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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)	BAP Nos.	NV-14-1468-DJuKu
	)		NV-14-1469-DJuKu
TONYA CAROL HEERS,	)		(Related Appeals)
)		
Debtor.	)	Bk. No.	2:13-bk-19887-LED
)		
TONYA CAROL HEERS,	)	Adv. Nos.	2:14-ap-01029-LED
	)		2:14-ap-01030-LED
Appellant,)		
)		
v.	)	O P I N I O N	
)		
DARRELL PARSONS, JR.; AMERICAN)		
CONTRACTORS INDEMNITY COMPANY,)		
)		
Appellees.)		

Argued and Submitted on March 19, 2015
at Las Vegas, Nevada

Filed - April 15, 2015

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

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

Appearances: William L. McGimsey argued for appellant Tonya Carol Heers; Abran E. Vigil of Ballard Spahr LLP argued for appellee Darrell Parsons, Jr.; Misty Perry Isaacson of Pagter and Perry Isaacson, APLC, argued for appellee American Contractors Indemnity Company.

Before: DUNN, JURY and KURTZ, Bankruptcy Judges.

Opinion by Judge Dunn
Dissent by Judge Kurtz

1 DUNN, Bankruptcy Judge:
2

3 Debtor defendant appellant Tonya Carol Heers ("Debtor")
4 appeals summary judgment orders in two separate adversary
5 proceedings excepting debts from her discharge under
6 § 523(a)(4)¹ for defalcations while acting in a fiduciary
7 capacity. We AFFIRM.

8 **I. FACTUAL BACKGROUND**

9 The facts in these two related appeals are not in dispute.
10 Darrell Parsons, Jr. ("Parsons"), was the sole heir of his
11 father, Darrell Parsons, Sr., who died intestate on November 1,
12 2008. Parsons' father's estate ("Estate") initially was
13 estimated to be worth approximately \$3 million² and included
14 real estate in California and North Carolina; a business which
15 leased coin-operated lockers to corporate customers throughout
16 the United States; and bank accounts into which cash proceeds
17 from the business were deposited.

18 When his father died, Parsons had to choose an
19 administrator for the Estate. Parsons learned of his father's
20 death from Thomas Warden ("Warden"), a friend and attorney for
21 his father. Warden handled a number of legal matters for
22 Parsons' father, and on several occasions, Warden had drafted
23

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

28 ²Ultimately, the gross Estate value was determined to be
\$5,087,791.

1 testamentary documents for Parsons' father, none of which were
2 executed. Warden advised Parsons that a probate proceeding
3 would need to be filed in California, and he volunteered to
4 serve as administrator and to refer the matter to a competent
5 probate attorney.

6 Parsons apparently was upset with Warden because he was not
7 notified of his father's death until after the burial and was
8 unwilling to designate Warden to administer the Estate. Parsons
9 discussed the situation with the Debtor, who was a criminal
10 defense attorney who had handled traffic ticket matters for
11 Parsons. Debtor indicated that she was inexperienced in probate
12 matters, but she expressed interest in administering the Estate.
13 She told Parsons that her mother and law partner was a "probate
14 wizard," and she advised Parsons that she could handle the
15 Estate matter for less than Warden.

16 Debtor in fact did not have any knowledge of probate law,
17 and prior to her involvement with the Estate, she had never been
18 involved in the administration of a decedent's estate. She
19 likewise had never been involved in any estate planning.
20 Nevertheless, Parsons asked Debtor to administer the Estate, and
21 she accepted. On or about February 6, 2009, Debtor was
22 appointed as administrator of the Estate by the Los Angeles
23 County, California Superior Court ("Probate Court"). She was
24 issued general letters of administration on February 27, 2009.
25 On that same date, Debtor signed and filed with the Probate
26 Court a statement acknowledging her "Duties and Liabilities of
27 Personal Representative" ("Duties Statement"), which stated,
28 among other things, that "[w]ithin four months after Letters [of

1 administration] are first issued to you as personal
2 representative, you must file with the court an inventory and
3 appraisal of all the assets in the estate." Upon her
4 appointment as Estate administrator, Debtor became a fiduciary
5 to the Estate.

6 In December 2008, Debtor had met with Parsons and Warden,
7 at which time Warden delivered to Debtor a Bekins box of records
8 including bank statements, notes and records showing bank
9 accounts and other information with respect to the decedent's
10 assets. In addition, by that time, Warden had completed an
11 inventory of assets in Parsons' father's home.

12 The Debtor was bonded by American Contractors Indemnity
13 Company ("ACIC"). Thereafter, probate and estate administration
14 proceeded, but neither efficiently nor smoothly.

15 Debtor understood that her duties in administering the
16 Estate included the preparation and timely filing of tax
17 returns, including the estate tax return, and payment of any
18 taxes owed on behalf of the Estate, so long as the Estate had
19 funds available to pay the taxes. To assist her in performing
20 these duties, Debtor selected an accounting firm headed by D.K.
21 Wallin, a former controller for the state of Nevada (the "Wallin
22 Firm"). The Wallin Firm was licensed in both California and
23 Nevada.

24 Debtor met with the Wallin Firm in February 2009, but she
25 was not presented with an engagement letter and did not sign a
26 contract of any kind at that time. An engagement letter
27 eventually was presented to her in October 2009. Lorrie
28 Edelblute ("Edelblute") was the Wallin Firm employee who was

1 assigned to the Estate matter.

2 Despite her knowledge of her non-delegable duty to do so,
3 Debtor took no steps on her own to ascertain when the estate tax
4 return for the Estate was due, which was no later than August 3,
5 2009 - nine months following the decedent's date of death.
6 According to Debtor, she was advised by Edelblute that the
7 estate tax return was due by August 15, 2009. However, in
8 subsequent proceedings before the Probate Court, Edelblute was
9 never called to testify in support of Debtor's contentions. On
10 August 11, 2009, Debtor signed and filed with the Internal
11 Revenue Service ("IRS") a Form 4768 request for extension of the
12 Form 706 estate tax return deadline, which included an estimated
13 estate tax due of \$825,000, as calculated by the Wallin Firm,
14 and further specifically referenced the past due deadline for
15 the estate tax return filing as August 3, 2009. With the Form
16 4768 extension request, Debtor included a tax payment of \$10,000
17 because she thought she had only a total of \$20,000 available in
18 the Estate bank account to which she had access.

19 Debtor eventually hired another accounting firm, Gamut and
20 King, to assist her with her Estate work. In April 2010, Debtor
21 received a notice from the IRS that they had not received the
22 estate tax return for the Estate. Debtor then paid an
23 additional \$16,000 to the IRS, in spite of the estimate from the
24 Wallin Firm that the estate tax would actually be approximately
25 \$825,000. Apparently, the estate tax return for the Estate was
26 finally filed on September 15, 2010. Debtor eventually sent
27 additional payments totaling approximately \$1,300,000 to the IRS
28 on behalf of the Estate, but in November 2010, Debtor received a

1 letter from the IRS advising her that the Estate owed an
2 additional \$397,000.

3 Upon inquiry to Gamut and King, Debtor learned that the
4 additional IRS claim represented penalties for failing to file
5 the estate tax return by the August 2009 deadline. Debtor
6 requested Gamut and King to appeal the IRS penalty assessment,
7 but the appeal was rejected. Late payment penalties plus
8 interest ultimately totaled \$439,621.61.

9 Debtor filed her first inventory and appraisal for the
10 Estate in February 2010. A "corrected" inventory was filed on
11 June 22, 2010, and the final accounting also was filed in June
12 2010.

13 Debtor filed a Second Account in the probate proceeding on
14 July 11, 2011, to which Parsons objected. Specifically, Parsons
15 requested a finding that Debtor was personally liable for the
16 tax penalties and interest assessed by the IRS against the
17 Estate as a result of breaches by Debtor of her fiduciary duties
18 as administrator, focusing on the late filing of the estate tax
19 return and the late payment of the estate tax owed.

20 The Probate Court heard Parsons' objection to Debtor's
21 Second Account at a trial on March 25-26, 2012. Following the
22 presentation of testimony and argument and the admission of
23 numerous exhibits, the Probate Court took the matter under
24 advisement and issued a written decision on June 22, 2012
25 ("Second Account Findings").

26 The Second Account Findings opened with a time line with
27 respect to the decedent's death and the probate proceedings.
28 The Probate Court described the "most salient and undisputed"

1 facts of the matter as follows:

2 [Debtor] was the general administrator of this
3 [Estate] with the sole responsibility to assure that
4 tax returns were filed and taxes owing were paid. The
5 accounting firm she engaged did not file the estate
6 tax return by the August 3, 2009 deadline. As a
7 result, interest and penalties became due and owing to
8 the IRS in the amount of \$439,621.61.

9 The Probate Court was troubled that although Debtor blamed
10 the Wallin Firm for the missed estate tax deadline, no
11 engagement letter setting forth the respective duties of the
12 parties was signed with the Wallin Firm until October 2009. In
13 addition, although Debtor testified that she was unaware of the
14 missed deadline until she was notified by the IRS, she had
15 signed the Form 4768 extension request on August 11, 2009, which
16 clearly designated the estate tax return deadline as August 3,
17 2009.

18 The Probate Court determined that Debtor was dilatory in
19 gathering and organizing Estate asset information, which was
20 "illustrative of [Debtor's] pattern of lethargy when it came to
21 working on this [Estate]." Under California Probate Code
22 § 8800(b), the Estate inventory was due in June 2009, within
23 four months after letters of administration issued, but was not
24 filed until February 2010.

25 The Probate Court further was mystified by Debtor's failure
26 to pay most if not all of the estate tax liability as soon as
27 she became aware of the due date because the "inventory and
28 appraisals coupled with the accountings filed in this case show
29 that sufficient or close to sufficient monies existed in the
30 cash accounts of Darrell Parsons, Senior to pay almost all, if
31 not all, of the estimate[d] tax." The Probate Court found that

1 Debtor's decision to pay \$10,000 as a down payment on an
2 estimated \$825,000 estate tax liability "makes absolutely no
3 sense."

4 The failure to explain why [Debtor] had not marshaled
5 sufficient control over the cash assets in the
6 [Estate] that, if provided to the IRS, would have
7 eliminated or at least, mitigated, the penalties and
8 interest, presents a mystery to this court and
9 substantially supports that [Debtor] breached her duty
10 of care.

11 Second Account Findings, at 14.

12 In its order regarding Debtor's Second Account ("Second
13 Account Order"), the Probate Court awarded what it characterized
14 as a surcharge against the Debtor in the amount of the IRS
15 estate tax late filing penalties and interest totaling
16 \$439,621.61, plus interest "at the legal rate." However, the
17 Probate Court further ordered that any subsequent award of
18 compensation to the Debtor as Estate administrator would be
19 offset against the surcharge amount and did not award Parsons
20 any attorneys fees. The Second Account Order was not appealed
21 and is final.

22 In an order entered on November 12, 2013, the Probate Court
23 determined the surcharge judgment ("Surcharge Judgment") to be
24 \$347,243.96 as of April 29, 2013, with interest accruing thereon
25 at a rate of \$95.13 per day. The Surcharge Judgment, among
26 other things, reflects offsets of \$150,000 from a settlement
27 payment ("Bond Payment") by ACIC to Parsons on Debtor's
28 fiduciary bonds and \$65,262.07, representing Debtor's statutory
29 commission/compensation as administrator of the Estate. The
30 Surcharge Judgment likewise is final.

31 Prior to that time, in July 2013, ACIC filed a motion in

1 the Probate Court to obtain judgment against Debtor for its Bond
2 Payment. Debtor did not oppose the motion, and on August 21,
3 2013, the Probate Court entered judgment in favor of ACIC for
4 the Bond Payment and \$22,374.30 in attorneys fees, plus interest
5 at 10% ("Bond Judgment"). Debtor did not appeal the Bond
6 Judgment, and it is final.

7 Debtor filed for relief under chapter 7 on November 26,
8 2013.³

9 Both Parsons and ACIC filed timely adversary proceedings
10 against Debtor, seeking determinations that the Surcharge
11 Judgment and the Bond Judgment should be excepted from Debtor's
12 discharge under § 523(a)(4) for defalcations by Debtor while
13 acting in a fiduciary capacity. Debtor filed answers to both
14 complaints denying that the subject debts should be excepted
15 from her discharge. Both Parsons and ACIC filed motions for
16 summary judgment in June 2014, supported by documentary evidence
17 and the declarations of one of ACIC's in-house counsel and its
18 trial counsel. The centerpiece supporting both summary judgment
19 motions was the Probate Court's Second Account Findings. Debtor
20 filed memoranda in opposition to both motions for summary
21 judgment, to which Parsons and ACIC replied. Both Parsons and
22

23 ³From the briefs and records filed in these appeals, there
24 is some question as to whether Debtor filed her chapter 7
25 petition on November 16 or 26, 2013. We have exercised our
26 discretion to take judicial notice of documents filed in
27 Debtor's main bankruptcy case and in the two adversary
28 proceedings from which these appeals arise to resolve this
question, among others. See O'Rourke v. Seaboard Sur. Co. (In
re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989);
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 ACIC relied primarily on the asserted preclusive effects of the
2 Second Account Findings, coupled respectively with the final
3 Surcharge Judgment and Bond Judgment.

4 The bankruptcy court heard oral argument ("Hearing") on
5 both summary judgment motions on August 6, 2014. At the
6 Hearing, while all parties unsurprisingly emphasized different
7 aspects of the undisputed facts, the focus of the argument was
8 on the impact of the recent Supreme Court decision in Bullock v.
9 BankChampaign, N.A., 133 S. Ct. 1754 (2013), interpreting
10 application of the "defalcation while acting in a fiduciary
11 capacity" standard in § 523(a)(4) cases. Following argument and
12 colloquy with counsel, the bankruptcy court announced its
13 conclusions orally. Initially, the bankruptcy court noted that
14 Debtor did not dispute the statements of undisputed facts
15 submitted by Parsons and ACIC and had submitted no declarations
16 in opposition. The bankruptcy court further pointed out that
17 the Supreme Court has recognized that bankruptcy courts can
18 apply issue preclusion to the findings of fact and conclusions
19 of law of other courts with respect to the elements of exception
20 to discharge claims. The bankruptcy court also noted that there
21 was no dispute that Debtor was a fiduciary of an express trust
22 for purposes of the plaintiffs' § 523(a)(4) claims. The only
23 issue was whether Debtor had committed a defalcation(s) that
24 would except her debts to Parsons and ACIC from discharge.
25 Citing the Supreme Court's Bullock decision, the bankruptcy
26 court characterized the applicable standard as "conduct that
27 would be deemed reckless, or recklessness to the point of
28 inferring a reckless disregard such as you would have in a

1 criminal situation.” Hr’g Tr. (Aug. 6, 2014) at 25:5-7. The
2 bankruptcy court then concluded that Debtor’s breaches of her
3 fiduciary duties met that standard and granted both summary
4 judgment motions.

5 Orders granting summary judgment in favor of ACIC and
6 Parsons against Debtor were entered on September 15 and 16,
7 2014, respectively. The order in favor of Parsons was
8 denominated a “judgment,” though it included a grant of the
9 summary judgment motion. The order in favor of ACIC was
10 denominated an “order granting summary judgment . . . ,” though
11 it included a statement that the debt was non-dischargeable
12 under § 523(a) (4).⁴

13 Debtor filed timely appeals from both summary judgment
14 decisions.

15 **II. JURISDICTION**

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

18
19 ⁴Each order/judgment might technically be considered to
20 violate the separate judgment rule. See Rule 7058, making Civil
21 Rule 58 applicable in adversary proceedings. “Ordinarily there
22 should be a separate document embodying a final judgment that is
23 distinct from and in addition to an order granting a motion for
24 summary judgment.” Gaughan v. Edward Dittlof Revocable Trust
25 (In re Costas), 346 B.R. 198, 200 n.3 (9th Cir. BAP 2006).
26 However, the requirement for a separate judgment may be
27 considered waived by the parties where the bankruptcy court
28 clearly evidenced its intent that an order from which an appeal
has been taken represented its final decision in the matter, and
the prevailing party does not object to the taking of an appeal
in the absence of a separate judgment. Bankers Trust Co. v.
Mallis, 435 U.S. 381, 387-88 (1978). These requirements are
satisfied in these cases, and the separate judgment requirement
is deemed waived to the extent it was not otherwise satisfied by
the expiration of the 150-day period in Civil Rule 58(c) (2) (B).

1 § 158.

2 **III. ISSUE**

3 Whether the bankruptcy court erred in concluding that
4 Debtor's conduct at issue met the standard for defalcation while
5 acting in a fiduciary capacity for purposes of § 523(a)(4).

6 **IV. STANDARDS FOR REVIEW**

7 We review bankruptcy court summary judgment orders de novo.
8 Shahrestani v. Alazzeh (In re Alazzeh), 509 B.R. 689, 692-93
9 (9th Cir. BAP 2014); Khaligh v. Hadaegh (In re Khaligh), 338
10 B.R. 817, 823 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir.
11 2007). Summary judgment is appropriate only "if the movant
12 shows that there is no genuine dispute as to any material fact
13 and the movant is entitled to judgment as a matter of law."
14 Civil Rule 56(a); Rule 7056; Anderson v. Liberty Lobby, Inc.,
15 477 U.S. 242, 249 (1986).

16 We also review de novo the preclusive effects of state
17 court orders and judgments. Whether issue preclusion is
18 available is a mixed question of law and fact. Stephens v.
19 Bigelow (In re Bigelow), 271 B.R. 178, 183 (9th Cir. BAP 2001);
20 In re Khaligh, 338 B.R. at 823. If issue preclusion is
21 available, the decision of the bankruptcy court to apply it is
22 reviewed for abuse of discretion. Lopez v. Emergency Serv.
23 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP
24 2007). Under the abuse of discretion standard, reversal is
25 appropriate only where the bankruptcy court applied an incorrect
26 legal rule, or where its application of the law to the facts was
27 illogical, implausible or without support from inferences that
28 may be drawn from the record. Ahanchian v. Xenon Pictures,

1 Inc., 624 F.3d 1253, 1258 (9th Cir. 2010), citing United States
2 v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). When
3 a state's preclusion law controls, the bankruptcy court is
4 required to exercise such discretion consistent with the
5 applicable state law.⁵ Gayden v. Nourbakhsh (In re Nourbakhsh),
6 67 F.3d 798, 800-01 (9th Cir. 1995); In re Khaligh, 338 B.R. at
7 823.

8 We can affirm the bankruptcy court on any basis supported
9 by the record. ASARCO, LLC v. Union Pac. R.R., 765 F.3d 999,
10 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d 1082, 1086
11 (9th Cir. 2008).

12 V. DISCUSSION

13 The only issue in these appeals is whether Debtor committed
14 a defalcation(s) while acting in a fiduciary capacity that
15 supports excepting her debts to Parsons and ACIC from discharge
16 for purposes of § 523(a)(4).⁶ We begin our analysis by noting
17 that we are bound by the principle that "exceptions to discharge
18 should be strictly construed against an objecting creditor and
19

20
21 ⁵Debtor does not contest or present any argument in either
22 of these appeals that the bankruptcy court misapplied California
23 issue preclusion law. Accordingly, any such argument is deemed
24 waived. "We review only issues which are argued specifically
and distinctly in a party's opening brief." Greenwood v. FAA,
28 F.3d 971, 977 (9th Cir. 1994), citing Miller v. Fairchild
Indus., Inc., 797 F.2d 727, 738 (9th Cir. 1986).

25 ⁶Section 523(a)(4) provides an exception to an individual
26 chapter 7 debtor's discharge for debts "for fraud or defalcation
27 while acting in a fiduciary capacity, embezzlement, or larceny."
As noted by the bankruptcy court at the Hearing, Debtor does not
28 contest that, considering her conduct that resulted in the
subject judgment debts, she was acting as a fiduciary of an
express trust.

1 in favor of the debtor." Snoke v. Riso (In re Riso), 978 F.2d
2 1151, 1154 (9th Cir. 1992); Mele v. Mele (In re Mele), 501 B.R.
3 357, 363 (9th Cir. BAP 2013).

4 The battle lines between the parties are drawn based on the
5 Supreme Court's recent decision in Bullock v. BankChampaign,
6 N.A., 133 S. Ct. 1754 (2013). Prior to the Bullock decision,
7 courts, including courts of appeals, had disagreed about the
8 mental state required to support an exception to discharge based
9 on a defalcation of a fiduciary under § 523(a)(4). In fact, in
10 considering interpretation of § 523(a)(4), the Ninth Circuit had
11 held that the term "defalcation" included "even innocent acts of
12 failure to fully account for money received in trust." Sherman
13 v. S.E.C. (In re Sherman), 658 F.3d 1009, 1017 (9th Cir. 2011),
14 quoting Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186, 1190
15 (9th Cir. 2001).

16 In Bullock, the debtor had served as the trustee of a
17 family trust with a single asset, a life insurance policy on his
18 father's life. Bullock, 133 S. Ct. at 1757. The trust
19 agreement allowed the trustee to borrow against the life
20 insurance policy's value, with any such loans to be repaid at
21 the "insurance company-determined 6% interest rate." Id. The
22 debtor, in fact, took out several such loans, using some of the
23 loan funds for transactions that benefitted him personally. Id.
24 However, all such loans were repaid in full with six percent
25 interest to the trust. Id.

26 The debtor later was sued by his brothers in Illinois state
27 court ("State Court"), and the State Court ultimately determined
28 that the debtor had breached his fiduciary duty, finding that,

1 although the debtor "does not appear to have had a malicious
2 motive in borrowing funds from the trust," he nonetheless "was
3 clearly involved in self-dealing." Id. Accordingly, the State
4 Court entered a judgment against the debtor that he sought to
5 discharge in bankruptcy. Id.

6 The successor trustee bank ("Bank") filed an adversary
7 proceeding in bankruptcy to except the debtor's judgment debt to
8 the trust from his discharge under § 523(a)(4). Id. As in
9 these appeals, the bankruptcy court granted summary judgment in
10 favor of the Bank, concluding that the debtor's debt to the
11 trust was for defalcation while acting in a fiduciary capacity
12 and thus was excepted from his discharge under § 523(a)(4). Id.
13 at 1758.

14 The Supreme Court granted certiorari to consider the scope
15 of the term "defalcation" in the § 523(a)(4) context and
16 concluded that it included a "culpable state of mind
17 requirement" to align it with the other claims for discharge
18 exceptions included in § 523(a)(4), i.e., fraud while acting in
19 a fiduciary capacity, embezzlement and larceny. Id. at 1757 and
20 1760-61. Following Bullock, it is clear that a finding of
21 "defalcation while acting in a fiduciary capacity" does not
22 support an exception to discharge under § 523(a)(4) on a "no
23 fault" or strict liability basis. See id. at 1761.

24 What is not so clear is where to draw the line in
25 considering fiduciary defalcations that do not involve a
26 subjective intent to cause harm. The expansive language used by
27 the Supreme Court in setting forth new standards leaves us with
28 some difficult problems of interpretation in this case. The

1 Supreme Court described the standards for excepting a fiduciary
2 defalcation from a debtor's discharge under § 523(a)(4) as
3 follows in Bullock:

4 [W]here the conduct at issue does not involve bad
5 faith, moral turpitude, or other immoral conduct, the
6 term requires an intentional wrong. We include as
7 intentional not only conduct that the fiduciary knows
8 is improper but also reckless conduct of the kind that
9 the criminal law often treats as the equivalent.
10 Thus, we include reckless conduct of the kind set
11 forth in the Model Penal Code. Where actual knowledge
12 of wrongdoing is lacking, we consider conduct as
13 equivalent if the fiduciary "consciously disregards"
14 (or is willfully blind to) "a substantial and
15 unjustifiable risk" that his conduct will turn out to
16 violate a fiduciary duty. ALI Model Penal Code
17 § 2.02(2)(c), p. 226 (1985). See id., § 2.02 Comment
18 9, at 248 (explaining that the Model Penal Code's
19 definition of "knowledge" was designed to include
20 "'wilful blindness'"). That risk "must be of such a
21 nature and degree that, considering the nature and
22 purpose of the actor's conduct and the circumstances
23 known to him, its disregard involves **a gross deviation**
24 from the standard of conduct that a law-abiding person
25 would observe in the actor's situation." Id.,
26 § 2.02(2)(c), at 226 (emphasis added).

16 Bullock at 1759-60 (emphasis in original).

17 The quoted language from the Bullock decision, in effect,
18 states three bases for determining that a fiduciary defalcation
19 supports an exception from a debtor's discharge for the subject
20 debt:

21 First, debts resulting from acts of bad faith, moral
22 turpitude or other immoral conduct are excepted from discharge
23 under the § 523(a)(4) defalcation standard. See Tomasi v.
24 Savannah N. Denoce Trust (In re Tomasi), No. CC-12-1401-KiTAD,
25 2013 WL 4399229, at *10 (9th Cir. BAP Aug. 15, 2013). In the
26 Surcharge Judgment, the Probate Court awarded Debtor her
27 statutory commission as Estate administrator in the amount of
28 \$65,262.07 as an offset against the surcharge award. In

1 addition, in his objection to the Debtor's Second Account,
2 Parsons requested attorneys fees and costs under California
3 Probate Code ("Probate Code") § 11003(b). Noting that Probate
4 Code § 11003(b) required a finding that Debtor opposed Parsons'
5 objection "without reasonable cause and in bad faith" to support
6 an award of fees and costs, the Probate Court declined to award
7 Parsons attorneys fees and costs. No party has suggested that
8 Debtor's breaches of her fiduciary duties at issue in these
9 appeals were the products of moral turpitude or other immoral
10 conduct.

11 Second, the § 523(a)(4) defalcation standard covers
12 intentional improper conduct and criminally reckless conduct.
13 Neither Parsons nor ACIC have claimed either before the
14 bankruptcy court or in these appeals that Debtor intentionally
15 breached her fiduciary duties or acted with criminal intent. If
16 the Supreme Court had stopped after the first two sentences of
17 the above-quoted standards, we would be compelled to reverse the
18 bankruptcy court's summary judgment decisions.

19 However, the Supreme Court went on to elaborate, in effect,
20 a third iteration of the defalcation standard under § 523(a)(4).
21 Citing the ALI Model Penal Code § 2.02(2)(c), the Supreme Court
22 determined that a fiduciary who breaches a fiduciary duty
23 without actual knowledge of wrongdoing but who consciously
24 disregards or is willfully blind to a substantial and
25 unjustifiable risk is subject to a § 523(a)(4) exception to
26
27
28

1 discharge for defalcation.⁷ We interpret this third iteration
2 of the defalcation standard as essentially a heightened
3 “recklessness” standard.

4 Debtor argues that she essentially was held liable for not
5 knowing the due date for the Estate’s estate tax return and not
6 filing the estate tax return timely, even though she had
7 retained an accounting firm to prepare the return. She further
8 argues that in these circumstances, excepting her judgment debts
9 to Parsons and ACIC as defalcations for purposes of § 523(a)(4)
10 amounts to a strict liability determination of criminal
11 culpability, contrary to the standards set forth in Bullock.

12 Parsons and ACIC assert that Debtor knowingly and/or
13 recklessly disregarded her fiduciary obligations in at least
14 three respects: (1) she failed to marshal and file an inventory
15 and appraisal of the Estate’s assets so that the estate tax
16 return could be timely filed and the estate tax liability could
17 be timely paid; (2) she failed to file the estate tax return
18 timely, even though it was her ultimate responsibility to file
19 the return and make sure that the deadline was met; and (3) even
20 after the estate tax return deadline had passed, the estate tax
21

22 ⁷ALI Model Penal Code § 2.02(2)(c) states:

23 Recklessly. A person acts recklessly with respect to
24 a material element of an offense when he consciously
25 disregards a substantial and unjustifiable risk that
26 the material element exists or will result from his
27 conduct. The risk must be of such a nature and degree
28 that considering the nature and purpose of the actor’s
conduct and the circumstances known to him, its
disregard involves a gross deviation from the standard
of conduct that a law-abiding person would observe in
the actor’s situation.

1 return was not completed and filed until many months after it
2 was due. In spite of having her accounting firm's estimate of
3 the estate tax to be paid, she dribbled in payments over a
4 period of many months, thus exacerbating the penalties assessed
5 and the amount of accrued interest that had to be paid. In
6 these circumstances, Parsons and ACIC both contend that the
7 bankruptcy court's summary judgment determinations were correct
8 that Debtor's judgment debts to them resulting from defalcations
9 of her fiduciary duties were excepted from her discharge
10 pursuant to § 523(a)(4) under Bullock.

11 Our review of the undisputed facts in the record before us
12 leads us to the following conclusions: Prior to her appointment
13 as Estate administrator, Debtor sought to be retained for
14 substantial Estate work that she was not competent to perform.

15 We agree with the Probate Court's conclusion that it is
16 inconceivable that a trained attorney who practiced outside the
17 probate area but had agreed to accept a position as the
18 administrator of a substantial California probate estate would
19 not have reviewed the duties of an estate administrator under
20 the Probate Code to ascertain the requirements to file an
21 inventory and appraisal timely. Debtor is not in the category
22 of "**nonprofessional** trustees, perhaps administering small family
23 trusts potentially immersed in intrafamily arguments," for whom
24 the Supreme Court expressed particular concern in Bullock. See
25 Bullock, 133 S. Ct. at 1761 (emphasis in original). In any
26 event, when she signed and filed the Duties Statement with the
27 Probate Court, Debtor was aware that she had four months from
28 the date that letters of administration were issued to her (the

1 very same date) to file the Estate inventory and appraisal.
2 Yet, in a patent exhibition of Debtor's "pattern of lethargy
3 when it came to working on" Estate matters, a partial inventory
4 and appraisal for the Estate was not filed until February 2,
5 2010, over seven months after it was due, and the final
6 inventory and appraisal was not filed until June 2010, four
7 months later.

8 Debtor's dilatory filing of the inventory and appraisal had
9 two very adverse effects for the Estate. First, the estate tax
10 return could not be prepared and filed in the absence of the
11 inventory and appraisal information. Consequently, Debtor's
12 late filing of the inventory and appraisal effectively
13 guaranteed that the estate tax return would be filed late.
14 Second, Debtor's failure to inventory and appraise the Estate
15 until a date well beyond when the estate tax return was due
16 meant that she was caught flat-footed when she needed access to
17 Estate bank accounts to marshal assets and pay the estate tax,
18 as estimated by her accountants. As pointed out by the Probate
19 Court, Debtor was entitled to access to all Estate bank accounts
20 from the date that she received her letter of administration,
21 February 27, 2009.

22 As administrator of the Estate, Debtor had the sole
23 responsibility to make sure that the estate tax return was filed
24 on time and the estate tax was paid. Indeed, upon her
25 appointment as Estate administrator, Debtor knew that she bore
26 those responsibilities so long as the Estate had funds available
27 to pay the estate tax. Yet, she testified before the Probate
28 Court that she relied entirely on the Wallin Firm to handle

1 estate tax return issues, admitting that she had no expertise in
2 the tax area: "I don't prepare my own taxes. I never have in my
3 entire life." Cal. Sup. Ct. Hr'g Tr. (Mar. 26, 2012) at 33:26-
4 28 (Exh. 6, ECF No. 13, adv. no. 2:14-ap-01030). Debtor further
5 testified that she was advised by Edelblute that the estate tax
6 return was due by August 15, 2009, and she "vehemently" denied
7 that she ever was told that the estate tax return was due on
8 August 3, 2009. However, she did not present any corroborating
9 testimony from Edelblute, by declaration or otherwise, and
10 Debtor's testimony was undercut by the late Form 4768 request
11 for extension that she signed, which noted the past due deadline
12 for the estate tax return of August 3, 2009. In any event, one
13 does not need to be an accountant or even an attorney to
14 calculate the deadline to file an estate tax return mandated by
15 26 U.S.C. § 6075(a), which requires that estate tax returns
16 "shall be filed within 9 months after the date of the decedent's
17 death." Even if there was some question as to the exact
18 deadline date, no accounting expertise was needed to calendar a
19 date comfortably in advance of the deadline either to make sure
20 that the return could be filed by that date or to request an
21 extension.

22 The reality was that the deadline was missed, and Debtor
23 made only a nominal \$10,000 payment on an estate tax liability
24 that the Wallin Firm estimated would be \$825,000. However, the
25 missed deadline to file the estate tax return and pay the estate
26 tax owed need not have been catastrophic for the Estate if
27 Debtor had diligently worked to get the estate tax return filed
28 and the tax liability paid as soon as possible thereafter.

1 However, the estate tax return apparently was not filed until
2 September 15, 2010, over thirteen months after the return was
3 due and after the IRS had sent a reminder that the estate tax
4 return had not been filed in April 2010, approximately five
5 months before. Debtor made further estate tax payments starting
6 in April 2010 through September 2010 totaling \$1,316,000.

7 However, by that time, it was too late to avoid the imposition
8 of very large penalties and the accrual of substantial interest.

9 In these circumstances, we simply disagree with Debtor that
10 concluding that she committed a defalcation in breach of her
11 fiduciary duties excepted from her discharge under § 523(a)(4)
12 is imposing strict liability on her for missing an estate tax
13 return deadline of which she was unaware. The records in these
14 appeals reflect a pervasive and unjustified series of breaches
15 of fiduciary duties by Debtor in administering the Estate. The
16 records further reflect that she consciously and recklessly
17 disregarded the substantial risks to the Estate of not filing
18 the estate tax return and paying the estate tax owed timely, or
19 at least as soon after the deadline passed as possible. Debtor
20 was not merely negligent but was grossly negligent in performing
21 her duties as administrator of the Estate. The materiality of
22 the risks Debtor blindly disregarded is fully reflected in the
23 \$439,621.61 in interest and penalties ultimately assessed by the
24 IRS for the late filing of the estate tax return and the late
25 payment of the estate taxes owed. We conclude that the
26 bankruptcy court did not err in granting summary judgments in
27 favor of Parsons and ACIC on their § 523(a)(4) adversary
28 proceeding claims based on Debtor's multiple defalcations of her

1 fiduciary duties to the Estate.

2 **VI. CONCLUSION**

3 For the foregoing reasons, we AFFIRM the bankruptcy court's
4 summary judgment decisions in both appeals.

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10 Dissent begins on next page.

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1 KURTZ, Bankruptcy Judge, dissenting:

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3 While I appreciate the majority's effort to make sense of
4 Bullock's recklessness standard, I have a different view of that
5 standard. The majority quotes selected portions of Bullock and
6 concludes that, under Bullock, two different levels of
7 recklessness are subsumed within the term "defalcation" as used
8 in § 523(a)(4). According to the majority, the first level of
9 recklessness included consists of criminal recklessness. The
10 majority then suggests that a second level of recklessness is
11 included, which is higher than the objective recklessness
12 standard Bullock explicitly rejected but lower than criminal
13 recklessness.

14 Unlike the majority, I have trouble reconciling this
15 second, non-criminal level of recklessness with Bullock's
16 statements tying the requisite level of recklessness to criminal
17 law, to the Model Penal Code, and to intentionally wrongful
18 conduct. See, e.g., Bullock, 133 S. Ct. at 1759 ("where the
19 conduct at issue does not involve bad faith, moral turpitude, or
20 other immoral conduct, the term [defalcation] requires an
21 intentional wrong. We include as intentional not only conduct
22 that the fiduciary knows is improper but also reckless conduct
23 of the kind that the criminal law often treats as the
24 equivalent."). In short, I believe that Bullock identifies only
25 one level of recklessness as falling within the scope of
26 defalcation under § 523(a)(4), and that is a criminal level of
27 recklessness.

28 In this respect, and in several others, I prefer the

1 analysis of Bullock's recklessness standard set forth in
2 MacArthur Co. v. Cupit (In re Cupit), 514 B.R. 42 (Bankr. D.
3 Colo. 2014). In my view, In re Cupit correctly identifies
4 Bullock's standard as being closely connected to the criminal
5 law definition of recklessness. Id. at 50. Furthermore, In re
6 Cupit offers a number of crucial observations regarding the
7 applicable standard, which include the following:

- 8 • The applicable recklessness standard is predominantly
9 subjective in nature and, in the first instance, focuses on the
10 debtor's actual awareness of the risk that his or her conduct
11 might turn out to violate his or her fiduciary duties. Id. at
12 50-51.
- 13 • The debtor is not reckless within the meaning of § 523(a)(4)
14 unless he or she consciously disregards or is willfully blind to
15 the risk of violating his or her fiduciary duties. Id. at 51-
16 52.
- 17 • Both conscious disregard and willful blindness focus on the
18 subjective state of mind of the debtor - what he or she actually
19 was aware of and actually believed regardless of the objective
20 reasonableness of that awareness or those beliefs. Id.
- 21 • If either of the above subjective elements are met, then the
22 court also must find that the risk ignored was both substantial
23 and unjustifiable. Unlike the conscious disregard and willful
24 blindness elements, this element is predominantly objective in
25 nature, and requires the court to assess whether, in
26 disregarding (or blinding himself or herself to) the risk,
27 debtor grossly deviated "from the standard of conduct that a
28 law-abiding person would observe in the actor's situation." Id.

1 at 52 (quoting Bullock, 133 S. Ct. at 1760).

2 In addition to In re Cupit, I also find persuasive
3 Cincinnati Ins. Co. v. Chidester (In re Chidester), 524 B.R.
4 656, 661-62 (Bankr. W.D. Va. 2015), which followed In re Cupit.
5 In re Chidester further refined Bullock's recklessness standard
6 in order to correctly apply it in the summary judgment context.
7 In re Chidester held that, on summary judgment, it could rule in
8 favor of the plaintiff-creditor on the recklessness issue only
9 if, given the state of the record, no reasonable trier of fact
10 could have found in favor of the debtor: (1) regarding the
11 debtor's subjective awareness of his or her fiduciary duties;
12 (2) regarding the debtor's conscious disregard of (or willful
13 blindness to) the risk that his or her conduct might breach
14 those duties; and (3) regarding his or her subjective awareness
15 of the substantial and unjustified nature of that risk. Id. at
16 662. In re Chidester's summary judgment standard is consistent
17 with Ninth Circuit precedent. See Soremekun v. Thrifty Payless,
18 Inc., 509 F.3d 978, 984 (9th Cir. 2007) ("Where the moving party
19 will have the burden of proof on an issue at trial, the movant
20 must affirmatively demonstrate that no reasonable trier of fact
21 could find other than for the moving party.").

22 Given the predominantly subjective nature of Bullock's
23 recklessness standard and its focus on what the debtor actually
24 was aware of and actually believed at the time, I am persuaded
25 that a reasonable trier fact could find in favor of Heers on the
26 recklessness issue. Indeed, when as here the defendant's state
27 of mind is disputed and is properly at issue, I believe summary
28 judgment almost never will be appropriate. Determining a

1 party's state of mind typically requires choosing between two or
2 more possible inferences as well as assessing the party's
3 credibility. See, e.g., Wang v. Ke (In re Ke), 2013 WL 4170250,
4 at *13-14 (Bankr. N.D.N.Y. Aug. 14, 2013), aff'd, 2014 WL
5 4626329 (N.D.N.Y. Sept. 15, 2014); see also Hernandez v. New
6 York, 500 U.S. 352, 364 (1991) (noting that a litigant's state
7 of mind, for purposes of determining intent, largely turns on
8 the court's assessment of the litigant's credibility).
9 Assessing credibility and choosing between two or more possible
10 inferences are tasks that simply cannot be performed properly in
11 the process of ruling on a summary judgment motion. Anderson v.
12 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

13 I agree with the majority that Heers' performance of her
14 duties was quite poor and that the explanations and excuses she
15 offered in the probate proceedings for her conduct were
16 unsatisfactory. I might even go so far as to characterize
17 Heers' conduct as criminally negligent. Nonetheless, based on
18 my view of Bullock's recklessness standard, I cannot transmute
19 even criminal negligence into a summary judgment ruling that
20 Heers' conduct rose to the same level as criminal recklessness.
21 See generally In re Cupit, 514 B.R. at 50-51 (distinguishing
22 between criminal negligence and criminal recklessness).

23 Accordingly, I respectfully dissent. I would reverse the
24 bankruptcy court's summary judgment ruling and would remand for
25 trial on the defalcation/recklessness issue.