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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-13-1518-JuHlPa
)
 BOBBY JOE WALLACE and) Bk. No. NV-10-24125-LBR
 BRIDGET JANINE WALLACE,)
)
 Debtors.)
 _____)
)
 BOBBY JOE WALLACE; BRIDGET)
 JANINE WALLACE,)
)
 Appellants,)
)
 v.) M E M O R A N D U M *
)
 ABEL ROSALES; ROBERT PIKE;)
 GARY AARDEMA; AARDEMA &)
 LONDON,)
)
 Appellees.)
 _____)

Argued and Submitted on September 18, 2014
at Las Vegas, Nevada

Filed - October 28, 2014

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

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: Christopher Burke, Esq. for appellants Bobby Joe
 Wallace and Bridget Janine Wallace; David Mincin,
 Esq. for appellees Abel Rosales, Robert Pike,
 Gary Aardema, and Aardema & London.

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

1 Before: JURY, HOULE,¹ and PAPPAS, Bankruptcy Judges.

2 Chapter 7² debtors Bobby and Bridget Wallace appeal from
3 the bankruptcy court's order denying (1) their motion to reopen
4 their bankruptcy case and (2) their request for attorney's fees
5 and costs incurred in defending the appeal of the bankruptcy
6 court's contempt order issued against appellees Abel Rosales,
7 Robert Pike, Gary Aardema, and Aardema & London (collectively,
8 Rosales). Because the bankruptcy court was precluded from
9 awarding the appellate attorney's fees requested, we AFFIRM.

10 **I. FACTS**

11 This appeal marks the third³ occasion in which this case
12 has come before this Panel. In the most recent previous
13 proceeding, the bankruptcy court found Rosales in contempt for
14 violating the § 524 discharge injunction and awarded sanctions
15 to debtors consisting of \$260 for the reopening fee, \$1,400 for
16 attorney's fees and costs, and \$3,000 for punitive damages.
17 Rosales appealed that order to this Panel.⁴ The Panel affirmed
18 the bankruptcy court's finding of contempt and its award of

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20 ¹ The Honorable Mark D. Houle, U.S. Bankruptcy Judge for the
Central District of California, sitting by designation.

21 ² Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

24 ³ See Rosales v. Wallace (In re Wallace), 490 B.R. 898,
25 906-07 (9th Cir. BAP 2013) and Rosales v. Wallace
(In re Wallace), 2012 WL 2401871 (9th Cir. BAP 2012).

26 ⁴ Rosales v. Wallace (In re Wallace), BAP No. NV-11-1681-
27 KiPaD. Because the material facts leading up to the bankruptcy
28 court's contempt order were set forth in that decision we do not
repeat them here.

1 sanctions based on the reopening fee and attorney's fees and
2 costs, but the Panel vacated and remanded the matter on the
3 award of punitive damages because the bankruptcy court did not
4 make sufficient findings to support the \$3,000 award. On
5 remand, following an evidentiary hearing, the bankruptcy court
6 issued its findings of fact and conclusions of law and entered
7 the order upholding the \$3,000 punitive damage award. Debtors'
8 bankruptcy case was closed for a second time.

9 Debtors moved again to reopen their case and requested
10 additional sanctions of \$16,714.80 in attorney's fees and costs
11 incurred in defending the contempt order on appeal. Relying on
12 Espinosa v. United Student Aid Funds, Inc. (In re Espinosa),
13 2011 WL 2358562, at *5 (Bankr. D. Ariz. 2011), debtors argued
14 that Rosales' violation of the discharge injunction continued
15 throughout the appeal and remand as Rosales attempted to reverse
16 the bankruptcy court's decision. Alternatively, relying on
17 Prandini v. Nat'l Tea Co., 585 F.2d 47, 52-53 (3d Cir. 1978),
18 debtors maintained that their attorney should be compensated for
19 the time spent in defending their fee award.⁵ Finally, debtors
20 asserted that they had to defend against Rosales' appeal and at
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24 ⁵ The Ninth Circuit has uniformly held that time spent in
25 establishing the entitlement to and amount of the fee is
26 compensable. See Orange Blossom Ltd. P'ship v. S. Cal. Sunbelt
27 Devs., Inc. (In re S. Cal. Sunbelt Devs., Inc.), 608 F.3d 456,
28 463 (9th Cir. 2010). "This is so because it would be
inconsistent to dilute a fees award by refusing to compensate
attorneys for the time they reasonably spent in establishing
their rightful claim to the fee." Id.

1 remand⁶ and should be compensated. Attached to the motion to
2 reopen was the declaration of debtors' counsel, Christopher
3 Burke, and his time sheets documenting that he had expended 36.3
4 hours in defending the appeal, including the remand, evidentiary
5 hearing, status conference, and meeting with clients.

6 In opposition, Rosales referred obliquely to Rule 8020⁷ and
7 Fed. R. App. P. (FRAP) 38,⁸ which provide specific vehicles for
8 recovery of attorney's fees for appeals to the appellate court
9 and argued that these rules cannot be bypassed under the holding
10 in Vasseli v. Wells Fargo Bank (In re Vasseli), 5 F.3d 351, 353
11 (9th Cir. 1993). Rosales also asserted that there was no basis
12 for awarding fees related to the evidentiary hearing on remand
13 when they had made an offer of judgment equal to the \$3,000

15 ⁶ This is the only mention of the fees associated with the
16 evidentiary hearing on remand in debtors' motion. Throughout
17 these proceedings it appears that debtors simply lump the fees
18 associated with the evidentiary hearing with those incurred for
defending the appeal.

19 ⁷ Rule 8020 provides,

20 If a district court or bankruptcy appellate panel
21 determines that an appeal from an order, judgment, or
22 decree of a bankruptcy judge is frivolous, it may,
23 after a separately filed motion or notice from the
24 district court or bankruptcy appellate panel and
reasonable opportunity to respond, award just damages
and single or double costs to the appellee.

25 ⁸ FRAP 38 provides,

26 If a court of appeals determines that an appeal is
27 frivolous, it may, after a separately filed motion or
28 notice from the court and reasonable opportunity to
respond, award just damages and single or double costs
to appellee.

1 punitive sanction.

2 In reply, debtors argued that the holding and reasoning in
3 Am. Serv. Co. v. Schwartz-Tallard (In re Schwartz-Tallard),
4 473 B.R. 340, 349 (9th Cir. BAP 2012), aff'd, 751 F.3d 966 (9th
5 Cir. 2014) should apply to this case. There, this Panel
6 affirmed the award of attorney's fees to the debtor for
7 defending a stay violation order on appeal. Debtors further
8 asserted that under Rule 7068 an offer of judgment applies only
9 in an adversary proceeding and thus Rosales' offer of judgment
10 was irrelevant. Debtors maintained that they were entitled to
11 all their fees because the remand was a result of the appeal,
12 and as Espinosa points out, the fees for both "litigation" and
13 appeals are actual damages.

14 At the hearing, after a short discussion, the bankruptcy
15 court denied debtors' motion for the additional fees on the
16 ground that only the appellate court had the authority to award
17 attorney's fees and costs for an appeal. The bankruptcy court
18 did not discuss the parties' arguments regarding the offer of
19 judgment nor did it address whether it lacked authority to award
20 additional fees and costs related to the evidentiary hearing on
21 remand. The bankruptcy court requested Rosales' counsel to
22 prepare the proposed findings, conclusions, and an order.

23 On October 7, 2013, the bankruptcy court entered the order
24 which stated simply that debtors' motion for attorney's fees and
25 costs for defending the appeal was denied. The order did not
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1 contain findings or conclusions.⁹ Debtors filed a timely notice
2 of appeal from that order.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **III. ISSUE**

8 Whether the bankruptcy court erred in finding that it did
9 not have authority to award debtors' attorney's fees and costs
10 incurred in defending the contempt order on appeal and on
11 remand.

12 **IV. STANDARD OF REVIEW**

13 The bankruptcy court's denial of an award of attorney's
14 fees is reviewed for an abuse of discretion or an erroneous
15 application of the law. State of Cal. Emp. Dev. Dep't v. Taxel
16 (In re Del Mission Ltd.), 98 F.3d 1147, 1153 (9th Cir. 1996).

17 **V. DISCUSSION**

18 It is well settled that if a bankruptcy court finds that a
19 party has willfully violated the discharge injunction, the court
20 may award actual damages, punitive damages and attorney's fees
21 to the debtor. Espinosa v. United Student Aid Funds, Inc.,
22 553 F.3d 1193, 1205 n.7 (9th Cir. 2008), aff'd 559 U.S. 260
23 (2010); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1195
24 (9th Cir. 2003) (actual damages, including attorney's fees,
25 incurred as a result of the noncompliant conduct can be

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27 ⁹ The hearing was conducted by the Honorable Lloyd King and
28 the order was signed by the Honorable Linda B. Riegle. Debtors
did not move to amend the order.

1 recovered as part of a compensatory civil contempt sanctions
2 award).

3 In Del Mission the Ninth Circuit addressed the issue of
4 whether the bankruptcy court has authority under § 105(a) to
5 award fees to the movant incurred in defending the court's
6 contempt order on appeal. In re Del Mission Ltd., 98 F.3d at
7 1152-54. There, the bankruptcy court earlier ordered the
8 California Employment Development Department and the State Board
9 of Equalization (collectively, the "State") to repay the
10 chapter 7 bankruptcy estate certain taxes, as the State had
11 violated the automatic stay. The State failed to comply while
12 the underlying bankruptcy order was on appeal. Id. at 1149-50.

13 The chapter 7 trustee filed a motion requesting the
14 bankruptcy court to hold the State in civil contempt under
15 § 105(a) and to impose sanctions in the form of his attorney's
16 fees and costs for enforcing the automatic stay on appeal. Id.
17 at 1150. The bankruptcy court denied the chapter 7 trustee's
18 request to impose sanctions, determining that it had no legal
19 authority to award fees incurred on prior appeals. This Panel
20 reversed the bankruptcy court, awarding the chapter 7 trustee
21 the fees and costs he incurred in the prior appeals. Id. at
22 1152-53.

23 The Ninth Circuit reversed this Panel, holding that
24 § 105(a) did not authorize bankruptcy courts to award previously
25 incurred appellate fees. In doing so, it relied on the prior
26 Ninth Circuit decision in Vasseli which held that bankruptcy
27 courts lacked authority to award appellate attorney's fees under
28 § 523(d). In re Vasseli, 5 F.3d at 352. In that case, the

1 Ninth Circuit relied on FRAP 38 in support of its holding. Id.
2 at 353. The court determined that FRAP 38 authorizes only
3 appellate courts, not bankruptcy courts, to award attorney's
4 fees and other expenses incurred by an appellee in response to a
5 frivolous appeal. Id. The Ninth Circuit held that while
6 § 523(d) authorized attorney's fees for the debtor, "it [did]
7 not grant the bankruptcy court authority to award attorney's
8 fees to the debtor for appellate representation. . . ." Id. In
9 addition, the Ninth Circuit determined that appellate courts
10 lacked authority "to delegate this power" to bankruptcy courts.
11 Id.

12 Applying the holding of Vasseli, the Ninth Circuit in
13 Del Mission concluded that a bankruptcy court's express
14 discretionary authority under § 105(a) to award fees at the
15 trial level did not extend to allow it to award fees at the
16 appellate level. In re Del Mission, Ltd., 98 F.3d at 1153-54.
17 The Ninth Circuit further reasoned that using § 105(a) as a
18 device to award appellate fees would impermissibly overlap with
19 FRAP 38. Id. at 1154. The court noted that its holding was
20 "limited to awards of discretionary appellate fees in bankruptcy
21 proceedings." Id. at 1154 n.7.

22 Del Mission is controlling authority on the question before
23 us – whether the bankruptcy court has discretionary authority to
24 award appellate fees under § 105(a). This Panel's decision in
25 Schwartz-Tallard, affirmed by the Ninth Circuit, does not compel
26 a different result because that decision dealt with an award of
27 appellate fees under § 362(k)(1) while Del Mission specifically
28 analyzed the bankruptcy court's discretionary authority to award

1 appellate fees under § 105(a). Indeed, the bankruptcy court
2 noted at the hearing on this matter that the case law debtors
3 relied upon involved § 362 rather than § 105(a) and that their
4 request was under § 105(a). Contrary to debtors' assertion,
5 there is a distinction between the bankruptcy court's statutory
6 mandate to award attorney's fees under § 362(k)(1) and its
7 discretionary authority under § 105(a). Because § 105(a)
8 directly applies to this matter, we are bound to follow
9 Del Mission's broad holding that bankruptcy courts have
10 discretionary authority to award fees at the trial level under
11 § 105(a) and not on appeal. See Hart v. Massanari, 266 F.3d
12 1155, 1171 (9th Cir. 2001) (circuit law "binds all courts within
13 a particular circuit."). The bankruptcy court thus did not err
14 in declining to award debtors' attorney's fees and costs
15 incurred in defending the contempt order on appeal.¹⁰

16 Debtors also requested as an additional sanction the fees
17 they incurred in the evidentiary hearing on remand. In their
18 second statement of issue on appeal, debtors argue that an
19 attorney is entitled to fees incurred for defending against
20 Rosales' appeal of an order imposing sanctions for violating the
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22 ¹⁰ Debtors' attorney suggested at oral argument that this
23 Panel had the authority to award the fees for defending the
24 appeal if the bankruptcy court did not. First, such motion for
25 appellate fees generally must be made by separate motion,
26 something that was not done here. See Rule 8020. Moreover, to
27 the extent it is proper, any such fee request should be made to
28 the Panel that upheld the bankruptcy court's decision to award
the reopening fee and attorney's fees, but remanded on the
punitive damage award. We express no opinion as to whether
debtors would be entitled to such fees in the event they filed a
motion before that Panel.

1 discharge injunction. Debtors then state they incurred such
2 fees and ask the question "shouldn't the attorney[']s fees
3 incurred defending against the appeal be awarded to the
4 Wallaces?" Debtors' brief contains arguments relating only to
5 this issue and the fees for defending the appeal. It does not
6 contain any arguments as to why the bankruptcy court erred by
7 denying the fees related to the evidentiary hearing conducted in
8 the bankruptcy court.¹¹ We "will not ordinarily consider matters
9 on appeal that are not specifically and distinctly argued in
10 appellant's opening brief." Miller v. Fairchild Indus.,
11 797 F.2d 727, 738 (9th Cir. 1986); see also Meehan v. Cnty. of
12 L.A., 856 F.2d 102, 105 n.1 (9th Cir. 1988) (issue not briefed
13 by a party is deemed waived). Because of debtors' waiver, we
14 decline to consider this issue on appeal.

15 VI. CONCLUSION

16 For the reasons stated, we AFFIRM.

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25 ¹¹ In their motion before the bankruptcy court, debtors make
26 a like argument, asserting only that they may recover fees for
27 "defending the appeal." However, the billing statements which
28 support the requested fees include the time related to the
evidentiary hearing on remand.