

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

**IN RE: JOSHUA TROY MATTHEWS and
KRISTINA RENE MATTHEWS, Debtors**

**NO. 5:07-bk-70334
CHAPTER 7**

FIRST FEDERAL BANK

PLAINTIFF

vs.

No. 5:07-ap-7157

**JOSHUA TROY MATTHEWS and
KRISTINA RENE MATTHEWS;
JILL JACOWAY**

DEFENDANTS

ORDER

Before the Court is plaintiff First Federal Bank's [First Federal] Motion for Summary Judgment filed on March 9, 2007, and debtors Joshua Troy Matthews's and Kristina Rene Matthews's Response to Plaintiff's Motion for Summary Judgment filed on March 20, 2007. For the reasons stated below, the Court grants in part and denies in part First Federal's motion for summary judgment.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. §§ 1334 and 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Background

In 2006, First Federal filed two foreclosure complaints. In each, First Federal alleged that the defendants defaulted in payment of several promissory notes, each executed by

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Frontier Development Group, Inc. [Frontier],¹ and personally guaranteed by the debtors. Each complaint also alleged fraud in the procurement of certain notes.

Specifically, on August 30, 2006, First Federal filed a complaint against the debtors and Frontier in the Circuit Court of Washington County, Arkansas. On October 27, 2006, the Circuit Court of Washington County entered a Default Foreclosure Decree and Judgment against Frontier and the debtors, which stated in pertinent part:

1. That the Summons issued in this cause was styled in the name of the Court and dated and signed by the Clerk under the seal of the Court, containing the name of the parties, directed toward the defendants, stating the name and address of the plaintiff's attorney and the time within which the Arkansas Rules of Civil Procedure require the defendants to appear, file a pleading and defend and stated that in case of the defendants' failure to do so, Judgment by default would be entered against them for the relief demanded in the Complaint; that service of said Summons was made on the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., by delivering said documents to the authorized agent for service of process and officer, Joshua T. Matthews, on September 8, 2006; that service of said Summons was served on the separate defendant, JOSHUA T. MATTHEWS, personally on September 8, 2006; and that the separate defendant, KRISTI R. MATTHEWS, was served with said summons personally on September 8, 2006; that the defendants have failed to answer within twenty (20) days after the Service of the Summons and Complaint upon them as required by Rule 12 of the Arkansas Rules of Civil Procedure and the plaintiff is entitled to a Decree of Foreclosure by default.

2. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., is justly indebted to the plaintiff in the sum of Sixty Nine Thousand Four Hundred Seventy One and 00/100 (\$69,471.00) Dollars, which includes interest through the 22nd day of August, 2006, with a daily accrual thereafter at the rate of \$16.1240 per day until paid in full by reason of promissory note number 14-810817-7; that the separate defendants, JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, by reason of their execution of their unconditional Guaranty pursuant to the aforesaid note, are justly indebted to the plaintiff in the aforesaid sums, jointly and severally; that the defendants herein agreed to pay all costs of collection, including a reasonable attorney's fee in

¹Debtor Joshua T. Matthews is the president and registered agent of Frontier, and co-debtor Kristi R. Matthews is the secretary and treasurer.

accordance with said promissory notes when placed in the hands of an attorney for collections [sic]; that to secure the payment of the aforesaid notes when due, the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., executed, acknowledged and delivered to the plaintiff, FIRST FEDERAL BANK, a real estate mortgage as set out in plaintiff's Complaint herein

3. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., is justly [indebted] to the plaintiff in the sum of Seventy Five Thousand Two Hundred Thirty Six and 42/100 (\$75,236.42) Dollars, which includes interest through the 22nd day of August, 2006, with a daily accrual thereafter at the rate of \$16.7369 per day until paid in full by reason of promissory note number 14-811081-9; that the separate defendants, JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, by reason of their execution of their unconditional Guaranty pursuant to the aforesaid note, are justly indebted to the plaintiff in the aforesaid sum, jointly and severally; that the defendants herein agreed to pay all costs of collection, including a reasonable attorney's fee in accordance with said promissory note when placed in the hands of an attorney for collections; that to secure the payment of the aforesaid notes when due, the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., executed, acknowledged and delivered to the plaintiff, FIRST FEDERAL BANK, a real estate mortgage as set out in plaintiff's Complaint herein

4. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., is justly indebted to the plaintiff, FIRST FEDERAL BANK, in the sum of Three Hundred Eighty Two Thousand Two Hundred Seventy Seven and 72/100 (\$382,277.72) Dollars, which includes interest through the 22nd day of August, 2006, with a daily accrual thereafter at the rate of \$71.5212 per day until paid in full by reason of promissory note number 14-810053-9; that the separate defendants, JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, by reason of their execution of their unconditional Guaranty pursuant to the aforesaid note, are justly indebted to the plaintiff in the aforesaid sums, jointly and severally; that the defendants herein agreed to pay all costs of collection, including a reasonable attorney's fee in accordance with said promissory note when placed in the hands of an attorney for collections; that to secure the payment of the aforesaid note when due, the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., executed, acknowledged and delivered to the plaintiff, FIRST FEDERAL BANK, a real estate mortgage as set out in plaintiff's Complaint herein

5. The Court further finds that said mortgages were filed for record . . . ;

that said notes are now past due and unpaid, and the aforesaid sums are due and owing the plaintiff herein, plus real estate taxes due and owing, abstract costs in the sum of Three Hundred and 00/100 (\$300.00) Dollars, plus a reasonable attorney's fee in the sum of Three Thousand Five Hundred and 00/100 (\$3,500.00) Dollars, plus costs of which plaintiff is entitled to have Judgment of and from the defendants, and each of them, both jointly and severally, with said Judgment to bear interest from the date hereof at the rate of Ten Percent (10%) per annum

The Washington County Circuit Court also made a finding of fraud against the debtors and awarded First Federal punitive damages:

6. The Court further finds that the defendants committed fraud upon the plaintiff when they represented and warranted to the plaintiff that they would use the funds loaned to the plaintiff under note number 14-810053-9 to construct a house 4,190 square feet in size; that despite their representations and warranties, the defendants knowingly and purposefully constructed a house 4,084 square feet in size without informing the plaintiff; that these intentional misrepresentations of fact, are in fact, material and are the proximate cause of the damages to the plaintiff as herein set out; that as a direct result of the defendants' fraudulent actions the plaintiff has been damages [sic] in the amount of Thirty Nine Thousand, and 00/100 (\$39,000.00); that in addition, punitive damages should be and are hereby awarded against the defendants and each of them, both jointly and severally, in the amount of Seventy Eight Thousand, and 00/100 (\$78,000.00) to punish them for their intentional, willful and wanton fraudulent conduct and to deter them and others from engaging in similar conduct in the future.

These findings track the allegations contained in the Washington County Circuit Court complaint.

The second complaint was filed on September 1, 2006, in the Circuit Court of Benton County, Arkansas. On November 3, 2006, the Circuit Court of Benton County entered a Default Foreclosure Decree and Judgment against the debtors, Frontier, and Shenandoah Hills Property Owners Association [Shenandoah]; the court found that the debtors had committed fraud with regard to two of the promissory notes and the judgment stated in pertinent part:

1. That the Summons issued in this cause was styled in the name of the

Court and dated and signed by the Clerk under the seal of the Court, containing the name of the parties, directed toward the defendants, stating the name and address of the plaintiff's attorney and the time within which the Arkansas Rules of Civil Procedure require the defendants to appear, file a pleading and defend and stated that in case of the defendants' failure to do so, Judgment by default would be entered against them for the relief demanded in the Complaint; that service of said Summons was made on the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., by delivering said documents to the authorized agent for service of process and officer, Joshua T. Matthews, on September 8, 2006; that service of said Summons was served on the separate defendant, JOSHUA T. MATTHEWS, personally on September 8, 2006; and that the separate defendant, KRISTI R. MATTHEWS, was served with said summons personally on September 8, 2006; that service of Summons was made on the separate defendant, SHENANDOAH HILLS PROPERTY OWNERS ASSOCIATION, by delivering said documents to the authorized agent for service of process and officer, Stephen J. Miller, on September 7, 2006; that the separate defendant SHENANDOAH HILLS PROPERTY OWNERS ASSOCIATION has agreed to the entry of judgment as evidenced by their Counsel's signature below; that the separate defendants, FRONTIER DEVELOPMENT GROUP, INC., JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, have failed to answer within twenty (20) days after the the service of the Summons and Complaint upon them as required by Rule 12 of the Arkansas Rules of Civil Procedure and the plaintiff is entitled to a Decree of Foreclosure by default.

2. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., is justly indebted to the plaintiff in the sum of Three Hundred Fourteen Thousand Twenty Four and 86/100 (\$314,024.86) Dollars, which includes interest through the 22nd day of August, 2006, with a daily accrual thereafter at the rate of \$58.7485 per day until paid in full by reason of promissory note number 14-810312-9; that the separate defendants, JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, by reason of their execution of their unconditional Guaranty pursuant to the aforesaid note, are justly indebted to the plaintiff in the aforesaid sums, jointly and severally; that the defendants herein agreed to pay all costs of collection, including a reasonable attorney's fee in accordance with said promissory notes when placed in the hands of an attorney for collections; that to secure the payment of the aforesaid notes when due, the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., executed, acknowledged and delivered to the plaintiff, FIRST FEDERAL BANK, a real estate mortgage as set out in plaintiff's Complaint herein

. . . .

4. The Court further finds that the separate defendant FRONTIER DEVELOPMENT GROUP, INC., JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS committed fraud upon the plaintiff when they represented and warranted to the plaintiff that they would use the funds loaned to the plaintiff under note number 14-810312-9 to construct a house 3,095 square feet in size; that despite their representations and warranties, the defendants knowingly and purposefully constructed a house 2,730 square feet in size without informing the plaintiff; that these intentional misrepresentations of fact, are in fact, material and are the proximate cause of the damages to the plaintiff as herein set out; that as a direct result of the defendants' fraudulent actions the plaintiff has been damaged in the amount of \$34,400.00; that in addition, punitive damages should be and are hereby awarded against the defendants and each of them, both jointly and severally, in the amount of \$68,000.00 to punish them for their intentional, willful and wanton fraudulent conduct and to deter them and others from engaging in similar conduct in the future.

5. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., is justly indebted to the plaintiff in the sum of Four Hundred Sixty Five Thousand Fifty Nine and 25/100 (\$465,059.25) Dollars, which includes interest through the 22nd day of August, 2006, with a daily accrual thereafter at the rate of \$106.7956 per day until paid in full by reason of promissory note number 14-810649-4; that the separate defendants, JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS, by reason of their execution of their unconditional Guaranty pursuant to the aforesaid note, are justly indebted to the plaintiff in the aforesaid sums, jointly and severally; that the defendants herein agreed to pay all costs of collection, including a reasonable attorney's fee in accordance with said promissory note when placed in the hands of an attorney for collections; that to secure the payment of the aforesaid notes when due, the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., executed, acknowledged and delivered to the plaintiff, FIRST FEDERAL BANK, a real estate mortgage as set out in plaintiff's Complaint herein

6. The Court further finds that said mortgages were filed for record . . . ; that said notes are now past due and unpaid, and the aforesaid sums are due and owing the plaintiff herein, plus real estate taxes due and owing, abstract costs in the sum of Three Hundred and 00/100 (\$300.00) Dollars, plus a reasonable attorney's fee in the sum of Nine Hundred Fifty Five and 00/100

(\$955.00) Dollars,² plus costs of which plaintiff is entitled to have Judgment of and from the defendants, and each of them, both jointly and severally, with said Judgment to bear interest from the date hereof at the rate of Ten Percent (10%) per annum

7. The Court further finds that the separate defendant, FRONTIER DEVELOPMENT GROUP, INC., JOSHUA T. MATTHEWS and KRISTI R. MATTHEWS committed fraud upon the plaintiff when they represented and warranted to the plaintiff that they would use the funds loaned to the plaintiff under note number 14-810649-4 to construct a house 4,936 square feet in size; that despite their representations and warranties, the defendants knowingly and purposefully constructed a house 4,217 square feet in size without informing the plaintiff; that these intentional misrepresentations of fact, are in fact, material and are the proximate cause of the damages to the plaintiff as herein set out; that as a direct result of the defendants' fraudulent actions the plaintiff has been damages [sic] in the amount of \$85,600.00; that in addition, punitive damages should be and are hereby awarded against the defendants and each of them, both jointly and severally, in the amount of \$171,200.00 to punish them for their intentional, willful and wanton fraudulent conduct and to deter them and others from engaging in similar conduct in the future.

On February 6, 2007, the debtors filed a joint, voluntary chapter 7 petition. First Federal filed an adversary proceeding on February 28, 2007, amended on March 9, 2007, to determine the dischargeability of First Federal's two state court judgments. Specifically, First Federal asserted that the two state court judgments should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).³ The debtors answered the complaint on March 2, 2007, and the amended complaint on March 19, 2007. First Federal filed a motion for summary judgment on March 9, 2007, and a statement of facts to which there is no dispute. The debtor filed a response to the summary judgment motion and controverted the statement of undisputed facts on March 20, 2007. First Federal filed a reply to the debtors' response to the motion for summary judgment on March 23, 2007.

² In the copy of the judgment filed with the Court, "Nine hundred Fifty Five and 00/100 (\$955.00) Dollars" was marked through and \$2000.00 was handwritten above it.

³ The adversary proceeding also included an objection to the debtors' discharge under 11 U.S.C. § 727; however, this issue was not raised in the plaintiff's motion for summary judgment.

Position of the Parties

In its motion for summary judgment, First Federal argues that the doctrine of collateral estoppel prevents this Court from relitigating the issues in the present adversary proceeding. According to First Federal, because the state court found that the debtors committed fraud and awarded punitive damages, this Court is bound by those findings and the debtors should be estopped from relitigating for dischargeability purposes the issues of whether the debts resulting from the state court judgments were obtained by fraud or the result of willful and malicious injury.

In their response, the debtors' main contention is that because the two state court judgments were obtained by default, the issues presented were not actually litigated, as is required for collateral estoppel principles to apply. Therefore, according to the debtors, they should be allowed to present evidence to this Court in defense of the allegation that the debts resulting from the state court judgments are excepted from discharge under §§ 523(a)(2)(A) and (a)(6).

Collateral Estoppel

The primary argument raised by First Federal in its motion for summary judgment relates to collateral estoppel. The Court can grant summary judgment if collateral estoppel principles preclude it from conducting further proceedings on issues that have already been litigated and ruled upon previously. *Fisher v. Scarborough (In re Scarborough)*, 171 F.3d 638, 641 (8th Cir. 1999). According to the Supreme Court, “if nondischargeability must be proved only by a preponderance of the evidence, all creditors who have secured fraud judgments, the elements of which are the same as those of the fraud discharge exception [in bankruptcy], will be exempt from discharge under collateral estoppel principles.” *Grogan v. Garner*, 498 U.S. 279, 285 (1991). The Court then examined the appropriate burden of proof under § 523 and held that the standard of proof for dischargeability exceptions in the code is the ordinary preponderance of the evidence standard. *Id.* at 291. In determining whether the state court judgment is entitled

to preclusive effect, the court must apply the law of Arkansas. *Scarborough*, 171 F.3d at 641 (stating that the court must look to the substantive law of the forum state in applying collateral estoppel). In Arkansas, there are four elements required to establish collateral estoppel: “(1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment.” *Riverdale Dev. Co. v. Ruffin Bldg. Sys., Inc.*, 146 S.W.3d 852, 855 (Ark. 2004).

To satisfy the first element of collateral estoppel, the issues in the adversary proceeding must be the same as presented in the state court action. First Federal contends in its adversary proceeding that the debts are excepted from discharge under § 523(a)(2)(A) and (a)(6). Section 523(a)(2)(A) of the bankruptcy code states that discharge is not available to a debtor for debts obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” 11 U.S.C. § 523(a)(2)(A). In order for a debt to be one obtained by false representation under § 523(a)(2)(A), the creditor must prove by a preponderance of the evidence that (1) the debtor made a representation; (2) at the time the debtor knew that the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained the alleged loss and damage as the proximate result of the representation having been made. *Merchants Nat’l Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 790 (B.A.P. 8th Cir. 1999) (citing *In re Ophaug*, 827 F.2d 340 (8th Cir. 1987)). The elements of typical “fraud” or misrepresentation under Arkansas law are substantially similar. The creditor must prove by a preponderance of the evidence the following: “(1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance.” *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568,

580 (Ark. 2002). Because the elements to support a finding of fraud under Arkansas law are sufficiently similar to those that support a finding of false representation under bankruptcy dischargeability law and there have been two state court judgments finding that the debtors committed fraud, the Court finds that the first element of collateral estoppel has been met as to § 523(a)(2)(A).

Section 523(a)(6) states that discharge is not available to a debtor for any debts “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). In the Eighth Circuit, willful and malicious are two distinct requirements. *Scarborough*, 171 F.3d at 641. According to the court, “[w]illfulness is defined as ‘headstrong and knowing conduct’ and ‘malicious’ as conduct ‘targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm.’” *Id.* (quoting *Johnson v. Miera (In re Miera)*, 926 F.2d 741, 743 (8th Cir. 1991)). In this case, the debtors must have acted with the intent to harm the plaintiffs, “rather than merely acting intentionally in a way that resulted in harm.” *Id.*

In both state court actions, the plaintiff’s complaint alleged that the debtors committed fraud upon First Federal knowingly and purposefully. Pl. Foreclosure Compl., Washington County Cir. Ct., ¶ 19; Pl. Foreclosure Compl., Benton County Cir. Ct., ¶¶ 7, 14. Both state court judgments included an award of punitive damages against the debtors. Under Arkansas law, “[i]n order to support an award of punitive damages, the evidence must indicate the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice might be inferred.” *Freeman v. Anderson*, 651 S.W.2d 450, 452 (Ark. 1983). Only in a case where the acting party knew or had reason to believe that his actions would cause injury, and he continued in his course of conduct in spite of that knowledge, may malice be inferred and punitive damages awarded. *James v. Bill C. Harris Constr. Co.*, 763 S.W.2d 640, 642 (Ark. 1989). In this case, because of the allegations contained in the state court complaints and the elements required to award punitive damages in state court are sufficiently similar to

those that would support a finding of both willful and malicious injury under the bankruptcy code, this Court must find that the debtors acted not only willfully, but also with malice. Therefore, the Court finds that the first element of collateral estoppel has been met as to § 523(a)(6).

The second element of collateral estoppel is that the issues must have been actually litigated. The law in Arkansas regarding default judgments has been stated in numerous cases: “A judgment by default is just as binding and enforceable as a judgment entered after a trial on the merits.” *Reyes v. Jackson*, 861 S.W.2d 554, 555 (Ark. Ct. App. 1993); *see also Glass v. Cagle (In re Cagle)*, 253 B.R. 437, 439 (Bankr. E.D. Ark. 2000) (listing six additional cases in support). The policies underlying the principle of collateral estoppel require that this Court give full faith and credit to a state court judgment, whether obtained by default or after full defense. *Cagle*, 253 B.R. at 439. Therefore, despite the fact that both state court judgments were obtained by default, under Arkansas law, both actions were “actually litigated.” Accordingly, the Court finds that the second element of collateral estoppel has been met as to § 523(a)(2)(A) and (a)(6).

The third element is that the issues must have been determined by a valid and final judgment. First Federal has also met this requirement. In Arkansas, upon entry of an order for default judgment, the facts alleged in the complaint are admitted. *See Kohlenberger, Inc. v. Tyson’s Foods, Inc.*, 510 S.W.2d 555, 560 (Ark. 1974). Arkansas courts have repeatedly held that a default judgment establishes liability. *See, e.g., Jean-Pierre, M.D. v. Plantation Homes of Crittenden County, Inc.*, 89 S.W.3d 337, 340-41 (Ark. 2002) (citing cases); *Gardner v. Robinson*, 854 S.W.2d 356, 357 (Ark. Ct. App. 1993) (stating the general rule that in an inquiry of damages upon default, all of the plaintiff’s material allegations are to be taken as true). In both state court complaints, First Federal alleged that the debtors defaulted in the payment of promissory notes, knowingly and purposefully committed fraud, and that the plaintiff was damaged as a direct result of the debtors’ fraudulent actions. Those allegations combined with the two orders for default judgment finding fraud and awarding punitive damages are sufficient

for this Court to find that the issues were determined by a valid and final judgment in state court. Consequently, the Court finds that the third element of collateral estoppel has been met as to § 523(a)(2)(A) and (a)(6).

The fourth element requires that the determinations established in the third element were essential to the judgments entered. Collateral estoppel applies only to determinations that are necessary to support the judgment entered in the first action. *Dowden v. Hogan (In re Hogan)*, 214 B.R. 1022, 1023-24 (Bankr. E.D. Ark. 1997). In this instance, each state court distinguished which of the grounds it relied upon to support each separate award for damages in the judgments. The Washington County Circuit Court awarded First Federal \$39,000.00 for the debtors' "fraudulent actions" and \$78,000.00 to "punish [the debtors] for their intentional, willful and wanton fraudulent conduct . . ." in connection with note 14-810053-9. The Benton County Circuit Court awarded First Federal \$34,000.00 for the debtors' "fraudulent actions" and \$68,000.00 to "punish [the debtors] for their intentional willful and wanton fraudulent conduct . . ." in connection with note 14-810312-9 and \$85,600.00 for the "fraudulent actions" and \$171,200.00 in punitive damages to "punish [the debtors] for their intentional willful and wanton fraudulent conduct . . ." in connection with note 14-810649-4.

Therefore, the fourth element of collateral estoppel has been met under § 523(a)(2)(A) and (a)(6), but only as to the above stated damages. It appears from the state court judgments that the remainder of the damages were awarded on account of the debtors' default and that neither fraud nor a finding of willful and malicious injury was necessary to support those damages. Therefore, as to the remaining debts, collateral estoppel is not an appropriate basis for granting summary judgment.

Summary Judgment Standard

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the movant to establish the absence of material fact and identify portions of pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party, who must "go beyond the pleadings" and by his or her own affidavits, depositions, answers to interrogatories, and/or admissions on file, designate specific facts to demonstrate that there is a genuine issue for trial. *Id.* at 324. When ruling on a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *Ferguson v. Cape Girardeau County.*, 88 F.3d 647, 650 (8th Cir. 1996).

All four elements of collateral estoppel have been met as to the debts owed to First Federal on account of fraud and punitive damages. Therefore, there are no genuine issue of material fact to be determined as to those debts, and they are excepted from discharge under § 523(a)(2)(A) and (a)(6), respectively. However, there is a genuine issue of material fact as to whether the remaining debts are non-dischargeable under § 523(a)(2)(A) and (a)(6). Although First Federal filed a statement of the material facts as to which it contends there is no genuine issue to be tried, the debtors controverted it by filing a response and including in it material facts to which they contend a genuine issue exists to be tried.

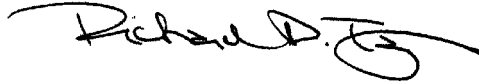
Accordingly, the Court grants First Federal's motion for summary judgment as to \$39,000.00 for fraud and \$78,000.00 in punitive damages awarded by the Washington County Circuit Court in connection with note 14-810053-9; \$34,000.00 for fraud and \$68,000.00 in punitive damages in connection with note 14-810312-9; and \$85,600.00 for fraud and \$171,200.00 in punitive damages in connection with note 14-810649-4 awarded by the Benton County Circuit Court. Summary judgment is denied as to the

remaining debt.

IT IS SO ORDERED.

June 11, 2007

DATE



RICHARD D. TAYLOR
UNITED STATES BANKRUPTCY JUDGE

cc: Don Brady, attorney for debtors
Amy C. Estes, attorney for creditor
Jill R. Jacoway, chapter 7 trustee
U.S. Trustee