

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re:  
Norman Lee Douyette and  
Mary B. Douyette,  
Debtors.

Chapter 7  
Case No. 19-26272-kmp

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Anthony Lay and  
Deborah Douyette,  
Plaintiffs,  
v.

Adversary No. 19-2128

Norman L. Douyette, Jr. and  
Mary B. Douyette,  
Defendants.

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**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs Anthony Lay and Deborah Douyette filed an adversary complaint against Debtors Norman and Mary Douyette seeking a determination that a \$33,657.02 judgment on an intentional misrepresentation claim (the "Judgment") is nondischargeable under 11 U.S.C. § 523(a)(6) as a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." On November 11, 2019, the Plaintiffs filed a Motion for Summary Judgment arguing that the Judgment precludes the Debtors from relitigating the issues at stake in this adversary proceeding and that the Plaintiffs are entitled to judgment as a matter of law. The parties have briefed the issues, and the matter is ripe for decision.

**Statement of Jurisdiction**

The Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the order of reference from the district court pursuant to 28 U.S.C. § 157(a). *See* Order of Reference (E.D. Wis. July 10, 1984) (available at [www.wied.uscourts.gov/local-rules-and-orders](http://www.wied.uscourts.gov/local-rules-and-orders)). As a proceeding to

determine the dischargeability of a debt, this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court may enter a final judgment. 28 U.S.C. § 157(b)(1).

### **Summary Judgment Standard**

Summary judgment is only appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. At the summary judgment stage, the role of the court is not to weigh evidence, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In determining whether there is a genuine issue of material fact, the Court must construe facts and inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

### **Undisputed Facts**

Plaintiff Deborah Douyette is the sister of Debtor-Defendant Norman Douyette. Deborah and her husband lived in one unit of a duplex and Norman and his wife, the Debtors in this bankruptcy case, lived in the other unit. On May 27, 2016, Deborah and her husband filed a Complaint against the Debtors in Milwaukee County Circuit Court. The Complaint alleged that Norman represented to Deborah and her husband that he would forward the mortgage payments that they made to him to the mortgage lender. (Docket No. 18 at 7, ¶ 16-17.) Norman failed to make the payments to the mortgage lender and instead retained the payments. (*Id.* at ¶ 14.) The Debtors filed a pro se answer and later retained an attorney. (Docket No. 28 at 1.) The attorney withdrew from representation on December 22, 2017. Two years after commencing the litigation, Deborah and her husband filed a motion for summary judgment on June 19, 2018.

The state court held a hearing on the motion on September 5, 2018, and granted summary judgment in favor of Deborah and her husband. The Debtors appeared at the hearing.

The state court's findings are quite limited. In their entirety, they read:

1. That Plaintiffs, in their pleadings, have established a prima facie case for the claims of intentional misrepresentation and negligent misrepresentation by Defendants, Norman L. Douyette, Jr. and Mary B. Douyette.
2. The Affidavit of Anthony Lay in support of Plaintiffs' Motion for Summary Judgment alleged that the Defendants intentionally misrepresented to Plaintiffs that the Defendants would not only make their share of the loan payments, but they would also forward the payments indirectly made by the Plaintiffs to the Defendants.
3. Between September of 2009 and May of 2015, Plaintiffs made payments to the Defendants in the amount totaling \$45,682.18. The Defendants intentionally misrepresented to the Plaintiffs that the Defendants would not only forward the Plaintiffs' payment to the loan servicer, but would also timely forward their own equal share of payments to the loan servicer.
4. While the Defendants have shown proof of some payments to the loan servicer, they have been unable to establish that the agreed upon payments were, in fact, made.
5. Plaintiffs relied on the intentional misrepresentation to their detriment and suffered damages.
6. The court, after at length discussing the amount of damages with the Plaintiffs and the Defendants and Attorney Ryan, accepts an agreement that the total damages of the Plaintiff are \$33,657.02.

(Docket No. 18 at 10.) As its Conclusions of Law, the state court held:

Based on the above findings and the agreement of the parties and based on Defendants' intentional misrepresentation justifiably relied on by the Plaintiffs to their detriment, Plaintiffs shall have summary judgment against the Defendants, Norman L. Douyette and Mary B. Douyette in the amount of \$33,657.02 plus its costs and disbursements.

(*Id.* at 10-11.)

**Discussion of Law and Resolution of Issues/Analysis**

**I. The Issues Necessarily Determined in the Judgment Have Preclusive Effect.**

The Court gives the Judgment the same preclusive effect it would have in a Wisconsin court. 28 U.S.C. § 1738; *DeGuelle v. Camilli*, 724 F.3d 933, 937 (7th Cir. 2013). Wisconsin courts use a two-step analysis to determine whether to apply issue preclusion: “(1) whether issue preclusion can, as a matter of law, be applied, and if so, (2) whether the application of issue preclusion would be fundamentally fair.” *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶ 36, 300 Wis. 2d 1, 19, 728 N.W.2d 693, 702.

The Court first determines “whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment.” *Id.* at ¶ 37. Here, the intentional misrepresentation claim was actually litigated, as the Plaintiffs and Debtors participated in the litigation for several years and the proceedings culminated in a hearing on the Plaintiffs’ motion for summary judgment, which all parties attended. Reserving the question of whether the issues necessarily determined in the Judgment are identical to the elements of § 523(a)(6), it is clear from the Order that the state court entered judgment on an intentional misrepresentation claim, meaning that the court determined that the Plaintiffs proved all required elements of that claim.

The Debtors argue that application of issue preclusion is not fundamentally fair under the second step of the analysis. Courts consider five non-exclusive factors in making this determination:

- 1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;
- 2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

- 3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
- 4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and
- 5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

*Estate of Rille*, 2007 WI 36, ¶ 61. Considering these factors, there is nothing fundamentally unfair about applying issue preclusion in this case. The Debtors had the benefit of the proceedings afforded in a civil case and therefore had an opportunity to obtain a full and fair adjudication in state court. The Plaintiffs do not have a higher burden of persuasion in this adversary proceeding than they did in state court. The Debtors assert that they “simply conceded to judgment because they planned to file for bankruptcy.” (Docket No. 28.) However, filing bankruptcy does not give a debtor the opportunity to relitigate issues that have already been decided. To the contrary, it is well accepted that “rather than prove the nondischargeability of the debt in the bankruptcy court, a creditor may invoke issue preclusion to avoid future litigation of the elements necessary to meet a § 523(a) exception.” *Gerard v. Gerard*, 780 F.3d 806, 810 (7th Cir. 2015).

The Debtors argue that they were not represented when the state court entered the Judgment. However, litigating pro se does not insulate a litigant from application of the doctrine of issue preclusion. *DeGuelle*, 724 F.3d at 938. The Debtors also complain that they were not properly served with the proposed Order for Summary Judgment before the state court entered it, a claim the Plaintiffs dispute. It is not clear what relevance this has to the question of whether it is fundamentally fair to apply issue preclusion. The Plaintiffs’ counsel apparently drafted the

proposed order to reflect the rulings made by the state court judge at the summary judgment hearing. If the order does not accurately reflect her ruling at the summary judgment hearing, the Debtors could presumably pursue a remedy in state court.

**II. The State Court’s Judgment Does Not Establish the Elements of § 523(a)(6) and There Are Genuine Issues of Material Fact.**

Because the Court has determined that the Debtors are bound by the Judgment, the question becomes whether the issues necessarily determined in that judgment are identical to the issues in this adversary proceeding. This requires a determination of whether the intentional misrepresentation claim satisfies all of the elements of § 523(a)(6).

**A. Section 523(a)(6) Requires That a Debtor Act with an Intent to Injure.**

Section 523(a)(6) of the Bankruptcy Code excepts from discharge debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” The Supreme Court analyzed the concept of a “willful” injury under § 523(a)(6) in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In that case, the Supreme Court determined that debt from a medical malpractice judgment did not fit within § 523(a)(6)’s exception to discharge. Observing that the word “willful,” read to mean “voluntary,” “intentional,” or “deliberate,” modifies the word “injury,” the Court reasoned that nondischargeability under § 523(a)(6) “takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Id.* at 61. If the word “willful” did not constrain the exception in this way, “[e]very traffic accident stemming from an initial intentional act – for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic – could fit the description.” *Id.* at 62.

In setting out its definition of “willfulness,” the Seventh Circuit states that “the requisite intent for purposes of § 523(a)(6) is the intent to injure rather than the intent to act.” *First Weber*

*Grp., Inc. v. Horsfall*, 738 F.3d 767, 775 (7th Cir. 2013). In *Horsfall*, the Court of Appeals found the willfulness requirement lacking in a state law tortious interference claim and a conversion claim. Under Wisconsin law, tortious interference requires that the interference be “intentional” and conversion requires “intentional control or taking of property belonging to another.” *Id.* at 775. However, according to the Seventh Circuit “[b]oth of these necessarily require only intent to act, not intent to injure.” *Id.* Because conversion and tortious interference claims under Wisconsin law only require an “intent to act” and not an “intent to injure,” the Seventh Circuit held that the prior state court summary judgment decision on those claims did not preclude the debtor from litigating the issue of willfulness in his subsequent bankruptcy case. *Geiger* and *Horsfall* both caution against the risk of “transforming every state-law intentional tort into a non-dischargeable debt,” *Horsfall*, 738 F.3d at 775, especially in light of the “well-known guide that exceptions to discharge should be confined to those plainly expressed.” *Geiger*, 523 U.S. at 62 (internal quotations omitted).<sup>1</sup>

Deeming a debt non-dischargeable under § 523(a)(6) requires the court to find that there has been a “willful and malicious injury.” According to the Seventh Circuit, “maliciousness exists when one acts in ‘conscious disregard of one’s duties or without just cause or excuse,’” but “does not require ill-will or specific intent to do harm.” *Horsfall*, 738 F.3d at 775 (quoting *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994)). In sum, “[a] creditor invoking section 523(a)(6) must show that the debt at issue arises from an injury to the creditor’s person or property, intentionally caused by the debtor, with some level of malice, wickedness, or a specific intent to

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<sup>1</sup> Notably, § 523(a)(6) is not intended to encompass all intentional torts. “Debts resulting from fraud, for example, are covered in different sections of the Bankruptcy Code,” like § 523(a)(2). *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012).

inflict injury.” *Heinrich v. Bagg (In re Bagg)*, 589 B.R. 650, 656 (Bankr. E.D. Wis. 2018) (citing *Horsfall*, 738 F.3d at 774-75).

**B. The Plaintiffs Were Not Required to Prove in State Court That the Debtors Acted with an Intent to Injure.**

The question that remains in this case is whether the Judgment entered in favor of the Plaintiffs in state court on their intentional misrepresentation claims against the Debtors precludes the parties from litigating the issues raised in this § 523(a)(6) Complaint. Because the state court entered judgment on an intentional misrepresentation claim, the Court must assume that the state court determined that the Plaintiffs proved all necessary elements for such a claim. According to the Wisconsin Supreme Court, to prove an intentional misrepresentation claim, a plaintiff must prove that:

- 1) the defendant made a representation of fact to the plaintiff;
- 2) the representation of fact was false;
- 3) the defendant made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false;
- 4) the defendant made the misrepresentation with intent to deceive and to induce the plaintiff to act on it;
- 5) the plaintiff believed and relied on the misrepresentation; and
- 6) the plaintiff suffered damages.

*See, e.g., Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 13, 270 Wis. 2d 146, 157, 677 N.W.2d 233, 239; *see also* Wis JI-Civil 2401.

For an intentional misrepresentation claim to meet the willful and malicious standard, however, there must be an “intent to injure” and not merely an “intent to act.” In this case, the Judgment only reflects an intent to act, but not an intent to injure. Although the state court found that the Debtors made misrepresentations with the intent of deceiving the Plaintiffs and with the



intent that the Plaintiffs would rely on the misrepresentations, the state court did not find that the Debtors intended to injure the Plaintiffs by making the misrepresentations. These findings in the Judgment merely show an intent to act and not an intent to injure. Thus, the Judgment on the intentional misrepresentation claim does not preclude the Debtors from litigating the issue of the Debtors' intent to injure the Plaintiffs in this bankruptcy case. Surrounding circumstances could transform a debt for an intentional misrepresentation claim into a nondischargeable debt under § 523(a)(6) if the facts demonstrate an intent to injure. In this case, though, there are no such facts in the record.

### **Conclusion**

The Judgment in this case does not establish that the debt is nondischargeable under § 523(a)(6) as debt for willful and malicious injury. The Plaintiffs have established that they suffered financial injury. However, the Judgment does not establish that the Debtors inflicted that injury deliberately or intentionally, and genuine issues of material fact exist.

IT IS THEREFORE ORDERED: the Plaintiffs' Motion for Summary Judgment is denied.

Dated: February 11, 2020

  
Katherine Maloney Perhach  
United States Bankruptcy Judge