

AUG 19 2014

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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NOT FOR PUBLICATION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-13-1461-KiTaPa
6	ROSIRA A. CORREIA-SASSER,)	Bk. No.	2:10-17877-RJH
7	Debtor.)	Adv. No.	2:10-1632-RJH
8	_____)		
9	ROSIRA a. CORREIA-SASSER,)		
10	Appellant,)		
11	v.)	MEMORANDUM¹	
12	JOHN ROGONE and JASON ROGONE,)		
13	individuals and successor)		
14	co-trustees of the ALFREDO)		
15	CORREIA AND MARY F. CORREIA)		
	TRUST,)		
	Appellees.)		
	_____)		

Submitted Without Oral Argument
on July 25, 2014²

Filed - August 19, 2014

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Appellant Rosira Correia-Sasser pro se on brief;
G. Lee Henman, Jr., of Henman Law Firm, P.C. on
brief for appellees, John Rogone and Jason Rogone.

¹ 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.

² In an order entered on April 4, 2014, the Panel determined this matter was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP R. 8012-1.

1 Before: KIRSCHER, TAYLOR and PAPPAS, Bankruptcy Judges.

2 Appellant, chapter 7³ debtor Rosira Correia-Sasser
3 ("Debtor"), appeals a judgment determining that a debt arising
4 from a California judgment was excepted from discharge under
5 § 523(a)(4) and that a debt arising from an Arizona judgment was
6 excepted from discharge under § 523(a)(4) and (a)(6). We AFFIRM.

7 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 **A. Events leading up to the California litigation**

9 Alfredo Correia, Debtor's father, died in 1989 and left
10 certain assets in a trust dated October 26, 1989 (the "Trust").
11 Debtor's sons, Jason Rogone, John Rogone (now Bing Bada Bing) and
12 James Shaw, are the Trust beneficiaries. At all relevant times,
13 Debtor was the trustee of the Trust. By its terms, the Trust was
14 to end in 2005, when James Shaw reached twenty-five years of age.

15 The Trust provided that upon Mr. Correia's death, Debtor
16 would receive title to two parcels of real property located in the
17 Point Loma area of San Diego (together, the "Lots"). Lot 12,
18 which contained a home, was left to Debtor "free of trust."
19 Lot 11, which was adjacent to Lot 12, was vacant. Lot 11 was left
20 to Debtor "as trustee for the benefit of John Rogone, Jason Rogone
21 and James Shaw."

22 In 1991, Debtor, individually and as trustee of the Trust,
23 contributed the Lots to a limited partnership known as Point Loma
24 Properties LLP (the "Developer") for a value of \$620,000 for the
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26
27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 purpose of building a condominium project.⁴ Debtor, individually
2 and as trustee of the Trust, became a limited partner in the
3 limited partnership owning the condominium project. She and the
4 Trust were each given an equal interest in the partnership valued
5 at \$310,000, for a total of \$620,000. She and the Trust received
6 a cash liquidating distribution on the formation of the limited
7 partnership in the amount of \$420,000, less a six percent broker
8 commission on the value of the property contributed to the
9 partnership, i.e., six percent of \$620,000. The net cash
10 liquidating distribution on formation, thus, amounted to
11 \$383,513.95 [\$420,000 less six percent of \$620,000]. The \$200,000
12 remaining from initial capital contribution was to be paid either
13 as a liquidating distribution or as liquidation proceeds as
14 specified in the limited partnership agreement. As security for
15 her investment, Debtor obtained deeds of trust on the homes of
16 other partners of the Developers; the California state court found
17 such deeds of trust "illusory."

18 Debtor did not distribute any portion of the cash liquidating
19 distribution on formation to the Trust, but kept all \$383,513.95
20 for herself, effectively shifting the entire risk of the
21 investment to the Trust and its beneficiaries. Although under the
22 limited partnership agreement the Lots were each assigned a value
23 of \$310,000 (or a 50/50 split), Debtor testified that she
24 allocated the cash liquidating distribution on formation to

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26 ⁴ Initially, Debtor's transaction with the Developers
27 involved a sale of the two lots, but the transaction evolved into
28 a partnership wherein one group of partners contributed cash and
Debtor, on behalf of herself and the Trust, contributed the two
lots.

1 herself because she had been advised by her father and her real
2 estate agent that Lot 11 (the Trust's lot) was worth only one
3 quarter of the value of Lot 12 (her lot). Debtor further
4 testified that at the time she entered into the transaction with
5 the limited partnership, she thought it was "very fair" that she
6 receive two-thirds of the \$620,000 (the nearly \$400,000 in cash)
7 and the Trust beneficiaries receive one-third (the \$200,000
8 investment risk).

9 When the Developer failed to develop the Lots and distribute
10 the \$200,000 plus interest, Debtor sued the Developer. In her
11 individual capacity, she settled that suit for \$60,000. Debtor
12 kept all of the settlement proceeds until John and Jason brought
13 suit against her, after which she distributed \$10,000 to each of
14 her sons, but kept \$30,000 for herself. Ultimately, Debtor was
15 ordered by the California state court to pay the remaining \$30,000
16 in settlement proceeds to the Trust.

17 **B. The California litigation and judgment**

18 In 2004, John and Jason filed suit against Debtor in
19 California state court for breach of fiduciary duty and other
20 claims. In 2006, the California state court found that while
21 acting in her capacity as trustee, Debtor committed multiple
22 breaches of her fiduciary duty by: (1) investing her children's
23 money in a highly speculative and risky investment; (2) taking the
24 entire cash distribution and placing the investment risk solely on
25 the Trust; (3) failing to provide annual accountings; (4) failing
26 to give the Trust beneficiaries access to Trust records; and
27 (5) failing to distribute the remaining Trust property upon its
28 termination in 2005. Debtor was removed as trustee.

1 While the California state court found that Debtor's
2 "inexperience, misunderstanding and misguided realtor reliance
3 [were] not defenses to her breach of fiduciary duty," it also
4 determined that allocating the entire risk of the investment to
5 the Trust while taking the cash for herself was "a pure conflict"
6 and that the transaction she entered into "was not a prudent
7 investment." It also found in support of mitigating damages under
8 CAL. PROBATE CODE § 16440(b)⁵ that Debtor had acted "reasonably, and
9 in good faith under the circumstances known to [her]" and that her
10 actions "were not intentional or an attempt to take her children's
11 inheritance." The California state court finally found that
12 Debtor was clearly taken advantage of by other partners of the
13 Developers, their attorneys and her realtor. Punitive damages
14 were denied.

15 An amended judgment for \$383,244.64⁶ plus \$4,647.60 for costs
16 was entered in March 2007 ("California Judgment"). Debtor did not
17 appeal. John and Jason registered the California Judgment in
18 Arizona in August 2007 and recorded the California Judgment in the
19 Maricopa County Recorder's Office in Arizona in October 2007.

20 **C. The Arizona litigation**

21 While the California litigation was pending, Debtor and her
22

23 ⁵ CAL. PROBATE CODE § 16440(b) provides:

24 If the trustee has acted reasonably and in good faith under
25 the circumstances as known to the trustee, the court, in its
26 discretion, may excuse the trustee in whole or in part from
liability under subdivision (a) if it would be equitable to
do so.

27 ⁶ The original \$414,003 judgment was reduced due to the
28 partial satisfaction of \$30,758.36 from the Developer suit
settlement proceeds.

1 current husband were busy working with legal counsel to transfer
2 Debtor's assets to protect her from any potential adverse
3 judgment. In October 2007, John and Jason sued Debtor, her
4 husband and others in Arizona state court alleging that various
5 asset transfers violated Arizona's Uniform Fraudulent Transfer
6 Act. The complaint asserted that during the pendency of the
7 California litigation, Debtor recognized she was not likely to
8 prevail and, before the conclusion of that case, she and her
9 husband transferred virtually all of Debtor's assets in an attempt
10 to hide them from her sons. Specifically, John and Jason claimed
11 that Debtor made the transfers with the intent to hinder, delay or
12 defraud them in the collection of the California Judgment.

13 An advisory jury found for John and Jason in July 2009.
14 Prior to the entry of any judgment, the Arizona state court issued
15 a Minute Entry Ruling on October 8, 2009 (the "2009 Minute Entry")
16 in relation to John and Jason's post-trial motion for attorney's
17 fees. The Arizona state court found that Debtor was liable for
18 John and Jason's fees under ARS §§ 12-349 and 12-350.⁷ A judgment
19 was eventually entered in November 2009 and amended in December
20 2009, nunc pro tunc. The Arizona state court determined that
21 Debtor and her husband transferred assets with the intent to
22 hinder, delay or defraud Debtor's sons in the collection of the
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24
25 ⁷ ARS § 12-349 permits the court to assess attorney's fees
26 against a party who brings or defends a claim without substantial
27 justification - in other words - frivolous claims or defenses. A
28 claim is "without substantial justification" if it constitutes
harassment, is groundless and is not made in good faith. ARS
§ 12-350 provides that the court must set forth specific reasons
for an award under ARS § 12-349 and lists the factors the court
may consider to make that determination.

1 California Judgment.⁸ It further found that Debtor and her
2 husband were aware of the substantial likelihood that Debtor would
3 not be successful in the California litigation and had the intent
4 to hide her assets from her sons by transferring them. Debtor and
5 her husband were found to have defended the case in bad faith.
6 Accordingly, Debtor's sons were awarded \$121,950 in attorney's
7 fees and \$3,137.21 in costs. The Arizona state court also ordered
8 that certain properties be sold and the net proceeds applied to
9 satisfy the California Judgment.

10 As explained below, post-judgment motions were considered,
11 matters were appealed, and the Arizona judgment was ultimately
12 amended two more times.

13 **D. The nondischargeability action**

14 Debtor filed a chapter 7 bankruptcy case on June 8, 2010.
15 John and Jason filed a complaint seeking to except the California
16 Judgment from discharge under § 523(a)(4) and to except the first
17 amended Arizona judgment from discharge under § 523(a)(6).

18 **1. The Arizona litigation continues**

19 In the meantime, the Arizona litigation continued. After
20 considering various motions to alter or amend judgment or for a
21 new trial, the Arizona state court entered another amended
22 judgment on November 19, 2010, nunc pro tunc to the original
23 November 2009 judgment (the "Second Amended Arizona Judgment").
24 Among other things, Debtor had sought relief from the attorney's

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26 ⁸ The Arizona state court found that Debtor's counsel were
27 never informed by Debtor of, or had any knowledge of, her intent
28 to hinder, delay or defraud her sons in the collection on their
judgment or that counsel defended the case with the primary or
sole purpose to hinder, delay or defraud the sons.

1 fee award, contending that the Arizona state court failed to make
2 the requisite findings to support it. The Arizona state court
3 disagreed, referring to the 2009 Minute Entry wherein it made the
4 required findings. Debtor's motion for a new trial on the
5 attorney's fees was denied.

6 Notably, after Debtor sought relief from the attorney's fee
7 award, the Arizona state court entered a "Ruling" on February 24,
8 2010, which appears to be the Memorandum in support of the Second
9 Amended Arizona Judgment and a supplement to the 2009 Minute Entry
10 (the "2010 Minute Entry"). The 2010 Minute Entry was drafted by
11 the court, as opposed to the Second Amended Arizona Judgment,
12 which was drafted by John and Jason's counsel. These facts become
13 important later. The 2010 Minute Entry set forth the same
14 findings made in the Second Amended Arizona Judgment as to the
15 attorney's fee award under ARS § 12-349 and the court's denial to
16 reconsider that issue. It also noted that Debtor had admitted at
17 trial "that she transferred Arizona property during the pendency
18 of the California litigation to insulate herself and her assets
19 from suit," which the Arizona state court found to be an admission
20 under the UFTA.

21 In January 2011, Debtor cross-appealed from portions of the
22 Second Amended Arizona Judgment, including the determination that
23 she had defended the case in bad faith, that resulted in the
24 monetary sanction of attorney's fees.

25 **2. Motion for summary judgment and ruling**

26 In March 2011, John and Jason moved for summary judgment on
27 their nondischargeability complaint ("MSJ"). In short, they
28 argued that issue preclusion applied to both the California

1 Judgment and the Second Amended Arizona Judgment.

2 The bankruptcy court granted the MSJ. Applying the Ninth
3 Circuit's pre-Bullock⁹ standard, the court reasoned that Debtor's
4 breach of fiduciary duty, even if innocent, satisfied the
5 requirement for a defalcation under § 523(a)(4) and therefore the
6 California Judgment was nondischargeable. As for the Second
7 Amended Arizona Judgment, the bankruptcy court determined that
8 Debtor's actions established a willful and malicious injury under
9 § 523(a)(6). The Arizona state court found she acted wrongfully
10 when she voluntarily and intentionally transferred her property
11 and property interests, the transfers were made with the actual
12 intent to hinder, delay or defraud her sons, and her actions
13 injured her sons in their attempt to collect on the California
14 Judgment. Therefore, the Second Amended Arizona Judgment was a
15 debt incurred due to Debtor's willful and malicious injury and was
16 nondischargeable under § 523(a)(6).

17 **3. Debtor's motion to stay entry of judgment**

18 In November 2011, Debtor moved to stay entry of the
19 nondischargeability judgment pending a ruling by the Arizona state
20 court. Apparently, the language in the Second Amended Arizona

21 ⁹ Bullock v. BankChampaign, N.A., 133 S.Ct. 1754 (2013).
22 Prior to Bullock, the rule in the Ninth Circuit was that no
23 particular state of mind was required to satisfy § 523(a)(4)'s
24 defalcation requirement. See Sherman v. Sec. & Exch. Comm'n.
25 (In re Sherman), 658 F.3d 1009, 1017-18 (9th Cir. 2011). Even an
26 innocent failure to account for trust property could constitute a
27 defalcation. See id. (citing Blyler v. Hemmeter (In re Hemmeter),
28 242 F.3d 1186, 1190-91 (9th Cir. 2001)). Bullock, however,
overruled In re Sherman and In re Hemmeter to the extent those two
decisions did not recognize that for purposes of § 523(a)(4), a
"defalcation" includes a scienter or "state of mind" component.
See Pemstein v. Pemstein (In re Pemstein), 492 B.R. 274, 278 (9th
Cir. BAP 2013) (recognizing Bullock and the abrogation of the Ninth
Circuit's previous intent standard).

1 Judgment, which the bankruptcy court had relied upon for its
2 ruling, was being reviewed by the Arizona state court for possible
3 "fraud upon the court" committed by John and Jason's counsel who
4 drafted it. The Arizona Court of Appeals had suspended the appeal
5 of the Second Amended Arizona Judgment and revested jurisdiction
6 in the trial court for the purpose of permitting Debtor to file a
7 motion to set the judgment aside. Debtor filed that motion, which
8 was pending.

9 No order was entered on the motion to stay entry of the
10 nondischargeability judgment, but the bankruptcy court informally
11 agreed to not enter it pending the outcome of the Arizona
12 litigation.

13 **4. The third amended Arizona judgment**

14 About eighteen months later, the Arizona state court issued a
15 third amended judgment (the "Third Amended Arizona Judgment") on
16 May 1, 2013, nunc pro tunc to the original November 2009 judgment.
17 It replaced and superceded the Second Amended Arizona Judgment
18 because that judgment "contained multiple, material and
19 surreptitiously added provisions not authorized by any prior court
20 ruling[.]" The Third Amended Arizona Judgment, however, and
21 contrary to statements made by Debtor's counsel at the later trial
22 before the bankruptcy court, expressly incorporated the findings
23 set forth in the 2010 Minute Entry, which incorporated similar
24 findings made in the 2009 Minute Entry. The Arizona state court
25 maintained its ruling that Debtor had defended the fraudulent
26 transfer claims in bad faith and, therefore, she was still liable
27 for the attorney's fee award for the reasons stated in the 2010
28 Minute Entry.

1 **5. The motion to amend the MSJ ruling**

2 In light of the Third Amended Arizona Judgment and the
3 issuance of Bullock, Debtor moved to amend the bankruptcy court's
4 ruling on the MSJ under Civil Rule 59(a). Debtor contended that
5 the findings in the Third Amended Arizona Judgment failed to
6 support a § 523(a)(6) claim for two reasons. First, the judgment
7 contained no findings that the fraudulent transfers were done with
8 the actual intent to hinder, delay or defraud Debtor's sons, only
9 that they were "fraudulent and of no force and effect." Second,
10 the only monetary relief granted to Debtor's sons was the
11 attorney's fees. She noted that the judgment stated only that
12 Debtor had defended the matter in "bad faith," and that finding,
13 standing alone, was insufficient to establish a willful and
14 malicious injury under § 523(a)(6).

15 Debtor also argued that the California Judgment did not
16 support a defalcation under § 523(a)(4). She asserted that the
17 California state court's findings that Debtor's breach was not
18 intentional or an attempt to take her children's inheritance, and
19 that she had acted reasonably and in good faith under the
20 circumstances, were insufficient to meet the heightened intent
21 standard under Bullock. John and Jason opposed Debtor's motion.

22 The bankruptcy court granted Debtor's motion to amend and
23 ordered a limited trial on the application of Bullock to her
24 intent. Although not expressly stated in its minute entry, Debtor
25 would also be allowed to present evidence as to her intent when
26 she made the property transfers during the California litigation.
27 However, the bankruptcy court's decision to allow that evidence
28 was "without prejudice" and subject to the court later concluding

1 after trial that issue preclusion did in fact apply to the Arizona
2 state court's findings on the matter.

3 **6. The trial and bankruptcy court's ruling**

4 The bankruptcy court held a trial on the issues of Debtor's
5 intent as a fiduciary under Bullock and her intent with respect to
6 the fraudulent transfers made during the California litigation.
7 Debtor and Jason testified. After summation by the parties, the
8 bankruptcy court announced its findings and conclusions on the
9 record, ruling that the California Judgment was excepted from
10 discharge under § 523(a)(4) and that the Third Amended Arizona
11 Judgment for John and Jason's attorney's fees was excepted from
12 discharge under § 523(a)(4) and (a)(6). A judgment consistent
13 with the court's oral ruling was entered on September 11, 2013.
14 This timely appeal followed.

15 **II. JURISDICTION**

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

18 **III. ISSUES**

- 19 1. Did the bankruptcy court err in determining the California
20 Judgment was excepted from discharge under § 523(a)(4)?
21 2. Did the bankruptcy court err in determining the Third Amended
22 Arizona Judgment was excepted from discharge under § 523(a)(4) and
23 (a)(6)?

24 **IV. STANDARDS OF REVIEW**

25 In reviewing a bankruptcy court's nondischargeability
26 determination, we review its findings of fact for clear error and
27 its conclusions of law de novo. Oney v. Weinberg
28 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). However,

1 the ultimate question of whether a particular debt is
2 dischargeable is a mixed question of fact and law that we review
3 de novo. See Honkanen v. Hopper (In re Honkanen), 446 B.R. 373,
4 382 (9th Cir. BAP 2011). The availability of issue preclusion is
5 a question of law we review de novo. Wolfe v. Jacobson
6 (In re Jacobson), 676 F.3d 1193, 1198 (9th Cir. 2012). If issue
7 preclusion is available, the decision to apply it is reviewed for
8 abuse of discretion. Lopez v. Emergency Serv. Restoration, Inc.
9 (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007). A bankruptcy
10 court abuses its discretion if it applies an incorrect legal
11 standard or its factual findings are illogical, implausible or
12 without support from evidence in the record. TrafficSchool.com v.
13 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

14 V. DISCUSSION

15 **A. The bankruptcy court did not err when it determined that the**
16 **California Judgment was excepted from discharge under**
§ 523(a)(4).

17 A debt is excepted from discharge under § 523(a)(4) where
18 "1) an express trust existed, 2) the debt was caused by fraud or
19 defalcation, and 3) the debtor acted as a fiduciary to the
20 creditor at the time the debt was created." Mele v. Mele
21 (In re Mele), 501 B.R. 357, 363 (9th Cir. BAP 2013) (quoting Otto
22 v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997)). A
23 party must prove these elements by a preponderance of the
24 evidence. Lovell v. Stanifer (In re Stanifer), 236 B.R. 709, 713
25 (9th Cir. BAP 1999).

26 In California, "[t]he five elements required to create an
27 express trust are (1) a competent trustor, (2) trust intent,
28 (3) trust property, (4) trust purpose, and (5) a beneficiary."

1 Keitel v. Heubel, 103 Cal.App.4th 324, 337 (2002). Although a
2 copy of the Trust was not offered in the record, no one disputes
3 its existence. Debtor also admitted that she was the trustee of
4 the Trust, which no one disputes is a "fiduciary" within the
5 meaning of § 523(a)(4), at the time the California debt was
6 created. Therefore, the only issue the bankruptcy court had to
7 resolve is whether the California Judgment was caused by a
8 defalcation.

9 A defalcation has two elements: a breach of fiduciary duty
10 and wrongful intent. A breach of fiduciary duty is satisfied
11 either by misappropriating trust assets or by failing to account
12 for such assets. In re Hemmeter, 242 F.3d at 1190 (citing Lewis
13 v. Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996)). A
14 "defalcation" can occur for purposes of § 523(a)(4) if the
15 fiduciary either misappropriated trust assets or failed to account
16 for them. See id.

17 "Wrongful intent" requires a culpable state of mind
18 "involving knowledge of, or gross recklessness in respect to, the
19 improper nature of the relevant fiduciary behavior." Bullock,
20 133 S.Ct. at 1757. Reckless conduct qualifies as the equivalent
21 of "actual knowledge of wrongdoing." Id. at 1759. A fiduciary's
22 conduct is sufficiently reckless "if the fiduciary consciously
23 disregards or is willfully blind to a substantial and
24 unjustifiable risk that his conduct will turn out to violate a
25 fiduciary duty." Id. (quotation marks omitted).

26 The bankruptcy court found that Debtor's conduct in failing
27 to allocate, without justification, any of the \$383,513.95 in sale
28 proceeds and placing the entire risk of the limited partnership

1 investment on the Trust was, at minimum, a willful blindness to a
2 substantial and unjustifiable risk that would violate her
3 fiduciary duties to the Trust:

4 To me the most significant fact in this case is not so
5 much how the sales price was allocated between the two
6 lots, but rather how the down payment was allocated
7 between the two lots. And there is no testimony that
8 Ms. Correia relied on the advice of anyone else that she
9 was acting properly or authorized to allocate all of the
10 cash down payment to her own benefit while allocating an
11 investment in, frankly, either a deferred debt secured by
12 a deed of trust or, as it turned out, a limited
13 partnership interest to the trust, to Lot 11. Nor did I
14 even hear from Ms. Correia any explanation or
15 justification for that allocation, that is allocating all
16 of the down payment to herself instead of, as she
17 contended, well, it should have been allocated - that is
18 the sale price should have been allocated three quarters
19 perhaps to Lot 12 and one quarter to Lot 11. She didn't
20 even provide any justification for similarly allocating
21 the down payment. That is where I find that, by taking
22 all of the cash for herself and leaving the trust with a
23 limited partnership interest, she acted at a minimum with
24 willful blindness to her fiduciary duties to the Trust.
25 Willfully blind to the substantial risk of the limited
26 partnership investment.

27 Again, it doesn't really matter how much she thought that
28 risk was, there's absolutely no justification for putting
all of that risk, however much it might be, on the trust
while taking none for herself and instead taking all of
the cash. That's where I find that she acted recklessly
within the meaning of the standard adopted by Bullock.

29 Trial Tr. (Sept. 9, 2013) 120:6-121:7.

30 Debtor contends the bankruptcy court erred by failing to give
31 preclusive effect to the California state court's findings that
32 she acted reasonably and in good faith, and that her actions were
33 not intentional or an attempt to harm her children.

34 The doctrine of issue preclusion applies in bankruptcy
35 dischargeability proceedings to preclude the relitigation of state
36 court findings relevant to dischargeability. Grogan v. Garner,
37 498 U.S. 279, 285 n.11 (1991); T & D Moravits & Co. v. Munton

1 (In re Munton), 352 B.R. 707 (9th Cir. BAP 2006). The party
2 asserting issue preclusion has the burden to prove each required
3 element. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050-51
4 (9th Cir. 2008). Any reasonable doubt regarding what the prior
5 court decided is resolved against applying issue preclusion.
6 In re Honkanen, 446 B.R. at 382.

7 For issue preclusion to apply to the California Judgment,
8 the California state court must have made findings that Debtor
9 engaged in a "defalcation" within the meaning of § 523(a)(4).¹⁰
10 These findings must have been actually litigated and necessary to
11 the California Judgment. The other requirements of issue
12 preclusion are satisfied because the issues in each proceeding are
13 the same (breach of fiduciary duty and damages), the parties are
14 the same, and the California Judgment is final.

15 To establish a breach of fiduciary duty in California,
16 plaintiff must show the existence of a fiduciary relationship, its
17 breach, and damage proximately caused by that breach. Oasis W.
18 Realty, LLC v. Goldman, 51 Cal.4th 811, 820 (2011). No particular
19 scienter element is required. The California state court's
20 language of "lack of prudence" and "acted reasonably" implies a
21 negligence standard was applied in Debtor's case and not the
22 subjective knowingly or reckless standard required by Bullock.

23
24 ¹⁰ In California, the party asserting issue preclusion must
25 establish the following five elements: (1) the issue sought to be
26 precluded from relitigation must be identical to that decided in a
27 former proceeding; (2) this issue must have been actually
28 litigated in the former proceeding; (3) it must have been
necessarily decided in the former proceeding; (4) the decision in
the former proceeding must be final and on the merits; and (5) the
party against whom preclusion is sought must be the same as, or in
privity with, the party to the former proceeding. Lucido v.
Super. Ct., 51 Cal.3d 335, 341 (1990) (en banc).

1 Thus, whether a "defalcation" occurred for purposes of § 523(a)(4)
2 involves a different legal standard than the breach of fiduciary
3 duty found by the California state court. Therefore, whether
4 Debtor's conduct rose to the level of a "defalcation" under
5 Bullock was never actually litigated or necessarily decided in the
6 prior action.

7 Nevertheless, in mitigating the beneficiaries' damages under
8 CAL. PROBATE CODE § 16440(b), the California state court found that
9 Debtor had "acted reasonably and in good faith under the
10 circumstances known to [her]." Thus, intent findings were made
11 for the purpose of assessing damages. Debtor contends the
12 bankruptcy court was required to give preclusive effect to these
13 "favorable" intent findings and could not make its own findings on
14 that issue. We disagree. On this record, it is not clear whether
15 these findings pertain to just Debtor's decision on the failed
16 investment, which the California state court focused heavily on
17 and tied to unscrupulous third parties, to Debtor's failure to
18 provide accountings or access to Trust records, or to all of her
19 breaches of fiduciary duty, including her act of "pure conflict"
20 in keeping the sale proceeds for herself while allocating 100% of
21 the investment risk to the Trust. Thus, it is not clear which
22 breach or breaches were necessary to the California Judgment, and
23 it cannot support a finding that Debtor did not commit a
24 defalcation.

25 We further conclude the California state court's findings
26 that Debtor's actions "were not intentional or an attempt to take
27 her children's inheritance" were entirely unnecessary to the
28 California Judgment. Under California law, an issue has been

1 "necessarily decided" if it is not "entirely unnecessary" to the
2 judgment in the initial proceeding. Zevnik v. Super. Ct.,
3 159 Cal.App.4th 76, 83 (2008) (citing Lucido, 51 Cal.3d at 342).
4 See also Yates v. United States, 354 U.S. 298, 336 (1957) (issue
5 preclusion "makes conclusive in subsequent proceeding only
6 determinations of fact . . . that were essential to the
7 decision"). Ultimately, these findings were unnecessary to the
8 court's determination on damages, because its findings of Debtor's
9 "reasonable" and "good faith" conduct were sufficient to support
10 its decision to mitigate damages under CAL. PROBATE CODE § 16440(b).
11 As a result, the bankruptcy court did not have to give these
12 additional and unnecessary findings preclusive effect.

13 Because the California Judgment had no preclusive effect as
14 to Debtor's intent for purposes of § 523(a)(4), the bankruptcy
15 court was free to make its own findings to determine whether it
16 was excepted from discharge. The bankruptcy court found the most
17 significant breach of Debtor's fiduciary duty was how she
18 allocated the cash liquidating distribution on formation between
19 her and the Trust. No one advised Debtor that allocating the
20 entire cash distribution to herself, while allocating only the
21 limited partnership interest and the \$200,000 remaining capital
22 account to the Trust, was proper. Further, Debtor provided no
23 explanation or justification for that allocation, or for her
24 failure to allocate the cash distribution in accordance with the
25 values she placed on the Lots. By taking all of the cash for
26 herself and leaving the Trust with only a limited partnership
27 interest and a \$200,000 remaining capital account, Debtor, at
28 minimum, was willfully blind to a substantial and unjustifiable

1 risk that her conduct would violate her fiduciary duties. This
2 conduct is what led the bankruptcy court to conclude that Debtor
3 had acted recklessly within the meaning of Bullock.

4 We see no clear error in the bankruptcy court's findings.
5 Accordingly, it did not err in determining the California Judgment
6 was excepted from discharge under § 523(a)(4).

7 **B. The bankruptcy court did not err when it determined that the**
8 **Third Amended Arizona Judgment was excepted from discharge**
9 **under § 523(a)(6) and (a)(4).**

10 Section 523(a)(6) excepts from discharge debts "for willful
11 and malicious injury by the debtor to another entity or to the
12 property of another entity." Both willfulness and maliciousness
13 must be proven to apply § 523(a)(6). Ormsby v. First Am. Title
14 Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010).
15 "A 'willful' injury is a 'deliberate or intentional injury, not
16 merely a deliberate or intentional act that leads to injury.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th
17 Cir. 2008) (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998)
18 (emphasis in original)). At a minimum, willful requires "a
19 deliberate act with knowledge that the act is substantially
20 certain to cause injury." Petralia v. Jercich (In re Jercich),
21 238 F.3d 1202, 1208 (9th Cir. 2001). In other words, a debtor's
22 act is "willful" only if he or she actually intended to cause
23 injury or actually believed that injury was substantially certain
24 to occur. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-45 (9th
25 Cir. 2002).

26 Proving a "malicious" injury requires a showing that the
27 debtor (1) committed a wrongful act, (2) done intentionally,
28 (3) which necessarily causes injury, and (4) was done without just

1 cause or excuse. Id. at 1146-47.

2 After hearing no testimony from Debtor attempting to justify
3 why she engaged in the fraudulent transfers of her assets during
4 the California litigation, the bankruptcy court decided the
5 Arizona state court's finding that Debtor defended the fraudulent
6 transfer action in bad faith would be given preclusive effect:

7 As to the Arizona litigation, there is a finding which is
8 entitled to res judicata effect that she defended the
9 fraudulent transfer action in bad faith. At a minimum,
10 that means as a matter of law it's a given that she had
11 no bona fide defense to the claim that the transfer of
her assets was made with actual intent to hinder, delay,
and [sic] defraud creditors. And before me today the
only evidence is that the only creditors she had were her
children.

12 She had the opportunity in testimony here to provide any
13 justification she may have had as to either why that
14 transfer was made in good faith, made for some reason
15 other than with actual intent to hinder, delay, or
16 defraud creditors, namely her children, or to put on any
17 defense - any justification as to why she had a bona fide
18 defense to that argument, and she did not come forward
with any. In fact, all we really heard about why the
transfer occurred at all was that it was originally
advised that it made sense to put her husband's rental
properties in an LLC. No testimony as to why she was
advised that her own property should go into an LLC.

19 Consequently, the only conclusion that can be drawn from
20 the judgment, coupled with the lack of any other
21 justification for it in her testimony today, is that it
22 was made with the intent to keep her assets from her
creditors and that constitutes willful and malicious
injury under § 523(a) (6).

23 . . .

24 Consequently, I find and conclude that on the testimony
the attorney's fees incurred in the Arizona litigation are
also non-dischargeable pursuant to § 523(a) (6).

25 Trial Tr. (Sept. 9, 2013) 121:8-122:6; 122:13-15.

26 Debtor argues the Arizona state court made no findings that
27 her conduct was willful or malicious and the bankruptcy court was
28 limited to the finding in the Third Amended Arizona Judgment that

1 she litigated the case in "bad faith." Debtor argues that a bad
2 faith finding is insufficient to satisfy a claim for a willful and
3 malicious injury under § 523(a)(6). She further argues the
4 bankruptcy court erred in determining the debt for the attorney's
5 fees was excepted from discharge under § 523(a)(6) because the
6 transfers did not result in any monetary damage to her sons. We
7 disagree with all of Debtor's arguments.

8 The elements of a state court action are rarely identical to
9 those for proving a willful and malicious injury. However, issue
10 preclusion will apply if the facts established by the state court
11 judgment establishes that a debtor's violation of the UFTA was a
12 willful and malicious injury. We conclude the findings made by
13 the Arizona state court established both the willful and malicious
14 prongs for purposes of nondischargeability under § 523(a)(6).

15 A judgment for "actual" fraudulent transfer can satisfy the
16 elements for a willful and malicious injury. In re Fairgrieves,
17 426 B.R. 748, 758 (Bankr. N.D. Ill. 2010) (judgment for "actual"
18 fraudulent transfer can demonstrate a willful and malicious injury
19 under § 523(a)(6)). See Vazquez v. AAA Blueprint & Digital
20 Reprographics (In re Vazquez), 2013 WL 6571693, at *4-6 (9th Cir.
21 BAP Dec. 13, 2013) (affirming bankruptcy court's ruling that
22 creditor's judgment for actual fraudulent transfer under CAL. CIV.
23 CODE § 3439.04(a)(1) satisfied the elements for a willful and
24 malicious injury under § 523(a)(6), so issue preclusion was
25 properly applied).

26 Although the Third Amended Arizona Judgment had eliminated
27 the "intent" language previously stated in the Second Amended
28 Arizona Judgment – i.e., that Debtor transferred her assets "with

1 the intent to hinder, delay or defraud Plaintiffs" – the Third
2 Amended Arizona Judgment incorporated the findings made in the
3 2010 Minute Entry, which also incorporated and supplemented the
4 findings made in the 2009 Minute Entry. The 2010 Minute Entry
5 found that "Rose's own admission at trial that she transferred the
6 Arizona property during the pendency of the California litigation
7 to insulate herself and assets from suit was an admission under
8 the UFTA." The 2009 Minute Entry states:

9 [T]he Court finds by a preponderance of the evidence that
10 Rosira Correia and John Sasser transferred assets with
the intent to hinder, delay or defraud Plaintiffs.

11 . . .

12 Defendants Rosira Correia and John K. Sasser defended the
13 case in bad faith. They transferred assets intending to
14 hinder, delay or defraud Plaintiffs. They tried to hide
her assets from Plaintiffs and then denied that was their
intent.

15 Thus, the Third Amended Arizona Judgment established that Debtor
16 engaged in an "actual" fraudulent transfer.

17 In addition, the Arizona state court's finding that Debtor
18 defended the fraudulent transfer action in bad faith only further
19 establishes a willful and malicious injury within the meaning of
20 § 523(a)(6). As the bankruptcy court properly concluded, as a
21 matter of law, because the Arizona state court found Debtor liable
22 for John and Jason's attorney's fees under ARS § 12-349, clearly
23 Debtor had no bona fide defense to the claim that the transfers of
24 her assets were made with the actual intent to hinder, delay or
25 defraud her sons and that the transfers were made with the intent
26 to keep her assets from them. And, contrary to Debtor's
27 contention, the bankruptcy court was not limited only to the
28 Arizona state court's finding of "bad faith." In support of the

1 fee award under ARS § 12-349, the Arizona state court set forth
2 its complete findings in the 2009 Minute Entry (incorporated in
3 the 2010 Minute Entry, which was incorporated into the Third
4 Amended Arizona Judgment), which states: "The Court finds that
5 Defendants' defense constituted harassment, was groundless, was
6 not made in good faith and was solely or primarily for delay."

7 With the Arizona state court's finding of actual intent, it
8 follows that Debtor intended to cause injury to her sons or
9 believed that injury was substantially certain to occur as a
10 result of her transferring virtually all of her assets during the
11 California litigation to prevent her sons from executing on what
12 became the eventual California Judgment. Thus, a "willful" injury
13 was established.

14 A "malicious" injury was also established. A wrongful act is
15 self-evident given the nature of Debtor's conduct in transferring
16 her assets for the purpose of hindering her sons' collection
17 efforts. By finding her liable for actual fraudulent transfers,
18 the Arizona state court also necessarily found that Debtor's acts
19 were intentional. Her wrongful actions, as evidenced by the
20 attorney's fee award under ARS § 12-349, necessarily caused her
21 sons injury; they were forced to incur attorney's fees by having
22 to file an action to undo the transfers in hopes of collecting on
23 the California Judgment. See Suarez v. Barrett (In re Suarez),
24 400 B.R. 732, 739-740 (9th Cir. BAP 2009) ("injury" can include
25 litigation expenses; no underlying compensatory judgment is
26 necessary for an award of attorney's fees to be nondischargeable).
27 Finally, as also evidenced by the attorney's fee award, Debtor's
28 actions were done without just cause or excuse. As the Arizona

1 state court found, her defense to the fraudulent transfer claims
2 was without substantial justification. The bankruptcy court even
3 offered Debtor the opportunity to provide any good faith reasons
4 for the transfers; she offered none.

5 The doctrine of issue preclusion prohibits relitigation of
6 issues adjudicated by the Arizona state court. In re Lopez,
7 367 B.R. at 104. Under Arizona law, issue preclusion applies
8 "when an issue was actually litigated in a previous proceeding,
9 there was a full and fair opportunity to litigate the issue,
10 resolution of the issue was essential to the decision, a valid and
11 final decision on the merits was entered, and there is common
12 identity of parties." Hullett v. Cousin, 63 P.3d 1029, 1034-35
13 (Ariz. 2003) (en banc).

14 All of the foregoing elements are satisfied in this case.
15 The factual issues relevant to Debtor's willful and malicious
16 injury under § 523(a)(6) were actually litigated by the Arizona
17 state court. Second, the record reflects that Debtor, who was
18 represented by counsel, had a full and fair opportunity to, and
19 did, litigate the fraudulent transfer claims and the attorney's
20 fees under ARS § 12-349. Third, that Debtor tried to hide her
21 assets and defended subsequent litigation in bad faith by denying
22 her intent were essential to the Arizona state court's finding in
23 the Third Amended Arizona Judgment that John and Jason were
24 entitled to attorney's fees under ARS § 12-349. Fourth, a valid
25 and final judgment on the merits was entered on May 1, 2013, nunc
26 pro tunc, to the original judgment entered on November 24, 2009.
27 Finally, the parties were the same. Accordingly, the bankruptcy
28 court did not err in giving preclusive effect to the Arizona state

1 court's findings supporting its conclusion that the Third Amended
2 Arizona Judgment for the statutory attorney's fees is a debt for a
3 willful and malicious injury.

4 The bankruptcy court also determined the debt for the
5 attorney's fees was nondischargeable under § 523(a)(4) as a direct
6 consequence of John and Jason's attempt to satisfy the California
7 Judgment:

8 In addition, however, I believe their non-dischargeability
9 stands on an independent ground. I believe those
10 attorney's fees are also predictable consequences of the
11 underlying actions and consequently are part of the debt
12 determined to be non-dischargeable in the California
13 actions. They are like the damages or I think in the case
14 it was treble damages in Cohen versus Del La Cruz, the
Supreme Court holding. They are by her own actions,
intentional consequences of the underlying action that
rendered the breach of her fiduciary duty non-
dischargeable under § 523(a)(4). And consequently I
believe the attorney's fees in the Arizona litigation are
also non-dischargeable under § 523(a)(4).

15 Trial Tr. (Sept. 9, 2013) 122:16-123:2. In her statement of
16 issues presented in her opening brief, Debtor questioned the
17 bankruptcy court's decision that the attorney's fee award was
18 nondischargeable under § 523(a)(4) because her sons did not seek
19 such relief. However, nowhere in her brief did Debtor provide any
20 more argument or authority on the matter. As a result, this issue
21 has been abandoned. City of Emeryville v. Robinson, 621 F.3d
22 1251, 1262 n.10 (9th Cir. 2010) (appellate court in this circuit
23 "will not review issues which are not argued specifically and
24 distinctly in a party's opening brief.").

25 In any event, we see no error in the bankruptcy court's
26 decision. The attorney's fees awarded in the Third Amended
27 Arizona Judgment are nondischargeable because they flowed from
28 Debtor's nondischargeable conduct under § 523(a)(4). See Cohen v.

