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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-15-1037-KiTaKu
)		
WHITNEY BRENDAN COOKE,)	Bk. No.	12-14393-PC
)		
Debtor.)	Adv. No.	13-01062-PC
)		
_____)		
)		
WHITNEY BRENDAN COOKE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JAMES RENSHAW,)		
)		
Appellee.)		
_____)		

Argued and Submitted on November 19, 2015,
at Pasadena, California

Filed - July 22, 2016

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Yi Sun Kim of Greenberg & Bass LLP argued for
appellant Whitney Brendan Cooke; Randy E. Wells of
Law Office of Ball & Yorke argued for appellee
James Renshaw.

Before: KIRSCHER, TAYLOR and KURTZ, Bankruptcy Judges.

Memorandum by Judge Kirscher
Dissent by Judge Taylor

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Debtor Whitney Brendan Cooke appeals a judgment denying his
2 discharge under § 727(a)(2)(A).² The bankruptcy court found that
3 Cooke had spent certain funds he received just days before filing
4 bankruptcy with the intent to hinder or delay his judgment
5 creditor, appellee James Renshaw. We AFFIRM.

6 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

7 A. Prepetition events

8 In January 2011, Cooke and Renshaw were in an automobile and
9 motorcycle accident in Ojai, California. Renshaw, a former
10 fireman, was seriously and permanently injured. Cooke was a
11 seventeen year-old high school student at the time of the
12 accident; he is now a full-time student at UCLA. Cooke was
13 insured by an automobile policy through Allied Nationwide
14 Insurance Company ("AMCO") with a liability coverage limit of
15 \$250,000.

16 Renshaw filed a state court action against Cooke for
17 negligence in connection with the accident. AMCO retained
18 attorney Jim Hart ("Hart") to defend Cooke. After trial, the jury
19 found Cooke liable for the accident. The state court entered a
20 judgment on July 11, 2012, awarding Renshaw \$1,681,527.89, plus
21 costs and interest ("Judgment"). A significant portion of the
22 award was for Renshaw's past and future medical bills.

23 On October 12, 2012, AMCO paid directly to Renshaw the policy
24 limits of \$250,000. This payment left Cooke liable for the excess
25 judgment.

26
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Cooke's AMCO policy provided that certain supplemental
2 payments would be made on behalf of the insured, including payment
3 of postjudgment interest to the insured. Specifically, the
4 "Supplementary Payment" provision stated, in pertinent part:

5 In addition to our limit of liability, we will pay on
6 behalf of an "insured:"

- 7 3. Interest accruing after a judgment is entered in any
8 suit we defend. Our duty to pay interest ends when
we offer to pay that part of the judgment which does
not exceed our limit of liability for this coverage.

9 By the time AMCO made the \$250,000 payment to Renshaw, the total
10 amount of interest accrued on the Judgment was \$45,147.62.

11 Concurrently with the state court action against Cooke,
12 Renshaw sued AMCO in late July 2012, in part, to determine whether
13 Renshaw could recover postjudgment interest and costs directly
14 from AMCO. During briefing, AMCO argued, under California law,
15 that a judgment creditor could not recover postjudgment interest
16 and costs in a direct action. Renshaw dismissed his suit against
17 AMCO on October 29, 2012, before any ruling was made.

18 On November 13, 2012, AMCO sent a letter to Cooke's home
19 address regarding the postjudgment interest of \$45,147.62 ("AMCO
20 Letter"). The AMCO Letter stated, in pertinent part:

21 James Renshaw recently sued [AMCO] and contended he was
22 entitled to receive post-judgment interest under the
23 policy which insured you in connection with the above-
24 referenced loss. In connection with responding to
25 Mr. Renshaw's claims, AMCO determined **you are entitled** to
receive post-judgment interest pursuant to the
SUPPLEMENTARY PAYMENTS provision of the insurance policy.

. . . .

26 **As such, we will be issuing you a check under separate**
27 **cover in the amount of \$45,147.62.** Because Mr. Renshaw
28 dismissed his lawsuit against AMCO based on our position
the post-judgment interest is owed to you rather than
Mr. Renshaw, **we believe it is likely Mr. Renshaw will**
presume AMCO is paying you post-judgment interest and

1 **will try to recover this amount from you.** We recommend
2 you provide this correspondence to personal counsel who
3 is assisting you with the judgment collection issues to
4 verify he or she agrees with the interest calculation and
to provide you advice regarding disposition of these
funds in light of the judgment which was entered against
you in excess of policy limits.

5 (emphasis added). A copy of the AMCO Letter was also sent to
6 Cooke's mother, Pamela Cooke ("Pamela"),³ and Hart.

7 Shortly thereafter (or concurrently with the AMCO Letter),
8 AMCO sent to Cooke's home address a check payable to him for
9 \$45,147.62 ("AMCO Payment"). Pamela forwarded the AMCO Letter and
10 AMCO Payment to Cooke at his UCLA residence.

11 On November 19, 2012, Cooke deposited the AMCO Payment in his
12 only checking account. Between November 19 and 28, 2012, Cooke
13 spent approximately \$30,000 of the AMCO Payment on the following:

14	\$1,040	Cash for miscellaneous items (Nov. 19)
15	\$5,600	UCLA Housing for upcoming quarter (Nov. 21)
16	\$4,670	UCLA Tuition & Fees for upcoming quarter (Nov. 23)
17	\$11,000	IRS for taxes owed on the AMCO Payment (Nov. 23)
18	\$4,306	Bankruptcy attorney and filing fees (Nov. 26)
19	\$2,800	California Franchise Tax Board for taxes owed on
20		the AMCO Payment (Nov. 26)
21	\$2,500	Computer (Nov. 27)

22 **B. Postpetition events**

23 Eleven days after depositing the AMCO Payment, Cooke filed a
24 chapter 7 bankruptcy case on November 30, 2012. He disclosed the
25 AMCO Payment and the transfers he made with the funds. Cooke also
26 disclosed the remaining \$14,250 from the AMCO Payment in his

27 ³ We refer to Cooke's mother as Pamela to avoid any
28 confusion. No disrespect is intended.

1 checking account, which he claimed exempt. Renshaw was listed as
2 one of Cooke's three unsecured creditors. The other two creditors
3 were owed less than \$600.00 combined.

4 **1. Cooke's testimony at his § 341(a) meeting**

5 With respect to the AMCO Letter and AMCO Payment, Cooke
6 testified at his first § 341(a) meeting of creditors on
7 January 22, 2013, that he had received a check for \$45,147.62 from
8 AMCO, but that he "d[idn't] exactly know" what it was for, and
9 that he "wasn't informed by [his] lawyer exactly what it was
10 from." Cooke further testified:

11 Q. You didn't ask what [the AMCO Payment] was for?

12 A. I think it was for - trying to think what the
13 interest - there was some interest on some of it.

14 Q. Interest on what?

15 A. I - they didn't - I think it was for - my insurance
16 didn't pay - make a payment as soon as possible and
so I, for some reason, got the money. I don't know
exactly why.

17 Q. You got a check for \$44,000. You don't know what
18 you got it for? Is that what your -

19 A. I didn't ask too many questions.

20

21 Q. Did you ever ask [Hart] what the check was for?

22 A. Not really.

23 Q. Did you ever ask anyone what the check was for?
When did you receive the check?

24 A. I probably (indiscernible).

25 **2. Cooke's testimony at his Rule 2004 examination**

26 On March 13, 2013, two months after Cooke's first § 341(a)
27 meeting, Cooke appeared and testified under oath in a Rule 2004
28 examination conducted by Renshaw. Cooke testified that he did not

1 recall receiving the AMCO Letter or that Pamela had forwarded it
2 to him at UCLA. He did testify, however, that prior to depositing
3 the AMCO Payment he inquired as to why he received it and that he
4 had relied upon Hart's advice to conclude the money belonged to
5 him and not Renshaw. Cooke admitted he contemplated filing
6 bankruptcy prior to depositing the AMCO Payment. Cooke also
7 testified he knew that the AMCO Payment represented interest
8 accrued from Renshaw's Judgment, that Renshaw might try to collect
9 the money and that he could have given the money to Renshaw but
10 elected to use the money for other purposes.

11 **3. Renshaw's adversary complaint**

12 Renshaw filed an adversary complaint against Cooke, seeking
13 to deny his discharge under § 727(a)(2)(A).⁴ Renshaw claimed the
14 AMCO Payment belonged to him because it was accrued interest on
15 the Judgment and contended that Cooke should have earmarked the
16 money for payment to Renshaw. However, rather than turning the
17 funds over to him, Renshaw alleged that Cooke wrongfully spent
18 them to avoid paying him. In his answer, Cooke admitted spending
19 some of the AMCO Payment days before filing for bankruptcy, but
20 denied that he spent the funds to avoid paying Renshaw.

21 In Cooke's declaration submitted on November 27, 2013, with
22 his motion for summary judgment, Cooke stated that before he
23 deposited the AMCO Payment: (1) he reviewed the AMCO Letter;
24 (2) he was told by Pamela that she had verified Cooke's

25

26 ⁴ Renshaw also sought other claims for relief, including
27 § 727(a)(2)(B), (a)(3), (a)(4) and (a)(5). The bankruptcy court
28 granted Cooke summary judgment on those claims; his motion was
denied as to Renshaw's § 727(a)(2)(A) claim, which went to trial
and is the only claim at issue on appeal.

1 entitlement to the funds and that he could spend them whichever
2 way he chose; (3) Hart had also told Cooke the funds belonged to
3 him to use in any manner; and (4) he relied on the statements from
4 AMCO, Pamela and Hart and believed he could use the money for his
5 own purposes.

6 **4. The trial, ruling and judgment**

7 Renshaw contended in his trial brief that Cooke had knowingly
8 and intentionally spent the AMCO Payment to hinder, delay or
9 defraud him in his ability to collect on the Judgment. Renshaw
10 argued that to the extent Cooke was relying on a good faith
11 defense of advice of counsel that he could spend the funds, Cooke
12 was precluded from doing so because he continued to assert the
13 attorney-client privilege to prevent Renshaw from discovering the
14 precise advice given by Hart. Notably, no declaration was ever
15 offered from attorney Hart.

16 In his trial brief, Cooke argued that he had repeatedly
17 testified as to his reliance on the statements made in the AMCO
18 Letter and on the advice of Pamela and Hart that the AMCO Payment
19 was postjudgment interest to which he was entitled and to which he
20 could use in whichever manner he chose. Cooke contended he, not
21 Renshaw, was the intended beneficiary of the contract provision in
22 his auto policy for postjudgment interest and, thus, the money
23 paid to him by AMCO was his money. Regardless, argued Cooke,
24 Renshaw could not show that he had the requisite intent to hinder,
25 delay or defraud Renshaw. No evidence suggested that Cooke had
26 reason to believe the AMCO Payment was being made to him in trust
27 for subsequent transfer to Renshaw. Even though the AMCO Letter
28 stated that Renshaw may "try to recover" the funds, Cooke argued

1 it was reasonable for him to believe they belonged to him, not
2 Renshaw, since the AMCO Letter advised that Renshaw was not able
3 to recover the postjudgment interest directly from AMCO.

4 **a. The trial**

5 Trial on the matter of the AMCO Payment and Cooke's discharge
6 proceeded. Renshaw, Cooke and Pamela testified. Cooke testified
7 that he had reviewed the AMCO Letter and discussed it with Pamela
8 before depositing the AMCO Payment. Renshaw's counsel then
9 proceeded to read into the record Cooke's testimony from his
10 Rule 2004 examination, which differed from this trial testimony.
11 Cooke further testified that he made inquiries to Hart, Pamela and
12 AMCO about what the AMCO Payment was for before depositing it.
13 Renshaw's counsel then played a portion of the audio file from
14 Cooke's first § 341(a) meeting, which contradicted Cooke's current
15 testimony.

16 Under questioning at the trial by Renshaw's counsel, Cooke
17 testified:

18 Q. Okay. Isn't it true that you did not want
19 Mr. Renshaw to have the money received from
AMCO?

20 A. Everyone I asked told me it was my money.

21 Q. I'm not - I'm asking you. Isn't it true that
22 you did not want Mr. Renshaw to have the
interest money?

23 A. That's not true.

24 Q. Well, if it was true, wouldn't you have given it
to him?

25 A. From my counsel and the insurance told me, he
26 might try to collect on it.

27

28 Q. Okay. And if you wanted Mr. Renshaw to have

1 that money, you could have given Mr. Renshaw
2 that money. Isn't that true?

3 A. Yes.

4 Q. But you didn't, did you?

5 A. No.

6 Q. Because you didn't want Mr. Renshaw to have that
7 money. Isn't that true?

8 A. I was told it was my money.

9 Q. I'm sorry. Excuse me. You didn't want
10 Mr. Renshaw to have that money, did you?

11 A. I didn't

12 Trial Tr. (Jan. 12, 2015) 52:13-22, 53:9-20.

13 Under questioning by Cooke's counsel, Cooke testified:

14 A. Did anyone ever tell you that it had to be paid
15 over to Mr. Renshaw?

16 Q. No. They told me he might try to collect on it,
17 but it was my money.

18 Id. at 59:8-11.

19 Cooke also testified that up until this point Pamela had paid
20 his UCLA tuition and living expenses and that he was not
21 responsible for reimbursing her for those expenses. Cooke
22 testified that he had never paid these expenses before because he
23 had no money of his own. However, he decided to pay them this
24 time to help out Pamela.

25 Pamela testified that she spoke with Hart about the AMCO
26 Letter and AMCO Payment and confirmed with Hart that the money
27 belonged to Cooke. She then relayed that information to Cooke.
28 Pamela testified that she also sought independent legal advice
29 from Laura Bartels and that Ms. Bartels essentially confirmed
30 Pamela's understanding that the money belonged to Cooke.

1 After hearing closing arguments from the parties, the
2 bankruptcy court took the matter under submission.

3 **b. The bankruptcy court's ruling and judgment**

4 The bankruptcy court found that the AMCO Payment was property
5 of the debtor and that all of Cooke's transfers of funds occurred
6 within one year prior to his bankruptcy filing. The court further
7 found that Cooke intended to hinder or delay Renshaw in his
8 ability to collect on the Judgment by transferring the funds.
9 Based on the totality of the circumstances, the court believed
10 Cooke's transfers went beyond legitimate prebankruptcy planning
11 and were done with the intent to keep the funds from Renshaw, his
12 most significant creditor, and to maximize the benefit of the
13 funds received for himself. Cooke timely appealed the judgment
14 denying his discharge under § 727(a)(2)(A).

15 **II. JURISDICTION**

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

18 **III. ISSUE**

19 Did the bankruptcy court err when it denied Cooke's discharge
20 under § 727(a)(2)(A)?

21 **IV. STANDARDS OF REVIEW**

22 In an action for denial of discharge, we review: (1) the
23 bankruptcy court's determinations of the historical facts for
24 clear error; (2) its selection of the applicable legal rules under
25 § 727 de novo; and (3) its application of the facts to those rules
26 requiring the exercise of judgments about values animating the
27 rules de novo. Searles v. Riley (In re Searles), 317 B.R. 368,
28 373 (9th Cir. BAP 2004), aff'd, 212 F. App'x 589 (9th Cir. 2006).

1 intent to defraud or delay Renshaw; (2) no badges of fraud were
2 present; (3) he acted in good faith, which negates any possible
3 badges of fraud; (4) prebankruptcy planning by converting
4 nonexempt assets to exempt assets on the eve of bankruptcy is not
5 in and of itself sufficient to prove fraud; and (5) the bankruptcy
6 court misapplied In re Bernard.

7 **A. The bankruptcy court did not err when it denied Cooke's**
8 **discharge under § 727(a)(2)(A).**

9 **1. Denial of discharge under § 727(a)(2)(A)**

10 Section 727(a)(2)(A) provides that the bankruptcy court may
11 deny a debtor's discharge if the debtor has disposed of his or her
12 property, with the intent to hinder, delay or defraud a creditor,
13 within one year prior to the petition date. The party objecting
14 to discharge under § 727(a)(2)(A) must prove two things: (1) the
15 disposition of property, whether by transfer, removal,
16 destruction, mutilation or concealment (within the statutory time
17 period); and (2) the debtor's subjective intent to hinder, delay
18 or defraud a creditor through the act of disposition of the
19 property. In re Retz, 606 F.3d at 1200 (citing Hughes v. Lawson
20 (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997)). Cooke
21 concedes and does not contest the bankruptcy court's findings that
22 the AMCO Payment was Cooke's property and that the subject
23 transfers of funds were within one year of the petition date.
24 This appeal does not require a determination that Cooke acted with
25 fraudulent intent to defraud Renshaw. As the statutory language
26 is disjunctive, it is sufficient to prove that Cooke's intent is
27 to hinder or delay a creditor. In re Retz, 606 F.3d at 1200
28 (citing In re Bernard, 96 F.3d at 1281). Thus, our review focuses

1 on whether the court's finding that Cooke intended to hinder or
2 delay Renshaw was clearly erroneous.⁵

3 The intent to hinder or delay "is a question of fact that
4 requires the trier of fact to delve into the mind of the debtor
5 and may be inferred from surrounding circumstances."

6 In re Searles, 317 B.R. at 379 (citing Emmett Valley Assocs. v.
7 Woodfield (In re Woodfield), 978 F.2d 516, 518 (9th Cir. 1992)
8 (intent may be inferred from the circumstances surrounding the
9 transaction in question)). Similarly, the debtor's "course of
10 conduct may be probative of the question." Id. at 380 (citing
11 Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751, 753-54
12 (9th Cir. 1985).

13 **2. The bankruptcy court's finding that Cooke intended to**
14 **hinder or delay Renshaw was not clearly erroneous.**

15 To begin, the bankruptcy court questioned Cooke's credibility
16 based on his conflicting testimony about the AMCO Letter and the
17 AMCO Payment. We give credibility findings great deference.

19 ⁵ The dissent's analysis doesn't consider intent, but rather
20 questions whether any transfers contemplated by § 727(a)(2)
21 occurred if the transfers constitute preferment of other
22 creditors. See Hultman v. Tevis, 82 F.2d 940, 941 (9th Cir.
23 1936). As noted in First Beverly Bank v. Adeeb (In re Adeeb),
24 787 F.2d 1339, 1343 (9th Cir. 1986), the real issue in Hultman
25 involved whether the debtor acted with the requisite intent when
26 he "in good faith, believed and relied on his attorney's advice
27 and acted on it in making the transfer to his son." Id. The
28 Hultman court concludes no other indicia of intent existed,
warranting a discharge. The facts in the present appeal
distinguish this appeal from Hultman. Although Cooke vaguely
raised an advice of counsel defense, he inconsistently testified
as to whether he talked to his counsel. Further he declined to
waive his attorney-client privilege so Hart could testify or
submit a declaration as to his advice to Cooke. However, in
raising such a defense, Cooke could not invoke an attorney-client
privilege. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1163
(9th Cir. 1992).

1 In re Retz, 606 F.3d at 1196. The court noted that at trial Cooke
2 testified he received and read the AMCO Letter prior to depositing
3 the AMCO Payment. However, at his Rule 2004 examination Cooke
4 testified that he did not recall receiving the AMCO Letter, he
5 would not have received it if it was sent to his home address and
6 he did not think Pamela had forwarded it to him at UCLA. The
7 court also found contradictory Cooke's testimony about what steps
8 he took after receiving the AMCO Payment to determine if the funds
9 were his to spend. At trial, Cooke testified that he asked Hart,
10 Pamela and AMCO if the check was his to keep and all said yes. At
11 his first § 341(a) meeting, which was two months before Renshaw
12 filed his adversary complaint, Cooke testified that he did not
13 know exactly what the AMCO Payment was for, Hart did not inform
14 him and he did not ask too many questions about it.

15 Cooke argues that no evidence was presented at trial that he
16 actually intended to defraud or delay Renshaw. Cooke contends the
17 evidence supports his position that the AMCO Payment was his to
18 spend; no evidence showed or suggested that anyone told him, or
19 that he had reason to believe, the AMCO Payment was being paid to
20 him in trust to then be remitted to Renshaw.

21 Bankruptcy courts may infer a debtor's intent from
22 surrounding circumstances and the debtor's course of conduct.
23 In re Woodfield, 978 F.2d at 518; In re Devers, 759 F.2d at
24 753-54; In re Searles, 317 B.R. at 379-80. In addition to Cooke's
25 conflicting testimony about the AMCO Letter and AMCO Payment –
26 i.e., whether or not he read and/or discussed with anyone the AMCO
27 Letter and/or the AMCO Payment before depositing the check and
28 spending the funds – Cooke had also testified that he knew the

1 AMCO Payment was for accrued interest on the Judgment and that
2 Renshaw might try to collect the money. During the trial, Cooke
3 additionally stated he did not want Renshaw to have the AMCO
4 Payment. Further, the record reflects that Cooke knew his policy
5 limits of \$250,000 would not satisfy the Judgment and that he was
6 responsible for the excess of nearly \$1.5 million. Even though
7 the AMCO Payment belonged to Cooke, inferences from the facts and
8 Cooke's course of conduct established that he knew that an
9 aggressive judgment creditor like Renshaw would look to Cooke's
10 assets for satisfaction, including the AMCO Payment. Moreover, as
11 the bankruptcy court found, the debt to Renshaw was the reason
12 Cooke filed his bankruptcy case; he had no other material debt on
13 the petition date. Perhaps one of these facts standing alone
14 would not prove Cooke's actual intent to hinder or delay Renshaw,
15 but they were the facts and circumstances the bankruptcy court
16 could consider in its subjective intent determination.

17 Cooke also takes issue with the bankruptcy court's findings
18 that he was upset with Renshaw and, thus, wanted to keep the money
19 away from Renshaw. As part of its intent finding, the bankruptcy
20 court discussed Cooke's testimony at trial that he was upset about
21 the Judgment, that he did not think he was fully responsible for
22 the accident even after the Judgment was entered, that Renshaw was
23 not entitled to the entire amount, and that he was contemplating
24 bankruptcy prior to receiving the AMCO Payment. Cooke argues that
25 anyone would be unhappy about such a significant judgment,
26 particularly someone of his age, but that such distress does not
27 constitute fraudulent intent. Again, this may be true. However,
28 Cooke's testimony as to his state of mind about the Judgment

1 included more facts for the bankruptcy court to consider in its
2 totality of the circumstances analysis in determining that Cooke
3 had the intent to hinder or delay Renshaw from recovering all or
4 any part of the AMCO Payment. This analysis is further buttressed
5 by Cooke's admission that he did not want Renshaw to have any of
6 the AMCO Payment.

7 Beyond the credibility determination, the bankruptcy court
8 also identified several elements as support for the inference that
9 Cooke acted with the requisite intent under § 727(a)(2)(A).⁶
10 Again, the bankruptcy court in determining Cooke's intent was not
11 required to identify or make any findings involving any fraudulent
12 intent as this appeal involves a determination of intent to hinder
13 or delay and not an intent to defraud. See In re Retz, 606 F.3d
14 at 1200. Even if the court made such findings, they further
15 identify acts supporting its determination of Cooke's intention to
16 hinder or delay Renshaw's recovery. The court determined that it
17 was evident from the AMCO Letter that Renshaw was pursuing
18 collection of postjudgment interest from the Judgment. Renshaw
19 had sued AMCO for the money, but dismissed his suit when he
20 learned the funds were being sent to Cooke, who was warned by AMCO
21 that Renshaw may try to collect them. The court further found
22 that the AMCO Payment was Cooke's most significant asset, that it
23 was received on the eve of bankruptcy and that two-thirds of the

24
25 ⁶ The bankruptcy court considered: "(1) the timing of the
26 transfer; (2) the amount of the transfer in relation to the
27 remaining property of the debtor; (3) whether the transfer
28 occurred after the entry of a large judgment against the debtor;
(4) whether the transfer rendered the debtor insolvent; (5) the
debtor's motivation to make the transfers; and [6] the credibility
of the debtor's explanation regarding the transfers." Trial Tr.
(Jan. 12, 2015) 10:23-11:5.

1 funds were transferred just days before he filed. The record also
2 reflected that Renshaw was Cooke's largest creditor, holding over
3 99% of the claims against the estate and that Cooke did not want
4 Renshaw to have the money.

5 Finally, Cooke contends the bankruptcy court misapplied
6 In re Bernard, 96 F.3d 1279 (9th Cir. 1996). Specifically, Cooke
7 argues the bankruptcy court relied entirely on Bernard in
8 determining whether he had the "intent to hinder or delay"
9 Renshaw. Cooke contends this was in error because the facts in
10 that case were significantly different from his own and the legal
11 question did not involve intent. In making its ruling against
12 Cooke, the bankruptcy court noted it was "a close case," and then
13 went on to discuss the facts in Bernard:

14 [T]he debtors . . . withdrew \$64,000 from their money
15 market account to avoid efforts by a creditor to collect
16 on an \$83,000 judgment, spent the money, and filed for
17 Chapter 7 to discharge the judgment. After withdrawing
18 the funds from the money market, the Ninth Circuit noted
19 that the bankruptcy estate was 'virtually worthless' as
a result of their actions. The Ninth Circuit confirmed
a denial of discharge stating: "Denial of discharge is
a harsh remedy; however, bankruptcy has its roots in
equity and to get equity one must do equity." Bernard at
page 1279.

20 Hr'g Tr. (Jan. 16, 2015) 14:9-21.

21 We agree the facts in Bernard are distinguishable in that
22 "intent" was not at issue; the Bernards essentially admitted they
23 withdrew the money market funds to fend off their creditor's
24 attempt to reach their assets. 96 F.3d at 1282. The question in
25 Bernard was whether the withdrawals were "transfers" of property
26 within the meaning of § 727(a)(2)(A), which the Ninth Circuit
27 answered in the affirmative, based on its broad interpretation of
28

1 the bankruptcy code's definition of the word "transfer."⁷ It
2 appears the bankruptcy court was relying on Bernard for the
3 proposition that Cooke's expenditure of the AMCO Payment
4 constituted "transfers" beyond that of legitimate prebankruptcy
5 planning, which supported an inference of Cooke's subjective
6 intent. Nevertheless, we perceive no error.

7 While Bernard may not be on "all fours" with Cooke's case, it
8 is clear from the record the bankruptcy court applied the correct
9 law. It articulated the correct elements for a claim under
10 § 727(a)(2)(A) and made the necessary findings. The court also
11 properly relied upon inferences and course of conduct that may be
12 considered in determining a debtor's actual intent. Although two
13 views of the evidence may exist, the court's choice between them
14 in determining that Cooke actually intended to hinder or delay,
15 cannot be clearly erroneous.

16 VI. CONCLUSION

17 While each of us individually may have reached a different
18 conclusion in this case, and clearly the dissent would have, we
19 perceive no clear error with respect to the bankruptcy court's

20
21 ⁷ The dissent asserts that the analysis in this appeal is
22 independent of the bankruptcy court's finding of intent and relies
23 on the interpretation of the word "transfers"; a legal issue
24 reviewed de novo and not a factual determination of the word
25 "intent," which is reviewed for clear error. The Ninth Circuit in
26 In re Bernard, 96 F.3d at 1282-83, concluded that the Bankruptcy
27 Code's definition is "**extremely** broad," including bank deposits
28 and withdrawals. See § 101(54). Definitionally, "transfers" are
not categorized by whether the property transferred may be
exempted under § 522 or whether the property may be equivalent to
permitted distributions of property of the estate under § 726 or
some other operative bankruptcy statute. The transfers involved
in this appeal occurred prepetition and involve property of the
debtor. In the requisite analysis for this appeal, we need to
determine if the bankruptcy court's finding of actual intent was
clear error.

1 finding that Cooke actually intended to hinder or delay Renshaw;
2 such finding is not illogical, implausible or without support in
3 the record. Any potential legal error by the bankruptcy court in
4 its application of Bernard was harmless and certainly does not
5 compel a reversal of the discharge judgment; the correct law was
6 applied in this case. Accordingly, we conclude the bankruptcy
7 court did not err when it denied Cooke's discharge under
8 § 727(a)(2)(A), and we AFFIRM.

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Dissent begins on next page.

1 TAYLOR, Bankruptcy Judge, Dissenting:

2 I acknowledge that we review intent findings for clear error.
3 And I understand that where two plausible views of the facts exist
4 we cannot reverse. But, nonetheless, I find reversible error
5 here; I respectfully dissent.

6 I do not contest the bankruptcy court's determinations as to
7 the preliminary facts of this case; they are not controversial.
8 On *de novo* review where appropriate in connection with a denial of
9 discharge, however, I cannot conclude that the bankruptcy court
10 correctly took into consideration all the "applicable rules"
11 required in consideration of a § 727 claim by binding Ninth
12 Circuit authority. And given that conclusion, I cannot on
13 appropriate *de novo* review agree that it correctly applied the
14 facts to these rules.

15 I discuss my reasoning in detail hereafter, but, in short, I
16 never reach the question of intent because I see no "transfer"
17 that appropriately supports a discharge denial given established
18 Ninth Circuit authority.

19 Even if I review the bankruptcy court's intent findings, I
20 conclude that remand is necessary. In particular, the record
21 reveals that the bankruptcy court's findings regarding Cooke's
22 state of mind were based in very significant measure on its
23 erroneous assumption that Cooke paid taxes prior to bankruptcy
24 that he could not discharge in his chapter 7 case. Its assumption
25 in this regard was in error. The majority simply ignores this
26 significant error which was the apparent linchpin of the
27 bankruptcy court's state of mind findings. I conclude that, at a
28 minimum, remand is required.

1 **Undisputed Facts.** It is undisputed that Cooke lacked
2 resources to pay Renshaw's judgment in full or even in any
3 significant way. There is no evidence that he would ever be able
4 to retire this debt, especially given the interest accrual which
5 is well in excess of \$100,000 a year.

6 Cooke, at some point, decided that he needed to file a
7 bankruptcy. The decision to file bankruptcy is subject neither to
8 question nor to recrimination - it certainly does not justify
9 denial of discharge even where the only reason for filing is to
10 halt the collection efforts of a creditor.

11 There is no evidence that Cooke was intoxicated at the time
12 of the accident and, thus, no argument that § 523(a)(9) bars
13 discharge. Renshaw's injuries were horrific, but that does not
14 change the calculus. Congress has made a hard decision, and the
15 Bankruptcy Code allows discharge of a judgment arising from
16 negligence where a debtor acts appropriately in the bankruptcy
17 process. Thus, Cooke had the right to discharge his debt to
18 Renshaw through a chapter 7 case.

19 Cooke's problems in the bankruptcy arose because his
20 insurance company did not promptly pay the judgment to the extent
21 of his policy limits. As a result, it was liable to Cooke, not to
22 Renshaw, for the interest that accrued on the judgment prior to
23 payment, \$45,147.62; it paid this amount directly to Cooke. His
24 pre-petition use of a portion of what the bankruptcy court
25 acknowledged was his own money (the "Funds") is what we must
26 evaluate.

27 So the question becomes: what did Cooke do with the Funds
28 that would justify the loss of discharge? The answer, I submit,

1 is that he did nothing that was an appropriate basis for discharge
2 denial under § 727(a)(2)(A).

3 **The bankruptcy court made no finding of fraud, and I see no**
4 **evidence of fraud or other similar nefarious conduct supporting a**
5 **discharge denial on this record.** The bankruptcy court based its
6 decision exclusively on the determination that Cooke's actions
7 were intended to hinder and delay Renshaw. It found no basis for
8 a determination that this case involved fraud; I agree. There is
9 no evidence that Cooke hid money or assets, paid fake or inflated
10 claims, initiated fraudulent transfers, or attempted to retain
11 access to the Funds post-bankruptcy in a manner inconsistent with
12 the Bankruptcy Code. This is important because the absence of
13 fraud - or anything even close to fraud - makes this case
14 distinguishable from the vast majority of reported § 727(a)(2)(A)
15 cases based on a determination that a debtor hindered or delayed
16 creditors.¹ The bankruptcy court and the majority fail to cite a

18 ¹ Having reviewed numerous reported and unreported decisions
19 from circuit courts and bankruptcy appellate panels affirming
20 denial of discharge on account of actions that hinder or delay
21 creditors, I find no case that did not involve conduct that did
22 not include deceit, non-disclosure, transfer of assets without
23 consideration, inappropriate pre-payment, excessive
24 collateralization, or similar conduct. Looking only at reported
25 Ninth Circuit and Panel decisions provides a representative
26 example of the national scope of cases where denial of discharge
27 was appropriate under § 727(a)(2)(A) and based on a determination
28 that the debtor hindered or delayed creditors. Adeli v. Sachs
(In re Adeli), 384 F. App'x 599 (9th Cir. 2010) (assets moved into
name of a friend to shield them from creditor claims); Bernard v.
Sheaffer (In re Bernard), 96 F.3d 1279 (9th Cir. 1996) (money
withdrawn from bank account, not paid to any creditor, and then
spent on a future vacation and gambling); Wolkowitz v. Beverly
(In re Beverly), 374 B.R. 221 (9th Cir. BAP 2007) aff'd in part,
dismissed in part, 551 F.3d 109 (9th Cir. 2008) (collusive marital
settlement agreement stripped debtor of all non-exempt assets and
fraudulent transfers); Beauchamp v. Hoose (In re Beauchamp),

(continued...)

1 single reported Ninth Circuit or Panel decision where a court
2 denied discharge based on efforts to hinder or delay that did not
3 involve deceit or other objectively or subjectively improper
4 conduct.

5 **Renshaw did not have a lien on the Funds or a right to**
6 **priority payment from the Funds.** It is important to put to rest a
7 theme that pervades Renshaw's position on appeal and that may have
8 influenced the bankruptcy court improperly. Implicit in his
9 argument is the assertion of entitlement to the Funds. Express in
10 his argument is the claim that they should have been paid to him.
11 The problem with this assertion is that it is not based on any
12 law, state or federal.

13 As Renshaw conceded during oral argument, the Funds were not
14 encumbered by any lien in his favor prior to bankruptcy; state law
15 does not provide for such a lien automatically, and Renshaw had
16 not otherwise acquired a judgment lien on the Funds. There is no
17 evidence or argument that Cooke impeded Renshaw during the
18 prepetition period.

19 Renshaw, ignoring these realities, first claimed entitlement
20 to the Funds as a third party beneficiary of the contract between
21 Cooke and his insurer; neither state law nor the Bankruptcy Code
22 nor the bankruptcy court recognized this alleged interest. The

24 ¹(...continued)
25 236 B.R. 727 (9th Cir. BAP 1999), aff'd, 5 F. App'x 743 (9th Cir.
26 2001) (checks deposited in a hidden account); Lawson v. Hughes
27 (In re Lawson), 193 B.R. 520 (9th Cir. BAP 1996), aff'd, 122 F.3d
28 1237 (9th Cir. 1997) (assets transferred to mother while debtor
retained a beneficial interest); Aubrey v. Thomas (In re Aubrey),
111 B.R. 268 (9th Cir. BAP 1990) (no evidence supported assertion
that transfer was based on a legitimate obligation as opposed to
an attempt to put assets beyond creditors' reach).

1 Funds were compensation to Cooke for the damages he suffered in
2 the form of interest accrual as a result of his insurer's failure
3 to pay immediately - at least to the extent of his policy limits.

4 Ultimately, Renshaw conceded in oral argument that his claim
5 was based on an alleged "moral obligation." I appreciate the
6 point, but neither the California legislature nor Congress allow
7 us to determine rights based on our perception of the moral
8 superiority of one claim over another. The law, in general, and
9 the Bankruptcy Code, in particular, create mandates and establish
10 priorities between similarly situated creditors; and there may
11 well be a moral element undergirding some of this legislation.
12 But here no such priority existed, and, until Renshaw created a
13 lien, he had no greater right to this money under either state or
14 federal law than any other creditor.

15 Similarly, as a matter of law, Cooke had no legal obligation
16 to turn the Funds over to Renshaw, was entitled to exempt a
17 portion of the Funds from any judgment lien, and was entitled,
18 within limits, to use the Funds for other purposes. My review of
19 the bankruptcy court's oral ruling causes me to question whether
20 the bankruptcy court gave improper weight to this moral imperative
21 argument. The bankruptcy court noted that there was an admission
22 that Cooke knew that he was responsible for interest on the debt
23 and that he received the Funds on account of interest accrual. To
24 the extent the bankruptcy court equated the general entitlement to
25 interest on a judgment with a legal requirement that Cooke pay the
26 Funds to Renshaw, that was legal error.

27 **Use of the Funds to pay an appropriate fee to an attorney to**
28 **initiate a bankruptcy case cannot be a basis for a denial of**

1 **discharge under § 727(a)(2)(A)**. It is the rare case where a
2 debtor does not file a bankruptcy with the express intent of
3 delaying and hindering at least one and sometimes all of his
4 creditors. The automatic stay has that effect any time it stops a
5 foreclosure, garnishment, or other collection activity. If
6 payment to an attorney from free and clear funds for the purpose
7 of initiating a bankruptcy is a transfer for § 727(a)(2)(A)
8 purposes, then discharge would be unobtainable for most, if not
9 all, debtors who retain counsel to assist them in filing a
10 bankruptcy. Such a construction of § 727(a)(2)(A), thus, is
11 nonsensical.

12 Here, there is no evidence that the attorney's fees were
13 unreasonable in amount or transferred with an improper intent.
14 Again, this was not a fraud case. To the extent the bankruptcy
15 court included this payment as a transfer for § 727(a)(2)(A)
16 purposes, this was error.²

17 **Binding Ninth Circuit authority and prior decisions of this**
18 **Panel make clear that use of the Funds to pay other creditors**
19 **cannot be considered an independent basis for a § 727(a)(2)(A)**
20 **discharge denial.** In Hultman v. Tevis, an Act case, the Ninth
21 Circuit stated as follows: "The mere fact that a bankrupt has made
22

23 ² In an unreported decision, Perrine v. Speier
24 (In re Perrine), 2008 WL 8448835 (9th Cir. BAP 2008), the Panel
25 did rely on a transfer to an attorney as a basis for denial of
26 discharge under § 727(a)(2)(A). There, however, the transfer was
27 not solely or even largely on account of legal services either
28 actually provided or reasonably anticipated. Id. at *5. Indeed,
as of the time of decision, the fees had still not reached the
level of the transferred funds. See id. Here, the fee appears
reasonable based on my knowledge of the rates charged in Southern
California for chapter 7 cases; and the record contains no
evidence to the contrary.

1 a preferential payment or transfer to one of his creditors is no
2 ground for denying a discharge." 82 F.2d 940, 941 (9th. Cir.
3 1936) (citations omitted). The debtor had transferred "large
4 sums" to his son during the year prior to bankruptcy allegedly
5 with the intent to hinder, delay, or defraud other creditors. Id.
6 The Ninth Circuit declined to determine whether this transaction
7 had a detrimental impact on other creditors and disregarded the
8 fact that the transaction involved preferment of an insider.
9 Instead, it focused on the undisputed fact that the debtor owed
10 his son \$50,000 at the time of the transfer and that the payments,
11 though substantial, failed to pay this debt in full. Thus, it
12 found discharge appropriate.

13 Hultman remains good law and bound the bankruptcy court here.
14 Indeed, the Panel previously considered the continuing impact of
15 Hultman and required far more than preferment of a creditor in a
16 discharge denial situation. See In re Perrine, 2008 WL 8448835,
17 at *5 (evidence that a transfer to attorney exceeded value of
18 services and, thus, was for a purpose other than debt repayment
19 and removed only asset from reach of creditors justified
20 conclusion that Hultman was inapplicable and that discharge denial
21 was appropriate).

22 At least one other circuit court has articulated a rule
23 similar to that stated in Hultman in a case decided under the
24 Code. See Equitable Bank v. Miller (In re Miller), 39 F.3d 301,
25 307 (11th Cir. 1994).³ In Miller, the debtor transferred property

27 ³ Hultman relied on decisions, from other circuits, which
28 stated this rule in a case decided under the Act. See 82 F.2d at
(continued...)

1 to a close business colleague in exchange for cancellation of
2 debt. See id. at 304. The evidence suggested that the property
3 was worth more than the debt. Id. at 307. The Eleventh Circuit
4 agreed with the bankruptcy court, however, that discharge denial
5 was not supported by this fact, stating that: "A mere preferential
6 transfer of this sort is not tantamount to a fraudulent transfer
7 for the purposes of denying discharge." Id. It also
8 distinguished the case from those involving transfers to
9 non-creditors. Id.

10 **The bankruptcy court here did not acknowledge the rule in**
11 **Hultman and erroneously relied on Cooke's use of the Funds to pay**
12 **other creditors.** The bankruptcy court and the Panel majority turn
13 a blind eye to this binding precedent. In footnote 5, the
14 majority attempts to avoid the requirement that it follow Hultman
15 by arguing that the "real" issue in that case was the debtor's
16 intent and the evidence supporting a lack of intent to hinder or
17 delay when the debtor relied on advice of counsel. Maj. Op. at 13
18 n.5. I agree that this was one basis for the Ninth Circuit's
19 decision in Hultman, and I agree that the evidence that Cooke
20 acted on advice of counsel is not strong. If this was the sole
21 reason for the Ninth Circuit's ruling in Hultman, it would not bar
22 affirmance here. I, however, cannot agree with the majority's
23 decision to simply disregard the other basis for the relevant
24 ruling in Hultman.

25
26
27 ³(...continued)
28 941 (citing Rutter v. General Motors Acceptance Corp., 70 F.2d
479, 481 (10th Cir. 1934); In re Richter, 57 F.2d 159, 160 (2nd
Cir. 1932); Bailey v. Ross, 53 F.2d 783, 784 (8th Cir. 1931)).

1 After making the point emphasized by the majority, Hultman
2 then stated as follows:

3 Furthermore, the amount of money so transferred was less
4 than the amount then owing by the bankrupt to his son.
5 The mere fact that a bankrupt has made a preferential
6 payment or transfer to one of his creditors is no ground
7 for denying a discharge.

8 82 F.2d at 941.

9 "Furthermore" indicates that this reason for affirmance is
10 additional to the only point the majority chooses to consider.
11 Hultman clearly states that payment of legitimate creditor claims,
12 even to insiders, is not a basis for discharge denial. Both the
13 bankruptcy court and the majority ignore this authority; I cannot
14 and do not do so.

15 Almost all of Cooke's transfers⁴ paid other debts. Renshaw
16 had the burden of proof and provided no evidence that these
17 payments did not relate to legitimate debts. Thus, the bankruptcy
18 court's reliance on Cooke's payments to other creditors as
19 "transfers" within the meaning of § 727(a)(2)(A) was error.

20 First, the payments of debt were not to insiders; Cooke paid
21 his bankruptcy lawyer, paid his taxes, and paid his college
22 tuition and housing expenses. The argument that his mother had
23 paid his college expenses in the past is irrelevant. There is no
24 evidence that she had a legal obligation to do so in the future.⁵
25 The case law does not allow a bankruptcy court to change the

26 ⁴ In footnote 7, the majority correctly states that the term
27 transfer is broadly construed. I agree, and I agree that Cooke
28 made transfers. But, as the Ninth Circuit made clear in Hultman,
some transfers do not support discharge denial as a matter of law.

⁵ Further, as discussed below, when Cooke did so, he used
money for which he had an available exemption.

1 quality of the UCLA bills as debt just because Cooke had a loving
2 parent who might be willing to pay his obligations. The focus
3 here is on what Cooke owed. As a result, this is a stronger case
4 than Hultman, which involved direct payment to an insider.

5 Second, taxes enjoy special protection under the Bankruptcy
6 Code. Congress has determined that taxes should be paid even if
7 this leaves a deserving creditor such as Renshaw unpaid. Here,
8 the bankruptcy court found that the taxes arose in connection with
9 the Funds themselves. There was no evidence that Cooke overpaid
10 the taxes.

11 Third, as already discussed, the payment of an appropriate
12 fee to a bankruptcy attorney in connection with a chapter 7 case
13 cannot be the basis for a § 727(a)(2)(A) denial of discharge. The
14 rule in Hultman, thus, provides additional but not exclusive
15 support for the conclusion that this payment should not have been
16 a basis for discharge denial.

17 The bankruptcy court erred when it based its decision on
18 Cooke's payment of these legitimate obligations. In inferring an
19 inappropriate intent to hinder or delay, it focused on the total
20 amount of pre-petition payments from the Funds. But its
21 consideration of over 90% of this amount was improper under the
22 rule established by the Ninth Circuit in Hultman. And this error
23 was not harmless.

24 The bankruptcy court failed to consider Hultman and, instead,
25 relied on Bernard as analogous. As the majority concedes, nothing
26 could be farther from the case; the debtors in Bernard depleted
27 funds putting them beyond the reach of all creditors. Here, Cooke
28

1 merely preferred certain creditors.⁶ This did not justify a
2 § 727(a)(2)(A) denial of discharge.

3 **Even if the taxes were not payable when paid, the outcome is**
4 **the same as they were entitled to priority treatment in a**
5 **chapter 7 case.** While there is no evidence from Renshaw, who had
6 the burden of proof, that the taxes were pre-paid, a common sense
7 argument can be made that the taxes - which relate to Cooke's
8 receipt of the Funds - were not due when paid. The question then
9 becomes whether that fact takes those payments outside the rule
10 articulated in Hultman. I assert that it does not.

11 Income tax liability arises at the end of the tax year;
12 typically, the last day of the tax year. See Towers v. United
13 States (In re Pac.-Atl. Trading Co.), 64 F.3d 1292, 1295, 1301
14 (9th Cir. 1995). But there is a possible exception when an
15 individual files a chapter 7 case and there are assets available
16 for distribution.

17 Section 1398(d)(2)(A) of the Internal Revenue Code allows a
18 debtor in an asset case to elect to bifurcate the
19 bankruptcy-filing year into two tax years and to terminate the
20 first tax year on the petition date. The tax debt accruing prior
21 to the petition date is then treated as pre-petition debt and is
22 available for treatment as a priority claim under § 507. Because
23 the Internal Revenue Code allows this treatment for federal tax
24 liability, the Bankruptcy Code mandates the same tax treatment for
25 state income taxes. See 11 U.S.C. § 346(a).

26
27 ⁶ And, as discussed hereafter, to the extent of his taxes,
28 he did so exactly as the Bankruptcy Code allows. While, in the
case of the transfers to parties other than his attorney, he used
exempt assets.

1 In paying tax liabilities, albeit prior to bankruptcy, Cooke
2 merely duplicated the treatment that these taxes would have
3 received if he held onto all of the Funds and took them into his
4 bankruptcy estate. Again, pre-petition payment of a legitimate
5 tax debt - payable in full as a priority in a chapter 7 case -
6 does not support a § 727(a)(2)(A) denial of discharge.

7 The bankruptcy court erred when it ignored the treatment the
8 taxes would have received in an asset case. In its findings, the
9 bankruptcy court erroneously concludes that Cooke paid the taxes
10 "to avoid any non-dischargeable claims that would result after his
11 petition was filed." Hr'g Tr. (Jan. 16, 2015) at 14:3-5. This
12 finding assumes that the taxes would not receive priority
13 treatment in an asset case; such an assumption, again, was
14 erroneous. And there is no evidence in the record that Cooke paid
15 the taxes based on an erroneous view of the law. The only
16 evidence in the record even remotely related to his understanding
17 of his tax obligations is the fact that he generally had access to
18 an accountant. There is nothing that supports the bankruptcy
19 court's conclusion that, in effect, Cooke paid his taxes based on
20 an erroneous view of the law.

21 The bankruptcy court's error as to the dischargeability of
22 the taxes related to the Funds was not harmless; it painted the
23 pre-petition tax payments as opportunistic and unduly beneficial
24 to Cooke. Because of the provisions of the Bankruptcy Code and
25 the Internal Revenue Code, the payment of taxes was neither. The
26 majority ignores this error entirely.

27 **Cooke's replacement of his laptop did not, in isolation,**
28 **justify a denial of discharge.** The undisputed evidence before the

1 bankruptcy court was that Cooke's prior computer was five to six
2 years old, that the screen had recently cracked and broken, and
3 that Cooke was a college student who needed a computer. Trial Tr.
4 (Jan. 12, 2015) at 57:21-23. Nefarious conduct, this was not.⁷

5 The record does not reflect that the bankruptcy court
6 considered this purchase in isolation, but if it denied discharge
7 based solely on this use of the Funds, I submit that this was
8 error. Such a conclusion turns the strong policy in favor of
9 discharge on its head.

10 Moreover, the Ninth Circuit allows debtors to engage in some
11 forms of pre-bankruptcy planning and to protect assets by
12 converting them from non-exempt to exempt. See, e.g., Gill v.
13 Stern (In re Stern), 345 F. 3d 1036, 1043 (9th Cir. 2003) ("[T]he
14 purposeful conversion of nonexempt assets to exempt assets on the

15 ⁷ As previously noted, I do not reach the bankruptcy court's
16 intent findings in my decision to reverse. I acknowledge that the
17 bankruptcy court found a lack of credibility in one area, which
18 the majority appears to determine was not erroneous, but nothing
19 in the record suggests that this finding related to the testimony
20 regarding the state of Cooke's computer. This evidence was
21 neither contradicted nor controversial.

22 I also note that I find the credibility findings troubling.
23 There is some discord in Cooke's various discussion of when,
24 whether, and how he got confirmation that he was free to spend the
25 Funds. My problems with this whole area of testimony, however,
26 are several. First, the § 341(a) meeting testimony ends with a
27 question related to this topic and, according to the transcript,
28 an inaudible response. Next, the questions seem to ignore that
his mother was copied on the letter from the insurance company
explaining relevant points. But most importantly, this seems to
be a tempest in a teapot. Cooke received the Funds in his own
name and there is no question that he had the legal right to use
them. Similarly, Cooke knew that he owed Renshaw on the judgment
and there was no suggestion that he naively believed that Renshaw
would not seek payment. Cooke had no duty to double check before
using the Funds and his use was for legitimate purposes. The
bankruptcy court did not find Cooke to lack credibility for all
purposes, and nothing in the credibility finding suggests that I
adopt a more expansive view of his lack of credibility and
disregard his testimony regarding his computer.

1 eve of bankruptcy is not fraudulent per se." (quoting Wudrick v.
2 Clements, 451 F.2d 988, 989 (9th Cir. 1971)). The bankruptcy
3 court here acknowledged this fact, stating that this was a close
4 case, but finding that combined expenditures from the Funds tipped
5 the balance towards a denial of discharge. In a close case, the
6 bankruptcy court could not find that the purchase of a much-needed
7 tool of Cooke's trade as a student, one that involved use of less
8 than ten percent of the Funds, justified discharge denial.⁸

9 **Reversal is warranted as a matter of law because the**
10 **bankruptcy court's factual finding of intent was based on**
11 **transfers which it could not consider for purposes of**

12 **§ 727(a)(2)(A).** In summary, I would reverse because the
13 bankruptcy court erred as a matter of law when it based its
14 decision almost entirely on Cooke's payment of other debt.
15 Hultman, as recognized by this Panel, does not permit this
16 reliance. I also conclude that the laptop computer acquisition in
17 isolation did not justify § 727(a)(2)(A) denial of discharge.

18 I emphasize that my analysis is independent of the bankruptcy
19 court's finding of intent. As already noted, all commencements of
20 bankruptcy cases involve, to some extent, an express intent to
21 hinder and delay a creditor. Further, almost all bankruptcy cases

23 ⁸ Cooke exempted most of the laptop computer's value as a
24 tool of the trade in his case; this was a classic transfer of non-
25 exempt assets to exempt assets. Any additional value remained
26 available to his creditors, so arguably only the \$1,500 that he
27 claimed as exempt is properly considered as a transfer. Further,
28 as discussed hereafter, he actually used some otherwise exempt
portions of the Funds to make this purchase. So, in part, this
was simply a change of the form of exempt assets. The math of the
transaction is discussed more thoroughly hereafter, but any
"transfer" related to the asset involved only a negligible portion
of the Funds that was not otherwise exempt.

1 involve some measure of transfer in anticipation of the creditor-
2 hindering-or-creditor-delaying bankruptcy; bankruptcy lawyers are
3 paid, creditors are preferred, and in some reasonable regards
4 non-exempt assets become exempt or goods or services essential to
5 day-to-day existence are obtained. These types of transfers do
6 not justify a denial of discharge, so one never need consider a
7 debtor's intent when causing them. And Hultman provides a firm
8 foundation for a determination that not all transfers are
9 appropriately considered in a § 727(a)(2)(A) context. Adeeb is
10 another such case.

11 In Adeeb, the debtor admitted to making pre-petition
12 transfers with improper intent. 787 F.2d at 1341-42. But, he
13 repented and attempted to retrieve the assets. Id. The Ninth
14 Circuit, thus, reversed the district court and remanded to the
15 bankruptcy court for a determination as to whether recovery had
16 been complete. Id. at 1346. The Ninth Circuit read transferred
17 in § 727(a)(2)(A) as meaning "transferred and remained
18 transferred." Id. at 1345. And it noted that Congress intended
19 to deny discharge where debtors took actions **to keep assets from**
20 **their creditors** by hiding assets or destroying them. Id. The
21 facts here evidence no such improper conduct. Instead, as in
22 Hultman, the transfers did not support § 727(a)(2)(A) discharge
23 denial.

24 Were we writing on a blank slate, I might join in the
25 majority's decision, but we are not. The Ninth Circuit in Hultman
26 and Adeeb made clear that not every transfer supports a § 727
27 objection to discharge. The majority ignores this precedent as
28 did the bankruptcy court.

1 **Reversal is also appropriate here because the transfers at**
2 **issue did not impact Renshaw in any way appropriately recognized**
3 **by law.** Relying on Adeeb, in Bernard the Ninth Circuit determined
4 that injury was not an element of a § 727(a)(2)(A) claim. 96 F.3d
5 at 1281-82. But see id. at 1283 (O’Scannlain, J., dissenting) (“I
6 read Adeeb as holding only that lack of injury to creditors is
7 irrelevant for purposes of denying a discharge in bankruptcy.”)
8 (internal quotation marks and citation omitted). Having
9 acknowledged that, I would still reverse here because, as stated,
10 the transfers at issue almost entirely duplicated the treatment
11 Renshaw would have received if Cooke paid his attorney and brought
12 the entirety of the Funds into his chapter 7 estate. I would
13 conclude as a matter of law that where the pre-petition transfers
14 merely facilitate the filing of a bankruptcy by paying an attorney
15 to file the case and then almost entirely duplicate the treatment
16 that creditors would receive under the Bankruptcy Code that they
17 cannot be considered in isolation as transfers that justify denial
18 of discharge.

19 The record makes clear that Cooke understood that he had a
20 wildcard exemption under state law, among others, and that he
21 intended to use it to protect his rights to the Funds. Here, on
22 the petition date, the California wildcard exemption totaled
23 \$23,250. Thus, if one considers only these two factors, the most
24 that would have been available to his estate if Cooke filed
25 bankruptcy and brought all of the Funds, net of the payment to the
26 attorney, into the case is \$17,592. This creates an asset case,
27 but there are two relevant consequences of that fact here.

28 First, the Trustee would be entitled to his statutory fee

1 which can be approximated at \$2,500 pursuant to § 326(a) if the
2 estate was an asset estate holding about \$17,590 for distribution.
3 This left approximately \$15,092 available to creditors.

4 And the second reality is that, as discussed above, the
5 taxing authorities would have a priority claim to this amount.
6 Tax claims based on Cooke's accountant's calculation totaled
7 \$11,000 payable to the IRS and \$2,800 payable to the California
8 Franchise Tax Board. Thus, tax debt would be payable from almost
9 all remaining non-exempt funds. The balance of approximately
10 \$1,292 would be further reduced by Trustee expenses and admittedly
11 small payments to other creditors. It is unclear that Renshaw
12 would have received anything.

13 What this analysis shows is that unless the real point of
14 Renshaw's argument is that Cooke wasn't entitled to file
15 bankruptcy or that Cooke was obligated to pay the Funds to him
16 prior to filing (a payment that would be recoverable as a
17 preference), the transfers of the Funds were not in any cognizable
18 way a deviation from the treatment he otherwise would have
19 received in Cooke's chapter 7 case.

20 Where Cooke made transfers that are entirely consistent with
21 the priorities under the Bankruptcy Code or, in the case of UCLA
22 and the laptop, where the transfers were made almost entirely from
23 funds that Cooke could claim as exempt, a determination of
24 discharge denial was reversible error.

25 Here, the bankruptcy court concluded that Cooke's use of the
26 money was intended "to maximize the benefit of the [F]unds
27 received for himself." Hr'g Tr. (Jan. 16, 2015) at 15:1-2.
28 Again, this conclusion was a negative one allegedly supporting

1 discharge denial. But here all Cooke did was to pay an attorney
2 to file his bankruptcy, pay taxes as allowed by the Bankruptcy
3 Code, make other payments from assets for which he had an
4 available state law exemption, and use a tiny portion of the non-
5 exempt funds to acquire an exempt asset necessary for his work as
6 a student. Such intended use of funds does not support discharge
7 denial unless we expand § 727(a)(2)(A) to a point unsupported by
8 case law and requiring a nonsensical interpretation of the
9 statute.

10 **In any event, if reversal is not appropriate, remand is**
11 **required.** The majority disagrees with my conclusion that the
12 transfers here are not appropriately considered for § 727
13 purposes. I respectfully disagree with their analysis. But even
14 if I were to agree that the transfers were properly considered, I
15 remain incapable of affirmance. If reversal is not the correct
16 result, remand is required.

17 The bankruptcy court specifically determined that Cooke paid
18 the taxes in order to avoid an otherwise nondischargeable debt.
19 In doing so, however, the bankruptcy court did not refer to any
20 testimony or evidence, documentary or otherwise, in the case.
21 And, in fact, the bankruptcy court could not have relied on any
22 such evidence because no such evidence exists in the record.
23 Instead, the bankruptcy court plucked a motive from the air and
24 inferred that it was Cooke's.

25 In deferring to the bankruptcy court's discretion in this
26 regard, the majority goes too far. They rubber stamp the
27 bankruptcy court's inference of wrongful intent when the
28 Bankruptcy Code and Internal Revenue Code make clear that Cooke

1 had no risk of nondischargeable tax debt if he brought the Funds
2 into his bankruptcy estate. Put more bluntly, the bankruptcy
3 court inferred, based on not a shred of evidence, that Cooke made
4 these payments based on the erroneous belief that the tax claims
5 would be nondischargeable. As these payments constitute the
6 majority of the payments made pre-bankruptcy, remand is
7 appropriate so that the bankruptcy court can reconsider its
8 determination that Cooke made all payments with the intent to
9 hinder or delay Renshaw in light of the tax treatment required by
10 law in a chapter 7 asset case.

11 **The testimony regarding Cooke's understandings about the**
12 **Funds and feelings about payment to Renshaw do not sufficiently**
13 **support affirmance on this record.** The majority and the
14 bankruptcy court, make much of allegedly inconsistent testimony by
15 Cooke. My review of the record leads me to question this
16 assumption as already discussed. Among other things, the
17 questions asked at the § 341(a) meeting, in deposition, and at
18 trial are subtly, but significantly, different.

19 The majority, but not the bankruptcy court, also rely on the
20 trial testimony that concludes as follows:

21 Q. I'm sorry. Excuse me. You didn't want Mr. Renshaw to
22 have that money, did you?

23 A. I didn't

24 An ellipsis generally indicates an omission of words. This
25 was not a firm statement, and the majority reaches too far when it
26 converts this apparently incomplete or equivocal statement into
27 "an admission that [Cooke] did not want Renshaw to have any of the
28 [Funds]." Maj. Op. at 18; see also id. at 16. This testimony

1 gives me no comfort in affirming the bankruptcy court.

2 First, the majority turns it into a specific declarative
3 statement. That, simply, is not the case, as the party
4 transcribing the testimony used an ellipsis, not the period
5 appropriate with a firm declaration of state of mind.

6 Second, the bankruptcy court did not mention this testimony
7 in its ruling. The majority, thus, gives this equivocal response
8 a weight beyond that found appropriate by the trial court which
9 heard the testimony and was able to observe demeanor and hear
10 tone.

11 Third, the question asked and the response given merely
12 relate to desire to pay; this is not an admission of intent to
13 hinder or delay.

14 To be clear, were this the only disagreement I have with the
15 majority's analysis, it would be a minor one. But given the
16 fundamental problems I have described, I merely point out that I
17 view any differences in testimony as essentially nonexistent and
18 the equivocal testimony as to desire to pay as immaterial. This
19 testimony does not allow me to overlook what I believe to be legal
20 error.

21 I would reverse or, at a minimum, remand.
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