SO ORDERED.

SIGNED this 12th day of April, 2023.

Mitchell L. Herren
United States Bankruptcy Judge

DESIGNATED FOR ONLINE PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE: **DANIEL BERTRAM ACOSTA,** **Debtor.**	**Case No. 22-10158** **Chapter 7**
LEE 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 THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Lavielle family (the "Lavielles"), plaintiffs, filed a nondischargeability proceeding against defendant Daniel Acosta under § 523(a)(6) of the Bankruptcy Code. The complaint alleges that an Oklahoma federal court civil judgment in favor of the Lavielles, awarded after a jury found Acosta liable for the tort of outrage, should be excepted from Acosta's bankruptcy discharge as a "willful and malicious" injury.[1] The Lavielles and Acosta proceed in this adversary proceeding without counsel.[2] Both timely filed motions for summary judgment.[3] Each party has filed a response to the other's motion. For the reasons set forth below, the parties' cross-motions for summary judgment are denied.

A. Background and Procedural History

The Lavielles and Acosta were former neighbors in Elkhart, Kansas. After suffering alleged harassment and stalking behavior, the Lavielles moved to Oklahoma to avoid Acosta and sued him in the United States District Court for the Western District of Oklahoma (the Oklahoma District Court). Following a trial in 2017, a jury returned verdicts in favor of the Lavielles, finding Acosta liable for the tort of outrage under Kansas law (also known as intentional infliction of emotional distress)[4] and awarding the Lavielles a combined $300,000 in actual and punitive damages. The Oklahoma District Court entered Judgment against Acosta (the

[1] 11 U.S.C. § 523(a)(6).
[2] Both Acosta and the Lavielles were represented by counsel in the Oklahoma case.
[3] Doc. 61 (Acosta) and Doc. 63 (the Lavielles).
[4] *See Valadez v. Emmis Communications,* 290 Kan. 472, 476, 229 P.3d 389 (2010).

"Judgment Debt")[5] and then further issued a permanent injunction (the "Injunction") against him on December 12, 2017.[6] The Injunction provided, in part:

> . . . Defendant is not to abuse, threaten, injure, assault, molest, stalk, harass or otherwise interfere with any Plaintiff and he may not damage or injure any property in which any Plaintiff has an interest. Defendant may not place any plaintiff under surveillance, for any purpose, including with the intent to kill, injure, harass, or intimidate any Plaintiff. Defendant may not follow any Plaintiff either by vehicle or on foot. Defendant may not enter upon the property of the Plaintiffs or direct any object or person upon their property. . . .[7]

Acosta filed a motion for a new trial that the Oklahoma District Court denied,[8] and he appealed to the United States Court of Appeals for the Tenth Circuit. It affirmed, citing Acosta's failure to designate an adequate record on appeal, which left the Tenth Circuit unable to review the sufficiency of the evidence supporting the Judgment Debt.[9]

In 2018, Acosta sued the Lavielles in the United States District Court for the District of Kansas, alleging previously failed counterclaims claims from the

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[5] *Lavielle v. Acosta,* No. 16-cv-01002-R, ECF No. 103 (W.D. Okla. Dec. 13, 2017), attached to the adversary complaint as Doc. 1-3, p. 116.
[6] *Lavielle v. Acosta,* No. 16-cv-01002-R, ECF No. 102 (W.D. Okla. Dec. 12, 2017), attached to the adversary complaint as Doc. 1-3, pp. 112-15. That Injunction and the fact that the parties are unrepresented here has complicated communication and notice to the parties about this current proceeding. The Injunction prohibited Acosta from contacting the Lavielles "in any manner, including but not limited to: in person, by telephone, online, or by mail, at any time or place." As a result, this Court issued an Order in this case on August 19, 2022 to address the manner in which the parties' pleadings and filings would be served on each other. Doc. 28, pp. 3-4.
[7] Doc. 1-3, p. 114.
[8] *Lavielle v. Acosta,* No. 16-cv-01002-R, ECF No. 112 (W.D. Okla. Feb. 20, 2018), attached to the adversary complaint as Doc. 1-3, pp. 125-30.
[9] *Lavielle v. Acosta,* No. 18-6041, ECF No. 010110110150 (Order and Judgment) (10th Cir. Jan. 14, 2019), attached to the adversary complaint as Doc. 1-8.

Oklahoma case. That case was dismissed.[10] Acosta filed this Chapter 7 case on March 15, 2022, seeking to discharge the Judgment Debt in bankruptcy. The Lavielles timely commenced this adversary proceeding and requested a determination under 11 U.S.C. § 523(a)(6) that the Judgment Debt is nondischargeable as a willful and malicious injury.

Acosta filed an answer to that complaint, followed by a motion to dismiss and to discharge the Judgment Debt due to the Lavielles' alleged failure to submit a Fed. R. Civ. P. 28(f) [sic] report.[11] Finding that the motion to dismiss and to discharge the debt stated no legal basis for relief, the Court denied the motion.[12]

Shortly before the Court's initial pretrial scheduling conference, the Lavielles filed a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), asserting that the Court could find by application of the collateral estoppel doctrine that the Oklahoma outrage verdicts established a willful and malicious injury.[13] While the Lavielles' motion was pending, Acosta filed a second motion for discharge of the Judgment Debt,[14] alleging that two of the Lavielles and their former attorney had committed perjury during the Oklahoma trial. The Court denied that motion, concluding it was a belated, collateral attack on the underlying Oklahoma

[10] *Acosta v. Lavielle et al.,* No. 18-1060-EFM (D. Kan.), Doc. 8, Report and Recommendation to dismiss case (Apr. 4, 2018) (Birzer, J.) and Doc. 10, Order adopting Report and Recommendation and dismissing case (June 4, 2018) (Melgren, J.).
[11] Doc. 13.
[12] Doc. 27.
[13] Docs. 23-24. Fed. R. Bankr. P. 7012(b) makes Fed. R. Civ. P. 12(c) applicable in bankruptcy adversary proceedings.
[14] Doc. 38.

judgment, and that alleged perjury was not a valid basis on which the Judgment Debt could be declared dischargeable.[15]

On January 10, 2023, the Court denied the Laveilles' motion for judgment on the pleadings.[16] As explained and emphasized in that Order, the Court could not give collateral estoppel effect to the Oklahoma judgment because it was unclear, looking solely at the complaint and its exhibits, if the jury based its verdict on a finding of reckless disregard, or intentional conduct. The jury instructions, verdicts, and judgment, without a more comprehensive review of all of the evidence and testimony presented in the Oklahoma trial, could not establish the basis of the jury's verdict. Nondischargeability under § 523(a)(6) requires a finding of intent to establish a "willful and malicious injury." Because the Oklahoma judgment *could* have been based on only reckless conduct, this Court could not determine *as a matter of law*, with the limited information in front of it, that Acosta's Judgment Debt constituted a willful and malicious injury.

The Court then convened a status conference with the parties and issued a hearing scheduling order for a trial on the § 523(a)(6) nondischargeability claim.[17] The Court asked the parties whether they needed additional pretrial discovery, and they stated they did not. The Court advised the parties the Court would take judicial notice of the court record of the Oklahoma case, including the entire trial

[15] Doc. 40.
[16] Doc. 47.
[17] Doc. 53.

transcript and the exhibits that were admitted into evidence.[18] The hearing scheduling order provided a deadline for the parties to disclose any new witnesses (lay or expert) who did not testify in the Oklahoma trial that might be called in the upcoming trial. Neither party has identified any new witnesses and the deadline for doing so has passed. The hearing scheduling order also set a deadline for the parties to provide any new exhibits beyond the exhibits from the Oklahoma trial.

On March 2, Acosta filed a motion for discovery "for malice and medical bills" or damages, apparently seeking to file a request for production of documents from the Lavielles.[19] At a telephonic hearing on the motion, the Court denied Acosta's request for discovery as to medical bills and damages because such requests exceed the scope of the nondischargeability trial. Upon inquiry from the Court, the Lavielles said they had no additional documents or exhibits supporting the malice element of their claim beyond the Oklahoma trial exhibits. Therefore, the Court dispensed with requiring Acosta to file a formal document request, ruled that no additional documents or exhibits would be admitted into evidence in support of the malice element, and reserved ruling on any objections to the admissibility of the Oklahoma trial exhibits in the nondischargeability trial.

With the case in this posture and a trial setting of June 22, 2023, Acosta timely filed a two-page motion for summary judgment asserting that there was no

[18] Doc. 51. The Lavielles thereafter submitted to the Court the 110 exhibits that were admitted in the Oklahoma trial. On March 10, 2023, the Court provided those exhibits to Acosta by e-mail. Doc. 60.
[19] Doc. 55.

evidence of malice, and he was entitled to judgment on the § 523(a)(6) claim.[20] The Lavielles timely filed their own summary judgment motion and supporting brief.[21] Both Acosta and the Lavielles have filed responses to the other's motion.[22]

The Court begins with a review of the applicable standards and rules governing pro se litigants and summary judgment motions.

B. Pro se Litigants

Courts liberally construe pro se pleadings and motions, but pro se litigants must still comply with the rules of procedure that govern litigants represented by counsel.[23] The Court will not act as an advocate for either side.[24] It is incumbent upon the movant to provide a sufficient evidentiary record for summary judgment.[25] Unsupported, conclusory allegations do not create a genuine issue of fact.[26]

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[20] Doc. 61.
[21] Doc. 63.
[22] Doc. 65 and 67.
[23] *James v. Wadas,* 724 F.3d 1312, 1315 (10th Cir. 2013) (a pro se litigant's filings are liberally construed); *Hampton v. Barclays Bank Delaware,* 478 F. Supp. 3d 1113, 1121 (D. Kan. 2020) (pro se litigants still must comply with the procedural rules or suffer the consequences of noncompliance).
[24] *James, supra* at 1315; *Hampton, supra* at 1121-22 (court has no duty to independently review the record for evidence supporting that litigant's summary judgment interests). *See also Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 840 (10th Cir. 2005) (stating that the court cannot take on the responsibility of serving as the pro se litigant's attorney in constructing arguments and searching the record).
[25] That evidentiary record may consist of particular parts of materials *in the record* in support of the litigant's statement of facts, including testimony in deposition or trial transcripts and incorporated exhibits, documents, affidavits or declarations of facts made on personal knowledge, interrogatory answers, or other materials. *See* Fed. R. Civ. P. 56(c)(1). The materials submitted to support or dispute a fact must be admissible evidence. Rule 56(c)(2).
[26] *James,* 724 F.3d 1312, 1315; *Terry v. Esurance Ins. Co.,* ___ F. Supp. 3d ___, 2022 WL 16571179, at *2 (D. Kan. Nov. 1, 2022).

C. Summary Judgment Standards

At the outset, the Court notes that the existence of cross-motions for summary judgment does not require the Court to grant one motion or the other.[27] Further, where the cross-motions mostly overlap, as is the case here, the Court may address the parties' legal arguments together.[28]

A court's role on a motion for summary judgment is to determine whether there is a genuine issue of fact for trial, not to "weigh the evidence and determine the truth of the matter."[29] The moving party must demonstrate that there is no genuine dispute as to any material fact and that those undisputed facts entitle the movant to judgment as a matter of law.[30] A fact is "material" when it is essential to the claim and issues of fact are "genuine" if the proffered evidence may reasonably be resolved in favor of either party.[31] A moving party can show that no genuine dispute exists by demonstrating that the non-moving party lacks evidence to support an essential element of the non-moving party's case.[32] In other words, a

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[27] *See Terry,* 2022 WL 16571179, at *3 (cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another; each party bears the burden of establishing that no genuine issue of material fact exists and entitlement to judgment as a matter of law); *Sedona Corp. v. Open Solutions, Inc.,* 646 F. Supp. 2d 262 (D. Conn. 2009) (court is not required to grant judgment as a matter of law for one side or the other; it must evaluate each party's motion independently and on its own merits).
[28] *Terry, supra.*
[29] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).
[30] Fed. R. Civ. P. 56(a); *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48.
[31] *Terry, supra* at *2; *Liberty Lobby, Inc.,* 477 U.S. 242, 250.
[32] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

movant that does not have the ultimate burden of persuasion at trial need not negate the other party's claim.[33]

D. The Parties' Noncompliance with Summary Judgment Rules

Though all parties in this adversary are proceeding without counsel, they are required to comply with the Federal Rules of Bankruptcy Procedure, including those Federal Rules of Civil Procedure incorporated in Part VII of the Bankruptcy Rules, and the local rules of this Court (D. Kan. and LBR). This specifically includes those rules applicable to motions for summary judgment: Fed. R. Bankr. P. 7056, which incorporates Fed. R. Civ. P. 56; D. Kan. Rule 56.1; and D. Kan. LBR 7056.1.

Neither of the cross-motions properly present a statement of facts or summary judgment record sufficient to enable the Court to grant summary judgment on the § 523(a)(6) claim. Fed. R. Civ. P. 56(c)(1) and LBR 7056.1(a) and (d) provide the way asserted facts must be supported and presented.

Rule 56(c)(1) requires that the movant support a statement of fact by "citing to particular parts of materials *in the record,* including depositions, documents, electronically stored information, affidavits or declarations, . . . admissions, interrogatory answers, or other materials" (emphasis added). More specifically, LBR 7056.1(a) requires that a brief in support of a motion for summary judgment

> . . . must begin with a section containing *a concise statement of material facts* to which the movant contends no genuine issue exists. The facts must be numbered and must refer with particularity to those portions of the record on which the movant relies. (Emphasis added).

[33] *See Hampton,* 478 F. Supp. 3d 1113, 1120; *Oliver v. CitiMortgage, Inc. (In re Oliver),* Adv. No. 11-7038, 2012 WL 1252955, at *2 (Bankr. D. Kan. 2012) (deciding a summary judgment motion on a tort of outrage claim).

LBR 7056.1(d) states:

> All facts on which a motion . . . is based must be presented by affidavit, declaration under penalty of perjury, and/or through the use of relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions. Affidavits or declarations must be made on personal knowledge and by a person competent to testify to the facts stated that are admissible in evidence. Where facts referred to in an affidavit or declaration are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document must be attached.

a. The Lavielles' motion, doc. 63

The Lavielles' motion and brief does not comply with the above procedural rules in several respects. First, their statement of material facts is insufficient. Within their facts section, the Lavielles identify and number some twenty-nine "incidents" attributable to Acosta that the Lavielles contend establish intentional acts, not reckless or negligent acts.[34] The numbered incidents are not *statements* of fact. They simply label or characterize each incident, but do not describe the incidents in any factual detail (*i.e.* who, what, where, when). For example, incident number 9 is referred to as "swerving car," without more.[35] The incidents are devoid of a statement, a factual description, or any context to demonstrate what they mean or their relevance to the § 523(a)(6) claim.

Second, the Lavielles' statement of facts are not properly supported by materials in the evidentiary record. The opening statement provides: "Plaintiffs' Tenth Circuit appeal brief summarizes, and gives record citations

[34] Doc. 63, pp. 1-2.
[35] Doc. 63, p. 2.

to, all the incidents that were at issue in the OKC trial. (16-cv-1002-r) (case no. 18-6041)." The referenced appellate brief and the record citations (presumably from the Oklahoma trial) are not attached to the motion or brief. Nor are relevant portions of the Oklahoma trial transcript or trial exhibits attached. The cited brief is not a part of the evidentiary record in this § 523(a)(6) proceeding.

For each of the numbered incidents, the Lavielles cite to the portion of their Tenth Circuit appeal brief where the incident is addressed. For example, for the "swerving car" incident, it simply states:

"9. Swerving Car (Pg. 7 2nd paragraph Appellee's [sic] Brief)"[36]

Even if the appeal brief contains further and more specific reference to the Oklahoma trial exhibits or the trial transcript, this Court is not required to sift through the appeal brief or those materials to try to tie the facts to the Lavielles' legal argument.[37] The last unnumbered statement of fact following the twenty-nine incidents is unsupported by any record citation or affidavit.[38]

In short, none of these alleged "statements of fact" are presented or supported by any of the evidentiary materials recognized by Rule 56(c)(1) or LBR 7056.1(d): an affidavit, declaration under penalty of perjury, relevant portions of pleadings, depositions, interrogatory answers or admissions. The

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[36] *Id.*

[37] *Certain Underwriters At Lloyd's London v. Garmin Intern., Inc.,* 781 F.3d 1226, 1130-31 (10th Cir. 2015); D. Kan. Rule 56.1(a), (b)(1) and LBR 7056.1(a), (b)(1) (requiring reference *with particularity* to the portion of the record relied upon by the movant and non-movant).

[38] Doc. 63, p. 2. "There was also a day to day presence and constant threat of not knowing what [Acosta]would do or where he would be . . ."

sole "record" support cited by the Lavielles is their Tenth Circuit appellate brief filed during Acosta's appeal of the Oklahoma Judgment Debt. It is well-settled that a brief, including a lawyer's brief, is not a part of the summary judgment record.[39] Nor do legal memoranda or briefs constitute evidence in the summary judgment context; they neither establish facts, nor create disputed facts.[40] Additionally, a brief is not a pleading.[41]

Third, each of the Lavielles' declarations attached to the motion are identical and lack specific facts,[42] contrary to Rule 56(c)(4)'s requirement that declarations be made on personal knowledge and *set out facts that would be admissible in evidence.* The Lavielles' declarations state that the declarant read the Court's Order denying their Rule 12(c) motion; that the declarant

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[39] *See Helmich v. Kennedy,* 796 F.2d 1441, 1443 (11th Cir. 1986) (statements of fact in party's brief, not in proper affidavit form, cannot be considered in determining summary judgment; brief signed by lawyer and filed in another case is not sufficient substitute for affidavit); *Midland Mortgage Corp. v. Wells Fargo Bank, N.A.,* 926 F. Supp. 2d 780, 793 (D.S.C. 2013) (statements set forth in brief without supporting evidence insufficient on summary judgment); *Gans v. Gray,* 612 F. Supp. 608, 618 (E.D. Pa. 1985) (mere statements made in counsel's briefs are not evidence for the purpose of supporting or opposing summary judgment); *United States v. Malkin,* 317 F. Supp. 612, 614 n. 6 (E.D. N.Y. 1970) (a brief cannot be resorted to for the evidentiary matter the summary judgment rule requires to be submitted); *Prince v. Sun Shipbuilding & Dry Dock Corp.,* 86 F.R.D. 106 (E.D. Pa. 1980) (unverified representations of counsel in a brief are not a proper part of the summary judgment record).

[40] *See ERBE Electromedizin GmbH v. Canady Technology LLC,* 529 F. Supp. 2d 577, 584 (W.D Pa. 2007); *Nowick v. Gammell,* 351 F. Supp.2d 1025, 1032 at n. 20 (D. Hawaii 2004) (citing *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978)); *Farm Credit Bank of Spokane v. Parsons,* 758 F. Supp. 1368, 1372 (D. Mont. 1990); *In re Fabrizio,* 369 B.R. 238, 246 (Bankr. W.D. Pa. 2007) (statements made in briefs are not evidence of the facts asserted and are not considered by the court).

[41] *See* Fed. R. Civ. P. 7(a) (a pleading does not include memoranda or briefs); *Pimentel & Sons Guitar Makers, Inc. v. Pimentel,* 229 F.R.D. 201 (D. N.M. 2005) (brief was not a "pleading" and not a proper subject of a motion to strike).

[42] Doc. 63, pp. 7-10.

understands the difference between intentional, reckless, and negligent conduct, and that the declarant *believes* Acosta's conduct was intentional, for those unspecified "incidents" where the declarant was present. A declarant's belief is tantamount to a conclusory allegation and does not state an undisputed fact.[43] Thus, the Lavielles' declarations do not establish as undisputed fact that Acosta's conduct was intentional, as opposed to reckless or negligent. That is one of the questions for this Court to determine, based on a complete record.

b. Acosta's motion, doc. 61

Acosta's "Brief and Pleadings" is devoid of a numbered statement of facts and summary judgment record.[44] He asserts "[t]he exhibits' [sic] failed to state the claim of malice."[45] But he does not identify or attach to his brief "the exhibits" referenced. Presumably, he is referring to the exhibits admitted in the Oklahoma outrage trial. He does not reference any relevant pleadings.

Acosta contends he is entitled to summary judgment and discharge of the Judgment Debt due to "plaintiff's [sic] failure to state claim of malice on the exhibits and perjury to the court."[46] Liberally construing Acosta's motion, it at best asserts that the trial exhibits and testimony from the Lavielles in

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[43] *See Argo v. Blue Cross Blue Shield of Kansas, Inc.,* 452 F.3d 1193, 1200 (10th Cir. 2006); *Tavery v. United States,* 32 F.3d 1423, 1426 n. 4 (10th Cir. 1994) (a statement of belief in affidavit is insufficient to support summary judgment and will be disregarded); *In re Sunbelt Grain WKS, LLC,* 406 B.R. 918, 923-24 (Bankr. D. Kan. 2009).
[44] Doc. 61, p.2.
[45] *Id.*
[46] *Id.*

the underlying Oklahoma outrage trial do not, as a matter of law, establish malice. The Court cannot reach that conclusion based on the conclusory contents of Acosta's motion. Moreover, his contention does not address the impact of the remaining evidence from the Oklahoma trial, or any other evidence or testimony by the Lavielles or Acosta during the trial of this case.

In short, the Court cannot conclude based on Acosta's brief that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law on the key issues of whether the evidence does or does not establish a "willful and malicious injury."

c. The Parties' Response Briefs, docs. 65 and 67

Neither response to the cross-motions for summary judgment provide additional statements of material fact or evidentiary materials. Both briefs are largely repetitious of the legal arguments advanced in the parties' respective opening briefs.

The Court does, however, address one point of legal error in the Lavielles' response to Acosta's motion for summary judgment. In paragraph 2, the Lavielles assert that "Defendant did not meet his evidentiary burden to show that he acted recklessly or negligent [sic] and not willful and malicious."[47] The precedent from the Supreme Court is well settled and clear[48] that the *Lavielles* carry the evidentiary burden by a preponderance of

[47] Doc. 65.
[48] *Grogan v. Garner,* 498 U.S. 279, 291 (1991) (holding that the creditor seeking nondischargeability of a debt has the burden of proof by a preponderance of the evidence

the evidence because they assert the nondischargeability of the Judgment Debt. Acosta does not have the burden of negating the Laveilles' § 523(a)(6) claim (*i.e.* Acosta does not bear the burden to prove that the Judgment Debt is *not* a willful and malicious injury).

E. The Court's Order Denying the Lavielles' Rule 12(c) Motion, doc. 47

The Court is compelled to draw the Parties' attention to its ruling on the Lavielles' previous Rule 12(c) motion for judgment on the pleadings. The Lavielles have seized on certain language in the Court's Order, asserting in their summary judgment briefing that they only need to establish intentional conduct or intentional acts by Acosta to prevail on their § 523(a)(6) nondischargeability claim. That is an incomplete and inaccurate assessment of this Court's Order.

The issue before the Court was whether, applying collateral estoppel, the finding of liability for the Kansas tort of outrage in the Oklahoma case also establishes a willful and malicious injury under § 523(a)(6). To make such a finding, the Court needed to decide if the elements in the outrage case were *identical* to the elements of a § 523(a)(6) claim. The jury instructions and verdict forms demonstrate that the Oklahoma jury was instructed it could find Acosta liable based upon a reckless disregard for the rights of the plaintiffs *or* intentional conduct, *either of which* would subject Acosta to liability for the tort of outrage. Because the jury did not have to specify which type of conduct Acosta engaged in to return a verdict for

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standard in all actions for nondischargeability of debts under § 523(a)): *In re Schupbach,* 500 B.R. 22, 32 (Bankr. D. Kan. 2013) (preponderance of evidence standard that debt is nondischargeable under § 523(a)(6)).

the Lavielles, this Court could not give the jury verdict and resulting Judgment Debt collateral estoppel effect in this nondischargeability action. The "willful and malicious" elements of § 523(a)(6) do not permit a determination of nondischargeability based on the lesser standard of reckless disregard or indifference.[49]

Because the Court could not determine from the pleadings, jury instructions, verdicts, or the Judgment Debt, the exact nature of the conduct the jury found to be the basis for Acosta's liability, the Court could not apply collateral estoppel and determine nondischargeability under § 523(a)(6) as a matter of law. As such, the Court did not engage in additional analysis of the "willful" prong, which requires more than just an intentional act. The Supreme Court addressed the willful element in 1998 in *Kawaauhau v. Geiger,* stating the issue as follows: "Does § 523(a)(6) . . . cover acts, done intentionally, that cause injury . . . , or only acts done with the actual intent to cause injury . . .?"[50] It concluded that the statute's language "strongly supports" the latter interpretation. The Supreme Court reasoned that the word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability requires not only an intentional act, *but also a deliberate or intentional injury,* not merely a deliberate or intentional *act* that leads to injury.[51]

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[49] *Kawaauhau v. Geiger,* 523 U.S. 57, 61 (1998). *See also* Doc. 47, p. 8 n. 34 (citing cases).
[50] 523 U.S. 57, 61. *Kawaauhau* resolved a split between the Eighth Circuit and the Sixth and Tenth Circuits, siding with the Eighth Circuit. *Id.* at 60.
[51] *Id.* at 61-62, stating that intentional torts require the actor to have intended "the consequences of an act," not simply "the act itself." (citing the Restatement (Second) of Torts § 8A, Comment *a*).

This is the willful injury standard that the Court must apply in this nondischargeability proceeding.[52]

Given the Court's inability to determine the willful injury prong on a Rule 12(c) motion, there was no reason for the Court to reach the other element of § 523(a)(6)—a malicious injury. As this Court noted in its Order after review of the Tenth Circuit Bankruptcy Appellate Panel's *Smith* decision, the willful and malicious elements of § 523(a)(6) are distinct elements.[53] A malicious injury requires the debtor's act to be wrongful (with a culpable state of mind vis-à-vis the actual injury caused) and without just cause or excuse.[54] It does not require proof of debtor's personal hatred, spite, or ill-will toward the Lavielles.[55]

Even if the Court had addressed the malicious injury prong in more detail in its Order on the Rule 12(c) motion, the result would be the same. Because the Oklahoma jury awarded punitive damages to the Lavielles, it *may* have determined that Acosta also acted with malice; but like the willful injury prong, this Court could not make that determination as a matter of law based on the record before it.

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[52] *See also Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley),* 235 B.R. 651, 656-67 (10th Cir. BAP 1999) (applying willful injury standard as articulated in *Kawaauhau,* and requiring intentional injury); *McCain Foods USA Inc. v. Shore (In re Shore),* 317 B.R. 536, 542 (10th Cir. BAP 2004); *Bank of Commerce & Trust Co. v. Schupbach (In re Schupbach),* 500 B.R. 22, 31 (Bankr. D. Kan. 2013).

[53] Doc. 47, p. 9; *First Am. Title Ins. Co. v. Smith (In re Smith),* 618 B.R. 901, 912 (10th Cir. BAP 2020). *See also Perry v. Judge (In re Judge),* 630 B.R. 338, 344 (10th Cir. BAP 2021) (damages from debtor's physical attack instigated against creditor in bar fight excepted from discharge as willful and malicious injury; both prongs must be proven).

[54] *Smith, supra* at 919-20 (adopting Tenth Circuit definition of malicious in *Dorr, Bentley & Pecha v. Pasek (In re Pasek),* 983 F.2d 1524, 1527 (10th Cir. 1993)); *In re Judge, supra* at 344-45.

[55] *Smith, supra* at 919 n. 113 (citing cases).

To award punitive damages, the Oklahoma District Court instructed the jury, as relevant here:

> INSTRUCTION NO. 21
>
> PUNITIVE DAMAGES
>
> . . .
>
> A party seeking punitive damages must prove by clear and convincing evidence that the party against whom they seek punitive damages acted *in a willful, wanton, or malicious manner* toward them.
>
> . . .
>
> Willful 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. . . .[56]

Like the tort of outrage instruction, the jury instruction for punitive damages is phrased in the alternative: willful, wanton, *or* malicious conduct. The jury *might* have awarded punitive damages based on wanton conduct (which can be based on reckless behavior), without finding that Acosta acted maliciously. Thus, this Court could not apply collateral estoppel to determine that Acosta maliciously injured the Lavielles based solely on the pleadings, jury instructions, verdicts, and the Judgment Debt.

Conclusion

Much like the Tenth Circuit's review of the Oklahoma outrage trial presented by Acosta's appeal of the Judgment Debt, this Court is limited by the summary judgment record presented by the movants. The Court cannot determine that

[56] *Lavielle et al v. Acosta,* No. 16-cv-01002-R, ECF No. 80 (W.D. Okla.), Instruction No. 21 attached to the adversary complaint as Doc. 1-3, pp. 87-88 (Emphasis added).

undisputed material facts entitle either party to judgment as a matter of law. Moving forward to trial of this § 523(a)(6) nondischargeability proceeding, the Court will consider and weigh the evidence presented in the Oklahoma trial by taking judicial notice of the complete trial transcript and admitted trial exhibits (reserving ruling on objections to admissibility of those exhibits in the trial of this case), and will consider any other admissible evidence and testimony. From that evidentiary record, the Court will determine whether the evidence supports a determination that the Judgment Debt is a willful and malicious injury and excepted from Acosta's discharge. Accordingly, the cross-motions for summary judgment are DENIED.

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