SO ORDERED.

SIGNED this 07 day of May, 2009.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

Opinion Designated for Electronic Use, But Not for Print Publication
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
TERRY J. DUCKWORTH,	**CASE NO. 07-12686-7**
DEBTOR.	**CHAPTER 7**
WOLFE ELECTRIC, INC.,	
PLAINTIFF,	
v.	**ADV. NO. 08-5023**
TERRY J. DUCKWORTH,	
DEFENDANT.	

OPINION DENYING BOTH PLAINTIFF'S AND DEFENDANT-DEBTOR'S MOTIONS FOR SUMMARY JUDGMENT

This dischargeability proceeding is before the Court on opposing motions for

summary judgment. Plaintiff Wolfe Electric, Inc., appears by counsel Karl R. Swartz and Ryan M. Peck. Defendant-Debtor Terry J. Duckworth appears by counsel Edward J. Nazar and Nicholas R. Grillot. The Court has reviewed the relevant materials and is now ready to rule.

The Plaintiff seeks a summary judgment determining that, through the alleged issue preclusion or collateral estoppel effect of a state court jury verdict and judgment entered before the Debtor filed for bankruptcy, its claim against the Debtor is excepted from discharge under 11 U.S.C.A. § 523(a)(6) as a debt based on willful and malicious injury caused by his misappropriation of its trade secrets. The Debtor bases his motion on the alleged claim preclusion or res judicata effect of the same jury verdict and judgment. As explained below, the Court concludes that both motions must be denied.

FACTS

Although the parties attempt to raise some factual disputes, the facts necessary for the Court to resolve their motions are not disputed.

The Plaintiff manufactures and sells conveyor pizza ovens. The Debtor served as its president from May 2004 until March 2005, when he either quit or was fired, depending on whose story is believed. Less than six months later, the Debtor was a part owner of a newly-formed company making competing conveyor pizza ovens. The Plaintiff sued him and the new company, asserting claims for breach of contract and breach of fiduciary duties, as well as for misappropriation of trade secrets. In December 2006, a jury found in favor of the Plaintiff, awarding damages on all three claims.

In its motion for summary judgment, the Plaintiff mistakenly described the jury verdict as having awarded it $325,000 in damages on each of its claims against the Debtor. However, the Plaintiff later corrected that description[1] and effectively modified the extent of its summary judgment motion. As relevant here, the jury verdict form submitted to the Court shows the jury was presented with Questions A through F (each with multiple subparts) concerning the three claims against the Debtor. Question A asked the jury to determine whether the Debtor had breached his contract with the Plaintiff. If they answered that question "Yes" (and they did), Question B asked them to determine the damages caused by the breach. The jury fixed various items of damages caused by the breach of contract in amounts that add up to $275,000. One of the items of damage was "Loss of trade secrets and confidential business information," and the jury awarded $50,000 for this item. Question C asked the jury to determine whether the Debtor had breached fiduciary duties to the Plaintiff. If they answered that question "Yes" (and they did), Question D asked them to determine the damages caused by those breaches. The possible items of damages were identical to those listed in Question B, and the jury fixed exactly the same amounts in Question D as they did in Question B. Question E asked the jury to determine whether the Debtor and the new company he had helped form misappropriated trade secrets belonging to the Plaintiff. If they answered that question "Yes" (and they did), Question F asked them to determine the damages caused by the

[1]*See* Docket # 39, Plaintiff Wolfe Electric, Inc.'s Memorandum in Opposition to Defendant Terry J. Duckworth's Motion for Summary Judgment, at 10, n. 1.

misappropriation. Responding to that question, the jury decided the Debtor had caused $50,000 in damages to the Plaintiff, and his new company had caused damages in the same amount. On a separate claim against the Debtor's new company for tortious interference with existing contractual relations, the jury found in favor of the Plaintiff and awarded damages of $225,000. The trial court entered judgment against the Debtor for $325,000 and against his company for $275,000.

Later, at a hearing on the Plaintiff's motion for an injunction and other relief, the trial court awarded the Plaintiff attorney fees under K.S.A. 60-3323. The trial court said:

> I will find based on the evidence that was presented at trial that under the Kansas Trade Secrets Act that there was a willful and malicious conduct done by [the Debtor]. And vicariously by [his company]. I say the worst culprit of those obviously was [the Debtor], but the wink and nod analogy given by [the Plaintiff's attorney], is probably most appropriate to [his company]. They knew the restraint [the Debtor] was under. They...circumvented and knowingly tried to go around and violate those contract provisions in the Trade Secrets Acts and similar matters, so I will find that willful and malicious conduct occurred on parts of both of the defendants [the Debtor] and [his company].[2]

In September 2007, the court signed a journal entry awarding the fees and granting an injunction. The journal entry stated, "the evidence establishes that [the Debtor and his company] willfully and maliciously misappropriated Plaintiff's trade secrets," and then awarded $140,122.06 in attorney fees "pursuant to K.S.A. § 60-3323(iii)."

On November 8, 2007, the Debtor appealed and, a year later, his appeal was transferred to the Kansas Supreme Court on that court's motion, where the appeal is now

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[2]Docket # 30, Memorandum in Support of Defendant's Motion for Summary Judgment, Ex. G, (Partial transcript of July 6, 2007, hearing in state court on Plaintiff's Motion for Attorney Fees, at 14:16 to 15:3).

pending.

The Debtor filed a Chapter 7 bankruptcy petition on November 1, 2007. The Plaintiff timely filed the complaint that initiated this proceeding, contending its judgment is excepted from discharge under § 523(a)(6). Both parties have now moved for summary judgment.

DISCUSSION

1. Summary judgment rules

Under the applicable rules of procedure, the Court is to grant summary judgment if the moving party demonstrates that there is "no genuine issue of material fact" and that the party "is entitled to a judgment as a matter of law."[3] The substantive law identifies which facts are material.[4] A dispute over a material fact is genuine when the evidence is such that a reasonable factfinder could resolve the dispute in favor of the party opposing the motion.[5] In adjudicating disputes, bankruptcy courts usually both determine the law and find the facts. In deciding a summary judgment motion, though, the Court is limited to its role of deciding legal questions, not weighing the evidence and resolving factual disputes, but merely determining whether the evidence favorable to the non-moving party about a material fact is sufficient to require a trial[6] at which the Court would act in its

[3]Fed. R. Civil P. 56(c), made applicable by Fed. R. Bankr. P. 7056.

[4]*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[5]*Id.*

[6]*Id.* at 249-50.

factfinding role. Summary judgment is inappropriate if an inference can be drawn from the materials properly submitted either to support or oppose the motion that would allow the non-moving party to prevail at trial.[7]

The substantive law's allocation of the burden of proof also affects the Court's analysis of a summary judgment motion. The party asking for summary judgment has the initial burden of showing that no genuine issue of material fact exists.[8] But if the moving party does not have the burden of proof on a question, this showing requires only pointing out to the Court that the other party does not have sufficient evidence to support a finding in that party's favor on that question.[9] When such a showing is made, the party with the burden of proof must respond with affidavits, depositions, answers to interrogatories, or admissions sufficient to establish that a finding on the question could properly be made in the party's favor at trial.[10]

2. The § 523(a)(6) exception to discharge

Section 523(a)(6) of the Bankruptcy Code excepts from a debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, the Supreme Court ruled that this provision applies only to a deliberate or intentional injury, not merely a deliberate or intentional act

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[7]*See id*. at 248.

[8]*Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

[9]*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[10]*Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

that leads to injury.[11] The Court explained that this means the debtor must have intended the consequences of the act he or she performed, not simply the act itself.[12]

After *Geiger*, the Tenth Circuit declared in *Panalis v. Moore (In re Moore)* that § 523(a)(6) requires proof of both a willful act and a malicious injury.[13] For the debtor's act to have been willful, the debtor must have intended to cause the consequences of the act or have believed that the consequences were substantially certain to follow.[14] *Moore* involved a state court judgment based on a jury's determination that a contractor justifiably relied on a debtor's false representation that he carried insurance and suffered damages as a result of the false representation when he was subsequently injured in a gas explosion.[15] The Circuit said:

> The essence of this case arises from basic tort law. It is a fundamental principle that a person who commits an intentional tort is liable for the consequences of his acts. However, it does not follow that everything that happens to the victim following the commission of the tort was *intended* by the tortfeasor.[16]

Because *Geiger* required the debtor to have intended the consequences of his tortious act and the debtor in *Moore* could not have intended for his fraudulent representation to cause the contractor to suffer injuries in a gas explosion, the Circuit ruled the state court

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[11]523 U.S. 57, 60-64 (1998).

[12]523 U.S. at 61-62.

[13]357 F.3d 1125, 1129 (10th Cir. 2004).

[14]*Id*.

[15]*Id*. at 1127.

[16]*Id*. at 1128.

judgment was not a debt based on a willful injury, as required for it to be excepted from discharge by § 523(a)(6).[17] Although the Circuit indicated § 523(a)(6) requires proof of both a "willful" act and a "malicious injury," it based its ruling on the conclusion the debtor had not intended to cause the contractor's physical injuries, and so not committed a willful act covered that provision.[18] Consequently, the opinion, like the Supreme Court's opinion in *Geiger*, does not provide a detailed analysis of the "malicious" element under § 523(a)(6), and does not suggest any significant difference between the "willful" and "malicious" elements of the provision.

After saying both a willful act and a malicious injury is required to make § 523(a)(6) applicable, the Circuit said in *Moore*:

> For example, in *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*, 235 B.R. 651, 657 (10th Cir. BAP 1999), the court held, to constitute a willful act under § 523(a)(6), the debtor must "desire . . . [to cause] the consequences of his act or . . . believe [that] the consequences are substantially certain to result from it." *Id*. at 657 (quoting Restatement (Second) of Torts, § 8A (1965)). Also, in *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir.1995), the court concluded the term "malicious" requires proof "that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury."[19]

The Court finds it difficult to perceive any meaningful difference between the quoted requirements for the "willful" and "malicious" elements of § 523(a)(6), since "consequences" and "injury" seem to refer to the same thing in the two statements.

Black's Law Dictionary suggests some distinctions between the words, stating that

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[17] *Id*. at 1128-29.

[18] *Id*. at 1127-30.

[19] 357 F.3d at 1129.

"willful" is an adjective that means, "Voluntary and intentional, but not necessarily malicious," while "malicious" is an adjective that means, "1. Substantially certain to cause injury. 2. Without just cause or excuse."[20] These definitions suggest the Supreme Court's opinion in *Geiger* added some of the usual definition of "malicious" to its construction of "willful." Black's also offers a definition specifically for "willful and malicious injury" under § 523(a)(6): "[D]amage to another entity (such as a creditor) caused by a debtor intentionally performing a wrongful act — without just cause or excuse — that the debtor knew was certain or substantially certain to cause injury."[21] This definition seems to cover all aspects of the dictionary's separate definitions of "willful" and "malicious." Black's definitions echo the Tenth Circuit's statements in *Moore*, except they add the possibility the actor might have just cause or excuse for causing the injury. Although that possibility was not mentioned in *Moore*, the Circuit did mention it an earlier decision, *Dorr, Bentley & Pecha, CPA's, P.C., v. Pasek (In re Pasek)*.[22] A common example of this possibility making a difference in the analysis of a person's actions is when the person was properly acting in self-defense.[23] Unless the

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[20]Black's Law Dictionary (version on Westlaw in April 2009, West/Thomson Publishing, 8th edition, 2004).

[21]*Id*.

[22]983 F.2d 1524, 1527-28 (10th Cir.1993).

[23]*See* Restatement (Second) of Torts, § 63(1) (1965) ("An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.").

justification or excuse possibility is added to the "willful" and "malicious" elements as stated in *Moore*, a person who caused an injury while properly acting in self-defense might have a debt for damages based on the injury excepted from discharge by § 523(a)(6).

3. Applicable law of preclusion

The Debtor contends that the Plaintiff's claim under § 523(a)(6) must fail here because the Plaintiff failed to prove in the state court trial that he caused it to suffer a willful and malicious injury. Although the Debtor suggests this is a collateral estoppel (or issue preclusion) argument, he is actually pushing for claim preclusion (or res judicata). Collateral estoppel only prevents reasserting claims that were actually decided in prior litigation, while claim preclusion is the doctrine that bars making claims in later litigation that were not but should have been made in the prior suit.[24] The Court will address claim preclusion more completely in discussing the Debtor's summary judgment motion.

The Plaintiff contends that the dischargeability of its claim against the Debtor is established through the collateral estoppel, or issue preclusion, effect of its state court judgment. The federal Full Faith and Credit Statute[25] requires the Court to apply the collateral estoppel law of Kansas, the state in which the judgment was rendered, to

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[24]*See Brown v. Felsen*, 442 U.S. 127, 139 n. 10 (1979) (explaining difference between doctrines, using res judicata and collateral estoppel terminology); *see also Carter v. City of Emporia*, 815 F.2d 617, 619 n. 2 (10th Cir. 1987) (indicating preference to use "claim preclusion" for res judicata and "issue preclusion" for collateral estoppel because older terms are too often misused).

[25]28 U.S.C.A. § 1738.

determine the judgment's effect in this case.[26] But if Kansas law says that the judgment would have a preclusive effect here, the Court must then determine whether something else in federal law makes an exception to the Full Faith and Credit Statute for purposes of the Plaintiff's claim.[27] Under Kansas law,

> The requirements of collateral estoppel are: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon the ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; and (3) the issue litigated must have been determined and necessary to support the judgment. [Citation omitted.][28]

The parties now before this Court engaged in a lengthy jury trial that resulted in the Plaintiff's judgment against the Debtor, so some of these requirements are clearly met in this case. The only questions will be whether an issue involved in the Plaintiff's claim under § 523(a)(6) was already litigated in the state court trial, determined by the state court judgment, and necessary to support the judgment.

4. Defendant-Debtor's motion for summary judgment

As the Court reads it, the Debtor's memorandum in support of his summary judgment motion completely relies on the argument that the Plaintiff's state court judgment is dischargeable because neither the jury nor the trial judge made findings that meet the § 523(a)(6) requirements for excepting the judgment from discharge. The Court

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[26]*Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-86 (1985); *Matsushita Electric Industrial Co., Ltd., v. Epstein*, 516 U.S. 367, 373-75 (1996).

[27]*Marresse*, 470 U.S. at 379-86; *see also National Union Fire Ins. Co. v. Boyovich (In re Boyovich)*, 126 B.R. 348, 350 (Bankr. W.D. Wash. 1991) (*Marresse* approach applies in bankruptcy proceedings).

[28]*Regency Park v. City of Topeka*, 267 Kan. 465, 478 (1999).

considered and rejected the same argument in *Frontier Farm Credit v. Norris (In re Norris)*, explaining that bankruptcy law does not require a creditor to prove in a non-bankruptcy forum facts necessary to except its claim against the debtor from discharge before the debtor has even filed a bankruptcy case in which he might receive a discharge.[29] Instead, so long as the creditor secures a judgment determining the debtor owes it a debt, the creditor can, after the debtor files for bankruptcy, try to prove the facts necessary to except that debt from discharge.[30] In other words, claim preclusion does not apply in proceedings seeking a determination of the dischargeability of a debt.

After the Plaintiff pointed out the *Norris* opinion, the debtor filed a reply brief that included this assertion: "[T]he facts as presented during the state-court case do not establish that [the Debtor] intentionally and maliciously harmed [the Plaintiff]."[31] Except to the extent any of the Plaintiff's state court claims *required* it to prove the Debtor's actions were willful and malicious, the state court judgment could not have foreclosed the Plaintiff's effort to prove the judgment is excepted from the Debtor's discharge by § 523(a)(6). As will be discussed more thoroughly later in this opinion in deciding the Plaintiff's motion for summary judgment, the Plaintiff did ask the state court judge to award attorney fees under K.S.A. 60-3323(iii) based on the Debtor's allegedly "willful and malicious" misappropriation of its trade secrets. If the state court had ruled the

[29]2007 WL 1946547 (Bankr. D. Kan. 2007).

[30]*Id.*

[31]Dkt. # 41 at 2.

Debtor's actions did not meet the requirements of that statute and therefore denied the request for attorney fees, the Plaintiff might well be barred from now arguing that the Debtor willfully and maliciously misappropriated its trade secrets. But that is not what the state court ruled. Based on the court's award of attorney fees under the state statute, any preclusion will operate against the Debtor in this adversary proceeding, not in his favor.

In his reply, the Debtor asserts another, more unusual argument that should be mentioned. He says the parties agreed in this adversary proceeding that discovery would be very limited because of the extensive state-court litigation, and the Plaintiff in fact did no additional discovery. Then he contends that, by doing no discovery in this proceeding, the Plaintiff limited itself to the facts as presented in the state court trial. He cites no authority to support this assertion, and the Court believes there is none. So far as the Court is aware, the only way a party's inaction in discovery can limit its ability to present evidence at trial is if the party failed in response to discovery requests to produce the evidence it wants to offer at trial.

Finally, the Debtor suggests that by pointing to the absence from the state court trial of evidence to support all the essential elements of the Plaintiff's § 523(a)(6) claim, he has made an adequate showing that the Plaintiff does not have such evidence to present , and he is entitled to summary judgment because the Plaintiff has not proffered additional evidence in response to his motion. The Court cannot agree. Even if the Plaintiff were limited to the evidence it presented in the state court trial, that evidence was

sufficient to convince the trial judge that the Debtor willfully and maliciously misappropriated the Plaintiff's trade secrets. While it is true the trial judge did not extend that finding to the Plaintiff's claims for breach of contract and breach of fiduciary duties, that may simply be because state law provided no reason for it to do so and not because it did not believe the Debtor's actions in breaching his contract and his fiduciary duties were willful and malicious. The Plaintiff's request for attorney fees was the only relief it sought that required a finding about the allegedly willful and malicious nature of the Debtor's actions, and on that score, the trial judge found for the Plaintiff. On the Plaintiff's other claims, whether the Debtor's actions were willful and malicious was not legally relevant. In other words, the fact only a limited finding of willful and malicious action was made does not establish that the Debtor's other actions were in fact not willful and malicious, only that it was not relevant to the Plaintiff's other claims. Pointing to an absence of findings on points that were not relevant in the state court trial is not sufficient to shift the summary judgment burden to the Plaintiff to show it has evidence beyond the record of that trial to support potential findings on points that are relevant in this proceeding.

The Debtor's motion for summary judgment must be denied.

5. The Plaintiff's motion for summary judgment.

In its initial memorandum in support of its summary judgment motion, the Plaintiff argued issue preclusion barred the Debtor from contesting the applicability of § 523(a)(6) to every part of its state court judgment. Later, in its response to the Debtor's motion for

summary judgment, the Plaintiff conceded the state court's determination the Debtor willfully and maliciously misappropriated the Plaintiff's trade secrets did not apply to its claims for breach of contract and breach of fiduciary duties, so the Debtor is not barred from contesting the dischargeability of the $275,000 judgment awarded on those claims. The Plaintiff still contends the nondischargeability of the $50,000 in actual damages and the $140,000 in attorney fees awarded on its misappropriation of trade secrets claim has been established by the state judge's ruling the Debtor's conduct with respect to that claim was willful and malicious.

The Court will first address a number of reasons the Debtor offers for denying the Plaintiff's motion.

The Debtor argues the Court should not grant the Plaintiff's motion for summary judgment because his appeal of the state court judgment is still pending before the Kansas Supreme Court. However, although doing so can cause some problems, the general rule federal courts follow is to give a federal judgment preclusive effect even though an appeal of the judgment is pending.[32] The Tenth Circuit has stated that Kansas also follows this general rule.[33] The Court will not deny the Plaintiff's motion simply because the Debtor's appeal of the state court judgment remains pending.

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[32]*See* 18A Wright, Miller & Cooper, *Federal Prac. & Pro.: Jurisdiction 2d*, § 4433 (2002) (stating general rule and discussing difficulties it causes); *see also* 18 Wright, Miller & Cooper, *Federal Prac. & Pro.: Jurisdiction 2d*, § 4402 (discussing terminology of res judicata and indicating treatise uses "res judicata" to refer to both claim preclusion and issue preclusion).

[33]*Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997) (citing *Willard v. Ostrander*, 51 Kan. 481, 486-90 (1893); *Munn v. Gordon*, 87 Kan. 519, 521-22 (1912)).

The Debtor suggests the Court should not apply issue preclusion here because the state court found both he and his company had willfully and maliciously misappropriated the Plaintiff's trade secrets, lumping both together and making it impossible to "determine the nature and extent of the intent attributed to each defendant."[34] This argument seems doubtful even if its factual premise were correct, but in this case, the premise is clearly wrong. It is true the journal entry of the state court's ruling says only that both defendants committed willful and malicious misappropriation. But the transcript of the hearing at which the court made that ruling reveals the court said: "I will find based on the evidence that was presented at trial that under the Kansas Trade Secrets Act that there was a willful and malicious conduct done by [the Debtor]. And vicariously by [his company]. I say the worst culprit of those obviously was [the Debtor.]"[35] This makes clear the court was convinced the Debtor engaged in the worst conduct, and shows the Debtor's argument on this point must fail.

Finally, the Debtor seems to suggest the fact the jury was not asked to award punitive damages and the trial judge, rather than the jury, made the willful and malicious finding supporting the attorney fee award somehow prevents the finding from having preclusive effect, though he cites no authority for such a rule. In fact, the Kansas version of the Uniform Trade Secrets Act[36] gives the power to make the necessary findings and

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[34]Dkt. # 40 at 14.

[35]Docket # 30, Ex. G, partial transcript at 14:16 to 14:21.

[36]K.S.A. 60-3320 to 60-3330.

award either punitive damages or attorney fees to the court, not to a jury.[37] The award in this case was made under K.S.A. 60-3323, which provides: "If . . . (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." Although the U.S. Supreme Court has held the Constitution prevents states from assigning some fact finding duties in criminal cases to the court rather than the jury, the Debtor has cited nothing indicating any similar limit applies here, and the Court is aware of none. The trial judge's willful and malicious finding is entitled to the same preclusive effect as a jury finding on any relevant point would be.

The Plaintiff argues the state court's finding of willful and malicious misappropriation of trade secrets and award of attorney fees under K.S.A. 60-3323(iii) satisfies the requirements for collateral estoppel and establishes the actual damages and attorney fees included in the judgment are excepted from discharge under § 523(a)(6). The fact the trial judge said the Debtor engaged in "willful and malicious conduct" suggests the court may have been convinced the Debtor had caused a "willful and malicious injury" to the Plaintiff. The only question is whether those words meant the same thing to the trial judge as they mean in § 523(a)(6). Kansas trial courts frequently rely on the form jury instructions published by the Kansas Judicial Council when they need definitions for words used in either statutes or the common law. The following relevant definitions are found in the most recent edition of the PIK:

[37] *See* K.S.A. 60-3322 & 60-3323.

> An act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another is a willful act.[38]
>
> Malice is a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse.[39]

These definitions are sufficiently similar to the meaning of "willful and malicious injury" under § 523(a)(6), as discussed earlier, that the Court would conclude the state court's willful and malicious finding bars the Debtor from contesting the dischargeability of the damages and attorney fees awarded for his misappropriation of the Plaintiff's trade secrets if the trial court applied these definitions in making its finding.

But the Court has found nothing in the materials the parties presented that suggests the state judge necessarily had the PIK definitions in mind. Neither the relevant portions of the transcript of the hearing where the court made the finding nor the journal entry committing the court's finding to writing include any discussion or explanation of what the judge thought the words meant. The only thing the Court has found in the materials the parties presented to support their opposing summary judgment motions that discusses the meaning of "willful" and "malicious" is the motion for permanent injunction and attorney's fees that the Plaintiff presented to the state court.[40] That document suggests the state judge might have had a different meaning in mind. On page 14 of the motion, the

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[38]*Pattern Instructions for Kansas, Civil, 4th ed.*, § 103.04 (Kansas Judicial Council, PIK - Civil Advisory Committee 2008).

[39]*Pattern Instructions for Kansas, Civil, 4th ed.*, § 103.05 (Kansas Judicial Council, PIK - Civil Advisory Committee 2008).

[40]*See* Docket # 39, Exhibit marked as Ex. 8, but entered into CM-ECF system as Ex. 13 (Plaintiff's Motion for Permanent Injunction and Attorney's Fees).

Plaintiff said, "The phrase 'willful and malicious misappropriation' has been interpreted to mean 'an intentional misappropriation as well as a misappropriation resulting from the conscious disregard of the rights of another,'" citing a Seventh Circuit decision involving the Illinois Trade Secrets Act.[41] This definition does not appear to include the intent to injure that the Supreme Court said in *Geiger* is required to bring a debt within § 523(a)(6). It also omits the possibility some justification or excuse might prevent a willful and malicious finding. Since nothing presented to the Court shows the state judge was referred to the PIK definitions or otherwise relied on them, and this document shows the judge was referred to a definition that does not satisfy § 523(a)(6), the Court is unable to determine whether the trial judge's willful and malicious finding was based on definitions that equaled the standard required to except from discharge the Plaintiff's judgment for misappropriation of trade secrets.

The Plaintiff's motion for summary judgment must be denied.

CONCLUSION

For these reasons, the Court concludes the opposing motions for summary judgment must be and they are hereby denied.

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[41]Quoting *Mangren Research & Dev. Corp. v. National Chem. Co., Inc.*, 87 F.3d 937, 946 (7th Cir. 1996).