

11 USC § 1328(a)(4)
claim preclusion
issue preclusion
malicious injury
personal injury
post-petition debt
public nuisance
willful injury

Krein v. Szewc et. al. (In re Szewc/Updegraff)

3/6/17

Adv. No. 14-6086-tmr

Renn

2017 WL ?

For more than 12 years before they filed Chapter 13, Debtors/Defendants kept up to 11 Mastiff dogs on their rural property and later on their daughter's neighboring property. The dogs barked almost incessantly while Defendants were not home. Eight years pre-petition, one of the Defendants was found in violation of Jackson County Code provisions prohibiting dogs from causing unreasonable noise disturbances. Two years pre-petition, Plaintiffs, who were Defendants' neighbors, filed suit in state court for damages and an injunction based on the tort theory of public nuisance.

After Defendants filed Chapter 13, Plaintiffs filed suit under § 1328(a)(4) to except from discharge any judgment they might receive in the state court litigation. Defendants eventually obtained confirmation of their Chapter 13 plan. After the Bankruptcy Court granted relief from stay, the state court litigation concluded with a judgment in Plaintiffs' favor for \$238,942 and an injunction requiring that any present and future Mastiffs be de-barked.

The § 1328(a)(4) action was then tried. The Court found that due to the barking, Plaintiffs had suffered severe emotional distress leading to sleep loss, migraines, chest pains, high blood pressure, and stomach aches. The Court allocated the state court damages on a per diem basis for the entire time (approximately 14 years) in which Defendants' tortious activity took place, and broke those damages up into 3 periods:

- 1) those accruing before the Jackson County Code violations;
- 2) those accruing from the County Code violations to the Chapter 13 petition; and,
- 3) those accruing after the Chapter 13 petition through issuance of the state court jury verdict.

As to the first period, the state court jury found Defendants had only acted negligently. Plaintiffs conceded during the § 1328(a)(4) litigation that the allocable damages (over \$69,000) were dischargeable.

As to the second period, the Court reviewed Oregon's common law of public nuisance. It also reviewed § 1328(a)(4)'s text and caselaw construing it. It rejected both sides' arguments

that the state court proceeding was preclusive on the issue of whether Plaintiffs had suffered a “personal injury” for purposes of § 1328(a)(4). It found, based on the evidence presented at trial, that the allocable damages (over \$138,000) were the result of willful or malicious personal injury, and thus would be excepted from any discharge Defendants might receive.

As to the third period, the Court held the allocable damages (over \$34,000) were excluded (as post-petition debt), from any discharge Defendants might receive under § 1328(a). It rejected Defendants’ argument that their post-petition tortious activity could somehow be wrapped into a potentially dischargeable pre-petition claim. Because neither side raised the issue, the Court did not consider whether any of the post-petition allocable damages qualified as an administrative expense claim.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
KAREN MICHELE SZEWC and) Bankruptcy Case
JON EDWARDS UPDEGRAFF,) No. 14-60928-tmr13
Debtors.)
DALE KREIN and) Adversary Proceeding
DEBRA KREIN,) No. 14-6086-tmr
Plaintiffs,)
v.)
KAREN MICHELE SZEWC and) MEMORANDUM OPINION
JON EDWARDS UPDEGRAFF,)
Defendants.)

Plaintiffs brought the present adversary proceeding to except a state court judgment from discharge under 11 U.S.C. § 1328(a)(4).¹ The proceeding was tried and post-trial briefing is complete. The matter is ripe for decision.

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¹Unless otherwise indicated, all subsequent statutory references are to Title 11 of the United States Code.

1 Procedural Background:

2 On February 3, 2012, Plaintiffs filed suit against Defendants in Jackson County Circuit Court (the
3 State Court Action), seeking money damages and an injunction based on an alleged public nuisance caused
4 by Defendants' Mastiff dogs. While the State Court Action was pending, Defendants filed a Chapter 13
5 petition on March 14, 2014. They are presently operating under a Chapter 13 plan dated April 1, 2014 (the
6 Plan), which was confirmed on October 2, 2014.

7 Plaintiffs filed the instant adversary proceeding on June 25, 2014. They were subsequently granted
8 relief from the automatic stay to prosecute the State Court Action, including pursuing injunctive relief and
9 liquidating damages (Doc. #103). The Court later clarified the scope of its order to clearly permit any appeal
10 or remand proceeding in the State Court Action (Doc. #158).

11 The State Court Action was tried in March and April 2016 on the Second Amended Complaint filed
12 therein. The damages claim was tried to a jury. The claim for an injunction was tried to the court. The
13 jury's verdict (the Verdict) was issued on April 2, 2016, and was incorporated into a General Judgment (the
14 Judgment) entered on or about May 28, 2016. A money award was entered against Defendants for \$238,942,
15 with post-judgment interest at 9%, plus costs and attorney fees to be determined in supplemental
16 proceedings.² Plaintiffs now seek to except the money award from Defendants' discharge.

17 Facts:

18 Defendants and Plaintiffs are neighbors residing on rural property in Jackson County, Oregon. For
19 years, Defendants owned another nearby parcel. In 2013, they transferred that parcel to their daughter,
20 where she presently resides. Plaintiffs' property borders both Defendants' and their daughter's properties.

21 Since 1999, Defendants have kept up to eleven (11) adult Mastiff dogs outside. Most of the dogs
22 have been kept on their property, although at times several of the dogs have been placed on the property their
23 daughter now owns. With the exception of short lulls, the dogs have continuously barked while Defendants
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26 ²The Judgment also contained an injunction requiring that Defendants remove the Mastiffs or debark
them within 60 days, and that any new Mastiffs brought onto the property be debarked.

1 are not at home, which during the workweek can be from 5:00 a.m. to 10:00 p.m. The dogs also bark while
2 Defendants are home, although not as frequently.

3 In 2005, Defendant Karen Szewc was cited for violation of the Jackson County Code for failing to
4 prevent two (2) dogs from becoming a public nuisance insofar as they “unreasonably caus[ed] annoyance,
5 alarm or noise disturbance at any time of the day or night, by frequent or prolonged noises which may be
6 heard beyond the boundary of the keeper’s property.” JCC 612.09(c)(2). In that matter, Mrs. Szewc argued
7 a “right to farm” defense under ORS 30.930 et. seq. In particular, she argued, among other things, the dogs
8 were necessary to protect a certain breed of sheep she raised. An evidentiary hearing was conducted before a
9 hearings officer. On March 22, 2006, the hearings officer issued an order rejecting on multiple grounds the
10 “farm use” defense, and finding and concluding that Mrs. Szewc was in violation of the Jackson County
11 Code. The order gave Mrs. Szewc ten (10) days to take all reasonable and necessary steps to abate the
12 nuisance, including but not limited to debarking or moving the dogs to a different property.³ Despite the
13 order, Defendants continued to keep many barking dogs on the properties.

14 Plaintiffs, with their residence located in close proximity to the property boundary of Defendant’s and
15 their daughter’s properties, described the noise level at their home as akin to living next to a shooting range
16 or blasting car horns. On a loudness scale of 1-10, Plaintiffs unequivocally rated it a 10. It affected all levels
17 of their daily living. Plaintiffs felt like prisoners in their own home, venturing outside only for short
18 intervals. Even then, Mrs. Krein’s wariness was compounded by cameras Defendants posted around their
19 own property’s perimeters. When Mr. Krein went out, he was forced to listen to music through headphones
20 to drown out the barking. Except for small events with family and close friends, Plaintiffs stopped hosting
21 social gatherings.

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26 ³Later in 2006 the order was affirmed by the Jackson County Circuit Court, which in 2008 was
affirmed by the Oregon Court of Appeals.

1 The continuous barking caused both Plaintiffs severe emotional distress. Because of the barking,
2 they suffered sleep loss, migraines, chest pains, high blood pressure, and stomach aches.⁴

3 Discussion:

4 Apportionment of Damages:

5 The jury found Plaintiffs were entitled to \$238,942 in damages for approximately fourteen (14) years
6 of injurious conduct. However, neither the jury nor the State Court judge apportioned the damages to any
7 particular period, and the State Court record is otherwise inconclusive on this point. At issue in this
8 proceeding is what portion of the damages are either excluded from Defendants' discharge as post-petition
9 debt, or excepted from it under § 1328(a)(4). Both of these are federal bankruptcy questions where the
10 burden of proof rests with Plaintiffs by a preponderance of the evidence. Hassanally v. Republic Bank (In re
11 Hassanally), 208 B.R. 46, 49 n.4 (9th Cir. BAP 1997) (creditor has burden of proving exclusion from scope
12 of discharge); Barnes v. Roberts (In re Roberts), 538 B.R. 1, 9 (Bankr. C.D. Cal. 2015) (creditor has burden
13 of proving exception to discharge).

14 The parties agree the damages compensated Plaintiffs through April 2, 2016, the date the Verdict was
15 issued. Exactly when the damages began, however, is ambiguous. The Verdict merely indicates
16 Defendants' conduct began in "2002." Plaintiffs' State Court counsel testified that, although no statute of
17 limitations applied,⁵ Plaintiffs' recovery was nonetheless limited by a ten (10) year statute of ultimate repose,
18 and thus they were only entitled to damages commencing February 3, 2002, exactly ten (10) years before
19 they filed the State Court Action.⁶ This testimony was uncontradicted, and the Court will adopt the February
20 3, 2002, "damage start date." The awarded damages therefore encompassed 5,173 days. During that entire
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22 ⁴The evidence indicates the barking has continued post-Judgment, and continues to affect Plaintiffs as
23 described above.

24 ⁵See Laurance v. Tucker, 160 Or. 474, 479, 85 P.2d 374, 376 (1938) (statutes of limitation do not
25 apply to actions for public nuisance).

26 ⁶The Court takes no position on whether actions for public nuisance are limited by a ten (10) year
ultimate repose period.

1 period, Plaintiffs' uncontested testimony indicated the barking was roughly equivalent both in duration
2 and degree. A per annum apportionment is thus appropriate. Because portions of years need to be
3 computed, a per diem calculation provides even more accuracy. The \$238,942 in damages, spread over
4 5,173 days, equates to \$46.19 per diem (rounded).

5 Portion of Damages Excluded from Discharge as Post-petition Debt:

6 Section 1328(a) provides for discharge of "all debts provided for by the plan." Defendants do not
7 dispute that the Plan, with limited exceptions, only "provide[s] for" debts which arose before they filed their
8 Chapter 13 petition on March 14, 2014. The question, therefore, becomes whether any of the apportioned
9 damages arose post-petition. If so, they are excluded from the scope of any discharge Defendants will
10 receive.

11 "The term 'debt' means liability on a claim." § 101(12). In turn, a "claim" is defined in § 101(5)(A)
12 in broad terms as a "right to payment, whether or not such right is . . . contingent." Section 101(5)(A) does
13 not, however, specifically dictate when a "claim" arises for bankruptcy purposes. That determination has
14 been left to the courts and is a matter of federal law. Bechtold v. Gillespie (In re Gillespie), 516 B.R. 586,
15 591 (9th Cir. BAP 2014). In general, the courts in this Circuit use the "fair contemplation" test. Id. Under
16 that test, a claim arises "when the claimant can fairly or reasonably contemplate the claim's existence even if
17 a cause of action has not yet accrued under non-bankruptcy law." Id. (internal quotation omitted). The test
18 originally grew out of environmental clean-up cases, see, e.g., Cal. Dep't of Health Servs. v. Jensen (In re
19 Jensen), 995 F.2d 925, 930-931 (9th Cir. 1993), but has been expanded to other types of proscribed activity.
20 Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1000-1001 (9th Cir. 2006) (claims of sex
21 discrimination).

22 There are two parts to the "fair contemplation" test. First, there must be pre-petition conduct.
23 Jensen, 995 F.2d at 930. Second, the claimant must have fairly contemplated that the conduct would give
24 rise to the debtor's potential liability. Id. at 930-931. Thus, the second prong limits the first; it does not
25 extend it to post-petition tortious conduct. Defendants' argument to the contrary is misplaced.

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1 As noted above, Defendants' conduct in allowing the dogs to bark and create a public nuisance
2 continued in equal measure throughout the entire damages period. The post-petition barking independently
3 supported a public nuisance claim. Perhaps one way to conceptualize this is to imagine the dogs started
4 barking one second after Defendants filed their Chapter 13 petition. The evidence supports the conclusion
5 that the post-petition barking alone would have constituted a public nuisance under Oregon law. See
6 discussion infra pp. 10-11. Defendants argue, however, that their post-petition tortious conduct should be
7 wrapped into a potentially dischargeable pre-petition claim simply because Plaintiffs were on fair notice the
8 dogs would likely keep barking post-bankruptcy. Following this argument to its logical conclusion would
9 allow the dogs to bark forever without financial consequence. The Bankruptcy Code is not that generous.

10 The damages attributable to Defendants' post-petition conduct amount to \$34,643 (rounded).⁷ This
11 amount,⁸ plus post-judgment interest thereon, is excluded from Defendants' discharge.

12 Portion of Damages Excepted from Discharge:

13 Sections 1328(a)(1)-(4) list the types of debts that, although coming within the scope of a general
14 discharge, nevertheless are excepted from it. The applicable subsection here is § 1328(a)(4), which as
15 discussed in more detail below excepts from discharge certain civil damages awards based on tortious
16 conduct. The Court must determine which portion, if any, of the damages attributable to the pre-petition
17 period falls within that subsection. See Waller v. Heckman (In re Heckman), 2011 WL 5148975, *2-5
18 (Bankr. D. Or. Oct. 28, 2011) (where state court default judgment was for overall repair costs, the
19 bankruptcy court examined each particular category of damage for dischargeability purposes). Two time-
20 frames are relevant: 1) February 3, 2002 through March 22, 2006; and 2) March 23, 2006 through March 14,
21 2014.

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23 ⁷\$46.19/diem times 750 days (March 15, 2014-April 2, 2016).

24 ⁸There is one other issue regarding post-petition debt. The Plan requires full payment of allowed
25 administrative expenses under §§ 507(a)(2) and 503(b). There is authority that post-petition tortious conduct
26 by a trustee or Chapter 11 debtor-in-possession gives rise to an administrative expense claim. Zilog, 450
F.3d at 999 n.1. Because neither side has raised the issue, the Court leaves for another day whether that
doctrine should be extended to conduct by Chapter 13 debtors.

1 Damages Through March 22, 2006:

2 For the period February 3, 2002, through March 22, 2006, the Verdict provided that “defendants
3 maintained a public nuisance on their property through their negligent conduct.” Whether or not this finding
4 precluded Plaintiffs from attempting to prove the elements of § 1328(a)(4) in this proceeding was mooted by
5 their concession in pre-trial proceedings that the damages attributable to this period, which equate to \$69,701
6 (rounded),⁹ are dischargeable.

7 Damages From March 23, 2006, through March 14, 2014:

8 The parties vigorously dispute the dischargeability of the damages attributable to the period from
9 March 23, 2006, through March 14, 2014, the date Defendants filed their Chapter 13 petition. These
10 damages total \$134,598 (rounded).¹⁰

11 Section § 1328(a)(4) excepts from discharge “any debt—for restitution, or damages, awarded in a civil
12 action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to
13 an individual or the death of an individual.”

14 Debt/Damages/Injury:

15 The Judgment “satisfies the requirement of a debt for damages awarded in a civil action.” B.B. v.
16 Grossman (In re Grossman), 538 B.R. 34, 39 (Bankr. E.D. Cal. 2015).¹¹ See also Sasson v. Sokoloff (In re
17 Sasson), 424 F.3d 864, 872 (9th Cir. 2005) (state court judgment preclusive as to amount of “debt” for § 523
18 purposes). Nevertheless, only those “damages . . . awarded . . . as a result of willful or malicious injury by
19 the debtor that caused personal injury” are excepted from discharge (emphasis added). The meaning of the
20 emphasized language is deceptively complex. Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d
21 1162, 1168 (9th Cir. 2006) (statutory construction begins with the statute’s text). Did Congress intend two

23 ⁹\$46.19/diem times 1509 days.
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25 ¹⁰\$46.19/diem times 2914 days.
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27 ¹¹For § 1328(a)(4) purposes, the damages award may be entered either pre or post-petition. Waag v.
Permann (In re Waag), 418 B.R. 373, 382 (9th Cir. BAP 2009).

1 types of “injury,” the first somehow “caus[ing]” the second? At least one court has recognized this
2 grammatical oddity. See Woods v. Roberts (In re Roberts), 431 B.R. 914, 922 n.4 (Bankr. S.D. Ind. 2010)
3 (“willful or malicious injury appears to be distinct from the personal injury for which damages were
4 awarded”).

5 Section 1328(a)(4) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection
6 Act of 2005 (BAPCPA). Its scant legislative history provides in pertinent part:

7 Section 314(b) amends section 1328(a) . . . to make the following additional
8 debts nondischargeable in a chapter 13 case: . . . debts for restitution or
9 damages, awarded in a civil action against the debtor as a result of willful or
malicious conduct by the debtor that caused personal injury to an
individual

10 HR Rep. No. 31, 109th Cong., 1st Sess 314 (2005) (emphasis added).

11 Based on this history, it could well be argued the first “injury” referenced in the statute equates to
12 “conduct” and the second equates to that conduct’s consequences. However, Congress did not use different
13 terms; it used “injury” twice. When “[a] term appear[s] in several places in a statutory text[, it] is generally
14 read the same way each time.” Ratzlaf v. United States, 510 U.S. 135, 143, 114 S. Ct. 655, 660 (1994). This
15 general rule is all the more forceful when the term appears in the same sentence. Moreover, when it
16 legislates, Congress is presumed to be aware of past judicial interpretations. Fed. Trade Comm’n v. AT & T
17 Mobility LLC, 835 F.3d 993, 999 (9th Cir. 2016). Seven years before BAPCPA’s enactment, the Supreme
18 Court took up the meaning of “willful and malicious injury” as used in § 523(a)(6).¹² In doing so, the Court
19 held that “willful” injury means a “deliberate or intentional *injury*, not merely a deliberate or intentional *act*
20 that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998) (emphasis in
21 original). Thus, the Court made a clear distinction between conduct and its consequences, and courts hence
22 have not been hesitant to import Geiger and its progeny when construing § 1328(a)(4). See, e.g., Grossman,
23 538 B.R. at 39; Toste v. Smedberg (In re Toste), 2014 WL 3908139, *4 n.6 (9th Cir. BAP Aug. 12, 2014).

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25 ¹²Section 523(a)(6) excepts debts “for willful and malicious injury by the debtor to another entity or
26 to the property of another entity” from discharge in Chapters 7, 11, and 12 of the Bankruptcy Code, and in
Chapter 13 in cases of “hardship discharge.”

1 Therefore, despite its awkward language, § 1328(a)(4) encompasses only one “injury” and can be
2 paraphrased as applying to “civil awards based on willful or malicious personal injury.” Id. at *2.

3 Personal Injury:

4 The statute requires “personal injury.” The Bankruptcy Code does not define the term and there is no
5 controlling caselaw. While it is well-settled that “personal injury” excludes injury to property, Waag, 418
6 B.R. at 377, the term’s reach has otherwise been open to interpretation.

7 Several Bankruptcy Courts have thoughtfully addressed the issue. See, e.g., Adams v. Adams (In re
8 Adams), 478 B.R. 476, 485-492 (Bankr. N.D. Ga. 2012); Sales v. Bailey (In re Bailey), 555 B.R. 557, 561-
9 564 (Bankr. N.D. Miss. 2016); Grossman, 538 B.R. at 34. Adams contains the most exhaustive analysis.
10 There, the court held the term “personal injury” includes nonphysical (or nonbodily) injuries, but does not
11 include injuries to business interests. In its analysis, the court examined the *prima facie* elements of the
12 underlying tort claims. Each one which provided a remedy for violation of a personal right (e.g., to be free
13 from intentional infliction of emotional distress or from harm to one’s personal reputation) was found to be a
14 “personal” injury. Id. at 488-492. In distinction, torts which addressed invasions of business interests,
15 including business reputation, were found not to be “personal injuries.” Id. Grossman addressed the same
16 issue and found the torts of intentional infliction of emotional distress and invasion of privacy were
17 “personal injuries.” 538 B.R. at 42-43. In doing so, the court quoted the Restatement (Second) of Torts § 7,
18 which provides that “[i]njury’ denotes the invasion of any legally protected interest of another.” Id. at 41.
19 These holdings support the view that “personal injury” depends on whether the claim upon which the
20 damages were awarded primarily protects a “personal” as opposed to “property, financial or business” right.

21 The statute’s parallel language also supports this interpretation. Clark, 460 F.3d at 1175 (court
22 should not view statutory language in isolation and should pursue consistency both within a particular
23 provision and the statutory scheme as a whole). The alternate ground for establishing an exception to
24 discharge under § 1328(a)(4) is “willful or malicious injury that caused . . . the death of an individual.”
25 “Death” is the ultimate invasion of an individual’s right to be free from harm, and of a survivor’s right to the
26 decedent’s society and companionship.

1 Finally, in construing “personal injury” in § 1328(a)(4), courts have been guided by judicial
2 interpretations of similar language in 28 U.S.C. §§ 157(b)(2)(O) and (5). Adams, 478 B.R. at 486;
3 Grossman, 538 B.R. at 42. Those subsections limit a bankruptcy court’s authority to adjudicate “personal
4 injury tort” claims. Courts interpreting that term have likewise focused on the type of legal interest primarily
5 infringed. See, e.g., Adelson v. Smith (In re Smith), 389 B.R. 902, 908 (Bankr. D. Nev. 2008) (“personal
6 injury tort” includes an invasion of one’s reputation, such as libel, but does not include invasions of business
7 or financial interests); Holt v. Green, 2016 WL 927148, *3 (D. Nev. March 10, 2016) (the scope of “personal
8 injury tort” does not include claims which have financial, business, property, and contract characteristics).

9 In light of the above authority, this Court will examine the evidence to determine whether Defendants
10 primarily injured a personal interest of Plaintiffs. State law guides that inquiry. The only tort theory
11 Plaintiffs argued was Oregon’s law of public nuisance. A brief review of that law is therefore appropriate.

12 Under Oregon law, claims for “nuisance” are divided into two categories “public” and “private.” The
13 name “nuisance” is misleading because it refers to the result of the tortious behavior rather than the behavior
14 itself. In fact, the torts are based on substantial and unreasonable interference or invasion of protected
15 interests. Jewett v. Deerhorn Enters., Inc., 281 Or. 469, 473, 575 P.2d 164, 166 (1978). A nuisance claim
16 can be based on intentional, reckless, or negligent acts, or the operation of an abnormally dangerous activity.
17 Frady v. Portland Gen. Elec. Co., 55 Or. App. 344, 348, 637 P.2d 1345, 1348 (1981). An invasion of
18 another’s interest so as to create a nuisance is “intentional” when it is done: 1) for the purpose of causing the
19 invasion; or 2) with knowledge that the invasion will result or is substantially certain to result from the
20 conduct.¹³ Phillips Ranch, Inc. v. Banta, 273 Or. 784, 792 n.5, 543 P.2d 1035, 1039 (1975). For a private
21 nuisance, the invasion or interference is to the use or enjoyment of land, Jacobson, 273 Or. at 18, 539 P.2d at
22 643, including the occupant’s comfort or convenience. Macca v. Gen. Tel. Co., 262 Or. 414, 419, 495 P.2d
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25 ¹³As explained further, “[i]ntentional” as used in this [second] context, means that the act was done
26 with the knowledge that it would result in damage to another, not that it was done for the purpose of
perpetrating injury.” Jacobson v. Crown Zellerbach Corp., 273 Or. 15, 19, 539 P.2d 641, 643 (1975).

1 1193, 1195 (1972). For a public nuisance, the invasion or interference is to a right common to the general
2 public. Raymond v. S. Pac. Co., 259 Or. 629, 634, 488 P.2d 460, 462 (1971).

3 “Public nuisances” are often defined by statute, ordinance, or code. However, as here, they may also
4 be based on the common law. Normally, public nuisances are vindicated by the appropriate government
5 agency. Frady, 55 Or. App. at 348, 637 P.2d at 1348-1349. However, a private citizen may commence a
6 private action for damages if he has suffered a “special injury.” Id. The “special injury” “must be different
7 in kind, not merely degree” from that suffered by the general public. Id. at 349, 637 P.2d at 1349. A public
8 nuisance that interferes with the use or enjoyment of land is one type of “special injury.” Id.

9 The State Court Record is Not Preclusive as to “Personal Injury”:

10 Both sides argue the record in the State Court Action is dispositive on the issue of whether or not
11 there was “personal injury.” Issue preclusion—sometimes referred to as collateral estoppel—is a viable tool in
12 dischargeability litigation. Grogan v. Garner, 498 U.S. 279, 284 n.11, 111 S. Ct. 654, 658 (1991). In that
13 context, “[i]f in the course of adjudicating a state-law question, a state court should determine factual issues
14 using standards identical to those of [§ 1328(a)], then collateral estoppel, in the absence of countervailing
15 statutory policy, would bar relitigation of those issues in the bankruptcy court.” Sasson, 424 F.3d at 872
16 (quoting Brown v. Felsen, 442 U.S. 127, 139 n.10, 99 S. Ct. 2205, 2213 (1979)).

17 In determining the preclusive effect of a state court judgment in a subsequent federal suit (including
18 dischargeability proceedings), the court looks to the issue-preclusion law of the state that rendered the
19 judgment. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). In Oregon, “[i]ssue
20 preclusion . . . preclude[s] relitigation of an issue [of law] or fact when that issue or fact has been determined
21 by a valid and final determination in a prior proceeding.” McCall v. Dynic USA Corp., 138 Or. App. 1, 5,
22 906 P.2d 295, 297 (1995) (internal quotation omitted). The requirements are:

- 23 1) The issue in the two proceedings is identical.
24 2) The issue was actually litigated and was essential to a final decision on the merits in
 the prior proceeding.
25 3) The party sought to be precluded has had a full and fair opportunity to be
 heard on that issue.
26 4) The party sought to be precluded was a party or was in privity with a party
 to the prior proceeding.

1 5) The prior proceeding was the type of proceeding to which th[e] court will
2 give preclusive effect.

3 Id. at 5, 906 P.2d at 297-298 (quoting Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104, 862 P.2d
4 1293, 1296-1297 (1993)). “The party asserting issue preclusion bears the burden of proof on the first,
5 second, and fourth requirements, whereupon the burden shifts to the party against whom preclusion is
6 asserted to show that the third and fifth requirements are not met.” Thomas v. U.S. Bank Nat'l Assoc., 244
7 Or. App. 457, 469, 260 P.3d 711, 719 (2011).

8 Prongs ##3-5 are not at issue. Prongs ##1 and 2 require that an identical issue be actually litigated.
9 “An issue is ‘actually litigated’ when the factual and legal issues that the plaintiff raises in the second case
10 were *actually* adjudicated and essential to the determination of the first case.” Id. at 472, 260 P.3d at 720
11 (internal quotation omitted) (emphasis in original).

12 Here, whether or not Defendants interfered with a primarily personal interest of Plaintiffs was not
13 actually litigated in the State Court Action. The record therein makes clear the only “special injury” pled
14 and presented to the jury primarily involved interference with Plaintiffs’ use and enjoyment of their property.
15 See Exhibits 3 (Second Amended Complaint) and 20 (Jury Instructions).¹⁴ As such, the State Court record is
16 not preclusive in either Plaintiffs’ or Defendants’ favor.

17 On a related note, it is important to bear in mind that a “debt,” here the \$248,942 in damages, and its
18 dischargeability are distinct concepts, and as such, the doctrine of “claim preclusion” does not apply.
19 Indeed, as the Court repeatedly reminded the parties in this case, it is not unusual for a “debt” to be based on
20 a theory different from the one argued to except it from discharge. In Brown v. Felsen, 442 U.S. 127, 99 S.
21 Ct. 2205 (1979), the Supreme Court discussed why there is little incentive for a creditor to fold a fraud claim

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¹⁴The State Court record indicates the trial court judge excluded an instruction allowing the jury to
24 consider Plaintiffs’ mental suffering, emotional distress, and humiliation in determining the amount of
25 noneconomic damages, in favor of a general instruction to consider “[a]ny substantial and unreasonable
26 inconvenience and interference with the plaintiff’s [sic] use and enjoyment of their property” in determining
 such damages. Contrary to Defendants’ arguments, the change in jury instructions does not limit Plaintiffs’
 ability to argue personal injury.

1 into a run-of-the-mill pre-bankruptcy collection suit. 442 U.S. at 134-138, 99 S. Ct. at 2211-2212. The same
2 holds true for tort claims, as there may be many reasons to sue on one theory but not another. One example
3 is Nassbridges v. Dimichele (In re Nassbridges), 464 B.R. 494, 2011 WL 3244396 (9th Cir. BAP July 15,
4 2011) (unpublished), where the creditor claimants stipulated in district court litigation that the damages
5 caused by the debtor were the result of his negligent acts or omissions. Their amended complaint thus
6 removed allegations of fraud and pled only claims based on negligence and breach of fiduciary duty. The
7 claimants then obtained summary judgment based on those claims. In subsequent dischargeability litigation,
8 the debtor attempted to preclude any § 523(a)(2) fraud claims based on claimants' prior stipulation in the
9 district court litigation. The court rejected the argument stating:

10 [T]here is nothing necessarily inconsistent about asserting negligence in
11 prebankruptcy litigation and fraud in a bankruptcy nondischargeability action.
12 As we explain further below, bankruptcy nondischargeable fraud is a different
13 legal question than state law fraud (*Brown v. Felsen*, 442 U.S. 127, 138–39, 99
S. Ct. 2205, 60 L. Ed.2d 767 (1979)), even though a determination of fraud by
a non-bankruptcy court may become issue preclusive in bankruptcy
nondischargeability litigation.

14 Id. at *9. Thus, even assuming arguendo the Verdict was based on a subspecies of property damage,
15 Plaintiffs' present claims as to the dischargeability of those damages on a different theory are not barred.

16 Plaintiffs Met Their Burden to Prove "Personal Injury":

17 Because preclusion principles do not carry the day, this Court must independently examine whether
18 sufficient evidence was adduced to show Defendants primarily interfered with a personal right recognized by
19 Oregon's law of public nuisance. As noted, the injury Plaintiffs suffered must be different in kind, rather
20 than degree, to that suffered by members of the public in general, and the interference must be substantial,
21 unreasonable, and, because an ultra-hazardous activity was not involved, supported by some degree of
22 culpable conduct.

23 The court in Wilson v. City of Portland, 153 Or. 679, 58 P.2d 257 (1936) discussed the required
24 injury. There, the plaintiffs brought multiple actions for public nuisance based on defendant's dumping of
25 garbage in a ravine next to their residence. There, the court considered whether the plaintiffs had split their
26 cause of action arising under a single tort, so that certain of the actions would be barred. The issue centered

1 on whether the plaintiffs had alleged injury to their personal as well as property interests. The court held that
2 allegations that odors and fumes from the garbage prevented plaintiffs' normal sleep and rendered the air
3 "foul and unfit to breathe" "disclose[d] a wrongful invasion of the personal rights of the plaintiffs" even
4 absent allegations the odors caused sickness or any objective physical injury. Id. at 684, 58 P.2d at 259.
5 Here, the barking went one step further than the odors in Wilson, interfering not only with Plaintiffs' peace
6 of mind, but with their peace of body as well, causing multiple physical manifestations in the form of
7 migraines, high blood pressure, stomach aches, and chest pains, all accentuating the point that an
8 individualized "special" injury occurred.¹⁵

9 Further, the interference was substantial. Jewett, 281 Or. at 473, 575 P.2d at 166. The barking
10 caused Plaintiffs to become prisoners in their own homes, rendering them mentally and physically
11 debilitated. Moreover, the barking's utility, when compared to its harm, was unreasonable. Hay v. Stevens,
12 271 Or. 16, 20-21, 530 P.2d 37, 39-40 (1975).¹⁶ Finally, the Court finds, supported by the Verdict as
13 addressed in this Court's summary judgment ruling,¹⁷ that Defendants acted intentionally in that, at
14 minimum, they knew that injury to Plaintiffs' mental and physical well-being would result or was
15 substantially certain to result from their conduct. Banta, 273 Or. at 792 n.5, 543 P.2d at 1039.

16 Plaintiffs have thus proven, by a preponderance of evidence, tortious injury to a personal interest
17 under Oregon law, and thus "personal injury" for purposes of § 1328(a)(4).

19 ¹⁵These physical manifestations distinguish this case and Wilson from cases such as Frady, 55 Or.
20 App. at 348-349, 637 P.2d at 1349.

21 ¹⁶Defendants did not testify at trial and adduced no other evidence as to why allowing the barking
22 was useful. They, and other witnesses on their behalf, did testify in the State Court Action, the transcript of
23 which has been admitted. Exhibit 15, pp. 28-539. However, this Court made clear it would not
24 independently review the entire transcript; rather, the parties were to direct the Court to the pertinent portions
thereof. Defendants have not directed the Court to any portion of the transcript relevant to the barking's
usefulness.

25 ¹⁷The Verdict contained findings that Defendants maintained a public nuisance on their property
26 through intentional conduct after March 22, 2006, and that this intentional conduct was a cause of damages
to Plaintiffs.

1 Willful or Malicious Injury:

2 Section 1328(a)(4) also requires a “willful or malicious” injury. Courts have assumed Congress
3 intended to give the terms “willful” and “malicious” as used in § 1328(a)(4), the same meaning they have in
4 § 523(a)(6). See, e.g., Toste, 2014 WL 3908139, at *4 n.6. To be “willful,” a debtor must have a subjective
5 motive to inflict injury or believe that injury is substantially certain to result from his own conduct. Ormsby
6 v. First Am. Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). For an injury to be “malicious,”
7 there must be: (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done
8 without just cause or excuse. Id. at 1207. “[I]t is the wrongful act that must be committed intentionally
9 rather than the injury itself.” Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

10 The evidence adduced easily satisfies either the willful or malicious requirement. The sheer volume
11 and duration of barking is itself relevant evidence as to Defendants’ state of mind. Moreover, after the
12 hearing officer’s order on March 22, 2006, Defendants were on clear notice that allowing the dogs to bark
13 created a public nuisance, yet their activity continued unabated.¹⁸ This is compelling circumstantial evidence
14 that they knew with substantial certainty that personal injury to Plaintiffs, their neighbors, would result.

15 Based on the nature of their wrongful act, Defendant’s willful injury allows a presumption that it was
16 also malicious. Ormsby, 591 F.3d at 1207. Even without the presumption, allowing the dogs to bark was

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¹⁸The evidence at trial indicated the barking continued unabated even after the State Court entered its
19 injunction, up to and including the time this matter was tried. This Court had a brief colloquy with counsel
20 on the subject. Counsel for Defendants represented that, although he had no personal knowledge regarding
it, he believed the injunction had been stayed pending the Judgment’s appeal.

21 Defendants have an obligation to proceed in good faith during the entirety of their Chapter 13 case.
22 See, e.g., In re Cluff, 2012 WL 1552391, *5 (Bankr. D. Idaho April 30, 2012) (lack of good faith post-
23 confirmation may constitute “cause” for dismissal under § 1307(c)); In re Bennett, 200 B.R. 252, 254
24 (Bankr. M.D. Fla. 1996) (same). Post-confirmation tortious conduct, especially in violation of an injunction,
25 would likely not be in good faith. An order will be entered requiring that by March 20, 2017, Defendants file
26 and serve on Plaintiffs’ counsel and the Chapter 13 Trustee, a declaration indicating whether the State
Court’s injunction as incorporated in the Judgment is, or has been, stayed and, if stayed, attaching a copy of
the order or judgment imposing the stay. This Court then reserves the right to take whatever action it deems
appropriate, including setting a hearing on an order to show cause why the main Chapter 13 case should not
be dismissed.

1 wrongful, intentional, and necessarily harmed Plaintiffs, and Defendants have adduced no evidence of a just
2 cause or excuse.¹⁹

3 Causation:

4 A preponderance of the evidence indicates that all of the damages awarded for the period March 23,
5 2006, through March 14, 2014, were, as required by § 1328(a)(4), “as a result of” the willful and malicious
6 personal injury inflicted on Plaintiffs.

7 Conclusion:

8 Of the total \$238,942 in damages awarded, \$34,643 plus post-judgment interest thereon is excluded
9 from Defendants’ discharge as post-petition debt. In contrast, \$69,701 is dischargeable under § 1328(a)
10 should Defendants complete the Plan and receive their discharge. The remaining \$134,598 plus post-
11 judgment interest thereon is nondischargeable under § 1328(a)(4) as willful or malicious personal injury.
12 Judgment will be entered consistent with this Opinion.

13 The Court’s findings of fact and conclusions of law under FRBP 7052 are set forth above. They shall
14 not be separately stated.

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18 THOMAS M. RENN
19 Bankruptcy Judge
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¹⁹Again, Defendants did not testify at trial, and have not directed the Court to any portion of the State Court transcript supporting a just cause or excuse for allowing the dogs to bark. See supra n.16