

APR 22 2011

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. AZ-10-1331-JuMkPa
)	
6	LEONA PHYLLIS FERRARA,)	Bk. No. 09-09228
)	
7	Debtor.)	Adv. No. 09-00830
	_____)	
8)	
9	LEONA PHYLLIS FERRARA,)	
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M *
)	
12	MARY JANE CONDIT, Conservator)	
	of the Estate of John)	
13	Charochak,)	
)	
14	Appellee.)	
	_____)	

Argued and Submitted on February 18, 2011
at Phoenix, Arizona

Filed - April 22, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Appearances: Gary L. Thomas, Esq. argued for Appellant
 Leona Phyllis Ferrara
 Craig E. Collins, Esq. argued for Appellee
 Mary Jane Condit

Before: JURY, MARKELL, and PAPPAS, 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.

1 Appellant, debtor Leona Phyllis Ferrara aka Leona Charochak
2 ("Leona" or "Debtor"), appeals the bankruptcy court's judgment
3 granting summary judgment to appellee Mary Jane Condit
4 ("Condit"), Conservator of the Estate of John Charochak
5 ("John").

6 Applying the doctrine of issue preclusion, the bankruptcy
7 court determined that Condit's state court judgment debt for
8 \$48,663.55 based on Leona's breach of fiduciary duty under
9 Arizona's Adult Protective Services Act ("APSA") was
10 nondischargeable under § 523(a)(4).¹ In a separate proceeding,
11 the bankruptcy court ruled that fees and costs of \$1,077.60
12 awarded by the state court were also excepted from discharge.

13 We AFFIRM.

14 I. FACTS

15 John and Leona were married on December 31, 2000, and are
16 still husband and wife. Prior to their marriage, John and Leona
17 executed a Pre-Nuptial Agreement which stated that they would
18 keep separate the assets brought into the marriage. However,
19 the parties' earnings after the marriage were designated as
20 community property. In March 2001, John and Leona bought a 2001
21 Buick LaSabre which was titled in both their names and both
22 contributed to the purchase price.

23 John and Leona maintained separate checking accounts, but
24 they also had a joint account to which they both contributed and
25

26 ¹ Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 from which they paid common living expenses. John usually
2 deposited his social security check into the joint account and
3 would supplement the joint account with additional deposits as
4 necessary. John paid his separate bills from his separate Wells
5 Fargo Bank ("Wells Fargo") account.

6 The couple has not lived together since late April 2005
7 when John was placed in a full-time care facility due to
8 complications that arose from bypass surgery in September 2004.
9 After John was first hospitalized in late September 2004, Leona
10 executed a number of checks, made numerous withdrawals,
11 initiated various correspondence to change legal documents, and
12 transferred John's separate funds to herself.

13 Leona transferred the money from John's separate Wells
14 Fargo account and closed the account. She wrote a check to
15 herself dated September 18, 2004, in the amount of \$10,000 and
16 transferred \$5,000 and \$2,504.90 to their joint account. Leona
17 also wrote a \$2,000 check to John's daughter, Sandra. In
18 addition, she withdrew \$10,000 from John's separate IRA account,
19 which she deposited into their joint account. Finally, Leona
20 received John's social security and pension checks which she
21 used for herself. John's children² also attempted to access
22 John's funds and maintain control over them.

23 In March 2005, when John was declining at home after his
24 surgery and Leona had become aware of disputes among his adult
25 children regarding his care and his finances, Leona engaged the
26 services of Condit to assist her with obtaining medical services

27
28 ² John had four adult children from a previous marriage.

1 and care for John. Leona's engagement agreement with Condit did
2 not require her to turn over all of John's social security or
3 pension checks.

4 On September 12, 2005, Condit applied for and was
5 appointed John's conservator.

6 **A. The State Court Lawsuit**

7 On February 1, 2006, Condit filed a Petition for
8 Instructions in the Maricopa County Superior Court regarding
9 John's separate Wells Fargo account, the 2001 Buick, and the
10 availability of John's Wachovia Securities ("Wachovia") account
11 due to the status of his daughter, Patricia, as a joint tenant
12 with the right of survivorship. The ruling on the petition took
13 place as part of the trial described below.

14 On July 21, 2006, Condit filed a complaint against Leona
15 seeking damages for unjust enrichment, conversion, breach of
16 fiduciary duty, breach of good faith and fair dealing in tort,
17 exploitation of vulnerable adult and partition of personal
18 property.

19 On January 30, 2008, the state court granted partial
20 summary judgment for Condit, finding that John was a "vulnerable
21 adult"³ continuously and at all times subsequent to his
22 September 2004 hospitalization. This threshold finding set the
23 stage for the causes of action alleged in Condit's complaint
24 which were based in large part on Ariz. Rev. Stat. § 46-456 that
25

26 ³ Under Ariz. Rev. Stat. § 46-451.A.10, a vulnerable
27 adult is one "who is unable to protect himself from abuse,
28 neglect or exploitation by others because of a physical or mental
impairment."

1 imposes civil penalties against a person in a position of trust
2 and confidence and who financially exploits a vulnerable adult.

3 At the time of trial, Ariz. Rev. Stat. § 46-456 provided in
4 relevant part:⁴

5 A. A person who is in a position of trust and
6 confidence to an incapacitated or vulnerable adult
7 shall act for the benefit of that person to the same
8 extent as a trustee pursuant to title 14, chapter 7,
9 article 3.

10 B. A person who is in a position of trust and
11 confidence and who by intimidation or deception
12 knowingly takes control, title, use or management of
13 an incapacitated or vulnerable adult's asset or
14 property with the intent to permanently deprive that
15 person of the asset or property is guilty of theft as
16 provided in § 13-1802.

17 C. A person who violates subsection A or B of this
18 section is subject to damages in a civil action
19 brought by or on behalf of an incapacitated or
20 vulnerable adult that equal up to three times the
21 amount of the monetary damages.

22 . . .

23 G. For the purposes of this section:

24 3. "Position of trust and confidence" means that a
25 person is any of the following:

26 (a) one who has assumed a duty to provide care to the
27 incapacitated or vulnerable adult;

28 (b) a joint tenant or a tenant in common with an
incapacitated or vulnerable adult; or

(c) one who is in a fiduciary relationship with an
incapacitated or vulnerable adult including a de facto
guardian or de facto conservator.

Under Ariz. Rev. Stat. § 46-451.A, a

2. "De facto conservator" means any person who takes

⁴ The statute was amended effective January 1, 2009, and
deleted reference to title 14, chapter 7, article 3, which
contains the statutes applicable to trustees of an express trust.

1 possession of the estate of a vulnerable adult,
2 without right or lawful authority. A de facto
3 conservator is subject to all of the responsibilities
4 that attach to a legally appointed conservator or
5 trustee.

6 3. "De facto guardian" means any person who takes
7 possession of the person of a vulnerable adult,
8 without right or lawful authority. A de facto
9 guardian is subject to all of the responsibilities
10 that attach to a legally appointed guardian.

11 4. "Exploitation" means the illegal or improper use of
12 a vulnerable adult or his resources for another's
13 profit or advantage.

14 On February 19, 2008, a three-day trial commenced which
15 resulted in judgment against Debtor for \$48,663.55 in damages
16 plus \$28,818.10 in attorney's fees, costs and interest. The
17 judgment also partitioned the 2001 Buick and required Leona to
18 reimburse the estate \$5,250 within thirty days of the judgment,
19 which was entered on May 15, 2008.

20 The state court made the following findings:

21 Leona, as John's wife, was a person in a position of
22 trust and confidence to John and had a duty to act for
23 his benefit to the same extent as a trustee. Leona
24 did violate that trust by closing John's separate
25 account, by transferring funds to the joint account,
26 by withdrawing funds from his separate IRA, by
27 retaining John's Social Security and pension benefits
28 and not contributing to his care, by using the ward's
interest in the Buick without compensation and
receiving and benefitting from the ward's funds used
to pay her car insurance and vehicle registration
expenses.

[W]hile the ward was a vulnerable adult, Leona
executed a number of checks, made numerous
withdrawals, initiated various correspondence to
change legal documents, and transferred the ward's
separate funds to herself.

By December 2004, it was clear that the ward, John,
was incapacitated, vulnerable and not able to handle
his affairs. Leona transferred the money and closed
[John's separate Wells Fargo Account]. She wrote a
check (#631) to herself dated September 18, 2004,
processed December 27, 2004, in the amount of \$10,000.

1 \$5000 was transferred to [their] joint account by
2 check #646 on December 24th. A \$2,000 check dated
3 December 7, 2004, was paid to the ward's daughter,
Sandra; and \$2,504.90 was transferred to [the] joint
account . . . on December 31st.

4 Therefore, Leona violated her fiduciary duty and was
5 unjustly enriched by converting this money
(\$22,108.21) to herself and others. This was at the
6 time John was a vulnerable adult and was a violation
of her fiduciary duty, and, therefore, constitutes
exploitation.

7
8 On December 2, 2004, Leona withdrew \$10,000 from the
ward's separate Cuna Mutual Group, IRA. . . . It
9 appears that the \$10,000 was deposited into [the]
joint account . . . on December 7, 2004. Leona,
10 therefore, violated her fiduciary duty and was
unjustly enriched by converting the \$10,000 IRA money
11 to herself. This was at a time John was a vulnerable
adult and was a violation of her fiduciary duty and,
12 therefore, constitutes exploitation.

13 On December 29, 2004, Leona had the ward change his
power of attorney appointing herself as durable power
14 of attorney, health care power of attorney and writing
a new will nominating Leona as personal
15 Representative. This was at the time John was a
vulnerable adult and was a violation of her fiduciary
16 duty, and therefore, constitutes exploitation.

17 On December 29, 2004, Leona sent a letter on behalf of
the ward withdrawing consent of daughter Patricia as
18 joint member on the Wachovia Account and granting
Leona access to the account in an attempt to exercise
19 control over the account and John's funds for herself.
This was at the time John was a vulnerable adult and
20 was a violation of her fiduciary duty, and therefore,
constitutes exploitation.

21 For the period between April 2005 and September 2005,
22 Leona continued to receive, accept, deposit and retain
the ward's Social Security and pension checks. This
23 amounted to \$8,738.29. Leona, therefore, violated her
fiduciary duty and was unjustly enriched by converting
24 \$8,738.29 to herself for her use. This was when John
was a vulnerable adult and, therefore, constitutes
25 exploitation.

26 The period between April 2005 and September 2005 was a
time John was a vulnerable adult, and Leona used the
27 jointly owned vehicle without compensation of the
ward's interest and accepted the benefit of the
28 Conservator's payments for insurance and registration.

1 The conservatorship paid the vehicle's insurance and
2 registration from the ward's funds on the vehicle in
3 the amount of \$2,557.05. Since ward John was
4 incapacitated and Leona had exclusive use and benefit
5 of the vehicle, Leona was unjustly enriched by having
6 the conservatorship pay the insurance and registration
7 in the amount of \$2,557.05. This was at a time John
8 was vulnerable adult and was a violation of her
9 fiduciary duty, and therefore, constitutes
10 exploitation.

11 **B. The Adversary Proceeding**

12 On May 1, 2009, Debtor filed her chapter 7 petition.
13 Condit filed a complaint against Debtor alleging that the state
14 court judgment debt was nondischargeable under § 523(a)(4), (6)
15 and (15).

16 On March 8, 2010, Condit filed a motion for summary
17 judgment on the grounds that the judgment debt was
18 nondischargeable as a matter of law based on the doctrine of
19 issue preclusion. Debtor filed a response and a cross-motion
20 for summary judgment seeking a declaration, as a matter of law,
21 that the debt was dischargeable.

22 At the May 20, 2010 hearing, the bankruptcy court granted
23 summary judgment for Condit on her § 523(a)(4) claim and
24 granted Debtor's cross-motion for summary judgment under
25 § 523(a)(15).⁵ The court stated its findings of fact and
26 conclusions of law on the record. The order reflecting the
27 court's ruling was entered on August 14, 2010, and contained a
28 certification under Fed. R. Civ. P. 54(b) (made applicable by
Rule 7054), making it final for appeal. Debtor filed this
timely appeal.

⁵ Condit dismissed her claim under § 523(a)(6).

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction over this proceeding
3 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
4 under 28 U.S.C. § 158.

5 **III. ISSUE**

6 Whether Debtor had the kind of fiduciary relationship with
7 her husband under Arizona law that fell within the scope of the
8 § 523(a)(4).

9 **IV. STANDARD OF REVIEW**

10 We review the grant of a motion for summary judgment de
11 novo. Honkanen v. Hopper (In re Honkanen), __ B.R. __ , 2011 WL
12 781831, at *2 (9th Cir. BAP 2011).

13 **V. DISCUSSION**

14 Summary judgment should be granted when the record shows
15 that "there is no genuine issue as to any material fact and that
16 the movant is entitled to judgment as a matter of law." Fed. R.
17 Civ. P. 56(c)(2) (made applicable by Rule 7056). The doctrine
18 of issue preclusion is applicable to issues decided on summary
19 judgment in the context of § 523(a). Grogan v. Garner, 498 U.S.
20 279, 284 n.11 (1991).

21 Under 28 U.S.C. § 1738 we are required to give preclusive
22 effect to the state court judgment if the courts of Arizona
23 would do so. Allen v. McCurry, 449 U.S. 90, 96 (1980). Under
24 Arizona law, the doctrine of issue preclusion bars a party from
25 relitigating an issue identical to one he has previously
26 litigated to a determination on the merits in another action.
27 Hawkins v. State, Dep't of Econ. Sec., 900 P.2d 1236, 1239
28 (Ariz. Ct. App. 1995). The elements necessary to invoke the

1 doctrine are: (a) the issue was actually litigated in the
2 previous proceeding, (b) there was a full and fair opportunity
3 to litigate the issue, (c) resolution of such issue was
4 essential to the decision, (d) there was a valid and final
5 decision on the merits, and (e) there was a common identity of
6 the parties. Id.

7 Condit, as the party asserting issue preclusion, had the
8 burden of proving that all of the threshold requirements were
9 met. Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir.
10 BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Reasonable
11 doubts about what was decided in the prior action should be
12 resolved against the party seeking preclusion. Id. Here, for
13 issue preclusion purposes, the only element Debtor questions on
14 appeal is whether the statutory fiduciary duty imposed under
15 Ariz. Rev. Stat. § 46-456 contains the identical elements as
16 those required under § 523(a)(4).

17 Section 523(a)(4) excepts from discharge any debt "for
18 . . . defalcation while acting in a fiduciary capacity"
19 To prevail under this exception from discharge, Condit had to
20 prove, by a preponderance of the evidence, that (1) debtor was
21 acting in a fiduciary capacity; and (2) while acting in that
22 capacity she engaged in defalcation. Honkanen, __ B.R. at __,
23 2011 WL 781831, at *2.

24 **A. Fiduciary Capacity**

25 Section 523(a)(4)'s reference to fiduciary capacity is
26 strict and narrow. Davis v. Aetna Acceptance Co., 293 U.S. 328,
27 333 (1934); Honkanen, __ B.R. at __, 2011 WL 781831, at *2. The
28 strict and narrow construction generally limits the fiduciary

1 relationship under § 523(a)(4) to those arising from either
2 express trusts or where the law imposes one. Byler v. Hemmeter
3 (In re Hemmeter), 242 F.3d 1186 (9th Cir. 2001); Lewis v. Scott
4 (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996).

5 Here, we consider whether one acting as a fiduciary-trustee
6 under the APSA is also acting in a fiduciary capacity under
7 § 523(a)(4). To determine if there is such an equivalence, we
8 consider whether the statute in question: "(1) defines the trust
9 res; (2) identifies the fiduciary's fund management duties; and
10 (3) imposes obligations on the fiduciary prior to the alleged
11 wrongdoing." Hemmeter, 242 F.3d at 1186.

12 The state court found that Debtor was in a position of
13 trust and confidence to John under Ariz. Rev. Stat. § 46-456 and
14 that finding is not disputed on appeal. While the fiduciary
15 capacity referred to by § 523(a)(4) is not the kind of general
16 fiduciary status often found in non-bankruptcy law based on a
17 relationship of trust and confidence, see Honkanen, ___ B.R. at
18 ___, 2011 WL 781831, at *2, Ariz. Rev. Stat. § 46-456 put Debtor
19 in a position occupied by that of a trustee of an express trust
20 and subject to the same rules.

21 Ariz. Rev. Stat. § 46-456.A sets forth a mandatory
22 requirement that a person who is in a position of trust and
23 confidence to a vulnerable adult shall act for the benefit of
24 that person to the same extent as a trustee pursuant to
25 title 14, chapter 7, article 3. In turn, under title 14, the
26 statutes governing trustees set forth the trustee's powers and
27 duties:

28 'Trust' means an express trust created by a trust

1 instrument including a will, by which a trustee has
2 the duty to administer a trust asset for the benefit
3 of a named or otherwise described income or principal
beneficiary, or both Ariz. Rev. Stat. § 14-
7231.2

4 From the time of creation of the trust until final
5 distribution of the assets of the trust, a trustee has
6 the power to perform, without court authorization,
every act which a prudent man dealing with the
7 property of another would perform for the purposes of
the trust Ariz. Rev. Stat. § 14-7233.A.

8 In the exercise of his powers including the powers
9 granted by this article, a trustee is subject to the
standards provided in § 14-7302 and has a duty to act
with due regard to his obligation as a fiduciary.
10 Ariz. Rev. Stat. § 14-7233.B.

11 [T]he trustee shall observe the standard in dealing
12 with the trust assets that would be observed by a
prudent man dealing with the property of another
. . . . Ariz. Rev. Stat. § 14-7302

13 These powers and duties relate to the administration of the
14 trust assets. Here, the "trust assets" consisted of John's
15 assets of which Debtor took possession and over which she
16 exercised control. Although the statute does not expressly
17 state that the trust res was John's separate property or his
18 half of the community property, we conclude that under the
19 statute, John's property was the trust res.

20 In sum, the Arizona statutory framework that governs
21 trustees of express trusts has all the hallmarks of a formal
22 trust under Hemmeter. By statute, Debtor became a fiduciary-
23 trustee who was required to act for John's benefit when dealing
24 with his assets and affairs since he was adjudged a vulnerable
25 adult. Under the statute, her status and duties were imposed
26 upon her prior to the alleged wrongdoing. As a consequence, we
27 conclude that the issue of whether Debtor was acting as a
28 fiduciary-trustee in the state court action was identical to the

1 fiduciary capacity element under § 523(a)(4). Accordingly, the
2 bankruptcy court properly applied the doctrine of issue
3 preclusion to bar Debtor from relitigating the fiduciary
4 capacity element in the adversary proceeding.⁶

5 **B. Defalcation**

6 The state court concluded that Debtor committed certain
7 conduct that, under federal law, easily qualifies as
8 "defalcation."⁷ "Defalcation is defined as the misappropriation
9 of trust funds or money held in any fiduciary capacity; the
10 failure to properly account for such funds." Lewis, 97 F.3d at
11 1186. It "includes the innocent default of a fiduciary who
12 fails to account fully for money received." Id. Further, an
13 intent to defraud is not required. Id. at 1187. Thus, even if

14
15 ⁶ There is no dispute that the remaining elements for
16 application of issue preclusion were met; i.e., that the issue
17 was actually litigated in the state court, that debtor had a full
18 and fair opportunity to litigate the issue, that resolution of
19 the issue was essential to the decision, that there was a valid
20 and final decision on the merits and that there was a common
21 identity of the parties.

22 ⁷ The state court found:

23 Leona did violate that trust by closing John's separate
24 account, by transferring funds to the joint account, by
25 withdrawing funds from his separate IRA, by retaining
26 John's Social Security and pension benefits and not
27 contributing to his care Leona executed a
28 number of checks, made numerous withdrawals. . . , and
transferred the ward's separate funds to herself. . . .
She wrote a check (#631) to herself dated September 18,
2004, processed December 27, 2004, in the amount of
\$10,000. \$5000 was transferred to [their] joint
account by check #646 on December 24th. A \$2,000 check
dated December 7, 2004, was paid to the ward's
daughter, Sandra; and \$2,504.90 was transferred to
[the] joint account . . . on December 31st.

1 Debtor did not know she was a fiduciary and innocently failed to
2 account for the funds from John's estate, her conduct would
3 nevertheless constitute defalcation under § 523(a)(4).

4 Accordingly, we are not persuaded by Debtor's argument that
5 she was unaware that she was in a position of trust and
6 confidence under Ariz. Rev. Stat. § 46-456 or that she was
7 engaged in a fiduciary relationship until three years after the
8 fact when the state court found that John was a vulnerable
9 adult.⁸ As a fiduciary-trustee, she was charged with knowledge
10 of her duties under the relevant statutes. "The requirement
11 that a fiduciary be charged with knowledge of his or her duties
12 and of the law 'prevents ignorance of the law from becoming a
13 defense to nondischargeability and provides an incentive for
14 individuals . . . who are engaged in occupations subject to
15 special statutes to apprise themselves of their obligations
16 under the law.'" Caddo Ready Mix v. Storie (In re Storie),
17 216 B.R. 283, 287 (10th Cir. BAP 1997). "It ensures that
18 fiduciaries will perform their obligations 'faithfully and with
19 care.'" Id. (citing Otto v. Niles (In re Niles), 106 F.3d 1456,
20 1462 (9th Cir. 1997).

21 Moreover, we cannot simply ignore the Arizona statute which
22 imposed on Debtor a fiduciary-trustee status in order to protect
23 the elderly who are vulnerable adults. Nor do we have

25 ⁸ Similarly, Debtor's argument in this appeal that as
26 late as December, 2004 John was deemed by a professional to be
27 competent has no import. This alleged inconsistency with the
28 state court's finding that he was a vulnerable adult at all
relevant times had to be raised in the state court, on appeal or
otherwise, not in the bankruptcy proceedings.

1 discretion to ignore the state court judgment which is entitled
2 to preclusive effect under 28 U.S.C. § 1738.

3 Accordingly, we conclude that the bankruptcy court properly
4 applied the doctrine of issue preclusion to bar Debtor from
5 relitigating the defalcation prong of § 523(a)(4) in the
6 adversary proceeding.

7 **C. Fees and Costs**

8 As previously mentioned, the bankruptcy court held a
9 separate hearing regarding the dischargeability of the
10 attorney's fees, interest and costs.⁹ Debtor does not argue in
11 her opening brief how the bankruptcy court erred in making the
12 fees and costs nondischargeable. Therefore, her argument is
13 waived and we affirm the bankruptcy court's decision that the
14 fees and costs were nondischargeable. Ghahremani v. Gonzales,
15 498 F.2d 993, 997-8 (9th Cir. 2007) ("[I]ssues not raised and
16 argued in the opening brief are deemed waived.")

17 **VI. CONCLUSION**

18 For all these reasons, we AFFIRM.

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26
27 ⁹ The state court had awarded \$28,818.10 in attorney's
28 fees, costs and interest. For reasons unknown to the Panel, this
sum was reduced to \$1,077.60.