NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-10-1304-MkMaD
	)	
RANDY ELBERT GRAY and KIMBERLY LORRAINE GRAY,	)	Bk. No. 08-11894
	)	Adv. No. 08-00931
Debtors.	)	
	)	
RANDY ELBERT GRAY; KIMBERLY LORRAINE GRAY,	)	
	)	
Appellants,	)	
	)	
v.	)	**MEMORANDUM**[*]
	)	
WALTER WENZEL; CHERYL L. WENZEL,	)	
	)	
Appellees.	)	

Submitted Without Oral Argument
on May 13, 2011

Filed – July 7, 2011

Appeal From The United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Before: MARKELL, MANN[**] and DUNN, 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.

[**]Hon. Margaret M. Mann, U.S. Bankruptcy Judge for the Southern District of California, sitting by designation.

INTRODUCTION

Randy Gray and Kimberly Gray (the "Grays") appeal from the bankruptcy court's summary judgment declaring that all amounts awarded in a state court judgment in favor of Walter Wenzel and Cheryl Wenzel (the "Wenzels") are nondischargeable in the Grays' chapter 7[1] bankruptcy. We AFFIRM IN PART, REVERSE IN PART, AND REMAND this matter for further proceedings.

FACTS

In 2006, the Wenzels filed a lawsuit against the Grays and their company, Gray Mobile Tire Service, Inc. ("GMTS"), in the Arizona Superior Court for Maricopa County (Case No. CV2006-015259) (the "State Court Litigation"). The Wenzels have never introduced into the record the complaint from the State Court Litigation, or any other document describing the interactions between the Wenzels and the Grays that eventually led the Wenzels to sue the Grays. The Wenzels only introduced: (1) the instructions given to the state court jury (the "Jury Instructions"), (2) the jury's verdict (the "Jury Verdict"), and (3) the state court's judgment based on the Jury Verdict (the "State Court Judgment"). In addition, no party has given us any useful general description of their pre-lawsuit relations. Consequently, our understanding of pre-lawsuit events is quite limited.

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[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

But from what has been provided, we have pieced together that the Wenzels' invested money in GMTS, and some or all of the Wenzels' investment was lost. After trial, the jury considered the Wenzels' legal theories after receiving instructions on various legal theories including breach of contract, breach of fiduciary duty, "common law fraud," negligent misrepresentation, innocent misrepresentation, securities fraud, and unjust enrichment.

In June 2008, the jury returned a verdict in favor of the Wenzels on some, but not all, of their claims. The jury awarded the Wenzels, among other things: $18,000 against the Grays for breach of contract; $171,731.73 against GMTS for breach of contract; $276,731.73 against the Grays for breach of fiduciary duty; $190,000 against the Grays for fraud; and, $207,477.60 against the Grays for securities fraud.[2] The jury also awarded

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[2]Nothing in the record specifies whether the Wenzels' securities fraud claim was based on state law, federal law or both. Securities fraud is similarly described in both A.R.S. § 44–1991 and in 17 C.F.R. § 240.10b-5. While the Jury Instruction on securities fraud arguably could have been modeled on either, the Jury Instruction did not include any reference to interstate commerce, the mails, or a national securities exchange, as referenced in 17 C.F.R. § 240.10b-5. Thus, we presume that the Wenzels' securities fraud claim was based on § 44–1991(A), which provides:

> It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under § 44-1843 or 44-1843.01 and including transactions exempted under § 44-1844, 44-1845 or 44-1850, directly or indirectly to do any of the following:

(continued...)

$23,768 against the Grays for punitive damages.[3]

In September 2008, before the state court entered judgment on the Jury Verdict, the Grays filed a chapter 11 bankruptcy, but they later stipulated to conversion of their case to chapter 7, and the bankruptcy court entered an order converting the case in December 2009. Meanwhile, in March 2009, the bankruptcy court granted the Wenzels relief from stay, thereby enabling the parties to complete the State Court Litigation.

Apparently, there were lengthy post-trial proceedings in the State Court Litigation, but the bankruptcy court record does not reveal their nature. The State Court Judgment, entered in March 2010, awarded the Wenzels compensatory damages of $207,477.60 for securities fraud and an additional $105,000.00 for breach of fiduciary duty. The State Court Judgment also awarded $23,768.00 in punitive damages, $125,000 in attorneys' fees and $3,942.17 in costs. The State Court Judgment referenced ARS § 44-2001,[4] ARS

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[2](...continued)
1. Employ any device, scheme or artifice to defraud.

2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

[3]The Jury Instructions reflect that the punitive damages award was likely based on the Gray's breach of fiduciary duty.

[4]ARS § 44-2001 provides for the award of fees and costs in an action based on the violation of Arizona securities law.

§ 12-341[5] and ARS § 12-341.01[6] as grounds for awarding fees and costs. However, the record does not specify what amount of fees and costs was attributable to each particular ground.

The Grays appealed the State Court Judgment, and that appeal is still pending (Arizona Court of Appeals, Division One, Case No. CV 10-0338).

The Wenzels, representing themselves in the bankruptcy court, filed a complaint against the Grays in December 2008. It is not entirely clear from the single page of allegations in their complaint whether the Wenzels sought to object to the Grays' discharge under § 727, to obtain a determination under § 523 that the Grays' indebtedness to them was nondischargeable, or both. In fact, the complaint does not reference any specific exception to discharge under § 523(a).

In any event, the Grays answered the complaint with a general denial in January 2009. The bankruptcy court from time to time held scheduling and status conferences, but essentially suspended prosecution of the adversary proceeding pending the completion of the post-trial proceedings in the State Court Litigation.

In April 2010, shortly after entry of the State Court Judgment, the Wenzels filed their motion for summary judgment. Reading their moving papers liberally, it appears that the Wenzels asserted that they were entitled to summary judgment

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[5]ARS § 12-341 is Arizona's general provision for an award of costs to the prevailing party in civil actions.

[6] ARS § 12-341.01 provides for attorneys' fees awards under certain circumstances in an actions arising out of contract.

based on issue preclusion, because the State Court Judgment established the requisite elements for nondichargeability under §§ 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), 523(a)(6) and 523(a)(19). As previously indicated, the only materials from the State Court Litigation that the Wenzels presented in support of their summary judgment motion were the Jury Instructions, the Jury Verdict and the State Court Judgment.

In response, the Grays (who were represented by counsel before the bankruptcy court) objected to the summary judgment motion solely on two grounds. First, they argued that the bankruptcy court could not properly apply issue preclusion because of their pending appeal of the State Court Judgment. According to the Grays, in light of the pending state court appeal, there was no final judgment on the merits. And second, the Grays argued that the State Court Judgment's award of punitive damages, attorneys' fees and costs should be deemed dischargeable because no particular exception to discharge under § 523(a) specifically covered these items.

On July 7, 2010, the bankruptcy court held a hearing on the summary judgment motion at which it considered and rejected both of the Grays' objections. The court entered summary judgment on July 27, 2010, deeming nondischargeable the entire debt represented by the State Court Judgment. Neither the court's comments at the July 7 hearing nor its July 27 judgment specified the grounds for granting summary judgment.

The Grays timely appealed on August 10, 2010.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

§§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err when it granted the Wenzels' motion for summary judgment?

STANDARDS OF REVIEW

The bankruptcy court's order granting summary judgment is reviewed de novo. Centre Ins. Co. v. SNTL Corp. (In re SNTL Corp.), 380 B.R. 204, 211 (9th Cir. BAP 2007). "Viewing the evidence in the light most favorable to the non-moving party, we must determine 'whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law.'" New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th Cir. BAP 2007) (quoting Tobin v. San Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001)).

We also review de novo the preclusive effect of a judgment; whether issue preclusion is available is a mixed question of law and fact in which the legal questions predominate. The Alary Corp. v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002); Stephens v. Bigelow (In re Bigelow), 271 B.R. 178, 183 (9th Cir. BAP 2001).

If issue preclusion is available, the bankruptcy court's decision to apply it is reviewed for abuse of discretion. Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 104 (9th Cir. BAP 2007); see also Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979).

Under the abuse of discretion standard of review, we first

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

DISCUSSION

A. Summary Judgment Standards

It is axiomatic that a court should not grant summary judgment unless: (1) there are no genuine and disputed issues of material fact; and (2), when viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. See Civil Rule 56(a) (made applicable in adversary proceedings by Rule 7056);[7] Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of showing that there is no material factual dispute. Id. At the time of the bankruptcy court's ruling, Civil Rule 56(e)(2) provided:

> Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule - set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered

[7]All references to Civil Rule 56 are to the form in which it appeared prior to the December 2010 amendments.

against that party.

Civil Rule 56(e)(2) (emphasis added). The phrases "is properly made and supported" and "if appropriate" were meant to emphasize the necessity of the moving party meeting its initial burden, under any and all circumstances, before the granting of summary judgment: "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee Notes accompanying the 1963 amendments to Civil Rule 56.[8]

Material facts that would preclude summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

B. Issue Preclusion Standards

Issue preclusion prohibits relitigation of issues that have been adjudicated in a prior lawsuit. In re Lopez, 367 B.R. at 104. Issue preclusion protects parties from the unnecessary

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[8]The latest version of Civil Rule 56, which became effective December 1, 2010, uses different language and numbering, but it embodies the same key concepts as set forth in the old version. Two subdivisions of the new version are particularly relevant here. First, new subdivision (c)(1)(a) makes clear that the moving party "must" point to materials in the record demonstrating that the material facts cannot be genuinely disputed. And second, new "[s]ubdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials – including the facts considered undisputed under subdivision (e)(2) – show that the movant is entitled to it." Advisory Committee Notes accompanying the 2010 amendments to Civil Rule 56.

multiplication of litigation, helps prevent inconsistent decisions, and conserves judicial resources. Montana v. U.S., 440 U.S. 147, 153 (1979). The party asserting issue preclusion must prove all of the elements necessary to apply the doctrine. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th Cir. BAP 2011) (citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995)).

> To meet this burden, the moving party must have pinpointed the exact issues litigated in the prior action and introduced a record revealing the controlling facts. Reasonable doubts about what was decided in the prior action should be resolved against the party seeking to assert preclusion.

446 B.R. at 382. (Citations omitted and emphasis added.)

Issue preclusion may be applied in nondischargeability litigation. Grogan v. Garner, 498 U.S. 279, 284–285 (1991). As a matter of full faith and credit, federal courts must give a state court judgment the same preclusive effect that another court of that state would give to that judgment. 28 U.S.C. § 1738; Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001). Accordingly, we must apply Arizona law to determine whether issue preclusion applies here. See Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995) (citing Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).

To apply issue preclusion in the Arizona courts:

> (1) the issue must have been actually litigated in a previous proceeding, (2) the parties must have had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits must have been entered, (4) resolution of the issue must be essential to the decision, and (5) there must be a common identity of the parties.

Short v. Dewald, 244 P.3d 92, 97 n.4 (Ariz. App. 2010) (citing Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1023 (Ariz. App. 2004)); see also Hullet v. Cousin, 63 P.3d 1029, 1035–36 (Ariz. 2003).

C. Application of Issue Preclusion

As mentioned previously, the bankruptcy court did not specify its grounds for granting summary judgment. The court did not identify which exceptions to discharge under § 523(a) were implicated by giving the State Court Judgment issue preclusive effect.[9] It would have facilitated our review if the bankruptcy court had stated its reasoning for granting summary judgment. See generally Civil Rule 56(a) (stating that "[t]he court should state on the record the reasons for granting or denying the motion.").

But the lack of such a statement, in the summary judgment context, may not by itself necessitate remand because we have the duty under the de novo standard of review to examine the record ourselves and to independently determine whether the motion for summary judgment should have been granted. See B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008) (stating that, under de novo review, "we consider a matter anew, as if it had not been heard before, and as if no decision had been previously rendered."). Further, as an appellate panel, we may affirm on any basis supported by the record. See Leavitt v.

[9]The court made a couple of passing references during the summary judgment hearing to "§ 523(a)(2)(A)" and "actual fraud." The court might have meant to imply that the issue preclusive effect of the State Court Judgment established actual fraud under § 523(a)(2)(A).

Soto (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999); Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (9th Cir. BAP 1995).

In light of the above, we will independently consider the exceptions to discharge invoked by the Wenzels and make our own assessment of whether the issue preclusive effect of the State Court Judgment established the necessary elements for any of the exceptions to discharge.[10] However, before we do so, we note one of the fundamental premises of nondischargeability litigation: that the exceptions to discharge set forth in § 523(a) are construed narrowly in favor of the debtor's receipt of the full discharge that the Bankruptcy Code allows. See Ryan v. United States (In re Ryan), 389 B.R. 710, 713 (9th Cir. BAP 2008) (quoting Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)). Accordingly, we will conclude that the issue preclusive effect of the State Court Judgment establishes the elements of nondischargeability only if that is clear on the face of the record.

1. The securities fraud award

a. Applicability of issue preclusion – § 523(a)(19)

The State Court Judgment awarded the Wenzels $207,477.60 based on the jury's finding that the Grays "knowingly or

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[10]We acknowledge that the Grays, by not raising the relevant issues, arguably might be deemed to have waived the issues we address in this appeal regarding the application of issue preclusion. See, e.g., Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001). However, we do not view the appellate waiver doctrine as trumping the clear mandate of Civil Rule 56 that the moving party must, as a preliminary matter, establish that no genuine issue of material fact exists.

recklessly committed securities fraud" under A.R.S. § 44–1991.[11] The Grays cannot seriously dispute that they had a full and fair opportunity to dispute this claim in the State Court Litigation, that the same parties were before the bankruptcy court in the nondischargeability litigation, or that the state court rendered a valid and final decision on the merits.[12]

Further, based on the record presented, the elements for nondischargeability under § 523(a)(19) were actually litigated and necessarily decided in reaching the securities fraud award.

Section 523(a)(19), enacted on July 30, 2002 as part of the Sarbanes–Oxley Act of 2002, renders nondischargeable any debt that results from a judgment for violation of any federal or state securities law or for common law fraud, deceit or manipulation in connection with the purchase or sale of any security. Smith v. Gibbons (In re Gibbons), 289 B.R. 588, 589 (Bankr. S.D.N.Y. 2003), aff'd, 311 B.R. 402 (S.D.N.Y. 2004), aff'd, 155 Fed.Appx. 534 (2nd Cir. 2005). The legislative history reflects that Congress intended § 523(a)(19) to have very broad application, to any judgment arising from the purchase or sale of a security that violated any state or federal securities law, and also intended to facilitate the application of issue

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[11]See Footnote 2, supra.

[12]We agree with the bankruptcy court regarding the finality of the State Court Judgment. Under Arizona law, a judgment is considered final for purposes of issue preclusion and claim preclusion even if an appeal is pending from that judgment. Ariz. Downs v. Superior Court, 623 P.2d 1229, 1232 (Ariz. 1981); Murphy v. Bd. of Med. Exam'rs, 949 P.2d 530, 538 (Ariz. App. 1997); see also Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1253 (9th Cir. 1987) (interpreting Arizona law).

preclusion to such judgments. See id. at 591-92 (discussing legislative history and purpose of § 523(a)(19)).

Here, the Jury Instructions in the State Court Litigation concerning securities fraud met the elements for securities fraud under Arizona securities law. See A.R.S. § 44–1991; Aaron v. Fromkin, 994 P.2d 1039, 1042 (Ariz. App. 2000). In particular, the Jury Instructions required the Wenzels to prove that the Grays "made, participated in or induced the unlawful sale or purchase" of a security.

Thus, the Wenzels established all of the elements necessary to give issue preclusive effect to the portion of the State Court Judgment awarding damages based on securities fraud.

b. Discretion in applying issue preclusion

In addition, the bankruptcy court did not abuse its discretion in actually giving the securities fraud portion of the State Court Judgment issue preclusive effect. The Grays essentially asserted both before the bankruptcy court and on appeal that the bankruptcy court should not exercise its discretion to give any part of the State Court Judgment issue preclusive effect because it created the potential for inconsistent judgments. According to the Grays, if the bankruptcy court granted summary judgment, but the state court of appeals ultimately reversed, then the Grays would be subject to one judgment (the state court of appeals judgment) absolving them of liability and another judgment (the bankruptcy court's summary judgment) holding them liable.

The bankruptcy court considered this concern and rejected it before granting summary judgment, and we agree with the

bankruptcy court's reasoning. The bankruptcy court's summary judgment solely determined that any liability imposed by the State Court Judgment was nondischargeable. In other words, the bankruptcy court's judgment did not make any determination as to liability. As explained by the bankruptcy court, if the state court of appeals ultimately reversed the State Court Judgment, then there would be no nondischargeable liability under the bankruptcy court's judgment. Thus, the bankruptcy court's judgment did not create a potential for inconsistent results.[13]

The Grays have not pointed us to any other potential grounds for concluding that the bankruptcy court abused its discretion in applying issue preclusion. Nor are we aware of any. In sum, we AFFIRM the portion of the bankruptcy court's summary judgment determining the securities fraud award nondischargeable.

2. Breach of fiduciary duty awards

a. Applicability of issue preclusion – § 523(a)(4)

Based on the jury's finding that the Grays breached their fiduciary duty, the State Court Judgment awarded the Wenzels additional compensatory damages of $105,000.00 and punitive damages of $23,768.00.

Notably, § 523(a)(4) does not apply to all breaches of all fiduciary relationships. To prevail under § 523(a)(4), a creditor must prove (1) that the debtor was acting as a "fiduciary" within the meaning of the Bankruptcy Code, and

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[13]Even if the bankruptcy court judgment was not derivative, Civil Rule 60(b)(5) (made applicable by Rule 9024) provides that a court may set it aside if "it is based on an earlier judgment that has been reversed, or vacated . . . ."

(2) that the debt arose from "fraud or defalcation." In re Honkanen, 446 B.R. at 378; Nahman v. Jacks (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001). We will separately examine each of these elements.

(i) Fiduciary Capacity

The term "fiduciary" is construed narrowly for purposes of § 523(a)(4). The term as used therein does not include all relationships of trust and confidence; rather, the fiduciary relationship must arise from an express or technical trust. See Cal–Micro Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003). "The broad, general definition of fiduciary - a relationship involving confidence, trust and good faith - is inapplicable in the dischargeability context." Id. (citing Ragsdale v. Haller (In re Haller), 780 F.2d 794, 796 (9th Cir. 1986)).[14] Federal courts must look to state law to determine whether a true trust relationship exists. In re Cantrell, 329 F.3d at 1125. A technical trust created by statute and/or case law will suffice, provided that the law (1) defines the trust res, (2) identifies the fiduciary's asset management duties, and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing. See Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186, 1190 (9th Cir. 2001).

Cantrell held that, under California corporations law, corporate officers and directors are not fiduciaries within the

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[14]The narrow definition of fiduciary for purposes of § 523(a)(4) is consistent with the general rule that discharge exceptions are construed narrowly in favor of the debtor's discharge. See In re Riso, 978 F.2d at 1154; In re Ryan, 389 B.R. at 713.

meaning of § 523(a)(4). In re Cantrell, 329 F.3d at 1127. As Cantrell explained, "although officers and directors [under California law] are imbued with the fiduciary duties of an agent and certain duties of a trustee, they are not trustees with respect to corporate assets." Id. at 1126 (emphasis added). Cantrell relied on Bainbridge v. Stoner, 106 P.2d 423 (Cal. 1940), which explicitly held that the relationship in California between a director on the one hand and the corporation and its shareholders on the other hand, strictly speaking, was one of agency and not trust. See In re Cantrell, 329 F.3d at 1126 (citing Bainbridge, 106 P.2d at 426).

Here, we are faced with the question of whether, under Arizona law, corporate officers and directors are fiduciaries within the meaning of § 523(a)(4). At first blush, F.D.I.C. v. Jackson, 133 F.3d 694 (9th Cir. 1998), would appear to answer this question for us. Jackson explicitly held that, under Arizona law, a corporate director is a fiduciary for purposes of § 523(a)(4). Id. at 703; see also Braden Trust v. Chavez (In re Chavez), 430 B.R. 890, 894-95 (Bankr. D. Ariz. 2010) (citing Jackson and, for purposes of § 523(a)(4), stating that "[i]n Arizona, corporate directors and officers and shareholders that have the ability to control a corporation owe a fiduciary duty to the corporation and other shareholders.").

Jackson cited several Arizona cases in support of its holding, but unlike Cantrell, Jackson did not search the Arizona cases for the requisite trust res. We have searched the Arizona cases cited by Jackson, and many others, and we have been unable to find any authority establishing a trust res in such

circumstances.

We acknowledge that there are a number of statements in Arizona case law referring to officers and directors as trustees. For instance:

> A director of a corporation occupies a fiduciary relation to it and its stockholders. His position is one of trust and he is frequently denominated a trustee and so held accountable in equity. The ordinary trust relationship of directors of a corporation and stockholders is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of the corporate business affairs and property and hence of the property interests of the stockholders. Equity recognizes that stockholders are the proprietors of the corporate interest and are ultimately the only beneficiaries thereof. Those interests are in virtue of the law entrusted through the corporation to the directors and from that condition arises the trusteeship of the directors with the concomitant fiduciary relationship.

Hatch v. Emery, 400 P.2d 349, 353 (Ariz. App. 1965).

The Arizona Supreme court essentially adopted Hatch's statement of corporate director duties:

> In Arizona a director of a corporation owes a fiduciary duty to the corporation and its stockholders . . . . This duty is in the nature of a trust relationship requiring a high degree of care on the part of the director. Hatch v. Emery, supra . . . .

Atkinson v. Marquart, 541 P.2d 556, 558 (Ariz. 1975) (also citing Kenton v. Wood, 56 Ariz. 325, 107 P.2d 380 (1940) ("It is true that directors are trustees for the benefit of the stockholders of a corporation, but there is no fiduciary relation between two directors as such . . . .")).

But these statements merely describe as "trust-like" the ordinary types of fiduciary duties that all corporate directors bear. Other statements of the Arizona Supreme Court support our reading:

> It is true that, in a certain sense, the directors of a corporation occupy the position of trustees towards the stockholders. As the value of the shares of the stockholders and their rights in connection therewith are affected by the conduct of the directors, a trust relation is created between them. The directors owe a fiduciary duty towards the stockholders in dealings which may affect the stock.

Steinfeld v. Nielsen, 139 P. 879, 889 (Ariz. 1913) (emphasis added).[15]

To reiterate, we cannot read any of the statements of the Arizona courts as identifying corporate assets as a trust res that the officers and directors hold in trust for the benefit of the corporation's shareholders. Consequently, we cannot reconcile Jackson's holding with Cantrell's statement of the fiduciary capacity requirements under § 523(a)(4).

We recently faced a similar situation in Honkanen. There, we dealt with whether California real estate brokers are fiduciaries under § 523(a)(4). The Ninth Circuit Court of Appeals held in Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1057 (9th Cir. 1994), that California real estate brokers were

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[15]The most recent statement from the Arizona courts on this subject states:

> Here, the relationship between the parties is that of directors and officers of a corporation to its shareholders. The parties do not dispute that a contract created that relationship. But "[i]n Arizona a director of a corporation owes a fiduciary duty to the corporation and its stockholders. This duty is in the nature of a trust relationship requiring a high degree of care on the part of the director."

Dooley v. O'Brien, 244 P.3d 586, 590 (Ariz. App. 2010) (quoting Atkinson, 541 P.2d at 558).

§ 523(a)(4) fiduciaries, but in so holding, Bugna did not find or identify any trust res. Accord, Woosley v. Edwards (In re Woosley), 117 B.R. 524, 529 (9th Cir. BAP 1990); Rettig v. Peters (In re Peters), 191 B.R. 411, 419 (9th Cir. BAP 1996). In Honkanen, we concluded that we could not reconcile Bugna's holding with Cantrell's statement of the fiduciary capacity requirements. See Honkanen, 446 B.R. at 380-81. Consequently, we determined that we should follow Cantrell, as the most-recent and better-reasoned of the two decisions, over Bugna. Id.

For the same reasons Honkanen followed Cantrell over Bugna, we here must follow Cantrell over Jackson. We are faced with the situation that in Arizona, corporate assets are not held in trust by corporate officers and directors for the benefit of the corporation's shareholders. Consequently, following Cantrell, we hold that, under Arizona law, corporate officers and directors are not § 523(a)(4) fiduciaries.

Under these circumstances, the Wenzels have not shown that the State Court Litigation actually litigated and necessarily decided the requisite element of fiduciary capacity. As a result, issue preclusion did not establish the nondischargeability of their breach of fiduciary duty awards under § 523(a)(4).

(ii) Fraud or Defalcation

Even though we already have determined that the first element under § 523(a)(4) was not satisfied, we will also examine the second element: whether the debt arose from fraud or defalcation. For purposes of defining fraud under § 523(a)(4), fraud means actual fraud. Honkanen, 446 B.R. at 382. Meanwhile,

> [t]he definition of defalcation includes both the "misappropriation of trust funds or money held in any fiduciary capacity; [and the] failure to properly account for such funds." Even innocent acts of failure to fully account for money received in trust will be held as non-dischargeable defalcations; no intent to defraud is required.

In re Hemmeter, 242 F.3d at 1190 (citations omitted); see also Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). Regardless of the debtor's state of mind, the creditor must establish that trust assets have gone missing and that the debtor has failed to account for them or is responsible for their loss. In re Hemmeter, 242 F.3d at 1191.

In this case, the bankruptcy court record is quite sparse, and we simply cannot discern from it what were the underlying grounds for the Wenzels' breach of fiduciary duty claim. The Wenzels did not make the state court complaint part of the bankruptcy court record, nor does any other document in the record describe the gravamen of the fiduciary duty claim. Furthermore, the Jury Instructions and the Jury Verdict are not specific enough for us to conclude that the breach of fiduciary duty found by the state court jury was in the nature of fraud or defalcation. Simply put, we cannot tell on this record whether the Gray's breach of fiduciary duty was the result of fraud, defalcation, or some other conduct of the Grays. Under these circumstances, the Wenzels have not shown that the State Court Litigation actually litigated and necessarily decided the requisite element of fraud or defalcation. This serves as an independent basis for our determination that issue preclusion did not apply to establish the nondischargeability of the breach of fiduciary duty awards under § 523(a)(4).

b. Applicability of issue preclusion – other exceptions to discharge

Issue preclusion does not establish that the breach of fiduciary duty award is nondischargeable under any other exception to discharge cited by the Wenzels. Among other things, § 523(a)(2)(A) requires a false representation and an intent to deceive. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010). Meanwhile, § 523(a)(2)(B) requires a false written financial statement. See Boyajian, 564 F.3d at 1090 n.2. The record before us simply does not connect the breach of fiduciary duty determination and awards to any false statements, written or otherwise, nor to any intent to deceive by the Grays.

The Wenzels also sought to invoke § 523(a)(6), which excepts from discharge a debt arising from a willful and malicious injury. In relevant part, for creditors to prove a willful injury, they must show that the debtor subjectively intended to injure them, or subjectively believed that harm was substantially certain to occur from the debtor's conduct. See Carrillo v. Su (In re Su), 290 F.3d 1140, 1143-45 (9th Cir. 2002).

There is nothing whatsoever in the Jury Instruction regarding breach of fiduciary duty indicating that willful injury was a consideration for the jury in finding that the Grays had breached their fiduciary duty. On the other hand, the jury also awarded punitive damages based on the Gray's breach of fiduciary duty. The Jury Instructions indicated that awarding punitive damages based on breach of fiduciary duty required a finding that the Grays either were "(1) gross, wanton, malicious and oppressive; or (2) showed spite, ill will or reckless

indifference to the interests of the [Wenzels] . . . . ” Moreover, the State Court Judgment specifies in connection with the punitive damages award that the jury found that the Grays “acted with spite, ill will or deliberate indifference to the interests” of the Wenzels.

Even if we were to assume that some of the descriptors used in the Jury Instructions and in the State Court Judgment to describe the Grays’ beach of fiduciary duty would satisfy the high level of scienter necessary to establish willfulness under § 523(a)(6), the disjunctive language in the Jury Instructions and the State Court Judgment is fatally problematic. In short, it is impossible to say on this record that the requisite state of mind was actually litigated and necessarily decided in the State Court Litigation.

Finally, the Wenzels invoked § 523(a)(19), which we previously held rendered the securities fraud award nondischargeable. However, there is nothing in the record connecting the breach of fiduciary determination and awards to any violation of either federal or state securities laws. That the State Court Judgment granted separate awards for securities fraud and breach of fiduciary duty suggests instead that the grounds for liability were separate and distinct. In any event, we cannot say on this record that the Grays’ breach of fiduciary duty involved a violation of the securities laws.

In sum, we find no basis in the record to conclude that issue preclusion established the nondischargeability of the breach of fiduciary duty awards (both compensatory and punitive) under any exception to discharge. Accordingly, we must REVERSE

the portion of the bankruptcy court's summary judgment determining the breach of fiduciary duty awards nondischargeable.

3. Attorneys' fees and costs

The Grays argued that the attorneys' fees and costs awarded in the State Court Judgment were dischargeable because no exception to discharge specifically covered them. The bankruptcy court rejected this argument, citing Cohen v. de la Cruz, 523 U.S. 213 (1998). Cohen stands for the general proposition that any liability duly imposed as a direct, but-for result of the defendant's nondischargeable conduct constitutes a nondischargeable debt, regardless of whether the liability reflects the actual damages incurred by the plaintiff. See id. at 220; see also Suarez v. Barrett (In re Suarez), 400 B.R. 732, 738-39 (9th Cir. BAP 2009)(applying Cohen holding to affirm bankruptcy court's determination under § 523(a)(6) that attorneys' fees and costs were nondischargeable, even though there was no award of compensatory damages).

The record presented here does not make clear whether (or to what extent) the State Court Judgment's award of costs and attorneys' fees flowed from nondischargeable conduct. The State Court Judgment identified more than one basis for awarding fees and costs, and we simply cannot tell on this record to what extent the fees and costs were awarded based on the nondischargeable securities law violation.

Accordingly, we must REVERSE the portion of the bankruptcy court's summary judgment determining the fees and costs awarded in the State Court Judgment nondischargeable.

CONCLUSION

For the reasons set forth above, the summary judgment of the bankruptcy court is AFFIRMED IN PART AND REVERSED IN PART, and this matter is REMANDED for further proceedings consistent with this decision.