

AUG 24 2012

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP Nos.	SC-11-1344-MkDJu
		)		SC-11-1377-MkDJu
7	ADOLFO CASTILLO, JR., and	)		
	ANA CASTILLO,	)	Bk. No.	09-02350
8		)		
	Debtors.	)	Adv. No.	09-90301
9	_____	)		
		)		
10	ANA CASTILLO,	)		
		)		
11	Appellant and Cross-Appellee,	)		
		)		
12	v.	)	<b>MEMORANDUM*</b>	
		)		
13	GREGORY AKERS, Chapter 7	)		
	Trustee of the Bankruptcy	)		
14	Estate of William Juarez,	)		
		)		
15	Appellee and Cross-Appellant.	)		
	_____	)		

Submitted Without Oral Argument  
On May 1, 2012\*\*

Filed: August 24, 2012

Appeal From The United States Bankruptcy Court  
for the Southern District of California

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

\*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

\*\*On March 5, 2012, the Panel unanimously determined that oral argument was unnecessary and granted Appellee's motion to submit on the briefs.

1 **INTRODUCTION**

2 Ana Castillo's step-father filed a chapter 7<sup>1</sup> bankruptcy,  
3 and his chapter 7 trustee Gregory Akers obtained a fraudulent  
4 transfer judgment against both Ms. Castillo and her husband  
5 Adolfo. The Castillos then filed their own bankruptcy, so Mr.  
6 Akers filed a complaint in the Castillos' bankruptcy case  
7 objecting to their discharge under § 727(a) and seeking to except  
8 his judgment against the Castillos from discharge under  
9 § 523(a).<sup>2</sup>

10 After trial, the bankruptcy court granted relief under  
11 § 523(a)(4) as against Ms. Castillo only, but denied any relief  
12 under § 727(a). Both sides appealed. While we AFFIRM the  
13 court's § 727(a) ruling, we VACATE and REMAND the bankruptcy  
14 court's § 523(a)(4) ruling for the reasons stated below.

15 **FACTS<sup>3</sup>**

16 Monica and William Juarez are Ms. Castillo's elderly mother  
17 and step-father. In or around 2004, the Juarezes sold their home  
18

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19 <sup>1</sup>Unless specified otherwise, all chapter and section  
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
21 all Rule references are to the Federal Rules of Bankruptcy  
22 Procedure, Rules 1001-9037. All Civil Rule references are to the  
23 Federal Rules of Civil Procedure.

24 <sup>2</sup>Mr. Akers, who is the appellee and cross-appellant herein,  
25 is not your garden-variety judgment creditor. As a chapter 7  
26 trustee, he had a statutory obligation to collect and reduce to  
27 money all assets of the bankruptcy estate, including the  
28 judgment. See § 704(a)(1).

<sup>3</sup>Unless otherwise indicated, the facts set forth herein are  
undisputed, and many are drawn from the bankruptcy court's  
memorandum decision entered in Akers v. Castillo (In re Juarez),  
Adv. No. 07-90901 (Feb. 5, 2009) ("Fraudulent Transfer Action").

1 in San Diego, California to the Castillos for a purchase price of  
2 \$400,000. The net sale proceeds of \$155,000 ("Proceeds") were  
3 deposited in a joint bank account ("Joint Account") in which the  
4 Juarezes and Ms. Castillo were named account holders.

5 Mr. Juarez had a gambling problem. By way of the sale, the  
6 Juarezes hoped to prevent Mr. Juarez from gambling away the  
7 equity in his home. The Juarezes and the Castillos intended to  
8 use the Proceeds to construct an additional rental unit on the  
9 same lot on which the home was located. They all hoped to  
10 generate enough rental income from the additional unit to make  
11 monthly payments on the mortgage the Castillos took out when they  
12 purchased the home and to cover the Juarezes' future living  
13 expenses.<sup>4</sup>

14 However, in addition to using some of the Proceeds to begin  
15 work on the rental unit, the Proceeds also were used to make  
16 mortgage payments, to pay monies owed to relatives, or as gifts  
17 to other relatives. On May 31, 2006, after Mr. Juarez withdrew  
18 some of the Proceeds from the Joint Account to gamble, Ms.  
19 Castillo transferred ("May 31 Transfer") the remaining balance of  
20 the Proceeds, \$92,000, from the Joint Account to another bank  
21 account solely in her name ("Castillo Account").

22 The rental unit was never built. After the May 31 Transfer,  
23 Ms. Castillo paid most of the remaining proceeds to the  
24 Castillos' mortgage lender, to other relatives, and to

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26 <sup>4</sup>The Castillos and the Juarezes intended that the Juarezes  
27 would continue to live in the home, and the Juarezes did continue  
28 to live there after the sale closed. For a time, the Juarezes  
paid \$500 per month in rent to the Castillos.

1 contractors to pay for remodeling and redecorating the home.  
2 Of the \$92,000, roughly \$13,000 was used to pay off some of Mr.  
3 Juarez's creditors. Ms. Castillo declined to pay other creditors  
4 of Mr. Juarez from the remaining Proceeds, which ultimately led  
5 Mr. Juarez to file an individual chapter 7 case in March 2007.

6 Mr. Akers was appointed to serve as the chapter 7 trustee in  
7 Mr. Juarez's bankruptcy case. Mr. Akers demanded that Ms.  
8 Castillo turn over the \$14,000 in Proceeds remaining at the time  
9 Mr. Juarez filed bankruptcy, which she did. Mr. Akers also  
10 commenced the Fraudulent Transfer Action against the Castillos,  
11 in which he alleged that the sale of the home and the disposition  
12 of the Proceeds constituted both intentional and constructive  
13 fraudulent transfers.

14 After trial, the bankruptcy court issued its memorandum  
15 decision in February 2009, in which it ruled that none of the  
16 alleged transfers were made with the intent to hinder, delay or  
17 defraud Mr. Castillo's creditors and that the sale of the home  
18 was not a constructive fraudulent transfer. However, the court  
19 also ruled that the May 31 Transfer was a constructive fraudulent  
20 transfer. According to the court the May 31 Transfer rendered  
21 Mr. Juarez insolvent.

22 The bankruptcy court credited against the \$92,000  
23 transferred into the Castillo Account the \$13,000 paid to Mr.  
24 Juarez's creditors prepetition and the \$14,000 paid over to Mr.  
25 Akers postpetition. However, the court refused to give the  
26 Castillos any credit for mortgage payments, payments to relatives  
27 and payments to contractors. According to the court, the  
28

1 mortgage payments and the contractor payments primarily  
2 benefitted the Castillos because they now owned the home. Based  
3 on these rulings, the court entered judgment in favor of Mr.  
4 Akers and against the Castillos in the approximate amount of  
5 \$65,000, plus interest ("Fraudulent Transfer Judgment"). Neither  
6 side appealed the Fraudulent Transfer Judgment.

7       Within days of entry of the Fraudulent Transfer Judgment,  
8 the Castillos filed their own chapter 7 bankruptcy case, and  
9 Gerald Davis was appointed as their chapter 7 trustee.<sup>5</sup> In July  
10 2009, Mr. Akers commenced an adversary proceeding objecting to  
11 the Castillos' discharge under §§ 727(a)(2), (a)(3), (a)(4)(A),  
12 (a)(4)(D) and (a)(5), and also claiming that the Fraudulent  
13 Transfer Judgment should be excepted from discharge under  
14 §§ 523(a)(2), (a)(4) and (a)(6) ("Discharge Action").<sup>6</sup>

15       In relevant part, with respect to the § 523(a)(4) claim, Mr.  
16 Akers alleged that "the indebtedness owed to Trustee Akers [on  
17 account of the Fraudulent Transfer Judgment] in whole or in part  
18 constitutes funds of an express trust and arises from a  
19

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20       <sup>5</sup>The Castillos' converted their chapter 7 case to chapter 13  
21 in March 2010, but the case was reconverted to chapter 7 in  
22 January 2011.

23       <sup>6</sup>The § 523(a)(4) claim only named Ms. Castillo as a  
24 defendant. The record arguably suggests that Mr. Akers abandoned  
25 his two claims under § 523(a)(2) and (a)(6), but the court never  
26 entered a final judgment disposing of these latter two claims.  
27 Instead, the court's amended judgment entered on April 17, 2012,  
28 only explicitly disposed of the § 727(a) claims and the  
§ 523(a)(4) claim. The amended judgment also contained a  
statement pursuant to Civil Rule 54(b) indicating that there was  
no just cause for delay in entering a final judgment disposing of  
the § 727(a) claims and the § 523(a)(4) claim.

1 defalcation of fiduciary duty and failure to turnover and account  
2 for such funds." Complaint Objecting to Discharge and  
3 Dischargeability of Debt (Jul. 27, 2009) at ¶ 48.

4 With respect to the § 727(a) claims, Mr. Akers alleged that  
5 the Castillos: (1) were slow to produce and/or failed to produce  
6 critical financial records despite numerous requests; (2) made a  
7 number of asset transfers to their relatives, for which they  
8 received no value in exchange; (3) failed to disclose any of  
9 these transfers in their bankruptcy schedules and statement of  
10 financial affairs; (4) concealed some of these transfers despite  
11 being questioned under oath at their § 341(a) meeting of  
12 creditors; and (5) engaged in all of the above conduct with the  
13 intent to hinder, delay or defraud Mr. Akers as their creditor.

14 Shortly before trial in the Discharge Action, the bankruptcy  
15 court issued a notice in which it framed the issues for trial and  
16 tentatively stated its view of Mr. Akers' documentary evidence  
17 submitted in advance of trial.<sup>7</sup> Among other things, the court  
18 indicated that, in large part, Mr. Akers' case was based upon the  
19 prior Fraudulent Transfer Judgment. Specifically with respect to  
20 the § 523(a)(4) claim, the court stated:

21 The final claim is to except [the Fraudulent Transfer  
22 Judgment] from discharge under § 523(a)(4). After  
23 presiding at the trial [in the Fraudulent Transfer  
24 Action], this Court is familiar with the underlying  
25 facts and the resulting judgment. The funds Ana  
26 Castillo moved from the joint account with William  
Juarez to her individual account was money held in  
trust for William Juarez. The issues remaining for  
trial on that claim will focus on whether there was a  
defalcation by Ana Castillo in her role as the trustee  
of that trust.

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27  
28 <sup>7</sup>The same bankruptcy judge who presided over the Fraudulent  
Transfer Action presided over the trial of the Discharge Action.

1 Notice of Intended Trial Procedure (Jan. 21, 2011) at 2:17-24  
2 (emphasis added).

3 The bankruptcy court conducted a one-day trial on January  
4 26, 2011, during which it heard testimony from various witnesses  
5 and various exhibits were offered and admitted into evidence. We  
6 do not know what testimony was given or which exhibits  
7 specifically were offered into evidence because neither of the  
8 parties obtained the transcript from January 26, 2011.

9 But we have been provided with a transcript of the  
10 bankruptcy court's January 27, 2011 oral rulings immediately  
11 following trial. The bankruptcy court held that it was going to  
12 overrule Mr. Akers' objections to the Castillos' discharge under  
13 § 727(a). In so holding, the court expressly stated that it was  
14 "convinced" by the Castillos' testimony that any errors or  
15 omissions by them in their chapter 7 case were the result of  
16 "innocent oversight and that they did not intend to deceive in  
17 any way." Trial Trans. (Jan. 27, 2011) at 3:23-25.

18 On the other hand, the court also ruled that it was inclined  
19 to grant Mr. Akers relief on his § 523(a)(4) claim. The court  
20 expressed a willingness to consider additional legal argument on  
21 the § 523(a)(4) claim because the relevant legal issues had not  
22 been adequately addressed in either the Fraudulent Transfer  
23 Action or in the Discharge Action, and because the Castillos did  
24 not have legal representation.

25 But the bankruptcy court opined that the evidentiary record  
26 from the Fraudulent Transfer Action appeared factually sufficient  
27 to support the § 523(a)(4) claim and that it was leaning toward  
28 holding that the Fraudulent Transfer Judgment was

1 nondischargeable as a defalcation by Ms. Castillo while acting in  
2 a fiduciary capacity:

3 I think the facts are there, pretty much, so what I'm  
4 inclined to do is continue this hearing on just the 523  
5 for six weeks and allow the parties, especially the  
6 debtors, to consult counsel and to see whether they  
7 would like to make - file a further pleading, that  
8 would have to be filed at least two weeks before the  
9 next hearing, indicating that they have any argument  
10 based on the record from the previous trial that [the  
11 Fraudulent Transfer Judgment] should not be excluded  
12 under 523 as a defalcation; in other words, it was  
13 monies held in trust, while they may or may not have  
14 been accounted for, they were not returned and,  
15 therefore, they would be excepted from the discharge.

16 \* \* \*

17 The only question left is whether the actual debt as  
18 evidenced by the [Fraudulent Transfer Judgment] should  
19 be excepted from the discharge. At this point, I think  
20 on this record, where we really haven't spent that much  
21 time dealing [with] that question, I'd be inclined to  
22 say it is excepted on the face of it. But I'd be glad  
23 to hear further argument.

24 Trial Trans. (Jan. 27, 2011) at 4:17-5:3, 10:22-11:3 (emphasis  
25 added).

26 While the bankruptcy court was focused on additional legal  
27 argument, it also left open the possibility that it might hold a  
28 further evidentiary hearing: "And we'd have further argument on  
this. And it might even involve scheduling a short hearing on  
any further evidence that might come up." Trial Trans. (Jan. 27,  
2011) at 5:5-7. The court later reiterated that it ultimately  
might decide to hold another evidentiary hearing in a scheduling  
order entered on May 2, 2011. In that order, the court further  
indicated that all § 523(a)(4) issues, including the fiduciary  
capacity and defalcation issues, were still open issues:

As stated in the Notice of Intended Trial Procedure  
issued on January 21, 2011, it appeared to the Court  
that the funds Ana Castillo moved from the joint



1 account with William Juarez to her individual account  
2 was money held in trust for William Juarez. However,  
3 the trust issues and any defalcation by Ana Castillo as  
4 trustee were not adequately addressed at the trial  
5 conducted in January, and the Court continued the case  
6 to allow the parties time to brief and present further  
7 evidence on the § 523(a)(4) issues.

8 Order Setting Deadlines and Scheduling Final Pre-trial Conference  
9 on § 523(a)(4) issues (May 2, 2011) at 2:7-14 (emphasis added).

10 In her supplemental brief, Ms. Castillo argued: (1) that she  
11 had never served in a fiduciary capacity within the meaning of  
12 § 523(a)(4); and (2) that a defalcation had not occurred because  
13 she disbursed the funds in the Castillo account only with the  
14 express consent of Ms. Juarez, Mr. Juarez or both.

15 Additionally, Ms. Castillo attempted to offer new evidence in the  
16 form of written declarations from both of the Juarezes, as well  
17 as excerpts from their deposition testimony.

18 In response, Mr. Akers objected to the new evidence on a  
19 number of different grounds. Among other things, he pointed out  
20 that the Castillos had not identified either of the Juarezes as  
21 witnesses despite having a duty to do so during discovery and  
22 later during pretrial proceedings. Mr. Akers also claimed that,  
23 even though he had previously taken the Juarezes' depositions in  
24 the Fraudulent Transfer Action, that action did not deal with  
25 § 523(a)(4), so he would be prejudiced by the admission of  
26 testimony from the Juarezes. Mr. Akers further argued that the  
27 Juarezes' prior deposition testimony was wholly inconsistent with  
28 their new declaration testimony. According to Mr. Akers, in the  
former, the Juarezes had testified to not knowing how Ms.  
Castillo had disbursed the proceeds. In contrast, in the latter,  
the Juarezes claimed that Ms. Castillo had requested and obtained

1 their express approval for the amounts disbursed from the  
2 Proceeds.

3 Mr. Akers also asserted, based largely on the undisputed  
4 facts set forth above, that Ms. Castillo had admitted in the  
5 Fraudulent Transfer Action that she was a trustee of an express  
6 trust, in which she held the Proceeds for the benefit Mr. Juarez,  
7 for the express purpose of building the additional rental unit.  
8 As Mr. Akers put it, Ms. Castillo's disbursement of the Proceeds for  
9 any other purpose violated the terms of the express trust.

10 The bankruptcy court held its final hearing, which the court  
11 had designated as a pretrial conference, on June 3, 2011. After  
12 giving the parties the opportunity to discuss the arguments they  
13 had made in their briefs, the court stated that it would not  
14 benefit from hearing the additional evidence Ms. Castillo  
15 proposed to offer. Instead, the court ruled based on the  
16 evidence adduced and judgment entered in the Fraudulent Transfer  
17 Action that the Fraudulent Transfer Judgment would be excepted  
18 from Ms. Castillo's discharge under § 523(a)(4). According to  
19 the bankruptcy court:

20 The judgment entered in the [Fraudulent Transfer  
21 Action] of 65,000 represents a series of transactions,  
and that judgment stands. I haven't -

22 At this point the evidence [has] suggested that the  
23 [Fraudulent Transfer Judgment] should be excepted from  
the discharge; that there was a defalcation from  
24 someone in a position of trust; and they have not  
accounted for the use of these funds in any way that  
25 would absolve them. In other words, the funds were, to  
my eye and this record, were used for their personal  
26 benefit, even though it might, as a subsidiary matter,  
be to their parents. The long and the short of it is  
27 that I have to declare, at this point, that the debt is  
excepted from the discharge.

28 Hr'g Trans. (June 3, 2011) at 35:1-13. In so ruling, the court

1 apparently reasoned: (1) that the evidence from the Fraudulent  
2 Transfer Action was sufficient to establish that Ms. Castillo was  
3 a fiduciary, (2) that a fiduciary may never receive a benefit at  
4 the expense of the trust property, and (3) that for a trustee to  
5 receive such a benefit constituted defalcation per se. In the  
6 process, the court excluded the additional evidence Ms. Castillo  
7 had sought to offer and disregarded her claim that her  
8 disbursement of the proceeds had been authorized by the Juarezes.

9 The court entered a judgment denying Mr. Akers any relief on  
10 his § 727(a) claims, but declaring the Fraudulent Transfer  
11 Judgment excepted from discharge under § 523(a)(4). Ms. Castillo  
12 appealed the bankruptcy court's ruling on the § 523(a)(4) claim,  
13 and Mr. Akers cross-appealed the court's ruling on the § 727(a)  
14 claims.

#### 15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(I) and (J). We have jurisdiction under 28  
18 U.S.C. § 158.

#### 19 ISSUES

20 1. Did the bankruptcy court err when it granted a judgment  
21 in favor of Akers on his § 523(a)(4) Claim?

22 2. Did the bankruptcy court err when it denied relief to  
23 Akers on his § 727 Claims?

#### 24 STANDARDS OF REVIEW

25 In the context of an appeal from a nondischargeability  
26 judgment, we review the bankruptcy court's findings of fact under  
27 the clearly erroneous standard and its conclusions of law de  
28 novo. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382

1 (9th Cir. BAP 2011). But the ultimate question of whether a  
2 particular debt is dischargeable is a mixed question of fact and  
3 law that we review de novo. Id.; see also Searles v. Riley (In  
4 re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004) (stating that  
5 mixed questions are reviewed de novo when they require the court  
6 "to consider legal concepts and exercise judgment about values  
7 animating legal principles.").

8 We review the bankruptcy court's evidentiary rulings for  
9 abuse of discretion. See Johnson v. Neilson (In re Slatkin),  
10 525 F.3d 805, 811 (9th Cir. 2008) (citing Latman v. Burdette, 366  
11 F.3d 774, 786 (9th Cir. 2004)). "We afford broad discretion to a  
12 district court's evidentiary rulings. To reverse such a ruling,  
13 we must find that the district court abused its discretion and  
14 that the error was prejudicial. A reviewing court should find  
15 prejudice only if it concludes that, more probably than not, the  
16 lower court's error tainted the verdict." Harper v. City of Los  
17 Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008) (citations and  
18 internal quotation marks omitted).

19 Under the abuse of discretion standard of review, we first  
20 "determine de novo whether the [bankruptcy] court identified the  
21 correct legal rule to apply to the relief requested." United  
22 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).  
23 And if the bankruptcy court identified the correct legal rule, we  
24 then determine under the clearly erroneous standard whether its  
25 factual findings and its application of the facts to the relevant  
26 law were: "(1) illogical, (2) implausible, or (3) without support  
27 in inferences that may be drawn from the facts in the record."  
28 Id. (internal quotation marks omitted).

1 As for judgments on objections to discharge, "(1) the  
2 court's determinations of the historical facts are reviewed for  
3 clear error; (2) the selection of the applicable legal rules  
4 under § 727 is reviewed de novo; and (3) the application of the  
5 facts to those rules requiring the exercise of judgments about  
6 values animating the rules is reviewed de novo." In re Searles,  
7 317 B.R. at 373.

## 8 DISCUSSION

### 9 A. Section 523 (a) (4) nondischargeability ruling.

#### 10 1. Section 523(a) (4), generally.

11 In pertinent part, § 523(a) (4) excepts from discharge debts  
12 incurred for "for fraud or defalcation while acting in a  
13 fiduciary capacity." § 523(a) (4). The term "fiduciary" is  
14 narrowly defined for purposes of § 523(a) (4). In re Honkanen,  
15 446 B.R. at 378 (citing Cal-Micro, Inc. v. Cantrell (In re  
16 Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003)). In order for  
17 there to be liability under § 523(a) (4), the debtor's fiduciary  
18 capacity "must arise from an express or technical trust that was  
19 imposed before, and without reference to, the wrongdoing that  
20 caused the debt . . . ." In re Cantrell, 329 F.3d at 1125  
21 (citing Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th  
22 Cir. 1996)). A trust "ex maleficio" will not suffice. In re  
23 Honkanen, 446 B.R. at 379. Moreover, "[t]he broad, general  
24 definition of fiduciary - a relationship involving confidence,  
25 trust and good faith - is inapplicable in the dischargeability  
26 context." In re Cantrell, 329 F.3d at 1125 (quoting Ragsdale v.  
27 Haller, 780 F.2d 794, 796 (9th Cir. 1986)).

28 Meanwhile, for purposes of § 523(a) (4), "defalcation" means

1 either a "misappropriation of trust funds or money held in any  
2 fiduciary capacity" or a "failure to properly account for such  
3 funds." Blyler, et al. v. Hemmeter (In re Hemmeter), 242 F.3d  
4 1186, 1190 (9th Cir. 2001).

5 **2. Exclusion of Ms. Castillo's additional evidence.**

6 Both in the bankruptcy court and on appeal, Ms. Castillo has  
7 argued that she did not have the type of fiduciary relationship  
8 with respect to the Proceeds that would qualify her as a  
9 fiduciary within the meaning of § 523(a)(4). She also has argued  
10 that there was no defalcation within the meaning of § 523(a)(4).  
11 In support of her arguments, her opening appeal brief largely  
12 relies on the additional evidence she sought to offer in the  
13 bankruptcy court, particularly the declaration of Monica Juarez.  
14 Liberally construing her appeal brief,<sup>8</sup> Ms. Castillo in essence  
15 claims that the bankruptcy court erred when it declined to  
16 consider her additional evidence. In his responsive brief on  
17 appeal, Mr. Akers argued at length that Ms. Castillo's additional  
18 evidence, particularly the Juarezes' declarations, were  
19 irreconcilably inconsistent with the evidence presented in the  
20 Fraudulent Transfer Action. He also reiterated that Ms. Castillo  
21 did not identify the Juarezes as witnesses during discovery or  
22 pretrial in the Discharge Action.

23 But the bankruptcy court did not exclude Ms. Castillo's  
24 additional testimony on any of the grounds articulated by Mr.  
25 Akers. Instead, the court simply ruled: "I do not believe the  
26

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27 <sup>8</sup>See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
28 (9th Cir. 1990) (holding that pro se appellate briefs should be  
liberally construed).

1 court would benefit from hearing other evidence.” Hr’g Trans.  
2 (June 3, 2011) at 34:17-18. Based on this statement and our  
3 reading of the entire June 3, 2011 hearing transcript, we presume  
4 the court meant that Ms. Castillo’s additional evidence was  
5 irrelevant in light of the grounds on which the court based its  
6 resolution of the fiduciary capacity and defalcation issues.<sup>9</sup>

7 **a. Relevancy of additional evidence to defalcation**  
8 **issue.**

9 We will first look at the bankruptcy court’s resolution of  
10 the defalcation issue and whether the court properly excluded the  
11 additional evidence on relevancy grounds in light of the court’s  
12 defalcation ruling.

13 The bankruptcy court held that, regardless of whether the  
14 Proceeds had been accounted for and regardless of whether the  
15 Juarezes had authorized Ms. Castillo’s use of the Proceeds for  
16 her own benefit, defalcation necessarily occurred because she  
17 used the Proceeds for her own benefit. While ordinarily a  
18 nondischargeable defalcation occurs when a trustee retains trust  
19 funds for his or her own benefit, see, e.g., Banks v. Gill  
20 Distribution Centers, Inc. (In re Banks), 263 F.3d 862, 865 (9th  
21 Cir. 2001); Lovell v. Stanifer (In re Stanifer), 236 B.R. 709,  
22 719 (9th Cir. BAP 1999), there may be no defalcation if the  
23 retention was authorized, either by the terms of the trust or the  
24 consent of the beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS

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25  
26 <sup>9</sup>When the basis for the court’s evidentiary ruling is not  
27 fully articulated, we may infer the basis from the court’s  
28 statements and the surrounding circumstances. See, e.g., Obrey  
v. Johnson, 400 F.3d 691, 694 (9th Cir. 2005); U.S. v.  
Cruz-Garcia, 344 F.3d 951, 955-57 & n.2 (9th Cir. 2003).

1 § 78, comments c(2) and c(3) (2007).

2         Simply put, if the Juarezes duly authorized Ms. Castillo to  
3 keep the funds and use them for her own benefit, then there was  
4 no misappropriation, and hence no defalcation.

5         To analyze this proposition, we start with the dictionary  
6 definition of misappropriation. The dictionary definition that  
7 meshes best with § 523(a)(4) is the broadest one - "a wrong  
8 use."<sup>10</sup> The bankruptcy court in essence decided that any use of  
9 trust funds for the benefit of the trustee constituted a misuse  
10 and hence a misappropriation. But we simply cannot agree with  
11 the bankruptcy court's premise that a trustee automatically  
12 misuses trust funds whenever that trustee uses such funds for his  
13 or her own benefit, even when the settlor or the beneficiary has  
14 duly authorized that particular use. As we have indicated, under  
15 appropriate circumstances, the law of trusts permits either a  
16 settlor or a beneficiary to authorize a trustee to benefit from  
17 trust property. See RESTATEMENT (THIRD) OF TRUSTS § 78, cmts. c(2)  
18 and c(3) (2007).<sup>11</sup>

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20         <sup>10</sup>We derive this definition from the Oxford English  
21 Dictionary, which defines misappropriation as "Appropriation of  
22 (something) for a wrong use; spec. the action or an instance of  
taking (funds, etc.) fraudulently or unfairly." (Emphasis added.)

23         <sup>11</sup>Indeed, a person may serve both as a trustee and a  
24 beneficiary under the same trust. See RESTATEMENT (THIRD) OF TRUSTS  
25 § 78 (referring to "[t]he common situation in which one or more  
26 of a trust's beneficiaries are selected or authorized by the  
27 settlor to serve as trustee or co-trustee"); see also RESTATEMENT  
28 (THIRD) OF TRUSTS § 32, comment b ("settlors often select  
beneficiaries as trustees or co-trustees, and the existence of  
conflicting interests is not ordinarily a basis for a court to  
remove (or deny appointment to) a trustee of the settlor's  
choice.")



1           Moreover, the Ninth Circuit has held that the meaning of  
2 defalcation for purposes of § 523(a)(4) does not include a  
3 diminution of trust assets resulting from actions the trustee  
4 explicitly was authorized to take. Blyler, et al. v. Hemmeter  
5 (In re Hemmeter), 242 F.3d 1186, 1191 (9th Cir. 2001). In  
6 Hemmeter, pension plan participants commenced an adversary  
7 proceeding against the debtor, alleging that losses suffered by  
8 the plans were nondischargeable debts of the debtor under  
9 § 523(a)(4). Id. at 1189. The employee plan participants  
10 further alleged that the plan losses resulted from the debtor's  
11 investment of plan funds in the stock of the employer company  
12 that had established the pension plans. Id. at 1191. In  
13 affirming the bankruptcy court's Civil Rule 12(b)(6) dismissal,  
14 the Hemmeter court pointed out that the plans specifically  
15 authorized plan fiduciaries to invest plan funds in the employer  
16 company's stock. Id. According to Hemmeter, the loss of the  
17 plan funds under the alleged circumstances, as a matter of law,  
18 could not have constituted a defalcation for purposes of  
19 § 523(a)(4) because the plans explicitly authorized the  
20 transactions that led to the losses. Id.<sup>12</sup>

21           Based on the Restatement and Hemmeter, we hold that the  
22 bankruptcy court erred as a matter of law when it declined to  
23 consider whether Ms. Castillo was authorized to use the Proceeds  
24 in the ways that she did. As a result, the court also erred when  
25 it excluded Ms. Castillo's additional evidence on relevancy

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27           <sup>12</sup>Accord, Destfino v. Bockting, 2012 WL 258408 (9th Cir.  
28 Mem. Dec. Jan 30, 2012); see also In re Banks, 263 F.3d at 870  
(indicating that beneficiary of trust may by agreement authorize  
the trustee to keep trust funds for the trustee's own benefit).

1 grounds. The Juarezes' declarations spoke directly to the issue  
2 of whether either or both of them had authorized Ms. Castillo to  
3 use the Proceeds for her own benefit. Accordingly, the  
4 bankruptcy court erred when it concluded that the additional  
5 evidence was irrelevant to the defalcation issue.<sup>13</sup>

6 **b. Relevancy of additional evidence to fiduciary**  
7 **capacity issue.**

8 The bankruptcy court relied upon the facts drawn from the  
9 Fraudulent Transfer Action to infer that Ms. Castillo was a  
10 fiduciary. Based on these facts, the court ruled that "there was  
11 a defalcation from someone in a position of trust." (emphasis  
12 added).<sup>14</sup> The court did not explain why it considered Ms.

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14 <sup>13</sup>Mr. Akers has asserted that Ms. Juarez had no authority to  
15 direct Ms. Castillo regarding the use of the Proceeds because  
16 they were solely Mr. Juarez's property. Assuming without  
17 deciding that the Proceeds were Mr. Juarez's sole and separate  
18 property, he still may have authorized Ms. Juarez, as his agent,  
19 to direct Ms. Castillo as to how the Proceeds should be used.  
20 The undisputed facts on which both parties rely could support an  
21 inference of such authorization. On remand, the bankruptcy court  
22 will be free to address the ownership and authorization issues.

23 <sup>14</sup>On its face, this solitary statement is ambiguous as to  
24 the specific type of fiduciary the court found Ms. Castillo to  
25 be. It would have been relatively easy for the court simply to  
26 have stated that Ms. Castillo was the trustee of an express trust  
27 consisting of the Proceeds, which she held for Mr. Juarez's  
28 benefit. That is precisely what Mr. Akers alleged and argued  
throughout the Discharge Action. But the court used no such  
language. Instead, the court used language sounding more like a  
reference to a "position of trust and confidence" which in  
California can cause a generic fiduciary relationship to arise.  
See, e.g., Lewis v. LeBaron, 61 Cal.Rptr. 903, 911 (Cal. Ct. App.  
1967); Sime v. Malouf, 212 P.2d 946, 955 (Cal. Ct. App. 1949).  
These types of generic fiduciary relationships do not by  
themselves give rise to liability under § 523(a)(4). As the  
Ninth Circuit has repeatedly held, "[t]he broad, general  
definition of fiduciary - a relationship involving confidence,  
(continued...)

1 Castillo's additional evidence irrelevant to this issue. As set  
2 forth above, the court merely stated "I do not believe the court  
3 would benefit from hearing other evidence." Hr'g Trans. (June 3,  
4 2011) at 34:17-18.

5 We disagree with the bankruptcy court. If it had considered  
6 and credited the statements in the Juarezes' declarations  
7 regarding their directions on the use of the Proceeds, those  
8 facts would have tended to undermine Mr. Akers' claim that Ms.  
9 Castillo was the Trustee of an express trust.

10 To explain why this is so, we must look at the substantive  
11 law of trusts. In California, an express trust requires a  
12 settlor by acts or words to objectively manifest an intent to  
13 create a trust. See Lonely Maiden Prods., LLC v. GoldenTree  
14 Asset Mgmt, LP, 135 Cal. Rptr. 3d 69, 78 (Cal. Ct. App. 2011);  
15 Chang v. Redding Bank of Commerce, 35 Cal. Rptr. 2d 64, 70 (Cal.  
16 Ct. App. 1994); Petherbridge v. Prudential Sav. & Loan Ass'n, 145  
17 Cal. Rptr. 87, 93 (Cal. Ct. App. 1978). The trustor's acts or  
18 words also must establish what property is subject to the trust,  
19 the trust's purpose, and the trust's beneficiary. See Chang, 35  
20 Cal. Rptr. 2d at 70; Abrams v. Crocker-Citizens Nat'l Bank, 114  
21 Cal. Rptr. 913, 915 (Cal. Ct. App. 1974).

22 Most importantly, in ascertaining the settlor's intent, all  
23 of the circumstances surrounding the transaction ordinarily  
24 should be considered. See Lonely Maiden Prods., 135 Cal. Rptr.  
25 3d at 78; Petherbridge, 145 Cal. Rptr. at 93. The Juarezes'

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26  
27 <sup>14</sup>(...continued)  
28 trust and good faith - is inapplicable in the dischargeability  
context." See In re Cantrell, 329 F.3d at 1125 (quoting Ragsdale  
v. Haller, 780 F.2d 794, 796 (9th Cir. 1986)).

1 various statements about what the Proceeds were supposed to be  
2 used for are directly relevant to the issue of the alleged  
3 trust's purpose and, indeed, whether Mr. Juarez intended to  
4 create a trust at all.<sup>15</sup> Moreover, even if we were to assume  
5 that a trust was created in the first instance, it also is  
6 possible that Mr. Juarez as settlor later modified or revoked the  
7 trust, either by directly authorizing alternate uses of the  
8 Proceeds, or indirectly through Ms. Juarez as his representative  
9 or agent.<sup>16</sup> Such modifications would not be unusual or unexpected  
10 when, as here, the trust allegedly was created through oral  
11 statements, and not by a written instrument.

12 Unless inadmissible on some other grounds, all relevant  
13 evidence generally is admissible. See Fed. R. Evid. 402; Shad v.  
14 Dean Witter Reynolds, Inc., 799 F.2d 525, 529 (9th Cir. 1986).  
15 Evidence is considered relevant if it has "any tendency to make a

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17 <sup>15</sup>See generally id. at 97-98 (stating that the parties'  
18 conduct is often the most probative evidence of the intent to  
19 create a trust and holding that the parties' conduct was  
inconsistent with a trust relationship and the attendant legal  
consequences).

20 <sup>16</sup>On the settlor's power to revoke or modify an inter vivos  
21 trust, see generally RESTATEMENT (THIRD) OF TRUSTS § 63 (2003).

22 Akers strenuously and at length has asserted that the  
23 Juarezes' later statements regarding the use of the Proceeds were  
inconsistent with their earlier testimony, going so far as to  
characterize the later statements as a fraud on the court.  
24 However, notwithstanding Mr. Akers' presentation, it still is  
conceivable that the Juarezes might have been able to reconcile  
25 or at least explain the differences in their various statements  
if they had been given the opportunity to testify at a further  
26 evidentiary hearing. The bankruptcy court as the trier of fact  
needed to find whether the Juarezes' various statements regarding  
27 the Proceeds were credible. In other words, the issue of the  
28 Juarezes' veracity went to the weight and credibility that should  
be given to their declarations and not to their admissibility.

1 [material] fact more or less probable than it would be without  
2 the evidence." Fed. R. Evid. 401 (emphasis added); see also  
3 Shad, 799 F.2d at 529. Here, as explained above, Ms. Castillo's  
4 additional evidence was relevant to both the defalcation and  
5 fiduciary capacity issues. Consequently, the bankruptcy court  
6 erred when it excluded Ms. Castillo's additional evidence on  
7 relevancy grounds.

### 8 **3. Harmless error.**

9 Having determined that the bankruptcy court abused its  
10 discretion in excluding Ms. Castillo's additional evidence as  
11 irrelevant, we still must determine whether Ms. Castillo was  
12 prejudiced by the court's abuse of discretion. Harper, 533 F.3d  
13 at 1030; In re Slatkin, 525 F.3d at 811. An appellant has been  
14 prejudiced by the trial court's erroneous evidentiary ruling if  
15 it is more probable than not that the error tainted the trial  
16 court's decision. Molina v. Astrue, 674 F.3d 1104, 1119 (9th  
17 Cir. 2012); Harper, 533 F.3d at 1030.

18 In determining whether the error was prejudicial, we must  
19 look at the circumstances of the particular case. See Shinseki  
20 v. Sanders, 556 U.S. 396, 407-08, 129 S.Ct. 1696, 1704-05, 173  
21 L.Ed.2d 532 (2009). More specifically, we must look at factors  
22 such as whether the evidence erroneously excluded was either  
23 tangential or cumulative, and also whether the overall strength  
24 of the case against Ms. Castillo was so great as to render the  
25 erroneously excluded evidence inconsequential. Molina, 674 F.3d  
26 at 1119. While the harmless error analysis sometimes may require  
27 a review of the entire record, the surrounding circumstances of  
28 the case often will make it clear to the appellate court "that

1 the ruling, if erroneous, was harmful and nothing further need be  
2 said." Shinseki, 556 U.S. at 410, 129 S.Ct. at 1706.

3 This is one of those cases where the prejudice to the  
4 appellant from the erroneous evidentiary ruling is rather  
5 obvious. As our above discussion of relevancy demonstrates, Ms.  
6 Castillo's additional evidence cannot be characterized as  
7 tangential. Nor can it be characterized as cumulative.  
8 "Cumulative evidence" is evidence which replicates other admitted  
9 evidence. U.S. v. Ives, 609 F.2d 930, 933 (9th Cir. 1979).  
10 Here, Mr. Akers' oft-repeated argument that the additional  
11 evidence was inconsistent with the evidence adduced in the  
12 Fraudulent Transfer Action belies any notion that the additional  
13 evidence could be considered cumulative.

14 Moreover, our view of the overall strength of Mr. Akers'  
15 case persuades us that his position was not so strong as to  
16 render Ms. Castillo's additional evidence inconsequential. The  
17 undisputed facts on which he relied to establish the existence of  
18 an express trust are not necessarily inconsistent with a mere  
19 agency relationship.<sup>17</sup> But an agency would have been  
20 insufficient by itself to impose liability under § 523(a)(4); as  
21 we previously stated, a debtor is not a fiduciary within the  
22 meaning of § 523(a)(4) unless he or she is trustee of an express  
23 or technical trust. In re Cantrell, 329 F.3d at 1125.

24 Indeed, our doubts regarding Mr. Akers' case are amplified  
25 by the apparent tension between the bankruptcy court's  
26 Fraudulent Transfer Judgment and its fiduciary capacity ruling.

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27  
28 <sup>17</sup>On the distinctions between trusts, agencies and agency-  
trusts, see generally Chang, 35 Cal. Rptr. 2d at 70-71.

1 If Ms. Castillo held the Proceeds pursuant to an express trust  
2 for Mr. Juarez's benefit, Mr. Juarez still held that beneficial  
3 interest in the Proceeds notwithstanding the May 31 Transfer. In  
4 other words, to the extent an express trust existed, the May 31  
5 Transfer did not transfer anything of value from Mr. Juarez to  
6 Ms. Castillo. Simply put, it is difficult to reconcile Mr.  
7 Akers' case for an express trust with the bankruptcy court's  
8 prior Fraudulent Transfer Judgment.

9 Given the above-referenced circumstances, we conclude that  
10 Ms. Castillo was prejudiced by the bankruptcy court's erroneous  
11 exclusion of her additional evidence. Accordingly, we must  
12 VACATE the bankruptcy court's § 523(a)(4) ruling and REMAND for  
13 further proceedings.<sup>18</sup>

14 **B. Section 727(a) objection to discharge ruling.**

15 In his cross-appeal, Mr. Akers has asked this Panel to  
16 review the "facts and evidence in this case" and to hold that the  
17 bankruptcy court erred in denying him any relief on his § 727(a)  
18 claims. See Aple. Opn. Brf. (Sept. 27, 2011) at p. 31. Mr.  
19 Akers in essence has argued on appeal that the record does not  
20

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21 <sup>18</sup>Mr. Akers also argued that we should have dismissed Ms.  
22 Castillo's appeal because she did not provide us with all  
23 necessary transcripts. While there is no question that Ms.  
24 Castillo should have provided us with the missing transcripts and  
25 that such transcripts would have facilitated our review, we  
26 decline to dismiss on this basis because we were able to conduct  
27 a meaningful review without the transcripts. See Kyle v. Dye (In  
28 re Kyle), 317 B.R. 390, 393-94 (9th Cir. BAP 2004), aff'd, 170  
Fed. Appx. 457 (9th Cir. 2006) (holding that, so long as record  
permits meaningful review, failure to provide all required  
transcripts need not result in dismissal or summary affirmance,  
and the appellate court has discretion to disregard the defect  
and decide the appeal on the merits).

1 support the bankruptcy court's dispositive findings that the  
2 Castillos' testimony was credible and that any errors or  
3 omissions by the Castillos in their bankruptcy case resulted from  
4 inadvertence rather than intentional deceit.

5 Because Mr. Akers' cross-appeal challenged the bankruptcy  
6 court's dispositive factual findings, it was incumbent upon him  
7 to demonstrate how those findings were clearly erroneous, and he  
8 needed to provide us with the bankruptcy court's findings and all  
9 evidence upon which those findings were based. Burkhart v. Fed.  
10 Dep. Ins. Corp. (In re Burkhart), 84 B.R. 658, 660 (9th Cir. BAP  
11 1988). Failure to provide necessary transcripts may be grounds  
12 for dismissal or summary affirmance of the appeal. See, e.g.,  
13 Jones v. City of Santa Monica, 382 F.3d 1052, 1057 (9th Cir.  
14 2004) (dismissing portion of appeal dependent on hearing  
15 transcripts not provided); Syncom Capital Corp. v. Wade, 924 F.2d  
16 167, 169 (9th Cir. 1991) (dismissing appeal based on appellant's  
17 failure to provide necessary trial transcript); see also In re  
18 Kyle, 317 B.R. at 393 (stating that "failure to provide a  
19 sufficient record to support informed review of trial-court  
20 determinations may, but need not, lead either to dismissal of the  
21 appeal or to affirmance for inability to demonstrate error.").

22 While we often attempt to conduct some measure of review in  
23 the absence of necessary transcripts, see, e.g., In re Kyle, 317  
24 B.R. at 393-94, we cannot do so here. Mr. Akers' only assignment  
25 of error in his cross-appeal concerns the bankruptcy court's  
26 dispositive findings on the § 727(a) claims, and we simply cannot  
27 meaningfully consider those findings without the January 26, 2011  
28 trial transcript.



1 Under appropriate circumstances, when we are confronted with  
2 a materially incomplete record, including the absence of  
3 essential transcripts, we may either dismiss the appeal or  
4 summarily affirm. Id. We acknowledge that, before we do so, we  
5 typically consider whether some judicial action short of  
6 dismissal or summary affirmance is justified in light of the  
7 circumstances presented. See Ehrenberg v. Cal. State Fullerton  
8 (In re Beachport Enter.), 396 F.3d 1083, 1087 (9th Cir. 2005).  
9 When considering what action to take, we ordinarily look at the  
10 impact of the sanction and the possibility of employing alternate  
11 sanctions. Id. We also assess whether the appellant or his or  
12 her counsel is more responsible for the procedural noncompliance.  
13 Id.

14 However, as Beachport itself pointed out, when the  
15 noncompliance with procedural rules is "egregious" an explicit  
16 discussion of alternative sanctions is unnecessary. Id. at 1087.  
17 "Egregious" is precisely how we would describe Mr. Akers' failure  
18 to supply the January 26, 2011 trial transcript. Mr. Akers was  
19 well aware of the requirement to provide necessary transcripts.  
20 In fact, he argued on appeal that Ms. Castillo's failure to  
21 provide such transcripts should result in dismissal of her  
22 appeal.<sup>19</sup> Less than two pages earlier, he had argued in his  
23 appellate brief that we should overturn the bankruptcy court's  
24 § 727(a) ruling, which hinged solely on the court's findings  
25 regarding the Castillos' credibility and their intent. We simply

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26  
27 <sup>19</sup>As it turned out, we were able to conduct a meaningful  
28 merits review of her appeal without all of the requisite  
transcripts. See n.17, supra. The same cannot be said for our  
ability to conduct a merits review of Mr. Akers' appeal.

1 cannot fathom how Mr. Akers expected us to address the merits of  
2 his appellate argument without the January 26, 2011 trial  
3 transcript.

4 Furthermore, we explicitly warned both parties in an order  
5 we issued on December 29, 2011, that the failure of either party  
6 to provide us with necessary transcripts could result in  
7 dismissal or summary affirmance of either or both of the  
8 cross-appeals. Yet Mr. Akers still took no action to provide us  
9 with the transcript we needed to address his cross-appeal from  
10 the § 727(a) ruling.

11 Under these circumstances, we consider it appropriate to  
12 summarily affirm the bankruptcy court's § 727(a) ruling.

13 **CONCLUSION**

14 For the reasons set forth above, we VACATE AND REMAND the  
15 bankruptcy court's § 523(a)(4) ruling, and we AFFIRM the court's  
16 § 727(a) ruling.