

JUN 10 2015

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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NOT FOR PUBLICATION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.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
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

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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.

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Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

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<sup>1</sup> 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").<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup>

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.

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18  
19 <sup>2</sup> 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 <sup>3</sup> 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 <sup>4</sup> 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 § 859<sup>5</sup> 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).<sup>6</sup> 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

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19 <sup>5</sup> 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 <sup>6</sup> 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").<sup>7</sup> Only the § 523(a)(6)

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27 <sup>7</sup> 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

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27 <sup>7</sup>(...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.

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

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

## 13 **II. JURISDICTION**

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

## 16 **III. ISSUE**

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

## 20 **IV. STANDARDS OF REVIEW**

21 The bankruptcy court's order granting summary judgment is  
22 reviewed de novo. Shahrestani v. Alazzeh (In re Alazzeh),  
23 509 B.R. 689, 692 (9th Cir. BAP 2014). "Viewing the evidence in  
24 the light most favorable to the non-moving party, we must  
25 determine 'whether there are any genuine issues of material fact  
26 and whether the trial court correctly applied relevant substantive  
27 law.'" New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R.  
28 138, 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.<sup>8</sup>

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 <sup>8</sup> 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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