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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-13-1437-KiLaPa
)		
BARRY MICHAEL GOULD,)	Bk. No.	1:12-11279-MT
)		
Debtor.)	Adv. No.	1:12-01168-MT
)		
<hr/>			
BARRY MICHAEL GOULD,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
RED HILL ENTERPRISES,)		
)		
Appellee.)		
)		

Submitted Without Oral Argument
on May 15, 2014²

Filed - August 25, 2014

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Appearances: Appellant Barry Michael Gould, pro se, on brief;
James Charles Bastian, Jr. and Melissa Davis Lowe
of Shulman Hodges & Bastian LLP on brief for
appellee, Red Hill Enterprises.

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 March 10, 2014, the Panel determined that this matter was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP R. 8012-1.

1 Before: KIRSCHER, LATHAM³ and PAPPAS, Bankruptcy Judges.

2 Debtor Barry Michael Gould ("Gould") appeals a judgment
3 determining that a state court judgment in favor of appellee Red
4 Hill Enterprises ("Red Hill") was excepted from discharge under
5 § 523(a)(2)(A)⁴ and (a)(6) on the basis of issue preclusion. We
6 AFFIRM on the § 523(a)(6) claim, but on a ground not relied upon
7 by the bankruptcy court. Because we are able to affirm on that
8 basis, we do not express an opinion as to the court's decision to
9 except the debt from Gould's discharge under § 523(a)(2)(A).

10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

11 A. Prepetition events

12 Red Hill's claims against Gould originate from a 1997 civil
13 action prosecuted by Red Hill against Gould and his corporation,
14 Learning Tree University ("Learning Tree"). Gould is the
15 President and founder of Learning Tree. Learning Tree was in the
16 business of selling vocational education services. In 1994, Gould
17 formed LTU Extension, a for-profit corporation, to manage and run
18 Learning Tree, a nonprofit corporation.

19 Judgment was entered against Gould and Learning Tree for
20 \$108,724.61 (the "1998 Judgment"). However, Gould compromised
21 this claim by waiving his and Learning Tree's appellate rights in
22 exchange for the 1998 Judgment being entered against Learning Tree
23 only. Red Hill properly recorded liens against Learning Tree's

24

25 ³ Hon. Christopher Latham, Bankruptcy Judge for the Southern
26 District of California, sitting by designation.

27 ⁴ 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 assets in connection with the 1998 Judgment.

2 After Learning Tree stopped making payments on the 1998
3 Judgment in March 2002, Red Hill initiated collection efforts.
4 The principal remaining on the debt at that time was about
5 \$51,000. Red Hill's writs on Learning Tree's accounts were
6 returned unsatisfied because Learning Tree had no funds to levy.
7 Red Hill later learned that Gould had transferred all of Learning
8 Tree's funds to LTU Extension.

9 In 2002, the assets of Learning Tree and LTU Extension were
10 sold to Corinthian Colleges, Inc. ("Corinthian") for \$5.3 million,
11 including a \$3 million cash payment from Corinthian. After the
12 sale, Corinthian, Gould, Learning Tree and LTU Extension executed
13 a separate letter agreement wherein the 1998 Judgment was excepted
14 from the asset sale. Red Hill alleged it never received notice of
15 the sale, which prevented it from satisfying its judgment lien
16 from the sale proceeds.

17 Red Hill filed a complaint in the Los Angeles Superior Court
18 (the "LA Action") against Gould, Learning Tree and LTU Extension
19 (collectively "Defendants"), with the operative pleading at the
20 time of trial being its Third Amended Complaint ("TAC"). The TAC
21 alleged claims for: (1) Unlawful Transfers under CAL. CIV. CODE
22 § 3439 et seq.; (2) Conspiracy to Commit Unlawful Transfers;
23 (3) Aiding and Abetting Fraudulent Transfers; (4) Conversion;
24 (5) Money Had and Received; (6) Interference with Prospective
25 Economic Advantage; and (7) Unfair Business Practices. Red Hill
26 alleged that Gould was the alter ego of Learning Tree and LTU
27 Extension.

28 In May 2005, the jury returned a verdict in favor of Red Hill

1 and a special verdict finding damages in the amount of \$51,177.44.

2 The special verdict included the following findings:

3 (a) Learning Tree, LTU Extension and Gould were liable for the
4 fraudulent transfer of Learning Tree's assets;

5 (b) Learning Tree, LTU Extension and Gould were liable for
6 conspiring with Learning Tree in the fraudulent transfer;

7 (c) Learning Tree, LTU Extension and Gould were liable for aiding
8 and abetting the fraudulent transfer;

9 (d) Learning Tree, LTU Extension and Gould were liable for
10 intentional interference with Red Hill's prospective economic
11 advantage;

12 (e) Learning Tree, LTU Extension and Gould were liable for
13 conversion;

14 (f) Learning Tree, LTU Extension and Gould were liable for money
15 had and received;

16 (g) Gould was the alter ego of both Learning Tree and LTU
17 Extension so as to make Gould personally liable for Red
18 Hill's judgment against Learning Tree, and LTU Extension was
19 the alter ego of Learning Tree; and

20 (h) Gould and LTU Extension acted with malice, fraud, or
21 oppression towards Red Hill.

22 In March 2004, Learning Tree filed a chapter 7 bankruptcy
23 case. Red Hill obtained relief from the automatic stay to proceed
24 with its motion for attorney's fees in the LA Action. Learning
25 Tree's bankruptcy case was closed in June 2007.

26 In 2010, after the appellate proceedings of the LA Action
27 terminated, the state court entered judgment awarding damages of
28 the special jury verdict plus interest, costs and fees related to

1 the appeals, for a grand total of \$239,621.10, plus attorney's
2 fees of \$291,753.50 (the "2010 Judgment").⁵ The 2010 Judgment
3 ordered that Red Hill "recover on its actions for intentional
4 fraudulent transfers, conversion, intentional interference with
5 prospective economic advantage, and for money had and received
6 against [Defendants] jointly and severally" Although a
7 separate trial was to be held on the issue of punitive damages,
8 Red Hill agreed to dismiss its right to recover punitive damages
9 so it could expedite judgment collection proceedings; the state
10 court vacated Red Hill's scheduled trial to determine punitive
11 damages. The 2010 Judgment is final.⁶

12 **B. Postpetition events**

13 Gould filed a chapter 7 bankruptcy case on February 9, 2012.
14 Red Hill sought to except the 2010 Judgment from discharge under
15 § 523(a)(2)(A) and (a)(6). Its claims relied on the same events
16 and conduct from which the 2010 Judgment arose.

17 Red Hill contended its debt was excepted from discharge under
18 § 523(a)(2)(A) because Gould (individually and as the alter ego of
19 his two entities) had defrauded Red Hill when he diverted funds of
20 Learning Tree to LTU Extension to prevent Red Hill from executing
21 on its 1998 Judgment, and when he sold the assets of those two

23 ⁵ Gould appealed the initial judgment from 2005. The
24 California Court of Appeal declined to reach the merits of Gould's
arguments due to his deficient briefing and excerpts of record.

25 ⁶ Gould argues for the first time on appeal that the 2010
26 Judgment is not final because the appellate court did not review
the merits of his arguments. Generally, we do not consider issues
27 not raised before the trial court. See, e.g., United States v.
28 Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990 (issues not raised at
the trial court ordinarily will not be considered for the first
time on appeal). We decline to consider this issue.

1 entities to Corinthian excluding Red Hill's debt to be paid from
2 the sale proceeds. Red Hill contended its debt was excepted from
3 discharge under § 523(a)(6) because the jury had found Gould
4 liable for conversion of Red Hill's collateral and the sale
5 proceeds thereof, that such conversion was a substantial factor in
6 causing harm to Red Hill, and that Gould and his alter ego LTU
7 Extension had acted with malice, fraud, or oppression. Red Hill's
8 damages totaled \$531,374.60.

9 **1. Red Hill's motion for summary judgment**

10 Red Hill moved for summary judgment on the basis of issue
11 preclusion (the "MSJ"). Red Hill contended that issue preclusion
12 applied to the 2010 Judgment because the jury found that Gould's
13 conduct in transferring Learning Tree's funds to LTU Extension,
14 which prevented Red Hill from levying on its 1998 Judgment, in
15 excluding the 1998 Judgment from being paid out of the sale
16 proceeds and in converting those proceeds was fraudulent,
17 malicious and oppressive. Specifically, Red Hill argued that
18 Gould's fraudulent transfers under CAL. CIV. CODE § 3439.04(a)⁷ –

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20 ⁷ CAL. CIV. CODE § 3439.04(a) provides:

21 (a) A transfer made or obligation incurred by a debtor is
22 fraudulent as to a creditor, whether the creditor's claim
23 arose before or after the transfer was made or the obligation
24 was incurred, if the debtor made the transfer or incurred the
25 obligation as follows:

24 (1) With actual intent to hinder, delay, or defraud any
25 creditor of the debtor.

25 (2) Without receiving a reasonably equivalent value in
26 exchange for the transfer or
27 obligation, and the debtor either:

26 (A) Was engaged or was about to engage in a business or a
27 transaction for which the remaining assets of the debtor were
28 unreasonably small in relation to the business or
transaction.

continue...

1 made with the actual intent to hinder, delay or defraud Red Hill -
2 met all of the elements for "actual fraud" under § 523(a)(2)(A),
3 and the jury's findings that Gould acted with malice, fraud or
4 oppression toward Red Hill also satisfied the elements for a
5 willful and malicious injury under § 523(a)(6).

6 Gould opposed the MSJ, contending that Red Hill was not
7 entitled to summary judgment because the 2010 Judgment did not
8 satisfy the elements of issue preclusion: the issues were not
9 identical; and they had not been actually litigated or necessarily
10 decided in the LA Action. Specifically, Gould argued that Red
11 Hill sought and obtained a judgment for "unlawful/fraudulent
12 transfers," not "actual fraud," and the jury's finding did not
13 specify whether Gould's intent with respect to the transfer was to
14 hinder, to delay or to defraud Red Hill. Thus, contended Gould,
15 whether he committed fraud was a triable issue of material fact
16 precluding summary judgment.

17 Gould argued that Red Hill's claim under § 523(a)(2)(A)
18 failed anyway because it had not established that he made any
19 misrepresentations to Red Hill, that he made knowingly false
20 representations to Red Hill, that he intended to deceive Red Hill,
21 and that Red Hill justifiably relied on his false representations
22 or which representations, if any, proximately caused Red Hill's
23 damages. Gould argued that issue preclusion also did not apply to
24 Red Hill's claim under § 523(a)(6) because the jury's finding that

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⁷...continue

27 (B) Intended to incur, or believed or reasonably should
28 have believed that he or she would incur, debts beyond his or
her ability to pay as they became due.

1 he acted with malice, fraud, or oppression did not satisfy the
2 requirements for a "willful and malicious" injury.

3 In reply, Red Hill argued that because Gould was found liable
4 for "fraudulent transfer" under CAL. CIV. CODE § 3439.04(a), which
5 requires actual intent, the jury necessarily found he committed
6 "actual fraud." Thus, even if the jury found that Gould only
7 tried to hinder or delay a creditor, the clear language of the
8 statute necessarily meant a finding of actual fraud. Red Hill
9 disputed Gould's contention that the jury's finding could have
10 been for "constructive" fraudulent transfer. The TAC in the
11 LA Action, as well as Red Hill's trial brief, referenced only
12 actual fraudulent transfers under CAL. CIV. CODE § 3439.04.
13 Further, the 2010 Judgment awarded recovery on Red Hill's "cause
14 of action for intentional fraudulent transfer." Finally, the jury
15 instructions spoke only to actual fraudulent transfers.
16 Therefore, argued Red Hill, the jury's finding had to be one for
17 actual fraud, not constructive fraud, so the issue of Gould's
18 "fraud" had been litigated and necessarily decided.

19 Red Hill agreed that conversion under California law, without
20 a showing of wrongful intent, will not satisfy the elements of a
21 willful and malicious injury under § 523(a)(6). However, Red Hill
22 argued that the jury specifically found Gould acted intentionally.
23 Because it found Gould liable for intentional interference with
24 Red Hill's prospective economic advantage, which requires an
25 "intentional" and "wrongful" act, Red Hill argued the jury
26 necessarily determined Gould had acted intentionally to cause
27 injury or with substantial certainty of injury. Red Hill further
28 argued that because the jury found fraud, it necessarily

1 determined Gould committed "intentional tortious conduct." Malice
2 could be inferred from Gould's wrongful conduct.

3 **2. The bankruptcy court's ruling**

4 The bankruptcy court issued a lengthy tentative ruling in
5 favor of Red Hill, which it later adopted as its final ruling.
6 The preclusive elements of a final judgment on the merits and the
7 same parties were not in dispute. The bankruptcy court concluded
8 that Gould's "actual fraud" was at issue in the LA Action because
9 the jury's findings, based on the instructions presented, were
10 solely under CAL. CIV. CODE § 3439.04(a)(1). However, Red Hill's
11 judgment for fraudulent transfer did not fall under the "usual"
12 requirements for a § 523(a)(2)(A) claim; a "false representation"
13 was missing. Therefore, whether Gould's actual fraud had been
14 actually litigated and necessarily decided in the LA Action for
15 purposes of § 523(a)(2)(A) was uncertain. Relying on McClellan v.
16 Cantrell, 217 F.3d 890, 892-93 (7th Cir. 2000), which analyzed the
17 term "actual fraud" in § 523(a)(2)(A) and extended the statute to
18 include a debt for an actual fraudulent transfer claim, the
19 bankruptcy court determined that the issue of Gould's fraudulent
20 intent, proximate cause and damages had been actually litigated
21 and necessarily decided by the jury.⁸ Therefore, issue preclusion
22 applied to the 2010 Judgment.

23 The bankruptcy court also decided that the jury's findings
24 were sufficient to prove the "willful and malicious" elements of

25
26 ⁸ Neither the Ninth Circuit nor this Panel has endorsed or
27 rejected in any reported decision the approach taken by the
28 Seventh Circuit in McClellan. This Panel, in Roos v. Kimmel
(In re Kimmel), 378 B.R. 630, 639 (9th Cir. BAP 2007),
distinguished McClellan on its facts and neither endorsed nor
rejected its approach.

1 § 523(a)(6). Specifically, the jury's finding of conversion,
2 combined with its scienter finding of Gould's intentional
3 interference with prospective economic advantage, established the
4 requisite wrongful intent for a "willful" injury. Alternatively,
5 the jury's finding of Gould's actual fraud also established this
6 element. As for the "malicious" element, the evidence before the
7 state court, including the jury instructions and the 2010
8 Judgment, demonstrated that the jury had found Gould's conversion
9 was an intentional act that caused injury. In addition, the jury
10 had found, by clear and convincing evidence, that Gould acted with
11 malice, fraud or oppression. While conceding the jury verdict was
12 not specific as to whether it found Gould had acted with malice,
13 fraud or oppression, the bankruptcy court noted that malice could
14 be inferred from the nature of Gould's wrongful act of conversion.
15 Further, Gould was given an opportunity to present his
16 justification and defenses to Red Hill's claims, but the jury
17 necessarily rejected them. Therefore, a willful and malicious
18 injury had been actually litigated and necessarily decided, and
19 issue preclusion applied to the 2010 Judgment.

20 Because no genuine issue of material fact existed as to
21 whether Gould actually defrauded Red Hill within the meaning of
22 § 523(a)(2)(A) or whether he willfully and maliciously injured Red
23 Hill within the meaning of § 523(a)(6), the bankruptcy court
24 entered an order on September 4, 2013, granting the MSJ. In its
25 concurrent judgment, the bankruptcy court determined that Red
26 Hill's entire debt of \$531,374.60, which included the jury award
27 and the litigation costs incurred defending the jury verdict, was
28 excepted from discharge. Gould timely appealed.

1 **II. JURISDICTION**

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

4 **III. ISSUES**

5 1. In granting summary judgment to Red Hill on its § 523(a) (6)
6 claim, did the bankruptcy court err in determining that issue
7 preclusion was available, or abuse its discretion in applying
8 issue preclusion to the 2010 Judgment?

9 2. In granting summary judgment to Red Hill on its
10 § 523(a) (2) (A) claim, did the bankruptcy court err in determining
11 that issue preclusion was available, or abuse its discretion in
12 applying issue preclusion to the 2010 Judgment?

13 **IV. STANDARDS OF REVIEW**

14 We review de novo the bankruptcy court's grant of summary
15 judgment. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219,
16 1221-22 (9th Cir. 2010); Cutter v. Seror (In re Cutter), 398 B.R.
17 6, 16 (9th Cir. BAP 2008).

18 We review de novo a bankruptcy court's determination that
19 issue preclusion is available. Lopez v. Emerg. Serv. Restoration,
20 Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007); Khaligh
21 v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006).
22 Once we determine issue preclusion is available, we review whether
23 applying it was an abuse of discretion. Id. A bankruptcy court
24 abuses its discretion if it applied the wrong legal standard or
25 its findings were illogical, implausible or without support in the
26 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
27 832 (9th Cir. 2011).

28 The question whether a claim is dischargeable presents mixed

1 issues of law and fact, which we also review de novo. Peklar v.
2 Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001).
3 Whether a creditor has proven an essential element of a claim
4 under § 523(a) is a factual determination reviewed for clear
5 error. See Candland v. Ins. Co. of N. Am. (In re Candland),
6 90 F.3d 1466, 1469 (9th Cir. 1996). A finding is clearly
7 erroneous if it is "illogical, implausible or without support in
8 the record." Retz v. Samson (In re Retz), 606 F.3d 1189, 1196
9 (9th Cir. 2010) (citing United States v. Hinkson, 585 F.3d 1247,
10 1261-62 & n.21 (9th Cir. 2009) (en banc)).

11 We may affirm on any ground supported by the record, even if
12 the ground was not relied upon by the bankruptcy court.
13 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
14 322 F.3d 1064, 1076-77 (9th Cir. 2003).

15 V. DISCUSSION

16 A. Governing law

17 1. Summary judgment standards

18 Under Civil Rule 56(a), applicable here through Rule 7056,
19 summary judgment is appropriate when "the movant shows that there
20 is no genuine dispute as to any material fact and the movant is
21 entitled to judgment as a matter of law." Summary judgment should
22 not be entered when there are disputes over facts that may affect
23 the outcome of the suit under the governing law. Anderson v.
24 Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party
25 bears the initial burden of showing that no material factual
26 dispute exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
27 (1986); Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th
28 Cir. 2007). When ruling on a motion for summary judgment, a court

1 must view all the evidence in the light most favorable to the
2 nonmoving party. Cnty. of Tuolumne v. Sonora Cmty. Hosp.,
3 236 F.3d 1148, 1154 (9th Cir. 2001).

4 **2. Issue preclusion standards**

5 The doctrine of issue preclusion prohibits relitigation of
6 issues adjudicated in a prior action. Child v. Foxboro Ranch
7 Estates, LLC (In re Child), 486 B.R. 168, 172 (9th Cir. BAP 2013).
8 Issue preclusion applies in exception to discharge proceedings.
9 Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991) (preclusion
10 principles apply in discharge exception proceedings under § 523(a)
11 to preclude relitigation of state court findings relevant to the
12 dischargeability determination). As required under 28 U.S.C.
13 § 1738, the Full Faith and Credit Act, we apply the relevant
14 state's preclusion principles. Far Out Prods., Inc. v. Oskar,
15 247 F.3d 986, 993 (9th Cir. 2001); Gayden v. Nourbakhsh
16 (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

17 Under California law, issue preclusion bars relitigation of
18 an issue if: (1) the issue sought to be precluded is identical to
19 that decided in the prior proceeding; (2) the issue was actually
20 litigated in the prior proceeding; (3) the issue was necessarily
21 decided in the prior proceeding; (4) the judgment in the prior
22 proceeding is final and on the merits; and (5) the party against
23 whom preclusion is sought is the same, or in privity with, the
24 party to the prior proceeding. Harmon v. Kobrin (In re Harmon),
25 250 F.3d 1240, 1245 (9th Cir. 2001) (citing Lucido v. Super. Ct.,
26 51 Cal.3d 335, 341 (1990)). In addition to meeting these
27 threshold requirements, a California court may apply issue
28 preclusion only if doing so furthers the underlying public

1 policies of preservation of the integrity of the judicial system,
2 promotion of judicial economy, and the protection of litigants
3 from harassment by vexatious litigation. Lucido, 51 Cal.3d at
4 342-43.

5 The party asserting issue preclusion bears the burden of
6 proof as to all elements and must introduce a sufficient record to
7 reveal the controlling facts and the exact issues litigated.
8 Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP
9 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Any reasonable doubt
10 as to what was decided by a prior judgment should be resolved
11 against allowing issue preclusive effect. Id.

12 At the outset, we observe the fourth and fifth elements for
13 application of issue preclusion to Red Hill's nondischargeability
14 claims are satisfied: the 2010 Judgment is final and was on the
15 merits; and the parties are the same. Accordingly, we review only
16 the first three.

17 **B. The bankruptcy court did not err in determining that issue
18 preclusion was available and granting summary judgment to Red
Hill for its claim under § 523(a) (6).**

19 Section 523(a) (6) excepts from discharge debts "for willful
20 and malicious injury by the debtor to another entity or to the
21 property of another entity." Both willfulness and maliciousness
22 must be proven in order to apply § 523(a) (6). Ormsby v. First Am.
23 Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir.
24 2010). "A 'willful' injury is a 'deliberate or intentional
25 injury, not merely a deliberate or intentional act that leads to
26 injury.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d
27 702, 706 (9th Cir. 2008) (quoting Kawaauhau v. Geiger, 523 U.S. 57,
28 61 (1998) (emphasis in original)). At a minimum, willful requires

1 a "deliberate act with knowledge that the act is substantially
2 certain to cause injury" Petralia v. Jercich
3 (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001). In other
4 words, a debtor's act is "willful" only if he or she actually
5 intended to cause injury or actually believed that injury was
6 substantially certain to occur. Carrillo v. Su (In re Su),
7 290 F.3d 1140, 1144-45 (9th Cir. 2002).

8 Proving a "malicious" injury requires a showing that the
9 debtor (1) committed a wrongful act, (2) done intentionally,
10 (3) which necessarily causes injury, and (4) was done without just
11 cause or excuse. Id. at 1146-47.

12 The bankruptcy court chose to apply issue preclusion to Red
13 Hill's claim under § 523(a)(6) based on the jury's findings of
14 conversion and intentional interference with prospective economic
15 advantage. However, we opt to affirm on another basis supported
16 by the record. Tahoe-Sierra Pres. Council, Inc., 322 F.3d at
17 1076-77.

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

27 Gould contends the bankruptcy court erred in "cran[ing] its
28 neck to speculate" that the jury found him liable for an actual

1 fraudulent transfer under CAL. CIV. CODE § 3439.04(a)(1), when the
2 jury might actually have determined he was liable for a
3 constructive fraudulent transfer under CAL. CIV. CODE
4 §§ 3439.04(a)(2) or 3439.05, which would not satisfy the statute.

5 In its TAC, Red Hill pled claims for unlawful/fraudulent
6 transfer under CAL. CIV. CODE § 3439.04(a)(1), which codifies
7 "actual fraud," and CAL. CIV. CODE § 3439.04(a)(2), which codifies
8 "constructive fraud." Donell v. Kowell, 533 F.3d 762, 770 (9th
9 Cir. 2008). Red Hill did not plead a claim under CAL. CIV. CODE
10 § 3439.05 as Gould contends. The instructions submitted to the
11 jury included an instruction for "actual fraud" with respect to
12 the alleged transfers and an instruction concerning the "badges of
13 fraud" the jury could consider to prove Gould's actual fraud. See
14 CAL. CIV. CODE § 3439.04(b) (listing badges of fraud).

15 Although one jury instruction referenced Learning Tree's
16 insolvency, which is an element for a constructive fraudulent
17 transfer under CAL. CIV. CODE § 3439.04(a)(2), that jury instruction
18 discusses insolvency as one of the many badges of fraud the jury
19 could consider in determining whether Gould committed "actual
20 fraud" (e.g., insolvency can be a "circumstance tending to show
21 that the transfer was made with the intent to defraud creditors").
22 Notably, no jury instruction was presented about the Defendants
23 not receiving reasonably equivalent value, which is a necessary
24 element for a claim under CAL. CIV. CODE § 3439.04(a)(2).

25 Thus, because the jury instructions spoke only to a claim
26 under CAL. CIV. CODE § 3439.04(a)(1) for "actual" fraudulent
27 transfer, it follows that this was the only standard upon which
28 the jury could have based its decision that Gould was liable.

1 Accordingly, the fact of Gould's intent was at issue in the
2 LA Action. See Lucido, 51 Cal.3d at 342 ("The 'identical issue'
3 requirement addresses whether 'identical factual allegations' are
4 at stake in the two proceedings, not whether the ultimate issues
5 or dispositions are the same.")

6 Gould also contends the issues of a willful and malicious
7 injury within the meaning of § 523(a)(6) were not actually
8 litigated and necessarily decided in the LA Action. The elements
9 of a state court action are rarely identical to those for proving
10 a willful and malicious injury. However, issue preclusion will
11 apply if the facts established by the 2010 Judgment establishes
12 that Gould's violation of CAL. CIV. CODE § 3439.04(a)(1) was a
13 willful and malicious injury. We conclude the findings made by
14 the jury establish both the willful and malicious prongs for
15 purposes of nondischargeability under § 523(a)(6).

16 With the jury's finding of actual fraudulent transfer, it
17 follows that Gould intended to cause injury to Red Hill or
18 believed that injury was substantially certain to occur with his
19 conduct of transferring Learning Tree's funds to LTU Extension to
20 prevent Red Hill from levying on its 1998 Judgment. His willful
21 intent is further shown by the following instruction the jury
22 considered:

23 It is not sufficient to hold Learning Tree University,
24 LTU Extension, or B. Michael Gould liable for fraudulent
25 transfers if you find that the only evidence supporting
26 this claim are transfers of money between Learning Tree
University and LTU Extension with the intent to defraud
all of the LTU's creditors instead of just Red Hill
Enterprises.

27 Given this instruction, and the jury's finding that Gould was
28 liable to Red Hill for actual fraudulent transfer, the jury

1 necessarily found he intended to injure Red Hill specifically.
2 Thus, a willful injury was actually litigated and necessarily
3 decided. See In re Harmon, 250 F.3d at 1248 (if an issue was
4 necessarily decided in a prior proceeding, it was actually
5 litigated).

6 As for the "malicious" prong, a wrongful act is self-evident
7 given the nature of Gould's conduct in transferring Learning
8 Tree's funds to LTU Extension for the purposes of hindering Red
9 Hill's collection efforts. By finding Gould liable for actual
10 fraudulent transfer, the jury also necessarily found that Gould's
11 acts were intentional. The jury further found, as stated in the
12 2010 Judgment, that the transfer of Learning Tree's assets was a
13 substantial factor in causing harm or loss to Red Hill. Finally,
14 because the jury found in favor of Red Hill on this claim, it
15 unequivocally found that Gould's actions were not justified. In
16 addition, the jury's finding that Gould acted with malice, fraud
17 or oppression – a finding that subjected him to punitive damages
18 and serves the purpose of punishing the wrongdoer – proves that
19 his conduct was done without just cause or excuse.

20 Even if there were any truth to Gould's defense arguments he
21 raised before the bankruptcy court, it would not as a matter of
22 law constitute just cause or excuse for Gould's wrongful acts,
23 given his specific intent to injure Red Hill. See Jett v. Sicroff
24 (In re Sicroff), 401 F.3d 1101, 1107 (9th Cir. 2005) (holding that
25 specific intent to injure negated proffered just cause or excuse
26 for debtor's wrongful conduct). Therefore, a malicious injury was
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1 actually litigated and necessarily decided.⁹

2 The facts established by the 2010 Judgment demonstrate that
3 all the elements for a willful and malicious injury were at issue,
4 actually litigated and essential to the jury's finding that Gould
5 was liable for damages to Red Hill based on his actual fraudulent
6 transfer. Therefore, all the elements for the application of
7 issue preclusion have been met.

8 Although we have determined the 2010 Judgment is excepted
9 from discharge under § 523(a)(6) on other grounds, the bankruptcy
10 court did not err in giving the jury findings preclusive effect.
11 Accordingly, because Red Hill satisfied its burden of
12 demonstrating that no genuine issue of material fact existed as to
13 the elements of a willful and malicious injury, the bankruptcy
14 court also did not err in granting Red Hill summary judgment.¹⁰

15 **VI. CONCLUSION**

16 For the foregoing reasons, we AFFIRM.

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24 ⁹ Although Gould does not dispute the bankruptcy court's
25 determination that policy considerations favored the application
26 of issue preclusion to the 2010 Judgment, we see no error in that
decision.

27 ¹⁰ Because we affirm the bankruptcy court's ruling that the
28 2010 Judgment was excepted from discharge under § 523(a)(6), we do
not need to decide whether it erred in granting summary judgment
to Red Hill on its claim under § 523(a)(2)(A).