sought.

1 *In re Cantrell*, 329 F.3d at 1124 (internal citations omitted). As discussed below, this Court  
2 finds that there are no triable issues of fact with respect to either of these limitations.

3  
4 **C. Debtor Raises No Triable Issues As To His Actual Notice And Full And Fair**  
5 **Opportunity To Litigate.**

6 The first issue that must be addressed is whether Debtor had a full and fair  
7 opportunity to litigate. In analyzing this issue, Debtor focuses solely on the service of the  
8 State Court Complaint and summons and on the pre-Judgment aspects of this case. The  
9 Debtor's focus, however, is far too narrow.

10 In those cases where service of the summons is not sufficient, as Debtor alleges to be  
11 the case here, CCP § 473.5 provides for attack on the judgment and states in relevant part,  
12 that:

13 (a) When service of a summons has not resulted in actual notice  
14 to a party in time to defend the action and a default or default  
15 judgment has been entered against him or her in the action, he or  
16 she may serve and file a notice of motion to set aside the default  
17 or default judgment and for leave to defend the action. The  
18 notice of motion shall be served and filed within a reasonable  
19 time, but in no event exceeding the earlier of: (i) two years after  
entry of a default judgment against him or her; or (ii) 180 days  
after service on him or her of a written notice that the default or  
default judgment has been entered.

20 Debtor admits that he learned about the State Court Action and the default prove-up  
21 hearing in February of 2008. He admits knowledge of the Judgment in September of 2008.  
22 He denies receipt of the Notice of Entry, but the evidence and the preclusive effect of the  
23 order denying the Set Aside Motion establish that Casares served it by mail directed to the  
24 Home Address on March 31, 2008. Notwithstanding, Debtor waited until April of 2009 to  
25 seek relief from the Judgment under CCP § 473.5. The State Court denied the Set Aside  
26 Motion based solely on its lack of timeliness.

27 As noted above, CCP § 473.5 provides two applicable time periods. It is obvious that  
28 the State Court did not utilize the two-year post-default judgment time period in denying the

1 Set Aside Motion as the Minute Order expressly finds that Casares served Debtor with the  
2 Notice of Entry on March 31, 2008. The State Court also expressly found, as a result, that  
3 the Set Aside Motion was untimely as it was not filed within 180 days of service of the  
4 Notice of Entry. Debtor does not directly dispute such service in this action – he merely  
5 denies receipt or knowledge of receipt. But the Court need not pause at this point in its  
6 analysis to determine whether a triable issue of material fact arises as a result of the  
7 assertion of ignorance. The State Court necessarily decided and the parties actually litigated  
8 the issue of whether Casares served the Notice of Entry – and the issue was decided in favor  
9 of Casares. There is no evidence that Debtor appealed from this ruling. Thus, the State  
10 Court's determination that Casares served the Notice of Entry on March 31, 2008 and that,  
11 as a result, Debtor failed to timely seek relief from the default under CCP § 473.5 cannot be  
12 disregarded by this Court. Issue preclusion clearly applies as to these determinations.

13 The State Court did not discuss the impact of Debtor's bankruptcy and section 108(c)  
14 on the time limits of CCP § 473.5. This omission is, however, unimportant. When Debtor  
15 filed bankruptcy on July 16, 2008, section 108(c) automatically extended the time limits for  
16 Debtor to take action to set aside the default under CCP § 473.5.<sup>8</sup> Upon closure of the  
17 Debtor's bankruptcy case on October 20, 2008, the automatic stay under section 362 expired  
18 and the section 108(c) extension of the CCP § 473.5 deadline, expired 30 days thereafter.  
19 11 U.S.C. §§ 362(c) and 108(c). Debtor did not seek to set aside the Judgment pursuant to  
20  
21  
22

---

23 <sup>8</sup> Section 108(c) provides, in relevant part, that:

24 . . . if applicable nonbankruptcy law, or order entered in a  
25 nonbankruptcy proceeding, or an agreement fixes a period for  
26 commencing or continuing a civil action in a court other than a  
27 bankruptcy court on a claim against the debtor, . . . , and such period  
28 has not expired before the date of the filing of the petition, then such  
period does not expire until the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, . . . of this title, . . . with respect to such claim.

1 CCP § 473.5 until April of 2009, long after any benefits of a section 108(c) extension  
2 expired.<sup>9</sup> Weissman Decl. Ex. K-M and P.

3 Based on the preclusively determined fact that Casares served the Notice of Entry on  
4 March 31, 2008, the Court concludes that Debtor had a full and fair opportunity to defend  
5 himself in the State Court Action. *See Cal-Micro*, 329 F.3d at 1124 (debtor who was not  
6 personally served with process before judgment, but had actual knowledge of the default  
7 judgment during the two-year interval provided by Section 473.5, had full and fair  
8 opportunity to litigate a default judgment). California law expressly places time limits on a  
9 defendant's ability to set aside a default even when the defendant received no pre-default  
10 service of process. Debtor sought relief well beyond the time allotted by statute. In short,  
11 this is a case where Debtor failed to avail himself of a full and fair opportunity to litigate  
12 and not a case where he never received such a opportunity.

13  
14 **D. Debtor's Cited Case Law Fails To Support An Attack On The Judgment.**

15 Debtor argues that California law allows an unlimited opportunity for attack on a  
16 judgment when a defendant fails to provide appropriate personal service of the summons  
17 and complaint. Opposition 6-8. Debtor does not discuss the relevance of CCP § 473.5 to  
18 this argument and relies, instead, on case law citations. Debtor's supportive case law,  
19 however, fails to properly support his argument.

20 First, most cases cited by Debtor pre-date the date on which the current version of  
21 CCP § 473.5 became operative, July 1, 1970. Thus, their broad language may be questioned  
22 given the time limits now set forth in the California Code. One case involved a judgment's  
23 efficacy when a corporate defendant subject to post-judgment collection did not exist until  
24 after entry of the judgment and after a post-judgment amendment that for the first time  
25 added the objecting corporation as a named judgment debtor. *Milrot v. Stamper Medical*

26  
27 <sup>9</sup> At oral argument on the Motion, Debtor's counsel argued that time remains before expiration  
28 of the two-year deadline for Debtor to file a motion to set aside the Judgment "in equity," or based  
on his argument that the Judgment is void. Tr. 43:22-25. The Court believes that Debtor misreads  
the applicable time limit under CCP 473.5, but that is not relevant to this Court's ruling.

1 *Corp.*, 44 Cal. App. 4th 182, 184-185 (Cal. App. 2d Dist. 1996). To say the least, this case  
2 is distinguishable. Suffice it to say that the court in *Milrot* found CCP § 473, among other  
3 statutes, inapplicable and never discussed the time limits of CCP § 473.5 as service was  
4 never attempted and a notice of default never provided. *Id.* Further, *Carr v. Kamins*,  
5 151 Cal. App. 4th 929 (Cal. App. 2d Dist. 2007) does not involve a case where the  
6 defendant received notice of entry and where the 180 day deadline of CCP § 473.5 is  
7 triggered. Finally, *Olvera v. Olvera*, 232 Cal. App. 3d 32 (Cal. App. 4th Dist. 1991)  
8 involves a timely motion under CCP § 473.5. In short, these cases correctly state that where  
9 personal service of the summons and complaint fail, the underlying judgment is subject to  
10 attack. But, they do not stand for the proposition that where a plaintiff does not provide  
11 appropriate pre-default judgment service of the summons and complaint, but does provide  
12 notice of entry of default judgment, the defendant may ignore the time limits on his right to  
13 seek to set aside the default judgment as set forth in CCP § 473.5.

14  
15 **E. Extrinsic Fraud Does Not Bar Use Of The Judgment For Issue Preclusion**  
16 **Purposes.**

17 Determining that Debtor had a full and fair opportunity to litigate within the meaning  
18 of *Cal-Micro*, however, does not necessarily end the issue. Debtor, undaunted by the  
19 unavailability of CCP § 473.5 relief, argues that the Judgment is void, and, therefore, not  
20 entitled to preclusive effect because the State Court lacked jurisdiction over him due to  
21 defects in service of the State Court Complaint and related summons. Casares argues that  
22 the State Court already addressed all these allegations in review and denial of the Set Aside  
23 Motion and that this Court should not revisit the same issues. The general rule in California,  
24 however, is that the prior denial of a motion in the underlying case to set aside a default and  
25 default judgment on grounds of timeliness does not collaterally estop a subsequent  
26 independent action in equity to set aside the prior judgment. *Groves v. Peterson*, 100 Cal.  
27 App. 4th 659, 667 (Cal. App. 2d Dist. 2002).

28

1 It is not clear that the assertion of defenses to issue preclusion in this proceeding is  
2 the functional equivalent of an action in equity allowing set aside of the default judgment.  
3 This Court believes, however, that it is appropriate to examine these issues here. In  
4 particular, the Court is aware that in California the application of issue preclusion must  
5 further appropriate public policy. *Harmon*, 250 F.3d at 1245. And the public policies  
6 favoring the finality of judgments and the avoidance of unnecessary litigation are not  
7 advanced appropriately if the judgment at issue arises as a result of extrinsic fraud.

8 A California judgment procured by extrinsic fraud is subject to collateral attack and  
9 may be disregarded by the bankruptcy court. *Younie v. Gonya (In re Younie)*, 211 B.R. 367,  
10 375 (9th Cir. BAP 1997). The exception is governed by California law and to obtain relief  
11 on this basis, the moving party must establish:

12 (1) facts constituting extrinsic fraud; (2) a substantial defense on  
13 the merits; and (3) diligence in seeking relief from the adverse  
14 judgment. In addition, a party seeking relief from a default  
15 judgment must also present a satisfactory excuse for not  
defending in the original action.

16 *Id.* at 375-76 (internal citations omitted). Here, however, Debtor's extrinsic fraud argument  
17 fails as he does not provide evidence establishing a genuine issue for trial on the first and  
18 third points.<sup>10</sup>

19 First, Debtor fails to advance any evidence of appropriate diligence. Debtor admits  
20 that he learned of the pending lawsuit and the prove-up hearing in February of 2008 and  
21 reviewed the summons and complaint on March 25, 2008. Casares served Notice of Entry  
22 of the March 28, 2008 Judgment by mail to the Home Address on March 31, 2008. Debtor  
23 admits knowledge of the Judgment in September of 2008. Because of the interplay with  
24 provisions of the Bankruptcy Code, the time limits afforded him under CCP § 473.5 to seek  
25 set aside of the Judgment did not expire until approximately November of 2008. Debtor,  
26 however, took no steps to seek relief from the Judgment in State Court until over 4 months

27  
28 <sup>10</sup> Debtor's unrefuted evidence that he successfully defended against criminal charges arising  
from his injury to Casares creates triable issues of material fact as to the second point.

1 later. These admitted or conclusively established facts establish that Debtor had actual  
2 notice of the State Court Action and the summons and complaint in at least sufficient time to  
3 object to entry of Judgment and/or seek to have the Judgment set aside pursuant to CCP  
4 § 473.5. Debtor explains neither his failure to oppose entry of the Judgment nor his failure  
5 to timely seek relief under CCP § 473.5. And even if fraud infected the initial service,  
6 Debtor is not entitled to do nothing for over a year once he learns of the action against him  
7 and the entry of a default judgment in the action.

8 Debtor also fails to establish a triable issue of material fact as to whether extrinsic  
9 fraud of the type allowing set aside of the Judgment exists. In order to establish extrinsic  
10 fraud sufficient to set aside a default, the allegedly fraudulent action must be such that it  
11 prevents one party to the litigation from presenting his case. *In re Marriage of Park*, 27 Cal.  
12 3d 337, 342 (1980). And, in particular, the failure to contest the matter must result from the  
13 fraud of the opponent. *Groves*, 100 Cal. App. 4th at 665.

14 In a point heading, the Opposition states that "Plaintiff's Default Was Obtained By  
15 Fraud Or Mistake." Opposition 6:16-28, 17:1-9. The section, however, contains no factual  
16 references or evidentiary support. Elsewhere in the Opposition, Debtor alleges that Casares  
17 did not make an "honest effort to give Vigil actual notice." Opposition 9:15-16. Debtor  
18 seems to argue that the nine failed attempts to serve him at the Home Address were not  
19 accurately represented to the State Court. He, however, provides no evidence to support this  
20 conclusion except to state that he did not intentionally evade service.

21 Debtor's Declaration is the only evidence offered by Debtor to support his allegation  
22 that Casares obtained the Judgment by default by intentionally and dishonestly depriving  
23 him of notice of the lawsuit. Debtor argues that Casares obtained court authority for service  
24 by publication on misrepresentations to the State Court that Debtor was evading service and  
25 that after obtaining a Publication Order, Casares failed to strictly abide by it. Debtor,  
26 however, fails to advance evidence to support this conclusion. Assuming that Debtor was  
27 not avoiding service, as this Court must at summary judgment, there remains no evidence  
28 that Casares' process server did not attempt service nine times or that Casares' attorney did

1 not, in fact, believe that Debtor was evading service. While Casares did not serve the  
2 Default Entry Request and advised the State Court that the Debtor's address was unknown,  
3 she then properly noticed the entry of default, the prove-up hearing, and the entry of  
4 Judgment, and Debtor acknowledges receipt of all but the last document. Here, there is no  
5 evidence of fraud in Casares' request for publication service, and the sole evidence of  
6 misstatement does not create a triable issue of material fact; even if assumed to be fraud  
7 rather than error, it is not the type of extrinsic fraud justifying revocation of the Judgment.  
8 Again, this failure of notice did not prevent Debtor from either defending against entry of  
9 the Judgment or seeking to set the Judgment aside under CCP § 473.5. The only available  
10 evidence established that Casares was not the cause of Debtor's failure to contest the action  
11 against him.

12 Debtor also challenges "jurisdiction" based on his claim that Casares failed to strictly  
13 follow the Publication Order by: (1) not publishing in a "designated newspaper that is 'most  
14 likely to give actual notice'" (Opposition 2:3-4); (2) publishing in the name Leroy D. Virgil,  
15 Jr. (as opposed to "Vigil"), and (3) failing to mail a copy of the summons and complaint to  
16 the Home Address. This argument fails to evidence fraud and otherwise fails to constitute  
17 facts sufficient to allow the Court to disregard the Judgment.

18 First, there is no evidence that the request for publication in the LA Journal  
19 constitutes an act of extrinsic fraud. The Publication Order directed use of the LA Journal  
20 and this Court takes judicial notice of the fact that the LA Journal is a publication of general  
21 circulation in San Diego County. This Court declines to second guess the State Court on the  
22 appropriateness of notice in the LA Journal. Debtor argues that the LA Journal is not  
23 published in San Diego County as Casares alleged in requesting publication service. But the  
24 county of publication is not necessarily limited to the county where a paper is printed, and  
25 Debtor cites no authority for the proposition that a localized newspaper always must be used  
26 as compared to another paper commonly used for legal notices in the relevant area.

1           Second, the misspelling of Debtor's name in the caption is harmless error as Casares  
2 references the correct spelling of "Vigil" in the text of the publication notice. There is no  
3 evidence that this constitutes extrinsic fraud.

4           Debtor finally argues that the Publication Order also required mail service of the  
5 Summons and Complaint. The Court disagrees. The Publication Order requires mail  
6 service if Casares ascertained an address prior to the end of Publication Notice. This  
7 language is future looking. Further, from a practical perspective, having failed to locate  
8 Debtor on nine attempts to personally serve him at the Home Address, there could be no  
9 reasonable belief that a mailed copy to the same address would be acknowledged as actual  
10 notice on which Casares could rely in seeking a default. It is undisputed that Casares did  
11 not learn of any new address. The traditional notions of fair play and substantial justice  
12 implicit in due process are not offended here by Casares' failure to mail a copy of the  
13 summons and complaint to the address at which Casares' process server failed to locate  
14 Debtor on nine separate attempts.

15           Once again, there is no evidence that these service errors, if they are such, constitute  
16 extrinsic fraud and only slim argument that they raise triable issues fatal to Casares' claim  
17 that she properly provided appropriate personal service. *See Bein v. Brechtel-Jochim*  
18 *Group, Inc.*, 6 Cal. App. 4th 1387, 1392 (Cal. App. 4th Dist. 1992) (service of process  
19 statutes "are now to be liberally construed to effectuate service and uphold jurisdiction if  
20 actual notice has been received by the defendant, and in the last analysis the question of  
21 service should be resolved by considering each situation from a practical standpoint . . .  
22 (internal quotation omitted)).

23           And even if evidence existed that suggested fraud in connection with personal service  
24 or serious error that negates service by publication, summary judgment remains appropriate.  
25 In this case, the Court assumes for purposes of this Motion that Debtor had no notice of the  
26 State Court Action until after entry of default. Notwithstanding, this is not the kind of fraud  
27 or error that would allow this Court to disregard the Judgment because Debtor had a full and  
28 fair opportunity to litigate as discussed above. Debtor took no action, despite notice, in

1 connection with the prove-up hearing. CCP § 473.5 remained fully available to Debtor –  
2 who failed to utilize it appropriately. In this case, these service issues simply are not enough  
3 to create a public policy concern that trumps the strong public policy underlying the finality  
4 of judgment rule and the need to avoid repetitive litigation. These public policies support  
5 use of issue preclusion generally and in this case.

6  
7 **F. Debtor Raises No Triable Issues That The Issues Necessary To Establish Willful**  
8 **and Malicious Injury For Section 523(a)(6) Purposes Were Not Litigated And**  
9 **Necessarily Decided By The State Court.**

10  
11 **1. Standards**

12 Dischargeability of the debt evidenced by the Judgment is governed by the  
13 Bankruptcy Code. Section 523(a)(6) provides that a debtor cannot discharge any debt that  
14 arises from: "willful and malicious injury by the debtor to another entity or to the property  
15 of another entity." 11 U.S.C. § 523(a)(6). The Ninth Circuit interprets section 523(a)(6) as  
16 barring discharge of punitive damages liability in appropriate cases. *Bugna v. McArthur (In*  
17 *re Bugna)*, 33 F.3d 1054, 1058 (9th Cir. 1994).

18 A willful injury is a deliberate or intentional *injury*, not merely a deliberate or  
19 intentional *act* that leads to injury. *Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d  
20 702, 706 (9th Cir. 2008) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998)). The willful  
21 injury requirement of § 523(a)(6) is met when a claimant shows either that the debtor had a  
22 subjective motive to inflict the injury or that the debtor believed that injury was substantially  
23 certain to occur as a result of his conduct. *Petralia v. Jercich (In re Jercich)*, 238 F.3d  
24 1202, 1208 (9th Cir. 2001). Thus, a debtor is charged with the knowledge of the natural  
25 consequences of his actions. *Ormsby v. First Title (In re Ormsby)*, 591 F.3d 1199, \_\_\_\_\_,  
26 2010 U.S. App. LEXIS 423, \*12 (9th Cir. 2010).

27 The "malicious" injury requirement in section 523(a)(6) is separate from the "willful"  
28 requirement. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002). "'A 'malicious'

1 injury requires: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes  
2 injury; and (4) is done without just cause or excuse." *Id.* at 1146-47 (citing *In re Jercich*,  
3 238 F.3d at 1209). The Court may infer malice based on the nature of the wrongful act.  
4 *Ormsby*, 2010 U.S. App. LEXIS at \*14. Again, the Court must find both willful injury and  
5 malicious injury to establish non-dischargeability under section 523(a)(6). *Barboza*,  
6 545 F.3d at 704.

## 7

### 8 **2. Issues Litigated.**

9 The State Court Complaint alleged all the required elements for assault and battery,  
10 false imprisonment, and negligence. The Judgment does not specify on which of the claims  
11 it is based, however, punitive damages would not be recoverable based on the negligence  
12 claim included in the State Court Complaint. Further, both intentional torts could support  
13 punitive damage awards, and the extensive evidence provided in the default prove-up relates  
14 exclusively to the intentional tort claims. Weissman Decl. Ex. G.

### 15

#### 16 **a. Negligence**

17 At the hearing, Casares' counsel argued that the negligence claim was thrown into the  
18 State Court Complaint solely to preserve the possibility of recovery from an vehicle  
19 insurance source, which did not materialize. Tr. 13:7-11. Further, Casares directed the  
20 default prove-up papers to the intentional torts and the injuries therefrom exclusively.  
21 Weissman Decl. Ex. G. In fact, the stated basis for Casares' negligence claim, although it  
22 purports to "incorporate" the paragraph 12 punitive damages allegations, is inconsistent with  
23 the punitive damages allegations. In particular, Casares alleged that Debtor, as the owner  
24 and/or operator of the vehicle, "either failed to protect [Casares] . . . or was careless and/or  
25 negligent in its operation, thus causing injury . . ." Weissman Decl. Ex. A ¶17.  
26 Paragraph 12 of the State Court Complaint alleged that Debtor's "conduct was willful,  
27 wanton, malicious and oppression [sic]" . . . and Debtor "took intentional steps to subject  
28 [Casares] to such conduct." Weissman Decl. Ex. A ¶12. The State Court could not have

1 awarded punitive damages based on Casares' negligence claim as set forth in the State Court  
2 Complaint, and Casares did not ask the State Court to do so. Weissman Decl. Ex. G.

3 Debtor's counsel, in an apparent attempt to raise unresolved factual issues about the  
4 issues involved in the litigation<sup>11</sup> argued at hearing that punitive damages may be awarded  
5 on negligence claims. This Court agrees that the cases cited by Debtor's counsel do so  
6 provide. The cases, however, are factually quite distinguishable. *See, SKF Farms v.*  
7 *Superior Court*, 153 Cal. App. 3d 902, 906 (Cal. App. 4th Dist. 1984) (grant of demurrer  
8 reversed, allowing punitive damages cause of action to go forward based on negligence  
9 claim where petitioners sufficiently alleged the defendants knew or should have known the  
10 specific facts regarding the dangers of crop dusting); and *Taylor v. Superior Court*, 24 Cal.  
11 3d 890, 892 (1979) (punitive damages are recoverable in a personal injury action against an  
12 intoxicated driver as the act of operating a motor vehicle while intoxicated may constitute an  
13 act of malice within the meaning of section 3294 if performed under circumstances which  
14 disclose a conscious disregard of the probable dangerous consequences). Here, the State  
15 Court Complaint alleges that Casares' injuries resulted from Debtor's intentional multiple  
16 blows and kicks to her head and body. Debtor and Casares happened to be in a vehicle at  
17 the time of the alleged attack. The alleged conduct of negligently operating the car,  
18 however, is not the alleged cause of Casares' injuries and, thus, is unlike crop dusting with  
19 an ultrahazardous substance (*SKF Farms*) or operating a vehicle while intoxicated (*Taylor*).  
20 The record in this case makes clear that the issues addressed by the State Court were not the  
21 negligence issues, but were instead, the issues associated with the two intentional tort  
22 claims.

23  
24  
25  
26  
27 <sup>11</sup> Debtor's papers in opposition to the Motion focused solely on arguments that the Judgment  
28 is void. Debtor's papers did not address any of the factors relevant to this Court's evaluation of the  
applicability of issue preclusion.

1                   **b. Assault and Battery**

2                   Assault is an unlawful attempt, coupled with a present ability to commit a violent  
3 injury on the person of another. Cal. Pen. Code § 240. Battery is any willful and unlawful  
4 use of force or violence upon the person of another. Cal. Pen. Code § 242. The California  
5 courts usually presume these Penal Code definitions are applicable in civil actions.  
6 *Fraguglia v. Sala*, 17 Cal. App. 2d 738, 742 (Cal. App. 1936). Thus, to establish civil  
7 assault and battery, the evidence must show that a defendant's violence caused a plaintiff's  
8 injury or that a defendant acted with wanton, willful, or reckless disregard of a plaintiff's  
9 rights. *Lopez v. Surchia*, 112 Cal. App. 2d 314, 318 (Cal. App. 1952).

10  
11                   **c. False Imprisonment**

12                   The statutory definition of false imprisonment is "the unlawful violation of the  
13 personal liberty of another." Cal. Pen. Code § 236. The elements of a tortious claim of  
14 false imprisonment are: (1) the nonconsensual, intentional confinement of a person;  
15 (2) without lawful privilege; and (3) for an appreciable period of time, however brief.  
16 *Easton v. Sutter Coast Hosp.*, 80 Cal. App. 4th 485, 496 (Cal. App. 1st Dist. 2000).

17  
18                   **d. Punitive Damages**

19                   In the State Court Complaint, Casares also alleged that when Debtor intentionally  
20 and unlawfully hit her about her face and body, his "conduct was willful, wanton, malicious  
21 and oppression [sic]." Weissman Decl. Ex. A ¶12. The State Court Complaint incorporated  
22 Paragraph 12 by reference into the false imprisonment claim. The statutory authorization  
23 for punitive damages in California states the general rule that:

24                   In an action for breach of an obligation not arising from  
25 contract, where it is proven by clear and convincing evidence  
26 that the defendant has been guilty of oppression, fraud, or  
27 *malice*, the plaintiff, in addition to the actual damages, may  
28 recover damages for the sake of example and by way of  
punishing the defendant.

1 *Newsom v. Moore (In re Moore)*, 186 B.R. 962, 972 (Bankr. ND Cal. 1995) (citing Cal. Civ.  
2 Code § 3294(a)). The statute defines malice as "conduct which is *intended* by the defendant  
3 to cause injury to the plaintiff or despicable conduct which is carried on by the defendant  
4 with a willful and conscious disregard of the rights or safety of others." Cal. Civ. Code  
5 § 3294(c)(1) (emphasis added). "Oppression" is defined by statute as "despicable conduct  
6 that subjects a person to cruel and unjust hardship in conscious disregard of that person's  
7 rights." Cal. Civ. Code § 3294(c)(2).<sup>12</sup>

8  
9 **e. Identity of Issues**

10 Casares' State Court Complaint alleges all the required elements for assault and  
11 battery, false imprisonment, and punitive damages. Casares alleges that Debtor attacked  
12 her, hitting and beating her about the face, head and body; and kicking her in the face with a  
13 hard boot while she was being restrained against her will in Debtor's vehicle. Weissman  
14 Decl. Ex. A 2:5-7. The Complaint also alleges that Debtor's conduct was willful, wanton,  
15 malicious, and oppressive. Weissman Decl. Ex. A ¶12. Thus, the State Court Complaint  
16 raised issues which include all the required elements for willful and malicious injury under  
17 section 523(a)(6) that this Court must determine in connection with Casares' non-  
18 dischargeability claim.

19  
20 **3. Issues Necessarily Decided.**

21 The Judgment does not contain factual findings but, obviously, awarded  
22 compensatory damages based on one or both of the assault and battery and false  
23 imprisonment claims. Similarly, the State Court could have awarded punitive damages  
24 based on one or both of such claims. Either intentional tort supports a section 523(a)(6)  
25 claim. Based on review of the default prove-up papers, it is clear that the damages awarded  
26 relate primarily, if not entirely, to the assault and battery.

27  
28 <sup>12</sup> The State Court Complaint does not contain any fraud allegations, and therefore the "fraud"  
element in the punitive damages statute will not be addressed here.

1 A judgment for assault and battery necessarily includes a determination of all the  
2 facts required for assault and battery under California law. *See In re Younie*, 211 B.R. at  
3 374 (judgment that debtors committed fraud, necessarily included determination of all facts  
4 required for actual fraud). The Judgment also contains punitive damages, which necessarily  
5 requires findings under section 3294(a) of the California Civil Code. Here, in order to  
6 award over \$500,000 in compensatory damages and \$1,000,000 in punitive damages, the  
7 State Court necessarily found that Debtor willfully and unlawfully used force or violence  
8 upon Casares, that Debtor must have known that Casares' injury was substantially certain to  
9 occur as a result of him kicking and hitting her while restraining her in the vehicle, and that  
10 his improper conduct necessarily caused her injuries.

11 Although not addressed in the papers, Debtor's counsel argued at the hearing that  
12 battery does not necessarily include the intent to inflict harm and that false imprisonment  
13 may arise from initially legitimate motives, despite the classification of both torts as  
14 "intentional torts." Debtor's counsel's argument appears to presume that the "willful injury"  
15 requirement in section 523(a)(6) must be established solely by the elements of the  
16 intentional torts. To the contrary, under the definitions utilized in the Ninth Circuit, the  
17 "willful injury" requirement in section 523(a)(6) is here established by the facts justifying  
18 punitive damages (conduct intended to cause injury, or despicable conduct with willful and  
19 conscious disregard of person's rights; despicable conduct subjecting person to cruel and  
20 unjust hardship). Similarly, the "malicious injury" requirement of section 523(a)(6) is  
21 established by the facts substantiating the intentional torts involved here (wrongful act, done  
22 intentionally, necessarily causing injury without just cause or excuse) and the award of  
23 punitive damages. The award of punitive damages negates the argument that in awarding  
24 the Judgment on account of assault and battery and/or false imprisonment the Court did not  
25 necessarily decide that the conduct at issue was both willful and malicious.<sup>13</sup>

26  
27 <sup>13</sup> Debtor's counsel also argued that the punitive damages award was not necessarily  
28 based on the intentional torts of assault and battery and/or false imprisonment because  
punitives may be awarded based on negligence and relied on a case in which the California  
court addressed whether crop dusting "is abnormally dangerous and therefore subject to

1 **CONCLUSION**

2  
3 Based on the foregoing, the Court determines that the Judgment is entitled to  
4 preclusive effect as to the Debtor's willful and malicious injury of Casares and is non-  
5 dischargeable in its entirety pursuant to 11 U.S.C. § 523(a)(6). Casares must submit an  
6 order and judgment consistent with this Memorandum Decision within fourteen days of  
7 entry.

8  
9 DATED: February 26, 2010

10   
11 LAURA S. TAYLOR, JUDGE  
12 United States Bankruptcy Court  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

24  
25 strict liability" and punitive damages. The *SKF Farms* court, however, acknowledged that  
26 "[n]onintentional conduct comes within the definition of malicious acts punishable by the  
27 assessment of punitive damages only when a party intentionally performs an act from which  
28 he knows, or should know, it is highly probable harm will result." 153 Cal. App. 3d at 907  
(citation omitted). As discussed above, the negligence claim in the State Court Complaint  
for careless or negligent operation of the vehicle, is inconsistent with Casares' allegations of  
exemplary damages, as well as the injuries (from being beaten and kicked about the head  
and body), for which the State Court awarded compensatory damages in excess of \$500,000.  
Thus, the Court finds Debtor's authorities unpersuasive in this regard.