SO ORDERED.

SIGNED this 10th day of January, 2023.

Mitchell L. Herren
United States Bankruptcy Judge

DESIGNATED FOR ONLINE PUBLICATION ONLY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE: **DANIEL BERTRAM ACOSTA** **Debtor.**	**Case No. 22-10158** **Chapter 7**
LEA ANN LAVIELLE, MICHAEL LAVIELLE, individually and on behalf of minor child D.L., HAYDEN LAVIELLE BOALDIN, ABBIGAIL LAVIELLE **Plaintiffs,** **vs.** **DANIEL BERTRAM ACOSTA** **Defendant.**	**Adv. No. 22-5015**

ORDER DENYING PLAINTIFFS' MOTION
FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, the Lavielle family, obtained a $300,000 judgment against debtor Daniel Acosta based on the Kansas tort of outrage. The sole issue before the Court at this time is whether that judgment, by itself, establishes under principles of collateral estoppel that Acosta inflicted "willful and malicious injury" on the Lavielles under 11 U.S.C. § 523(a)(6)[1], such that the judgment would be nondischargeable in Acosta's bankruptcy. The Court concludes that it does not. Because § 523(a)(6) requires intentional conduct and the judgment could have been based on a finding of reckless conduct, further proceedings are necessary in this adversary proceeding.

Facts

Acosta and the Lavielles (Lea Ann, Michael, and their three children) were former neighbors in Elkhart, Kansas. The Lavielles allege that for more than a decade, Acosta engaged in a pattern of "assaulting, battering, threatening, intimidating, and verbally and physically abusing"[2] the Lavielle family.[3] Acosta's behavior continued even after the Lavielles obtained a protective order; to escape from his behavior, the Lavielles moved to Oklahoma. While in Oklahoma, the Lavielles sued Acosta in the United States District Court for the Western District of Oklahoma, asserting that Acosta committed the Kansas tort of outrage by engaging

[1] All future statutory references, unless otherwise provided, are to Title 11 of the United States Code (the "Bankruptcy Code").
[2] ECF No. 1-3, at 20.
[3] *Id.* at 18–25.

in extreme and outrageous conduct that caused them extreme and severe mental distress.[4] They sought compensatory and punitive damages and injunctive relief.[5]

A jury trial was held in November 2017, in which both the Lavielles and Acosta were represented by counsel.[6] The jury found for the Lavielles on their complaint, awarding both actual and punitive damages.[7] In total, the jury awarded the Lavielles $300,000.[8] The Court also granted the Lavielles' request for a permanent injunction to stop Acosta's continuing harassment of the Lavielles.[9] Judgment was entered on December 13, 2017.[10]

Acosta filed a Chapter 7 bankruptcy on March 15, 2022 in the District of Kansas.[11] The judgment debt to the Lavielles comprises nearly all of Acosta's debts.[12] The Lavielles, proceeding *pro se,* timely filed this adversary proceeding seeking a determination that the Oklahoma federal court judgment is

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[4] *Id.*
[5] *Id.*
[6] *Id.* at 6–7, 13.
[7] *Id.* at 95–104, 107–11.
[8] *Id.*
[9] *Id.* at 112–15.
[10] *Id.* at 116. The court issued a final judgment and denied Acosta' motion for a new trial. *Id.* at 116, 125–30. Acosta then appealed the judgment, *id.* at 132, and the Tenth Circuit Court of Appeals affirmed. *Lavielle, et. al. v. Acosta*, 748 Fed. Appx. 196 (10th Cir. 2019). In February 2018, Acosta filed a new case against Lea Ann and Michael Lavielle in the District of Kansas, alleging the Lavielles stalked and harassed him and that they pursued false legal claims. Complaint, *Acosta v. Lavielle, et. al.,* No. 18-CV-1060-EFM-GEB., ECF No. 1, at 3 (D. Kan., filed Feb. 26, 2018). The Magistrate Judge recommended that Acosta's claims should be dismissed for failure to state a claim. Report and Recommendation, *Acosta v. Lavielle, et. al.,* No. 18-CV-1060-EFM-GEB., ECF No. 8, at 10 (D. Kan., filed April 4, 2018). The District Court adopted the recommendation and dismissed the case. Judgment, *Acosta v. Lavielle, et. al.,* No. 18-CV-1060-EFM-GEB., ECF No. 11(D. Kan., filed June 4, 2018).
[11] Case No. 22-10158 (Bankr. D. Kan), ECF No. 1.
[12] Acosta's schedules disclose only unsecured debts. Schedule E/F lists debts of $6,612 to Chase Bank, $52,000 to Lea Ann Lavielle, and $248,000 to Michael Lavielle and children.

nondischargeable under § 523(a)(6).[13] With the complaint, plaintiffs filed voluminous exhibits (Exhibits 1–7) comprised of portions of the court record in the Oklahoma case, including the complaint seeking damages for the tort of outrage, jury instructions, verdict forms, judgment, permanent injunction, and excerpts from trial transcripts.[14] Acosta, also proceeding without counsel, answered the complaint by alleging that the plaintiffs committed perjury before the trial court and prayed for discharge of its judgment. Acosta has twice in this adversary proceeding unsuccessfully sought dismissal of the complaint and discharge of the judgment debt.[15]

On August 15, 2022, the Lavielles filed the current motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), as made applicable to adversary proceedings by Fed. R. Bankr. P. 7012.[16] Acosta filed his response, again asserting that the plaintiffs committed perjury in the Oklahoma proceedings and that this Bankruptcy Court should "strike the judgment" and discharge the debt.[17] In their reply, the Lavielles assert that it is inappropriate to relitigate the Oklahoma case in this proceeding.[18] The Court took the Lavielles' Motion under advisement and is now ready to rule.

Standard for Judgment on the Pleadings

[13] ECF No. 1-9. The complaint was amended two days later to add the plaintiffs' signatures on the complaint; the substantive allegations remained the same. *See* ECF No. 4.
[14] *See* ECF Nos. 1-2 to 1-8, comprising Exhibits 1–7.
[15] *See* ECF Nos. 13, 27, 38, and 40.
[16] ECF Nos. 23 and 24 (supporting memorandum).
[17] ECF No. 34.
[18] ECF No. 36.

A party moving for judgment on the pleadings under FED. R. CIV. P. 12(c)[19] can seek a substantive, merits disposition of the underlying dispute.[20] A Rule 12(c) motion is appropriate after the pleadings are closed, so long as the motion is made early enough to not delay trial.[21]

A motion for judgment on the pleadings under Rule 12(c) is analyzed under the same standards that apply to a Rule 12(b)(6) motion.[22] In other words, a court must accept all facts plead by the nonmoving party and all reasonable inferences in the pleadings as true in the light most favorable to the nonmoving party.[23] The moving party must establish that there are no material issues of fact to be resolved and that the moving party is entitled to judgment as a matter of law.[24] In deciding a motion for judgment on the pleadings, a court may only consider "the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claim are based upon these documents."[25]

To the extent that the material facts are not at issue in this case, judgment on the pleadings may be appropriate to resolve the issues on their merits. Here, there is no genuine dispute that the Federal District Court sitting in the Western District of Oklahoma entered a money judgment against Acosta following the jury trial and verdicts finding Acosta liable on the Lavielles' outrage claim. As noted

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[19] FED. R. CIV. P. 12(c) applies to adversary proceedings, including this one, through FED. R. BANKR. P. 7012(b).
[20] *See Hale v. Meetrex Research Corp.*, 963 F.3d 424, 427 (5th Cir. 2020).
[21] FED. R. CIV P. 12(c).
[22] *Sanders v. Mountain America Federal Credit Union*, 689 F.3d 1138, 1141 (10th Cir. 2012).
[23] *Park Univ. Enters., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006).
[24] *Sanders*, 689 F.3d at 1141.
[25] *Wolfington v. Reconstructive Orthopaedic Assoc.*, 935 F.3d 187, 195 (3rd Cir. 2019) (citing *Mayer v. Belichick*, 605 F.3d 223, 230 (3rd Cir. 2010)).

previously, the Lavielles have filed with this Court certain court records from the Oklahoma proceeding that bear on the nature of the judgment debt at issue. This Court has previously ruled that Acosta's continuing allegations of perjury are not relevant to this inquiry, are not within the bankruptcy court's jurisdiction, and are not a basis here to relitigate the outrage claim or consider collateral attacks on the underlying Oklahoma judgment.[26] The Court emphasizes that the sole issue before this Court is whether the Oklahoma judgment constitutes a debt for willful and malicious injury by Acosta to the Lavielles.

Analysis

Certain debts incurred prepetition by a bankruptcy debtor may be excepted from the debtor's bankruptcy discharge (*i.e.* determined by the bankruptcy court to be nondischargeable). Those exceptions to discharge are contained in § 523 of the Bankruptcy Code. The discharge exception at issue here is § 523(a)(6), which provides:

> A discharge under section 727 [Chapter 7] . . . of this title [the Bankruptcy Code] does not discharge an individual debtor from any debt— . . . (6) for willful *and* malicious injury by the debtor to another entity or to the property of another entity.[27]

The Lavielles contend that their Rule 12(c) Motion should be granted by giving collateral estoppel effect to the Oklahoma judgment, without relitigating Acosta's conduct. In other words, the Lavielles argue that the Oklahoma jury has already found that Acosta committed a willful and malicious injury when it found him liable

[26] ECF No. 40, at 3.

[27] Section 523(a)(6) (emphasis added). Section 101(15) of the Bankruptcy Code includes a person within the definition of an "entity."

for the tort of outrage. This Court must determine whether the Oklahoma judgment on the tort of outrage establishes a willful and malicious injury by Acosta within the meaning of § 523(a)(6) as a matter of law.

Collateral Estoppel in General

The collateral estoppel doctrine, or issue preclusion, prevents relitigation of the same issue between the same parties when raised and decided in a different case or proceeding.[28] Collateral estoppel applies in bankruptcy dischargeability proceedings.[29] While the bankruptcy court determines the ultimate outcome of a dischargeability action, the doctrine of collateral estoppel applies to the factual issues underlying the litigation.[30] Generally, federal principles of collateral estoppel apply to prior judgments rendered by a federal court.[31] However, when a federal court is sitting in diversity, the preclusive effect of judgments is determined by the state law that the federal court was applying in that case (e.g., the Oklahoma standard for collateral estoppel applies to a judgment rendered by a federal court sitting in diversity and applying Oklahoma law).[32]

Here, Kansas state law dictates the applicable standard for application of collateral estoppel. The trial was held in the Western District of Oklahoma sitting in diversity, deciding a question of Kansas state law between two parties—one residing in Kansas and the other in Oklahoma. Since the federal trial court was

[28] *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).
[29] *Grogan v. Garner*, 489 U.S. 279, 285 n. 11 (1991).
[30] *In re Wallace*, 840 F.3d 762, 764 (10th Cir. 1988).
[31] *Morris v. King (In re Rosales)*, 621 B.R. 903, 931 (Bankr. D. Kan. 2020).
[32] *Knight v. Mooring Cap. Fund, LLC*, 749 F.3d 1180, 1186 (10th Cir. 2014).

applying Kansas state law to the tort of outrage (where the conduct occurred), the Kansas law of collateral estoppel controls.

In Kansas, collateral estoppel may be invoked when three elements are met: (1) a prior judgment on the merits which determined the parties' rights and liabilities on the issues based upon the ultimate facts as disclosed by the pleadings and judgment, (2) the parties are the same or are in privity, and (3) the issue litigated must have been determined and necessary to support the judgment.[33]

Application of Collateral Estoppel to § 523(a)(6)

For this Court to apply collateral estoppel, the Lavielles must demonstrate that the issues decided by the jury in the outrage action are the same as those in the nondischargeability action. If collateral estoppel applies, Acosta is precluded from relitigating any material issues of fact on that issue. In other words, this Court must determine whether proving the Kansas tort of outrage is the same as satisfying the willful and malicious nondischargeability standard under § 523(a)(6). The Court concludes that it is not, because the tort of outrage encompasses reckless conduct, while § 523(a)(6) does not.[34]

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[33] *In re Application of Fleet for Relief from a Tax Grievance in Shawnee County*, 293 Kan. 768, 778, 272 P.2d 583 (2012).

[34] *See Kawaauhau v. Geiger,* 523 U.S. 57, 64 (1998) (malpractice judgment attributable to negligent or reckless conduct does not fall within the § 523(a)(6) discharge exception); *In re Bradley,* 466 B.R. 582 (1st Cir. BAP 2012) (denying judgment creditor summary judgment on § 523(a)(6) claim based on collateral estoppel effect of judgment for intentional infliction of emotional distress due to lack of identical issues); *In re Gray,* 322 B.R. 682, 689–91 (Bankr. N.D. Ala. 2005) (civil judgment for intentional infliction of emotional distress was not entitled to preclusive effect nor dispositive of the § 523(a)(6) claim under collateral estoppel where jury could have found liability upon a reckless or wanton act); *In re Mauz,* 496 B.R. 777, 783–84 (Bankr. M.D. Pa. 2013) (agreeing with analysis in *Bradley, supra)*; *Mahadevan v. Bikkina,* Civil Action No. H-22-00008, Doc. 46 (S.D. Tex. July 25, 2022) (reversing bankruptcy court's determination giving collateral estoppel effect to judgment for intention infliction of emotional distress as a willful and malicious injury under § 523(a)(6) because the jury did not determine whether debtor acted with intent to harm *or* with reckless disregard).

Section 523(a)(6) excludes intentional torts from being discharged in bankruptcy.[35] Specifically, under § 523(a)(6), discharge is not available for any debts resulting from "willful and malicious injury by the debtor to another entity." A willful and malicious injury requires intentional conduct—negligence or reckless conduct will not suffice.[36] Tenth Circuit precedent is unclear as to whether "willful and malicious" is a unitary standard or separate prongs.[37] The Tenth Circuit Bankruptcy Appellate Panel recently opined that treating "willful and malicious" as distinct elements is the better approach because it facilitates a more rigorous examination of what is required to satisfy § 523(a)(6).[38]

"Willful" means that there was "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." [39] "A willful injury is akin to an intentional tort, as opposed to a negligent or reckless tort. [40] Similarly, "malicious" means that the debtor acted with a culpable state of mind vis-à-vis the actual injury; [41] he must have consciously disregarded his required duties such that his act was wrongful and without just cause or excuse." [42]

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[35] *Kawaauhau v.* Geiger, 523 U.S. 57, 61 n.3 (1988).
[36] *Swan Pediatric Dental, LLC v. Hulse (In re Hulse),* No. 21-20084, Adv. No. 21-02038, 2022 WL 16826561, at *7 (B.A.P. 10th Cir. Nov. 8, 2022) (Somers, J.).
[37] *First Am. Title Ins. Co. v. Smith (In re Smith)*, 618 B.R. 901, 911 (B.A.P. 10th Cir. 2020) (Somers, J.).
[38] However, the Tenth Circuit BAP noted in the decision that the ultimate outcome and required proof should be the same under either a unitary or separate standard. *Id.* at 912.
[39] *Id.* at 913 (quoting *Kawaauhau*, 523 U.S. at 61).
[40] *Id.*
[41] *Id.*
[42] *Id.*

In contrast, the Kansas tort of outrage[43] may be established on a showing that the defendant acted intentionally *or* that he acted in reckless disregard of the plaintiff.[44] And while punitive damages may be available if the defendant acted "willfully, wantonly, or wickedly," "wanton" conduct can also be established on a showing of reckless disregard.[45]

Here, in Instruction No. 14, the Oklahoma jury was instructed on the tort of outrage as follows:

> [i]f the Defendant intentionally *or* recklessly caused severe emotional distress to a Plaintiff by extreme and outrageous conduct, then Defendant is liable to that Plaintiff for the emotional distress; and if, the emotional distress causes bodily harm, then the Defendant is liable for the bodily harm thus caused.[46]

Instruction No. 16 defined reckless *or* with intent as follows:

> [r]eckless conduct . . . means a disregard or an indifference to the consequence of that conduct under circumstances involving danger to life or safety of others, although no harm was intended. A person who is reckless must know or have reason to know of facts that create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceeds to act.
>
> Intent to cause severe emotional distress exists when one engages in conduct with a desire to cause this distress in another person,

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[43] The Kansas tort of outrage is recognized in other jurisdictions as intentional infliction of emotional distress. These standards are based on the Restatement of Torts (Second) § 46(1) which provides: "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

[44] The elements for the tort of outrage are: (1) defendant acted intentionally or in reckless disregard of the plaintiff, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's conduct caused the plaintiff's mental distress, and (4) that plaintiff's mental distress was extreme. ECF No. 1-3 at 80. *See Dawson v. Assoc. Fin. Svs. Co.*, 215 Kan. 814, 820–22, 529 P.2d 104 (1974); *Moore v. State Bank of Burden*, 240 Kan. 382, 388, 729 P.2d 1183 (1986).

[45] ECF No. 1-3, at 87 (defining wanton conduct as "doing something knowing that it is dangerous, and either being completely indifferent to the danger or recklessly disregarding the danger.").

[46] *Id*. at 80. Emphasis added.

> or when he or she knows his or her conduct will cause that result.[47]

Further, Instruction No. 21 defined acting willfully, wantonly *or* with malice for purposes of awarding punitive damages as follows:

> [w]illful conduct is intentionally or purposefully doing wrong or causing injury to another. Wanton conduct is doing something knowing that it is dangerous, and either being completely indifferent to the danger or recklessly disregarding the danger. Malice is the intent to do harm without any reasonable justification or excuse.[48]

In short, the jury instructions do not conclusively determine whether Acosta acted intentionally because they are phrased in the alternative. The jury's initial finding could have been based on a finding of recklessness *or* intent, and the jury's secondary finding could have been based on a finding of willfulness *or* wantonness *or* malice. In other words, the jury could have found Acosta acted under any one of the possible states of mind, including recklessness or wantonness, which fall short of an intentional state of mind.

Because the jury's verdicts[49] did not contain specific findings as to Acosta's state of mind, his liability for the tort of outrage could be based on misconduct that

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[47] ECF No. 1-3, at 82.
[48] ECF No. 1-3, at 87.
[49] For example, the Stage I Verdict Form for Lea Ann Lavielle provides:

> We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows with regard to the claim of Lea Ann Lavielle:
>
> **I.**
>
> **X** In favor of Lea Ann Lavielle and against Daniel Acosta and award Lea Ann Lavielle damages in the amount of:
>
> Noneconomic losses (past and future)
> $ 20,000

was less than willful *and* malicious. Since the Oklahoma judgment could have been based on a finding of reckless disregard, collateral estoppel does not establish that Acosta's actions were both willful and malicious within the meaning of § 523(a)(6).

For the reasons stated above, the Lavielles' Motion for Judgment on the Pleadings must be DENIED.

The Court's Order today does not mean that the Court can never find the debt at issue to be nondischargeable. It simply means that the Oklahoma judgment, standing alone, cannot be the basis for a finding of willful and malicious conduct by application of collateral estoppel.[50] This Court will need to make that determination independently after providing the parties opportunity to present

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-OR-

___ In favor of Daniel Acosta.

II.

(ANSWER THE FOLLOWING ONLY IN THE EVENT YOU FOUND IN FAVOR OF LEA ANN LAVIELLE AND AGAINST DANIEL ACOSTA)

Do you find, by clear and convincing evidence, that Daniel Acosta acted willfully, wantonly, or with malice toward Lea Ann Lavielle?

__X__ YES

___ NO

ECF No. 1-3, at 95–96. The Stage II Verdict Form for Lea Ann Lavielle provides:

> We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, having found in favor of Plaintiff Lea Ann Lavielle, assess punitive damages in the amount of $ $32,000 . (state amount or write "none")

Id. at 107. The verdict forms' language is identical for each Lavielle, except the form for Michael Lavielle, which includes a provision for economic damages. *Id.* at 95–104, 107–11.

[50] *See In re Kamps,* 575 B.R. 62, 81–82 (Bankr E.D. Pa. 2017) (concluding that intentional infliction of emotional distress constituted a willful and malicious injury under § 523(a)(6), but not on the basis of collateral estoppel). *Berrien v. Van Vuuren,* 280 F. App'x 762, 2008 WL 2275928, *4 (10th Cir. 2008) (fabricated hit and run accident leading to false criminal charges could be the basis for a nondischargeable intentional infliction of emotional distress claim under § 523(a)(6)).

evidence on the limited issues involved. This Court's decision will include appropriate consideration of the record from the federal trial in Oklahoma.[51] The Court will schedule a telephonic status conference with the parties to discuss the manner in which this adversary proceeding will proceed.

IT IS SO ORDERED.

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[51] *See U.S. v. Ahidley,* 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (stating that a court may, but is not obligated to, take judicial notice of publicly filed records in other courts that bear directly to the disposition of the current case). *See e.g., Swan Pediatric Dental, LLC*, 2022 WL 16826561, at *6 n.46 (taking judicial notice of a summary judgment transcript from the underlying bankruptcy docket on appeal of a § 523(a)(6) action).