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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-14-1396-KiTAD
)		
ALBERT ALFRED GRENIER,)	Bk. No.	11-61744
)		
Debtor.)	Adv. No.	12-05067
)		
ALBERT ALFRED GRENIER,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JOAN ROBACK,)		
)		
Appellee.)		

Argued and Submitted on May 14, 2015,
at San Francisco, California

Filed - June 10, 2015

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

Honorable Charles D. Novack, Bankruptcy Judge, Presiding

Appearances: Michael E. Stone of Stone – Siegel Law Firm argued
for appellant Albert Alfred Grenier; Richard A.
Canatella of Cotter & Del Carlo argued for appellee
Joan Roback.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

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 8024-1.

1 Albert Alfred Grenier ("Debtor") appeals an order granting
2 summary judgment to Joan Roback ("Joan").² The bankruptcy court
3 applied issue preclusion to a California judgment against Debtor
4 for financial elder abuse, determining that the debt constituted a
5 willful and malicious injury under § 523(a)(6).³ Because Joan
6 failed to establish that Debtor's state of mind was actually
7 litigated or necessarily decided by the state court, we VACATE and
8 REMAND for further proceedings.⁴

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

10 **A. Prepetition events**

11 In 2011, Debtor was found liable for financial elder abuse
12 along with Joan's brother, Richard Bertolina ("Richard"). WELF. &
13 INST. CODE § 15610.30. The state court determined that Debtor, a
14 real estate investor in both California and Illinois, conspired
15 with Richard, his friend and business associate, to take one-half
16 of a property located at 438-440 32nd Avenue in San Francisco (the
17 "Property") from Richard and Joan's elderly mother, Mary D.

18
19 ² Three members of Joan Roback's family are mentioned in this
20 decision: Joan Roback, her brother Richard Bertolina, and her
21 mother Mary Bertolina. For convenience reference is made to each
22 family member by first name. No disrespect is intended.

23 ³ Unless specified otherwise, all chapter, code and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ⁴ Debtor's excerpts of the record are missing several
27 documents necessary for our review of this appeal, including:
28 (1) Joan's adversary complaint; (2) Joan's motion for summary
judgment; (3) Debtor's opposition to the motion; (4) Joan's reply;
(5) the order dismissing Joan's § 523(a)(2)(A) claim; and (6) the
pages of the transcript where the bankruptcy court entered its
findings for issue preclusion. We have taken the liberty of
retrieving these documents from the bankruptcy court's electronic
docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 Bertolina ("Mary"), who died in 2006.

2 Mary and her spouse acquired a one-half interest in the
3 Property in 1947; the other half interest was owned in joint
4 tenancy with Mary's parents. Ultimately, Mary and her siblings
5 inherited their parents' interest in the Property. Mary then
6 bought her siblings' interest in the Property for \$90,000, using
7 some of her own funds and, with Richard's assistance, borrowing
8 the remaining amount. To facilitate the loan, Richard took title
9 to a one-half interest in the Property pursuant to a tenancy in
10 common agreement. Richard did not put up any of his own funds for
11 the buy-out. The testimony established that after Richard
12 received an ownership interest to facilitate the loan, Richard
13 used his interest in the Property as collateral to borrow money
14 for his own purposes. Richard's debt secured by the Property grew
15 over time to approximately \$275,000.

16 While the testimony does not use precisely appropriate legal
17 terms, we understand Joan's position to be that Mary never
18 intended equitable title to pass to Richard until her death and,
19 then, only in accordance with her 1978 will and 1998 revocable
20 trust, whereby Joan and Richard would equally share Mary's estate.
21 Notably, Debtor notarized Mary's revocable trust document, dated
22 March 26, 1998.

23 Mary suffered a stroke in April 2001 at age 82, requiring
24 hospitalization and then relocation to a skilled nursing facility.
25 In 2002, she began showing signs of a mental disorder, requiring
26 relocation to another facility where she remained until her death.
27 In January 2002, Mary gave Joan a power of attorney over her
28 affairs. Debtor again notarized that document.

1 **1. Debtor obtains Mary's one-half interest in the Property**

2 In July 2002, on Richard's initiative, Mary's half interest
3 in the Property was sold to Debtor and his wife as trustees of the
4 Grenier Trust for \$300,000, with the deed recorded on August 1,
5 2002. Debtor prepared certain documents for the transaction ("to
6 help Rich"), and one of his entities financed the transaction.
7 Debtor testified that the title company notary appeared at the
8 care facility to notarize Mary's signature for the sale documents,
9 but refused to do so because she held outdated identification.

10 Raymond Beach (deceased), Debtor's former business associate,
11 ultimately notarized the grant deed allegedly signed by Mary. The
12 state court found that Mary's signature on the conveyance had been
13 forged; the appellate court stated in its decision that her
14 signature "may have been" forged. Richard used most of the
15 \$300,000 in sale proceeds to satisfy his personal outstanding
16 loans secured by the Property; Mary only received an annuity for
17 \$31,000.

18 As part of the same transaction, Richard and the Grenier
19 Trust obtained a refinance loan of \$438,000, secured by the
20 Property. Richard paid Joan \$59,000 out of escrow, a payment she
21 testified was "hush money," and Richard received \$129,661.

22 In November 2003, Richard and the Grenier Trust sold the
23 entire Property to Richard's son and a third party for \$1 million.
24 Based on expert testimony that the entire Property could have sold
25 for \$1 million when Debtor purchased it, the state court found
26 that the value for Mary's half interest sold to Debtor's trust in
27 2002 was \$500,000, not \$300,000.

28

1 **2. The financial elder abuse action against Debtor**

2 Mary's conservator filed a petition under CAL. PROB. CODE § 850
3 et seq., alleging that Debtor had assisted and conspired with
4 Richard in the financial elder abuse of Mary. Joan was
5 substituted in as petitioner after Mary's death. Debtor appeared
6 pro se at the seven-day trial.

7 The state court entered a tentative Decision After Trial on
8 May 9, 2011. It found by "clear and convincing evidence" that
9 Richard committed financial elder abuse against Mary by his
10 conduct concerning: (1) the sale of Mary's one-half interest to
11 Debtor "for a possibly below market price at the time when she was
12 incapable of intelligent or reasoned discussion[;]" and (2) the
13 use of the sale proceeds to satisfy loans for which he should have
14 been solely responsible. In addition, the court found that
15 Richard's actions were malicious, which provided a basis for
16 punitive damages.

17 As to Debtor, the state court found his testimony deceptive,
18 but concluded that Joan had not shown by clear and convincing
19 evidence that he conspired to commit financial elder abuse, and
20 proposed judgment in Debtor's favor. The court declined to award
21 punitive, double or other exemplary damages against Richard due to
22 Joan's "unclean hands" for her involvement in the transaction –
23 she accepted \$59,000 in "hush money" and funded only a \$31,000
24 annuity for Mary.

25 Joan later requested a statement of decision, asking the
26 state court to address the controverted issue of whether she was
27 required to prove the alleged conspiracy between Debtor and
28 Richard by clear and convincing evidence or by a preponderance of

1 the evidence. Although Joan's request indicated that a hearing
2 would be held on it at a date and time to be determined, the state
3 court never scheduled a hearing. Debtor did not file a
4 counterproposal to Joan's request for a statement of decision.

5 The state court ordered Joan to prepare and file a proposed
6 statement of decision, including a standard of proof finding
7 concerning Debtor, within 30 days. Joan complied. Debtor did not
8 object to Joan's proposed statement of decision or the failure to
9 hold a hearing on her request.

10 On October 5, 2011, the state court entered Joan's proposed
11 statement of decision with some minor modifications ("Statement of
12 Decision"). The Statement of Decision differed in some respects
13 from the Decision After Trial entered on May 9. The state court
14 found that the proper standard of proof for the financial elder
15 abuse and conspiracy claims against Debtor was a preponderance of
16 the evidence, not a clear and convincing standard. Based on a
17 preponderance standard of proof, the state court made the
18 following findings:

- 19 • Debtor knowingly conspired with Richard to "take" Mary's one-
20 half of the Property for "a wrongful use" (i.e., deprivation
21 of the full value of her half of the Property, a minimum of
22 \$300,000) for their own benefit and purposes;
- 23 • Debtor assisted Richard in taking and retaining Mary's one-
24 half of the Property for "a wrongful use" within WELF. & INST.
25 CODE § 15610.30;
- 26 • Debtor "bought" Mary's one-half interest for below market
27 price and no consideration at a time when she was incapable
28 of understanding she was selling her home of fifty years;
- Debtor's affirmative acts (preparing documents for the
transaction and his entity providing financing for it, and
the substantially profitable \$1 million sale to Richard's son
sixteen months later) were in furtherance of the agreement
with Richard to commit financial elder abuse, which
ultimately resulted in damage to Mary;

- 1 • Debtor knew he was taking the full value of Mary's half of
2 the Property for inadequate consideration, in that Mary was
3 to receive a mere \$31,000 annuity while Richard was to have
4 over \$200,000 in loans paid from the \$300,000 sale proceeds,
5 thus frustrating Mary's testamentary plan;
- 6 • since Debtor arranged for the refinancing loan of \$438,000,
7 he knew these proceeds would not be used to fully fund an
8 annuity of \$300,000 for Mary, but rather only \$31,000; and
- 9 • because the notary of the grant deed was associated with
10 Debtor, it was reasonable to infer that Debtor played a role
11 in the forgery.

12 As part of Joan's damages award, the state court imposed
13 double damages under CAL. PROB. CODE § 859⁵ based on Debtor's and
14 Richard's bad faith wrongful taking of Mary's one-half of the
15 Property. Joan was also awarded attorney's fees in accordance
16 with WELF. & INST. CODE § 15657.5(a).⁶ The state court made no
17 mention in the Statement of Decision of its previous finding in
18 its Decision After Trial of Joan's "unclean hands" as a basis for

19 ⁵ The version of CAL. PROB. CODE § 859 in effect and applied by
20 the state court provided, in relevant part:

21 If a court finds that a person has in bad faith wrongfully
22 taken, concealed, or disposed of property belonging to the
23 estate of a decedent, conservatee, minor, or trust, the
24 person shall be liable for twice the value of the property
25 recovered by an action under this part

26 ⁶ WELF. & INST. CODE § 15657.5(a) provides:

27 (a) Where it is proven by a preponderance of the evidence
28 that a defendant is liable for financial abuse, as defined in
Section 15610.30, in addition to compensatory damages and all
other remedies otherwise provided by law, the court shall
award to the plaintiff reasonable attorney's fees and costs.
The term "costs" includes, but is not limited to, reasonable
fees for the services of a conservator, if any, devoted to
the litigation of a claim brought under this article.

Under subsection (b), if the plaintiff can show "by clear and
convincing evidence" that the defendant was guilty of
"recklessness, oppression, fraud or malice," the plaintiff can
also recover punitive damages.

1 disallowing punitive or double damages. By ultimately awarding
2 double damages to her, the court apparently changed its initial
3 decision on that issue.

4 The state court entered a judgment (drafted by Joan's
5 counsel) on October 5, 2011 ("Judgment"). Joan was awarded actual
6 damages of \$653,423.31 and double damages of \$1,306,946.62 (plus
7 prejudgment interest on the \$653,423.31 and attorney's fees)
8 against Debtor and Richard. The court ultimately denied punitive
9 damages against Richard, determining that the double damages
10 allowed under CAL. PROB. CODE § 859 "sufficiently redresse[d] the
11 wrong." Debtor appealed.

12 **B. Postpetition events**

13 While the appeal of the Judgment was pending, Debtor filed a
14 chapter 7 bankruptcy case on December 29, 2011.

15 **1. Joan's nondischargeability complaint**

16 Joan timely filed her nondischargeability action against
17 Debtor, alleging that the Judgment was excepted from discharge
18 under § 523(a)(2)(A), (a)(4) and (a)(6). As part of his
19 affirmative defenses, Debtor contended that the state court had
20 found Joan guilty of "unclean hands," and therefore she was not
21 entitled to double damages. The bankruptcy court stayed Joan's
22 action while the parties pursued the appeal of the Judgment.

23 **2. The Court of Appeal decision**

24 On August 22, 2013, the California Court of Appeal affirmed
25 the state court's decision finding Debtor liable for financial
26 elder abuse under WELF. & INST. CODE § 15610.30 by a preponderance
27 of the evidence but modified the damages awarded to Joan.

28 The appellate court rejected Debtor's argument regarding any

1 alleged prejudicial procedural errors committed by the state
2 court; his claims either lacked merit or had been waived by
3 failing to raise them previously. The appellate court noted that
4 "[w]hile there were procedural irregularities in the conduct of
5 the trial and post-trial proceedings, and [Debtor] was no doubt
6 disadvantaged by not having legal representation to fully protect
7 his interests, he assumed responsibility for his own defense and
8 must be treated like any other party."

9 The appellate court also rejected Debtor's argument that
10 double damages under CAL. PROB. CODE § 859 should not have been
11 awarded based on the state court's earlier finding in its Decision
12 After Trial that Joan had "unclean hands." The state court was
13 not bound by that earlier determination when it issued the
14 Statement of Decision, which controlled and made "no finding or
15 mention of unclean hands in connection with the award of double
16 damages against [Debtor] or Richard."

17 However, the appellate court did find that the state court
18 erred in its calculation of damages as to Debtor, finding that
19 only \$258,617.83 was subject to doubling, and that the prejudgment
20 interest had been awarded on an incorrect amount. Thus, the
21 Judgment as to Debtor was modified to reduce Joan's recovery to
22 \$517,235.66, plus prejudgment interest of \$78,447.71.

23 **3. Motion for summary judgment on the § 523(a)(6) claim**

24 Subsequently, Joan moved for summary judgment on her
25 § 523(a)(2)(A) and (a)(6) claims ("MSJ").⁷ Only the § 523(a)(6)

27 ⁷ Joan was unsuccessful in her earlier motion for summary
28 judgment on her § 523(a)(4) claim; judgment was granted for Debtor
(continued...)

1 claim is at issue on appeal. In essence, Joan contended that
2 because the findings by the state court – that Debtor had in bad
3 faith taken Mary's property in violation of WELF. & INST. CODE
4 § 15610.30 and CAL. PROB. CODE § 859 – established the elements for
5 a "willful and malicious injury" under § 523(a)(6), and because
6 the Judgment was now final, she was entitled to summary judgment
7 on the basis of issue preclusion. In support, Joan attached the
8 California Court of Appeal decision, the Statement of Decision,
9 the Judgment and a copy of the 2002 grant deed.

10 Debtor opposed the MSJ, disputing Joan's argument that the
11 elements for issue preclusion and § 523(a)(6) were met. To
12 support his opposition, Debtor offered the Decision After Trial.
13 As for issue preclusion, Debtor conceded the Judgment was final,
14 but argued that because it was based on post-trial "procedural
15 irregularities," it was not obtained "on the merits" and was
16 therefore not entitled to preclusive effect. Debtor suggested
17 that the state court was duped into signing Joan's proposed
18 statement of decision, which contradicted its earlier ruling in
19 the Decision After Trial that Debtor was not liable for financial
20 elder abuse and that Joan was guilty of unclean hands. Debtor
21 further argued that the Statement of Decision was adopted only by
22 default, because Debtor did not know to object and/or request a
23 hearing. Debtor contended that Joan had also failed to establish
24 that his intent to injure Mary had been decided; the state court

25

26

27 ⁷(...continued)
28 on April 23, 2014. Joan's § 523(a)(2)(A) claim was dismissed on
her § 523(a)(6) claim.

1 did not deal with his subjective motive or find that his conduct
2 was willful in intending to injure Mary as required under
3 § 523(a)(6).

4 As for Joan's § 523(a)(6) claim, Debtor argued that the state
5 court had addressed the "malicious" element, declining to find
6 that his conduct was malicious. Thus, this finding supported
7 summary judgment in his favor.

8 In reply, Joan contended that the "malicious" prong under
9 § 523(a)(6) was satisfied by the state court's findings that
10 Debtor knowingly conspired and assisted Richard in the wrongful
11 taking of Mary's one-half interest in the Property and converting
12 it to their own use and benefit.

13 **4. The bankruptcy court's ruling on the MSJ**

14 The bankruptcy court entered its oral ruling on the MSJ at
15 the hearing on May 30, 2014. After carefully reciting the facts
16 of the case and the findings made by the state court, the
17 bankruptcy court determined that issue preclusion applied to the
18 Judgment: (1) it was final and on the merits; (2) the issue of
19 financial elder abuse was actually and necessarily decided; and
20 (3) the parties were the same.

21 Recognizing that it was required to find a specific type of
22 intent to satisfy a claim under § 523(a)(6), the bankruptcy court
23 determined that the state court's findings for the financial elder
24 abuse claim against Debtor satisfied the willful and malicious
25 standard:

26 Grenier is no innocent bystander whose non-dischargeable
27 liability is being imputed to him. Rather, as the
28 Superior Court found, he was an active co-conspirator in
a financial elder abuse claim. As such, he acted
willfully since he knew that the sale he was helping to

1 orchestrate would financially injure Mary. His conduct
2 was intentional and deliberate, as he assisted in
3 preparing and financing the sale of the San Francisco
4 property, and since his trust was buying the one-half
5 interest at a significantly below market price, he knew
6 or had a belief that Mary would be financially injured
7 from this scheme. His conduct was also malicious since
8 it was a wrongful act; i.e., elder abuse, done
9 intentionally, which necessarily caused Mary financial
10 injury and was done without any just cause or excuse.

11 Hr'g Tr. (May 30, 2014) 20:13-21:1.

12 An order granting the MSJ on Joan's § 523(a) (6) claim was
13 entered on June 4, 2014, and a judgment excepting the Judgment
14 debt of \$517,235.66, plus prejudgment interest of \$78,447.41, from
15 discharge under § 523(a) (6) was entered on August 5, 2014. Debtor
16 timely appealed.

17 **II. JURISDICTION**

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

20 **III. ISSUE**

21 Did the bankruptcy court err when it granted Joan summary
22 judgment on her § 523(a) (6) claim by applying issue preclusion to
23 the Judgment?

24 **IV. STANDARDS OF REVIEW**

25 The bankruptcy court's order granting summary judgment is
26 reviewed de novo. Shahrestani v. Alazzeh (In re Alazzeh),
27 509 B.R. 689, 692 (9th Cir. BAP 2014). "Viewing the evidence in
28 the light most favorable to the non-moving party, we must
determine 'whether there are any genuine issues of material fact
and whether the trial court correctly applied relevant substantive
law.'" New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R.
138, 141 (9th Cir. BAP 2007) (quoting Tobin v. San Souci Ltd.

1 P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001)).

2 The availability of issue preclusion is a question of law we
3 review de novo. Wolfe v. Jacobson (In re Jacobson), 676 F.3d
4 1193, 1198 (9th Cir. 2012). If issue preclusion is available, the
5 bankruptcy court's decision to apply it is reviewed for abuse of
6 discretion. Lopez v. Emergency Serv. Restoration, Inc.
7 (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007). Under that
8 standard, we reverse where the bankruptcy court applied an
9 incorrect legal rule or where its application of the law to the
10 facts was illogical, implausible or without support in inferences
11 that may be drawn from the record. Ahanchian v. Xenon Pictures,
12 Inc., 624 F.3d 1253, 1258 (9th Cir. 2010) (citing United States v.
13 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

14 V. DISCUSSION

15 A. Summary judgment standards

16 Summary judgment is appropriate where the movant shows that
17 no genuine issue of material fact is in dispute and the movant is
18 entitled to judgment as a matter of law. Rule 7056 (incorporating
19 Fed. R. Civ. P. 56(a)). The court views the evidence in the light
20 most favorable to the non-moving party in determining whether any
21 genuine disputes of material fact exist and the movant is entitled
22 to judgment as a matter of law. Fresno Motors, LLC v. Mercedes
23 Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014).

24 B. Issue preclusion standards

25 The doctrine of issue preclusion prohibits relitigation of
26 issues adjudicated in a prior action. Child v. Foxboro Ranch
27 Estates, LLC (In re Child), 486 B.R. 168, 172 (9th Cir. BAP 2013).
28 Issue preclusion applies to dischargeability proceedings under

1 § 523(a). Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991)
2 (preclusion principles apply in discharge proceedings under
3 § 523(a) to preclude relitigation of state court findings relevant
4 to the dischargeability determination). In determining the effect
5 of a state court judgment, we must apply, as a matter of full
6 faith and credit, the state's law of issue preclusion. Gayden v.
7 Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995);
8 Jung Sup Lee v. Tcast Commc'ns, Inc. (In re Jung Sup Lee),
9 335 B.R. 130, 136 (9th Cir. BAP 2005).

10 Under California law, a prior judgment is entitled to issue
11 preclusive effect if all five of the following requirements are
12 met:

- 13 (1) The issue sought to be precluded must be identical to
14 that decided in the former proceeding;
- 15 (2) The issue must have been actually litigated in the
16 former proceeding;
- 17 (3) The issue must have been necessarily decided in the
18 former proceeding;
- 19 (4) The decision in the former proceeding must be final and
20 on the merits;
- 21 (5) The party against whom issue preclusion is sought must be
22 the same as, or in privity with, the party to the former
23 proceeding.

24 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.
25 2001); Lucido v. Super. Ct., 51 Cal.3d 335, 341 (1990). In
26 addition to the listed requirements, California also has the
27 requirement that these five factors are found and the "application
28 of issue preclusion furthers the public policies underlying the
doctrine." See In re Harmon, 250 F.3d at 1245 (and cases cited
therein).

The party asserting preclusion bears the burden of

1 establishing these threshold requirements. Id. This burden
2 requires providing "a record sufficient to reveal the controlling
3 facts and pinpoint the exact issues litigated in the prior action.
4 Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP
5 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Any reasonable doubt
6 as to what was decided by a prior judgment should be resolved
7 against allowing the [issue preclusive] effect." Id.

8 **C. The bankruptcy court erred in applying issue preclusion to**
9 **the Judgment.**

10 Debtor does not dispute that the parties are the same,
11 thereby satisfying the fifth element. He does not dispute that
12 the Judgment is final, which satisfies, in part, the fourth
13 element. Debtor also does not appear to dispute the first
14 element, that the issues involved in both proceedings are
15 identical. See Lucido, 51 Cal.3d at 342 ("The 'identical issue'
16 requirement addresses whether 'identical factual allegations' are
17 at stake in the two proceedings, not whether the ultimate issues
18 or dispositions are the same.").

19 Debtor does dispute, however, that the Judgment was "on the
20 merits," and contends that the issues of his "malicious" conduct
21 or that his conduct was "without just cause or excuse" were either
22 not decided or were decided in his favor by the state court.

23 **1. The Judgment was on the merits.**

24 Debtor contends the bankruptcy court erred in finding that
25 the Judgment was on the merits, when in fact it was based on what
26 the court allegedly recognized were "procedural irregularities."
27 We disagree.

28 The state court held a seven-day trial on the financial elder

1 abuse claim against Debtor, who appeared and testified. Although
2 Debtor has suggested the state court was duped into signing Joan's
3 proposed statement of decision, nothing in the record establishes
4 that is the case. It appears the state court simply changed its
5 mind as to Debtor's liability when it applied the lower (and
6 proper) standard of preponderance of the evidence as opposed to a
7 clear and convincing standard.

8 In addition, nothing in the record reflects that, if Debtor's
9 accusation were true, he has moved the state court for
10 reconsideration or raised some argument respecting fraud upon the
11 court. Further, while the appellate court acknowledged that
12 Debtor representing himself put him at a disadvantage, it rejected
13 his argument that the post-trial procedural irregularities
14 prejudiced him sufficiently for reversal. Finally, Debtor has
15 failed to cite a case where a party received a seven-day trial
16 and, as a result of procedural irregularities, the judgment
17 entered by the prior court was not considered "on the merits" and
18 not entitled to preclusive effect.

19 **2. The issue of Debtor's subjective state of mind was not**
20 **actually litigated or necessarily decided by the state**
21 **court.**

22 Debtor contends the bankruptcy court erred by applying issue
23 preclusion to the Judgment because the state court did not find
24 his conduct to be "malicious," and because the state court never
25 decided the issue of his motive for assisting Richard in the sale
26 of the Property or his intent to injure Mary. We reject Debtor's
27 first argument. The elements of a state court action are rarely
28 identical to those for proving a willful and malicious injury.
Nonetheless, issue preclusion will apply if the factual findings

1 by the state court establish that Debtor's violation of WELF. &
2 INST. CODE § 15610.30 was a willful and malicious injury; no
3 "malice" finding by the state court was necessary for Joan to
4 establish her claim under § 523(a)(6).

5 However, we conclude that Joan failed to prove her claim
6 because Debtor's subjective state of mind was not litigated in the
7 financial elder abuse action or decided by the state court. The
8 § 523(a)(6) calculus requires a subjective intent finding and not
9 an objective or reasonable man evaluation of a debtor's conduct.
10 Carrillo v. Su (In re Su), 290 F.3d 1140, 1143, 1145 (9th Cir.
11 2002).

12 The version of WELF. & INST. CODE § 15610.30 in effect at the
13 time of this case and applied by the state court provided, in
14 relevant part:

15 (a) "Financial abuse" of an elder . . . occurs when a person
16 or entity does any of the following:

17 (1) Takes, secretes, appropriates, or retains real or
18 personal property of an elder . . . to a wrongful use or with
19 intent to defraud, or both.

20 (2) Assists in taking, secreting, appropriating, or retaining
21 real or personal property of an elder . . . to a wrongful use
22 or with intent to defraud, or both.

23 (b) A person or entity shall be deemed to have taken,
24 secreted, appropriated, or retained property for a wrongful
25 use if, among other things, the person or entity takes,
26 secretes, appropriates or retains possession of property in
27 bad faith.

28 (1) A person or entity shall be deemed to have acted in bad
29 faith if the person or entity knew or should have known that
30 the elder . . . had the right to have the property
31 transferred or made readily available to the elder . . . or
32 to his or her representative.

33 In other words, a use is "wrongful" if conducted in bad faith –
34 that is, if a person knew or should have known that the elder had

1 a right to have the property transferred or made readily
2 available, and it is obvious to a reasonable person that the taker
3 was not entitled to the elder's property.⁸

4 Section 523(a)(6) excepts from discharge debts "for willful
5 and malicious injury by the debtor to another entity or to the
6 property of another entity." Both willfulness and maliciousness
7 must be proven in order to apply § 523(a)(6). Ormsby v. First Am.
8 Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir.
9 2010). "A 'willful' injury is a 'deliberate or intentional
10 **injury**, not merely a deliberate or intentional **act** that leads to
11 injury.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d
12 702, 706 (9th Cir. 2008) (quoting Kawaauhau v. Geiger, 523 U.S. 57,
13 61 (1998) (emphasis in original)). The willful injury requirement
14 under § 523(a)(6) "is met only when the debtor has a subjective
15 motive to inflict injury or when the debtor believes that injury
16 is substantially certain to result from his own conduct."
17 In re Ormsby, 591 F.3d at 1206.

18 "A malicious injury involves (1) a wrongful act, (2) done
19 intentionally, (3) which necessarily causes injury, and (4) is
20 done without just cause or excuse. Malice may be inferred based
21 on the nature of the wrongful act." Id. at 1207. The willful
22 injury must be established, however, before malice may be
23 inferred. See id. (citing Thiara v. Spycher Bros. (In re Thiara),

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25 ⁸ WELF. & INST. CODE § 15610.30 was amended in 2009, eliminating
26 the requirement of bad faith, defining "wrongful use" to mean that
27 the person or entity who took the elder's property knew or should
28 have known that the conduct was likely to be harmful to the elder,
and adding the conduct of "undue influence" with subsection (3).
See Stebley v. Litton Loan Servicing, LLP, 202 Cal.App.4th 522,
527 (2011) (recognizing that bad faith is no longer required in
elder abuse cases).

1 285 B.R. 420, 434 (9th Cir. BAP 2002) ("the 'done intentionally'
2 element of a 'malicious' injury brings into play the same
3 subjective standard of intent which focuses on . . . knowledge of
4 harm to the creditor.")).

5 Unfortunately, neither party cited or addressed our decision
6 in Van Zandt v. Mbunda (In re Mbunda), 484 B.R. 344 (9th Cir. BAP
7 2012). There, we analyzed the plain language of WELF. & INST. CODE
8 § 15610.30, determining that a claim for financial elder abuse
9 must include: (1) a wrongful use; (2) an undue influence/unfair
10 advantage; or (3) an intent to defraud. Id. at 358. We concluded
11 that the first two types of conduct covered – wrongful use and
12 undue influence/unfair advantage – do not require any motive to
13 injure or any belief that injury will occur. Id. As such, we
14 held that pleading a claim under WELF. & INST. CODE § 15610.30 based
15 on wrongful use or undue influence fails to state a § 523(a)(6)
16 claim because neither of these types of conduct is sufficient to
17 establish the requisite willfulness. Id. at 358-59.

18 Without a copy of the state court complaint, we do not know
19 what was pled against Debtor. In any event, the state court found
20 that he had engaged in the conduct of "wrongful use," which fails
21 to meet the willfulness element of § 523(a)(6). Finding a party
22 liable for financial elder abuse based on such conduct does not
23 require an inquiry into the party's subjective intent – i.e.,
24 whether Debtor had a subjective motive to inflict injury to Mary
25 or believed that injury was substantially certain to result from
26 his own conduct. In re Ormsby, 591 F.3d at 1206.

27 Nonetheless, a willful and malicious injury may still be
28 established if the state court made any findings as to Debtor's

1 subjective intent to injure Mary, in addition to his conduct of
2 "wrongful use." We conclude that the state court made no such
3 additional findings. While it found that Debtor "knowingly"
4 assisted and conspired with Richard to take Mary's one-half of the
5 Property for a wrongful use, the state court made no finding that
6 he **intended to cause injury to Mary**. The only finding that
7 perhaps supports Joan is that Debtor knew he was taking the full
8 value of Mary's half of the Property for inadequate consideration,
9 in that Mary was to receive only a \$31,000 annuity from the
10 \$300,000 in sale proceeds. Although a close call, we believe this
11 finding is inadequate to meet the critical element of the
12 subjective state of mind required to support a claim under
13 § 523(a)(6). Further, it is not evident that this finding was
14 necessary to the Judgment.

15 Joan has not established that Debtor's subjective intent was
16 at issue in the financial elder abuse action; she was not required
17 to prove Debtor's subjective intent to injure Mary in order to
18 prove his liability based on "wrongful use" under WELF. & INST. CODE
19 § 15610.30. Accordingly, the issue of Debtor's subjective intent
20 was neither actually litigated nor necessarily decided by the
21 state court. Thus, the bankruptcy court erred in applying issue
22 preclusion to the Judgment.

23 Because the material fact of Debtor's subjective intent to
24 injure Mary is still at issue, Joan was not entitled to summary
25 judgment on her § 523(a)(6) claim on the basis of issue
26 preclusion. The ultimate determination of Debtor's state of mind
27 must remain a finding to be made by the bankruptcy court at trial.
28 Given our determination here, we need not address Debtor's

1 arguments respecting the bankruptcy court's failure to consider
2 his affirmative defense of "unclean hands" on the part of Joan or
3 that the court erred by applying issue preclusion to a state court
4 judgment that imposed a form of vicarious liability.

5 **VI. CONCLUSION**

6 Based on the foregoing reasons, we VACATE the bankruptcy
7 court's order granting summary judgment and REMAND this matter for
8 further proceedings.

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