

Arbitration
Collateral Estoppel
Issue Preclusion
11 U.S.C. § 523(a) (6)

Re v. Dutton, Adv. No. 95-3036
In re Dutton, Case No. 394-36575-elp7

10/13/95

ELP

unpublished

Creditor sought a determination that a judgment based on an arbitrator's award was nondischargeable under 11 U.S.C. § 523(a) (2), (4) and (6). On a motion for summary judgment, the court determined that under the doctrine of collateral estoppel or issue preclusion, the arbitration award preclusively established the elements of willful and malicious conduct under 11 U.S.C § 523(a) (6) and that the judgment, including the punitive damage portion, is nondischargeable.

The court determined that an award in a arbitration proceeding conducted under an arbitration agreement may be given collateral estoppel effect under Oregon law and the standards of Restatement (Second) of Judgments §§ 83(2) and 84(1) where the arbitrator decided the case based on the law with appropriate procedural safeguards, including the application of the Oregon rules of civil procedure, where according preclusive effect to the award was consistent with the purpose of the arbitration agreement and where the elements of collateral estoppel were otherwise satisfied.

With respect to the elements of collateral estoppel, the court determined as follows: (1) that an arbitrator's finding that the debtors' conduct justified an award of punitive damages under state law was a sufficient finding to establish willful and malicious conduct under section 523(a) (6); (2) that the malicious conduct issue was actually litigated and necessary to the decision when the issue was within the scope of the proceeding as framed by the arbitration agreement, when the record reflected that the arbitrator issued his award after two days of trial and when punitive damages could not have been awarded in the absence of a finding a malicious conduct; and (3) the debtors had a full and fair opportunity to be heard in the arbitration proceeding.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Case No. 394-36575-elp7
)	
CHARLES DUTTON and)	
CAROLE DUTTON,)	
)	
Debtors.)	
)	
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DANIEL C. RE, as Conservator)	Adversary No. 95-3036
for AMELIA LEWIS deGREMLI, a)	
protected person,)	
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CHARLES DUTTON and CAROLE)	
DUTTON,)	
)	
Defendants.)	

In this action to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2), (4) and (6), the plaintiff moves for summary judgment asserting that an arbitrator's award and a state court judgment based on that award establish the elements of his dischargeability complaint under the doctrine of collateral

estoppel. For the reasons set forth below, I grant the plaintiff's motion for summary judgment.

I. BACKGROUND FACTS

Prior to October of 1991, the debtors, Charles and Carole Dutton, assisted Amelia Lewis deGremli and exercised control over her financial affairs. In 1991, a conservator was appointed for deGremli. Thereafter, a dispute arose between the debtors and the conservator regarding an accounting provided by the debtors, the parties' rights to certain property and the care of deGremli's estate.

On November 19, 1993, the debtors and the conservator entered an Agreement to Arbitrate, by which the parties agreed "to submit for resolution by arbitration all claims and defenses of either party arising out of or pertaining to the Duttons' caring for and handling the person and the estate of Ms. deGremli." The Agreement to Arbitrate further provided, in pertinent part, that the arbitrator would apply Oregon procedural and substantive law, that the decision of the arbitrator would be final and binding on the parties and recordable as a final judgment in state circuit court and that neither party shall have any right of review.

On August 23, 1994, the arbitrator issued an arbitration award, which determined, among other things, the following:

- (1) The debtors clearly defrauded deGremli in the handling

of her financial affairs;

(2) The debtors used deGremli's accounts and income as if they were the debtors' own. The debtors' own reconciliation establish fraudulent payments made for the debtors' benefit, including payments for the purchase of two vehicles, a boat and a camper from which deGremli received no benefit and unauthorized and "larcenous" payments for expenses pertaining to the vehicles, camper and boat;

(3) The debtors spent a total of \$46,644.03 of deGremli's funds in improper unauthorized expenditures and the conservator was entitled to a judgment against the debtors in that sum plus interest;

(4) Because the fraud committed by the debtors was aggravated by reason of its duration, evil purpose and the extreme vulnerability of the victim, the conservator was entitled to recover punitive damages of \$50,000.

Based on the arbitrator's award, the Deschutes County Circuit Court entered a judgment awarding the conservator \$46,644.03 plus interest from certain specified dates and \$50,000 in punitive damages.

The debtors filed a Chapter 7 petition on November 3, 1994.

II. ISSUE

Whether the arbitration award collaterally estops the

relitigation of the §§ 523(a)(2), 523(a)(4) and/or 523(a)(6) claims?

III. DISCUSSION

Summary judgment is appropriate if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In making this determination, all inferences must be drawn in favor of the nonmoving party. Jose v. M/V Fir Grove, 765 F.Supp. 1024, 1028 (D. Or. 1991). In this proceeding, whether a summary judgment should be granted turns upon the application of the doctrine of collateral estoppel to the arbitration award and state court judgment.

There is no dispute that collateral estoppel may apply in dischargeability proceedings if the requisite elements are present. See, e.g., In re Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994). In determining the collateral estoppel effect of a state court judgment, federal courts must apply that state's law of collateral estoppel. Id.

The requirements for the application of collateral estoppel, or issue preclusion, under Oregon law are as follows: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and a determination of the issue was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full

and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which the court will give preclusive effect. Nelson v. Emerald People's Utility District, 318 Or. 99, 104, 862 P.2d 1293, 1296-97 (1993).

The party asserting collateral estoppel or issue preclusion bears the burden of establishing the identity of issues and parties, and the matters actually litigated, decided and necessary to a final decision. See State Farm Fire & Casualty Inc. v. Century Home Components Co., 275 Or. 97, 105, 550 P.2d 1185, 1188-89 (1976); Universal Ideas Corp. v. Esty, 68 Or. App. 276, ___, 681 P.2d 1176, 1178-79 (1984) review denied 297 Or 546, 685 P.2d 997 (1984). Once this burden is met, the burden shifts to the party against whom estoppel is sought to present evidence of circumstances indicating the absence of a full and fair opportunity to contest the issue or other considerations which would make the application of issue preclusion unfair. State Farm Fire & Casualty Co., 275 Or. at ___, 550 P.2d at 1188.

The collateral estoppel determination in this adversary proceeding turns upon the following sub-issues: (1) whether the arbitration proceeding is the type of proceeding to which Oregon
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courts should give preclusive effect;¹ (2) whether the issues in this proceeding are the same as those determined in the prior proceeding; (3) whether the issues were actually litigated and essential to the final judgment; (4) whether the debtors had a full and fair opportunity to contest the issues in the prior proceeding; and (5) whether other considerations exist which would make the application of issue preclusion unfair.²

A. The Preclusive Effect of an Arbitration Award.

There is considerable dispute as to the collateral estoppel effect of arbitration proceedings. See generally G. Richard Shell, Res Judicata and Collateral Estoppel Effects of

¹ Although the debtors do not expressly raise this issue, they do premise some of their arguments on perceived limitations of the arbitration procedure. They also argue that the application of collateral estoppel would be contrary to arbitration's purpose of avoiding protracted litigation.

² Debtors do not dispute that the same parties were involved in the prior litigation and that the prior proceeding resulted in a final decision.

Commercial Arbitration, 35 U.C.L.A. L. Rev. 623 (1988); Horishi Motomura, Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices, 63 Tul. L. Rev. 29 (1988). The only Oregon authorities that directly address whether arbitration awards may be given collateral estoppel effect do so in a context unrelated to the proceeding before me and are not controlling.

Mazorol v. Coats, 102 Or. App. 8, 12, 793 P.2d 326, 328 (1990), rev'd 316 Or 367, 852 P.2d 178 (1993), and Carrier v. Hicks, 102 Or. App. 13, 793 P.2d 329 (1990), rev'd on other grounds, 316 Or. 341, 851 P.2d 581 (1993) held that the arbitration of an uninsured motorist claim between an insured and the insurer will not collaterally estop the insured from relitigating the amount of the damages in a later action against another motorist. Mazorol reasoned that allowing a third party to assert collateral estoppel on the basis of the arbitrator's award would be unfair and would be contrary to the policy of encouraging expeditious resolution of uninsured motorist claims because it would prevent the insured from pursuing an expedited resolution of his uninsured motorist claim without first engaging in full blown litigation with the tortfeasor. 102 Or. App. at 12; 793 P.2d at 328. In addition, the court reasoned that the uninsured motorists statutes provide a clear indication that the legislature intended that uninsured motorist awards would not preclude litigating the amount of damages with the tortfeasor.

Id. Apart from the fairness considerations and statutory grounds, the court did not otherwise indicate that the arbitration award in question would not be entitled to preclusive effect. Nor did the court provide any rules or guidance on the question of whether arbitration awards, in general, are not entitled to preclusive effect.

Faris v. Gamble, Inc., 133 Or. App. 221, 889 P.2d 1363 (1995), and Andrews v. May Department Stores, 96 Or. App. 305, 773 P.2d 1324 (1989), held that arbitrators' decisions arising from the binding arbitration of grievances pursuant to the provisions of collective bargaining agreements were not entitled to collateral estoppel effect in actions by the employees alleging unfair labor practices. In reaching this holding, the courts relied on cases addressing the effect of an arbitrator's decision of matters within the scope of a collective bargaining agreement on an employee's rights to pursue statutory remedies that are separate and apart from the agreement when the statutes in question were intended to supplement existing remedies under the collective bargaining agreement. In that context, the courts reasoned that the determination of the rights under the collective bargaining agreement would not preclude litigation of similar statutory rights. Faris, however, drew a distinction between collective bargaining agreement arbitration where there was tension between collective representation and individual

statutory rights and where the arbitrator's authority is limited to arbitrating contract based claims and arbitration under commercial arbitration agreements. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 1657, 114 L.Ed. 2d 26 (1991). Outside the collective bargaining context, parties to an arbitration agreement may be compelled to arbitrate all disputes, including statutory claims and the arbitration may be binding in a subsequent proceeding. See Faris, 133 Or. App. at 228; 889 P.2d at 1366-67.

This is not a case where the arbitration arises from a collective bargaining agreement and the interests unique to that setting control. While the fairness considerations discussed in Mazoral and Carrier carry some weight in this case in that the arbitration here was likely intended to expeditiously resolve the dispute, the statutory basis for the decisions in those cases is not present in this case. In addition, the arbitration in this case differs because the parties agreed to arbitrate the disputes after they arose and all parties to the present proceeding were involved in the arbitration. Given the lack of Oregon case law on point, I turn to more general principles for guidance.

Restatement (Second) of Judgments, § 84(1) (1982) provides the general rule that a final and valid arbitration award has the same preclusive effect as a judgment of a court. Section 84(3) sets forth an exception to the general rule in the area of issue

preclusion, providing that determination of an issue in arbitration does not preclude relitigation if:

- (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
- (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

Restatement (Second) of Judgments § 83(2) describes the essential elements of adjudication as including the following:

- (a) Adequate notice by persons who are to be bound by the adjudication . . . ;
- (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
- (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
- (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
- (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.³

³ Oregon courts apply similar factors in determining whether a prior administrative proceeding is the type of proceeding to which courts will give preclusive effect. Nelson v. Emerald People's Utility District, 318 Or. 99, 104, 862 P.2d 1293, 1297, n. 4 (1993).

Applying these principles, the criteria for application of collateral estoppel to the arbitration proceeding at issue in this case are satisfied. There is not a legal policy that precludes the bankruptcy court from giving collateral estoppel effect to an arbitration proceeding in which the arbitrator decided the case based on the law and conducted the proceeding with appropriate procedural safeguards. The Supreme Court rejected the argument that determination of issues in dischargeability litigation should be solely the province of bankruptcy courts when it decided that collateral estoppel applies in such proceedings. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). According preclusive effect is consistent with the purpose of the arbitration agreement between the parties which was to resolve all the disputes between the parties.⁴ Likewise, nothing in the arbitration agreement evidences that the arbitration was to be "specially expeditious." To the contrary, the parties directed the arbitrator to apply Oregon law and procedure, which would be less expeditious than giving the arbitrator complete discretion. The mere fact that

⁴ The fact the parties voluntarily submitted the dispute to arbitration, with the limited right of review provided by ORS 36.355, makes this case distinguishable from mandatory arbitration proceedings pursuant to ORS 36.400 et. seq., which are subject to de novo review. This opinion does not reach the question of whether collateral estoppel applies to such mandatory arbitration proceedings.

the proceeding was an arbitration proceeding is not sufficient to meet the "specially expeditious" exception because if it were, collateral estoppel would never apply to arbitration proceedings. This is clearly not the law.

The remaining factors are generally concerned with the procedures applied in the arbitration proceeding.⁵ The arbitration agreement provides that the procedural rules shall be in accordance with the rules applicable to litigation in the circuit courts of Oregon. If the arbitrator failed to follow the requirements of the agreement to arbitrate, debtors could have challenged the arbitration award. See ORS 36.355(1)(c), (d), (g). Given that the debtors did not so challenge the award, the lack of a formal record of the arbitration proceeding is not enough for the court to conclude that the arbitrator failed to follow the procedures required by the agreement. Oregon law and rules provide sufficient procedural safeguards to allow application of collateral estoppel if the requirements are otherwise satisfied.

The court concludes that none of the exceptions to the general rule that a final and valid arbitration award be given the same preclusive effect as a judgment apply in this adversary proceeding. The arbitration award can provide a basis for application of collateral estoppel.

⁵ See further discussion in part III.D.

B. Identity of issues.⁶

Examining the identity of issues requires the court to compare the issues determined in the prior action with the issues in question in the present action. 11 U.S.C. § 523(a)(6) renders nondischargeable debts for willful and malicious injury by the debtor to another entity or to the property of another entity. A willful and malicious injury arises, even absent a specific intent to injure, from wrongful conduct, done intentionally, which necessarily produces harm and which is without just cause and excuse. In re Cecchini, 780 F.2d 1440 (9th Cir. 1986). A further limitation is that the wrongful conduct must be certain or almost certain to cause harm or that harm to the creditor be a highly foreseeable result of the intentional wrongful conduct. See In re Littleton, 942 F.2d 551, 555 (9th Cir. 1991).

The arbitrator's award determines the existence of the requisite wrongful conduct under this standard. The award determined that the debtors exercised control over funds and property of deGremlis and wrongfully applied that property for the debtors' sole use and benefit. In addition, the award determined

⁶ The conservator contends that the arbitration award and the judgment based on that award establishes the issues necessary to determine that his claim is nondischargeable under 523(a)(2), (a)(4) and (a)(6). As discussed below, I determine that the arbitration award and the judgment based on that award determined the issues necessary to determine that the conservator has established the elements of section 523(a)(6). For this reason, I need not address whether the arbitration proceeding determined the issues necessary to find the claim nondischargeable under sections 523(a)(2) or 523(a)(4).

that punitive damages should be imposed against the debtors. In Oregon, an award of punitive damages requires wanton or malicious misconduct or a deliberate disregard for the rights of others and may not be assessed on the basis of negligent or reckless indifference to the rights of others. E.g., Cereghino v. Boeing Co., 826 F. Supp. 1243, 1249 (D. Or. 1993). Cases examining malice for the purpose of determining punitive damages reveal that courts apply a standard which is at least as stringent as the standard applied for willful and malicious conduct under section 523(a)(6). See Friendship Auto Sales, Inc. v. Bank of Willamette Valley, 300 Or. 522, 716 P.2d 715, 721-22 (1986). Consequently, the factual issues determined by the arbitrator are the same as those issues that arise under section 523(a)(6) and may be binding in the conservator's willful and malicious injury claim.

C. Actually litigated and essential to a final decision.

The debtors contend that even if any issues pertaining to section 523(a) were the same as the issues determined in the arbitration award and judgment, the judgment can have no collateral estoppel effect on those issues because there is no evidence that the issues were actually litigated or that a determination of those the issues was essential to the final judgment.

Turning to the second argument first, the issue of the

debtor's willful and malicious conduct was necessary to the decision because the arbitrator could not have awarded punitive damages unless he found such misconduct. See Winters v. Bisailon, 153 Or. 509, 57 P.2d 1095, 1096 (Or. 1936).

A more difficult question is whether the conservator has produced a record sufficient to establish that the issue of the debtors' willful and malicious conduct was actually litigated in the arbitration. The conservator relies upon the provisions in the arbitration agreement that call for the resolution of all claims and the terms of the arbitration award to establish that the issues pertaining to the debtors' willful and malicious conduct were actually litigated. He also relies upon Clark v. Bear Stearns & Co., 966 F.2d 1318, 1322 (9th Cir. 1992), to assert that the specific findings in the arbitration award are sufficient to show the issues actually litigated.

The debtors assert that the arbitration agreement contemplated a determination of property rights but not a determination of any claims of willful and malicious conduct, that they did not contemplate that such claims would be litigated in the arbitration and that such claims were not actually litigated. They assert that the arbitrator basically decided issues pertaining to willful and malicious conduct even though such claims were not properly before him and not litigated. Finally, they rely on In re Berr, 172 B.R. 299, 306 (9th Cir. BAP

1994) for the proposition that the party asserting estoppel must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated and contend that the trustee has not sustained this burden.

I agree with the conservator. In general, an issue is actually litigated when it is properly raised by the pleadings or otherwise, is submitted for determination and is determined.

Restatement (Second) of Judgments § 27, Comment d. A party asserting collateral estoppel must submit sufficient evidence for the court to reach the conclusion that the pertinent issue was actually litigated under this standard. The amount and type of evidence will vary in given cases. Specific findings of fact and conclusions of law may in some cases provide sufficient proof, as Clark v. Bear Stearns suggests. 966 F.2d at 1322, n. 4. In some cases, however, findings of fact and conclusions of law may not be present or may not be sufficiently detailed or specific and the party asserting collateral estoppel may, as suggested by State Farm Fire & Casualty Co. and In re Berr, be required to present portions of the records, including pleadings and pertinent transcripts.⁷

⁷ I note that although Clark v. Bear Stearns and In re Berr provide persuasive authority, neither case is controlling on the issue before me. Both cases involved the federal law of collateral estoppel, while the issues before me are determined by Oregon's law of collateral estoppel. In addition, the pertinent statement in Clark v. Bear Stearns was dicta in that it suggested that evidence that was not presented would have been sufficient to establish collateral estoppel. Finally, the pertinent

Under these standards, the conservator has submitted sufficient evidence to establish that the issues pertaining to willful and malicious conduct were actually litigated. Although there were no pleadings in the arbitration proceeding, the arbitration agreement framed the scope of the proceeding. That agreement provided for the resolution through arbitration of all claims and defenses of either party arising out of or pertaining to the Duttons' caring for and handling the person and the estate of Ms. deGremli. Although the agreement did contain provisions concerning the possession and disposal of certain disputed assets pending the arbitrator's decision, there is no indication in the agreement that the arbitration be limited to issues pertaining to certain items of property. Thus the arbitration agreement raised the issue of the debtors' misconduct in the handling of deGremli's affairs and provided the debtors with fair notice that those issues, including any claim for punitive damages arising from the willful and malicious conduct of the debtors in managing deGremli's affairs, would be determined in the arbitration proceeding.

The judgment reflects that the arbitrator issued his award after two days of arbitration and consideration of testimony, exhibits and arguments of counsel. The arbitrator's award

statement in In re Berr was in a part of the opinion to which only a single judge joined and for that reason any precedential value it may have is doubtful.

reflects that the dispute centered on whether the debtors engaged in wrongful conduct by wrongfully misapplying assets of deGremli for their own purposes and on the debtors' reasons for making the expenditures at issue. The award reflects that the debtors attempted to justify their conduct and the application of the assets by, inter alia, contending that the expenses were directed to the furtherance of the family. The arbitrator rejected these justifications, finding that the debtors wrongfully diverted the funds for their own purposes and that their conduct was sufficiently willful and wanton to justify punitive damages.

Contrary to the debtor's contentions, this record provides sufficient evidence that the issue was submitted for determination and determined by the arbitrator and that the issues were, therefore, actually litigated. The debtors contention that the arbitrator, by reaching the issue of the debtors' willful and malicious misconduct, decided a matter not submitted to him is inconsistent with the record of the prior proceeding that is before the court. The debtors should not be allowed to defeat summary judgment and the application of collateral estoppel by simply asserting, in an affidavit or otherwise, that the matter was not submitted for a decision, particularly where the debtors failed to file any exceptions to the arbitrator's award on this basis. See ORS 36.355(1)(f).

D. Full and fair opportunity to be heard.

Although the debtors did not specifically raise this issue, their contentions that the agreement did not contemplate litigation of willful and malicious conduct and that the purpose of arbitration was to avoid protracted litigation of these issues implicitly suggests a contention that they did not have a full and fair opportunity to be heard on these issues or that

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considerations exist that would make the application of issue preclusion unfair.

Universal Ideas Corp. v. Esty, 68 Or. App. 276, 681 P.2d 1176, 1179 (1984), explained the application of this fairness consideration in issue preclusion as follows:

In order to determine whether the parties receive a full and fair opportunity to litigate, we make a particularized examination of the prior action. The investigation involves a policy judgment balancing the interests of an individual litigant against the interests of the administration of justice and we decide where the balance is to be struck in any given case. If actual unfairness will result, collateral estoppel should not be applied.

In Universal Ideas, the court determined that the availability of review in the prior action is essential, under such fairness principles, to the application of issue preclusion and that preclusion should not be applied where the party lost the opportunity to appeal through circumstances beyond its control.

See also Restatement (Second) of Judgments § 28(1). Further

bases for denying the application of collateral estoppel on fairness grounds include: (1) where there are differences in the quality or extensiveness of the procedures followed in the two courts; (2) where the allocation of the burden of persuasion in the initial action was more unfavorable to the party against whom preclusion is sought; and (3) where there is a clear and convincing need of a new determination of the issue because at the time of the initial action it was not sufficiently foreseeable that the issue would arise in a subsequent action or because the party sought to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the prior action. Restatement (Second) of Judgments §28(3)-(5). As discussed above, the party against whom estoppel is sought bears the burden of presenting evidence on this issue.

Applying these principles in this proceeding, although the arbitration agreement limits the right of review, to the extent the debtors lost that right, they did so by their own conduct. In addition ORS 36.355(1) afforded the debtors with limited review by providing the debtors with the opportunity to file exceptions to the award for various reasons, including the reason raised in this proceeding that the arbitrator rendered a decision on a matter not submitted to him. See ORS 36.355(1)(f). The debtor's right to a fair decision by a trustworthy tribunal was protected by these provisions allowing for an exception to the

award.

In addition, as discussed above, the resolution of the pertinent issues was within the scope of the arbitration agreement and the debtors had fair notice that the issues would be determined in the arbitration proceeding. There is no evidence in the record that the debtors lacked incentive or an opportunity to litigate the issues in the prior proceeding or that there were any differences in the applicable burden of proof or the applicable procedures. For these reasons, the debtors have not presented evidence sufficient to create an issue of material fact that they lacked a full and fair opportunity to litigate the issue or that other considerations exist that would make the application of collateral estoppel unfair.

CONCLUSION

For the reasons set forth above, collateral estoppel applies to arbitral proceedings unless the nature of the proceeding or procedural and legal aspects of the arbitration cause the court to determine that an exception to the general rule should apply. This proceeding and the arbitration which preceded it fit within the general rule. Debtors have established no considerations that would make the application of issue preclusion unfair.

The doctrine of issue preclusion establishes the debtors engaged in willful and malicious conduct under § 523(a)(6) and

that the judgment represents a debt for willful and malicious injury. This includes the punitive damage portion of the judgment as the Ninth Circuit has determined that an award of punitive damages in a judgment based upon willful and malicious conduct is nondischargeable under § 523(a)(6). In re Britton, 950 F2d at 606.

The conservator's motion for summary judgment is granted. Ms. Jarvis should submit the judgment within 14 days of the date of this memorandum opinion.

This Memorandum Opinion shall constitute Findings of Fact

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and Conclusions of Law as required by Fed. R. Bankr. P. 7052 and they shall not be separately stated.

ELIZABETH L. PERRIS
Bankruptcy Judge