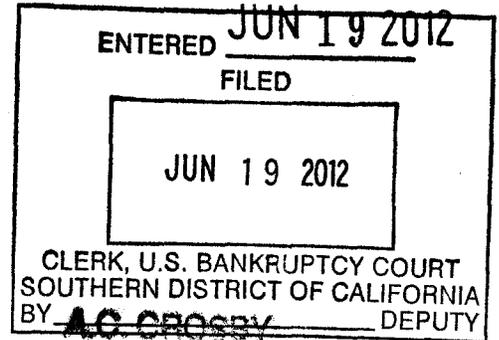


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 10-10681-MM7
)
GREGORY ALAN SMITH,) CHAPTER: 7
)
) ADV. NO. 10-90364-MM
Debtor,)
) MEMORANDUM DECISION
_____)
)
CONSUELO GONZALES,) DATE: June 5, 2012
) TIME: 9:00 a.m.
Plaintiff,) CRTRM: 1
)
) JUDGE: Margaret M. Mann
v.)
)
GREGORY ALLEN SMITH,)
)
Defendant.)
_____)

1 Plaintiffs John and Consuelo Gonzales sued their ex son-in-law Gregory Smith ("Debtor") in
2 this Court to determine the nondischargeability of his debts to them under 11 U.S.C. § 523(a)(6). Mr.
3 Gonzalez held a pre-petition state court judgment for his injuries caused when the Debtor physically
4 attacked him and Mrs. Gonzales held a pre-petition state court judgment for loss of consortium and
5 emotional distress resulting from the attack. Although the Debtor admitted that he punched Mr.
6 Gonzales in the face once, and that this act was witnessed by Mrs. Gonzales, the Debtor claimed that
7 he lacked the level of intent necessary to except the Gonzales' debt from discharge. Having considered
8 the admitted evidence and testimony at the trial held on June 5, 2012, the Court disagrees. The Court
9 finds that the Debtor willfully and maliciously struck Mr. Gonzales repeatedly in the face causing him
10 serious bodily harm, and causing Mrs. Gonzales emotional harm. The Debtor's violent infliction of
11 harm in this manner prevents the discharge of these debts.

12 **I. SUMMARY OF THE FACTS**

13 **A. The Incident**

14 Susan Smith is the daughter of the Gonzales', and was living with them in 1998 after separating
15 from her husband, the Debtor. On the evening of December 22, the Debtor and Susan's son, Matthew
16 Smith, who was then eight years old and was 23 at the time of the trial, went out to eat at a pizza
17 parlor. The Debtor spotted Ms. Smith's car near the pizza parlor, which was in the same shopping
18 center where she had parked her car while seeing a movie with a girlfriend. The Debtor told Matthew
19 that they were going to wait at the pizza parlor until Ms. Smith returned. After waiting at the pizza
20 parlor for several hours, with no sign of Ms. Smith, the Debtor dropped Matthew off at his
21 grandparents' home. The Debtor told Matthew that he would "kick his ass" if he told anyone he was
22 looking for his mom. Matthew feared the Debtor's threat because his father had been physically
23 abusive towards him and his mother before.

24 The Debtor told a different story about that evening. He testified that he did not remember
25 seeing Ms. Smith's car outside the parking lot of the pizza parlor, or that they waited for Ms. Smith's
26 return. The Court, however, did not find this testimony credible because the Debtor's answers were
27 evasive and his recollection was poor question. In contrast, the Court finds Matthew's testimony
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1 credible on this and all other matters because he remembered significant details of the event and
2 answered all questions on cross-examination with appropriate detail.

3 Ms. Smith testified that her friend dropped her off at her car outside the pizza parlor at 11 p.m.
4 When she drove to her parents' home, she noticed she was being followed and recognized the Debtor's
5 truck. When Ms. Smith pulled into the driveway at her parents' home, the Debtor pulled up alongside
6 the sidewalk, on the wrong side of the road, got out of his truck and demanded they talk. The Debtor
7 denied following her and testified instead that he and Ms. Smith had an arranged meeting that evening
8 to discuss child-support and their pending divorce. Ms. Smith denied any such arrangement and
9 testified she was immediately afraid when she saw the Debtor get out of his truck. The Court finds her
10 testimony credible.

11 Ms. Smith refused to talk to the Debtor and began walking towards the front door of her
12 parents' home. When she arrived at the front door, which had two separate locks, she had difficulty
13 opening it. By this time, the Debtor had gotten out of his truck, leaving his engine running and car
14 door open, and ran after Ms. Smith. Ms. Smith noticed him and began repeatedly ringing the doorbell
15 and banging on the front door to get away from him. The Debtor then grabbed Ms. Smith by her
16 shoulders, pulled her jacket partially over her head in the process, and began dragging her across the
17 lawn towards his truck.

18 Matthew who was in his bedroom near the front door heard the doorbell since he was awake
19 and worried for his mother because of his father's hostility earlier that night. He looked out his
20 bedroom window, saw his parents and began screaming, "He's killing her; he's killing her." When
21 Matthew ran to the part of the house where his grandparents were watching television to alert them,
22 Mr. Gonzales thought that Matthew was having a dream and told his wife to take him back to bed.
23 With all the commotion outside, Mr. Gonzales, believing there was a car accident or other incident to
24 be investigated, went outside and took a few steps towards the Debtor and Ms. Smith without
25 immediately realizing who they were. He remembered asking, "What is going on here?" Mr.
26 Gonzales does not remember anything after this moment until he awoke with the police and
27 paramedics at his side.
28

1 Matthew and Mrs. Gonzales both followed Mr. Gonzales out the door. Matthew also
2 immediately called 911 to get help.

3 Ms. Smith and Matthew both testified that when Mr. Gonzales approached the couple, the
4 Debtor sprang up and punched him in the face. Mr. Gonzales fell on the sidewalk, the back of his head
5 hit the concrete, and he was knocked unconscious. The Debtor then straddled Mr. Gonzales and hit
6 him in the face six to seven times while Ms. Smith and Mrs. Gonzales tried to intervene. Once the
7 Debtor realized neighbors were gathering around, he got into his car and left the scene. Mr. Gonzales'
8 injuries were so severe that he was rushed to the hospital by ambulance.

9 The Debtor's testimony was significantly different from that of the other witnesses. The Debtor
10 claimed he had an argument with Ms. Smith during their pre-arranged meeting that night at the house.
11 He testified he never chased her to the front door of her house, but only stood by his truck trying to talk
12 with her. In his declaration, the Debtor stated that he noticed Mr. Gonzales coming out of the house
13 while he was talking with Ms. Smith. At trial the Debtor inconsistently testified¹ that he did not
14 recognize Mr. Gonzales coming out of the house, but only perceived a large shadow coming towards
15 him because his back was turned. The Debtor claimed Mr. Gonzales then grabbed him and struck him
16 in the face, causing both men to fall to the ground and struggle. During the fall, the Debtor avowed he
17 struck Mr. Gonzales only once on the left-hand side of his face in self-defense, and Mr. Gonzales then
18 landed on top of the Debtor. The Debtor said he then left the scene after Mrs. Gonzales told him to
19 leave.

20 The Court's primary reason for finding the Debtor's claim of throwing one punch in self-
21 defense not believable is that it is inconsistent with the undisputed medical records. These records
22 establish Mr. Gonzales suffered a fracture to his left mandible, left maxilla, left zygoma, and left lateral
23 wall of the orbit, and had extensive reconstructive surgery resulting in permanent metal plates and
24 screws in his head. Additionally, his jaw was wired shut for eight weeks. The extensive injuries that
25 Mr. Gonzales suffered, spanning the entire left side of his face, could not have resulted from a single
26 blow, but only from multiple blows. The Debtor's broken bones in his hands, as well as lacerated fists
27

28 ¹ The Debtor's hostile attitude on cross-examination also undercut the credibility of his explanation of the fight.

1 reflected in the police reports, also contradict his story of hitting his father-in-law only once in self-
2 defense.

3 **B. Civil Proceedings**

4 On December 22, 1999, the Gonzales' filed a civil lawsuit (Case # GIN0002261) in San Diego
5 Superior Court for assault, battery, intentional infliction of emotional distress, negligence, negligent
6 infliction of emotional distress, and loss of consortium. On June 19, 2000, a default judgment against
7 the Debtor was entered. The Gonzales' were awarded special, general, and punitive damages totaling
8 \$363,427.60. After the Debtor failed to satisfy any part of the judgment, the Gonzales' had the
9 judgment renewed on February 10, 2010 and began execution on it. A judgment interest rate of 10%
10 per year was added to the original judgment bringing the total to \$708,714.60 as of February 2, 2010.
11 At the pre-trial status conference, the Court queried whether the civil judgment should be afforded any
12 issue preclusive effect to meet its obligation to apply issue preclusion where the necessary elements are
13 met. *Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057 (9th Cir. 1994).

14 The Gonzales' then brought a summary judgment motion which the Debtor resisted on two
15 grounds. First, he claims that he was never served with the state court suit and did not know about the
16 judgment until 2010, when his wages were garnished. But, the proof of service of the civil complaint
17 reflects the Sheriff of San Diego County personally served the Debtor with the summons and
18 complaint on January 12, 2000. The Court finds that service as supported by this proof was proper and
19 does not believe the Debtor's testimony that he was not served.

20 The Debtor's second ground was to assert that triable issues regarding the Debtor's intent in
21 inflicting the injuries prevented summary judgment. The Court declined to apply issue preclusion to
22 the intentional torts incorporated in the state court judgment, since the state court had not specifically
23 made findings on any of the underlying tort theories. One of those theories, the negligent infliction of
24 emotional distress, would result in a dischargeable judgment. Since that tort could have been the basis
25 for the state court judgment, this Court is unable to determine if the actually litigated element of the
26 issue preclusion test is met. *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1124 (9th Cir.
27 2003) (only where the record shows that the issue on which preclusion was sought was actually and
28 necessarily litigated may the court preclude relitigation of the issues).

1 The Court nevertheless applies issue preclusion to the state court's determination of the amount
2 of damages, even if not to any of the causes of action alleged. *Sasson v. Sokoloff (In re Sasson)*, 424
3 F.3d 864, 872 (9th Cir. 2005) ("The classic example of the proper use of issue preclusion in discharge
4 proceeding is when the amount of the debt has been determined by the state court and reduced to
5 judgment. In that event, if there are no new issues, the bankruptcy court should ordinarily decline to
6 allow the parties to relitigate the debt amount and should give the state court judgment as to the
7 amount of preclusive effect.") Before trial, the Court granted summary adjudication as to the amount
8 of the damages, leaving intent as the only issue to be tried.

9 **C. Criminal Proceedings**

10 After the Debtor was arrested on December 23, 1998, he pled guilty, under oath, to a felony;
11 California Penal Code § 245(A)(1). On April 2, 1999, the Debtor was sentenced to 365 days in jail,
12 five years of probation, and was ordered to pay restitution of \$260. He admitted in the criminal case
13 that he had assaulted Mr. Gonzales using his fists as a deadly weapon with sufficient force to produce
14 great bodily injury. Issues raised regarding the admissibility of the plea agreement were ultimately
15 withdrawn at trial. Giving the plea due consideration, the Court finds it destroys any remaining vestige
16 of the Debtor's fragile credibility in this Court. The plea contains the Debtor's contemporaneous
17 admission under oath, and against his interest, of each of the elements of the nondischargeability
18 claims before the Court. The Debtor's denial of these elements over a decade later in this Court cannot
19 be trusted.

20 After briefing by the parties in response to the Court's issue preclusion query, the Court
21 declined to give this plea preclusive effect. California law is applicable to determine the issue
22 preclusive effect of the criminal conviction. To determine the issue preclusive effect of a California
23 state court's judgment, federal courts look to California law. 28 U.S.C. § 1738 (the Full Faith and
24 Credit Statute); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Harmon v.*
25 *Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001). Under California law, plea agreements
26 are not entitled to preclusive effect. See *20th Century Ins. Co. v. Schurtz*, 92 Cal. App. 4th 1188, 1196
27 (Cal. App. 2001); *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 605 (1962).

1 **II. JURISDICTION**

2 This Court has constitutional authority to enter a final judgment in this adversary proceeding
3 determining both the amount of the damage claim, and that the claim is excepted from discharge.
4 *Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 31-32 (B.A.P. 9th Cir. 2012).

5 **III. LEGAL ANALYSIS**

6 Under 11 U.S.C. § 523(a)(6), a debt arising from "willful and malicious injury by the debtor to
7 another entity or to the property of another entity" is nondischargeable. The injury must be both
8 "willful" and "malicious." While these elements share certain characteristics, they are separate and
9 distinct. *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001).

10 Willful means that the defendant had subjective motive to inflict injury or the defendant
11 believed that the injury was substantially certain to occur as a result of his or her conduct. *In re*
12 *Jercich*, 238 F.3d at 1208. The focus of the "willful" test is whether the debtor intended to cause
13 injury, or knew injury would follow from his or her acts. *Thiara v. Spycher Bros. (In re Thiara)*, 285
14 B.R. 420, 434 (B.A.P. 9th Cir. 2002).

15 The Court concludes the Debtor intended to injure Mr. Gonzales by straddling and repeatedly
16 punching him in the face while he lay unconscious on the ground in such a violent way that the
17 paramedics and police had to be called. There is simply no other purpose for that conduct. The Debtor
18 had the motive to inflict injury because he was clearly angry about his failing relationship with his ex-
19 wife, demonstrated by his stalking of her, and his threats to his son.

20 Alternatively, the Court concludes the Debtor knew that injury would result from his actions,
21 even if the first punch was a flailing one. The injuries Mr. Gonzales suffered were a foreseeable
22 consequence of hitting another human being in the vulnerable area of the head and face, which people
23 protect instinctively when threatened. It does not matter whether Debtor intended to cause the degree
24 of harm that he caused. *In re Edie*, 314 B.R. 6, 15-16 (Bankr. D. Utah 2004) ("The crucial question is
25 whether [the debtor] intended, or expected, to cause injury to [the plaintiff's] property, not whether she
26 intended to cause the precise magnitude of injuries sustained."). Mr. Gonzales is entitled to be
27 compensated by a nondischargeable debt for all of the injuries he suffered.

1 The malicious prong to the 11 U.S.C. 523(a)(6) test involves: "(1) a wrongful act, (2) done
2 intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse."
3 *Jercich*, 238 F.3d at 1209. While many of the willful and malicious elements overlap, the
4 differentiating element between willful and malicious is whether the Debtor acted without just cause or
5 excuse. *See id.*

6 The Court finds the multiple punches were not thrown in self-defense by the Debtor; the only
7 excuse offered by the Debtor. Mr. Gonzales did not initiate the conflict, but merely demanded to know
8 what was going on between his daughter and the Debtor. Even if the first punch was thrown out of
9 fear or surprise, which the Court does not believe, the Debtor thereafter unilaterally escalated the
10 beating, even after Mr. Gonzales was rendered unconscious. Certainly by this time the Debtor's
11 actions became indubitably malicious. *See Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1107 (9th Cir.
12 2005) (where debtor "went well beyond the scope of his legitimate goal" in making disparaging
13 comments about his professor, the resulting debt was not dischargeable).

14 As to Mrs. Gonzales' consortium claim, the Court also finds her injuries were caused by willful
15 and malicious conduct. Her damages are similar to *Jendus-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th
16 Cir. 2012), where the Seventh Circuit found that the children's and husband's emotional injuries
17 resulting from the debtor's brutal beating of his ex-wife were nondischargeable. *See also Rodriguez v.*
18 *Bethlehem Steel Corp.*, 12 Cal. 3d 382, 408 (Cal. 1974) (finding that a "spouse has a cause of action
19 for loss of consortium, caused by a negligent or intentional injury to the other spouse by a third party").
20 The Debtor had the specific intent to injure Mr. Gonzales. While this intent may not have been
21 directed at Mrs. Gonzales, she was present for the beating and the Debtor was aware of her presence.
22 In fact, he admitted speaking to her after he ceased his attack. That Mrs. Gonzales would be injured by
23 the Debtor's attack on her husband was foreseeable, and thus willful. *In re Jercich*, 238 F.3d at 1208.

24 The Debtor's infliction of emotional injury and loss of consortium on Mrs. Gonzales was also
25 malicious. He had no excuse for beating her husband, whether in or out of her presence. Although
26 Mrs. Gonzales' claims are derivative of the attack on Mr. Gonzales, they emanate from the same
27 wrongful act and are nondischargeable even if the malice was not directed specifically at her. *See*
28 *Larsen*, 677 F.3d at 322; *Drewes v. Levin (In re Levin)*, 434 B.R. 910, 921 (Bankr. S.D. Fla. 2010)

1 (finding damages for parents' mental pain from son's shooting death by the debtor nondischargeable).
2 In awarding damages to the parents of the murdered son, *Levin, id.* at 924, quoted *Smith v. Pitner (In re*
3 *Pitner)*, 6 B.R. 731, 733 (E.D. Tenn. 1980), *aff'd*, 696 F.2d 447 (6th Cir. 1982): "The deliberate
4 shooting of another human being, not done in self-defense, is a malicious act in every sense of the
5 word."

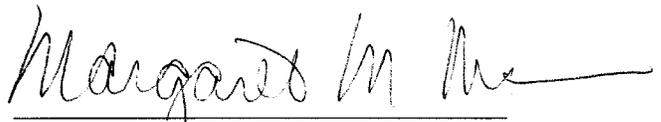
6 **IV. DAMAGES**

7 Both parties listed \$708,714.60 as the amount of debt at issue as per the Renewal of Judgment
8 entered on February 2, 2010. Debtor's debt to the Plaintiffs, including interest at the state court
9 judgment rate, is nondischargeable under 11 U.S.C. § 523(a)(6). *Shoen v. Shoen (In re Shoen)*, 176
10 F.3d 1150, 1159 (9th Cir. 1999) *cert. den.* 528 U.S. 1075 (2000) (post-petition interest at the state court
11 judgment rate accrues on nondischargeable debts under 11 U.S.C. § 523); *citing Bruning v. United*
12 *States*, 376 U.S. 358, 362 (U.S. 1964) (post-petition interest on a nondischargeable claim to the extent
13 not paid by the estate continues to accrue during the bankruptcy case as a similarly nondischargeable
14 claim).

15 **V. CONCLUSION**

16 This Memorandum Decision constitutes the Court's findings of facts and conclusions of law
17 under Federal Rule of Bankruptcy Procedure 7052(a). Plaintiffs are to lodge a judgment consistent
18 with this decision within ten days.

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20 Dated: June 19, 2012



21 MARGARET M. MANN, JUDGE
22 United States Bankruptcy Court
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