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

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re: ) BAP No. CC-16-1075-TaFMc  
TERRANCE ALEXANDER TOMKOW, )  
Debtor. ) Adv. No. 2:13-bk-19712-WB  
2:13-ap-01751-WB

TERRANCE ALEXANDER TOMKOW,  
Appellant,

v.

KENNETH BARTON,  
Appellee.

In re: ) BAP No. CC-16-1076-TaFMc  
ZAFAR DAVID KHAN, )  
Debtor. ) Adv. No. 2:13-bk-19713-WB  
2:13-ap-01752-WB

ZAFAR DAVID KHAN,  
Appellant,

v.

KENNETH BARTON,  
Appellee.

**O P I N I O N**

Argued and Submitted on October 21, 2016  
at Pasadena, California

Filed - January 5, 2017  
Ordered Published - January 17, 2017

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

Honorable Julia Wagner Brand, Bankruptcy Judge, Presiding

1 Appearances: Lewis R. Landau on behalf of appellants Terrance  
2 Alexander Tomkow and Zafar David Khan; Patrick C.  
3 McGarrigle of McFarrigle, Kenney & Zampielo, APD  
on behalf of appellee Kenneth Barton.

4 Before: TAYLOR, FARIS, and MCKITTRICK,\* Bankruptcy Judges.

5  
6 TAYLOR, Bankruptcy Judge:

7  
8 **INTRODUCTION**

9 Appellants<sup>1</sup> Terrance Tomkow and Zafar Khan appeal from two  
10 orders: (1) an order granting summary judgment in favor of  
11 Kenneth Barton determining that a California state court  
12 judgment against them was nondischargeable under § 523(a)(2)(A)<sup>2</sup>  
13 and (a)(6); and (2) an order denying their subsequent motion for  
14 direct appeal certification to the Ninth Circuit.

15 Binding Ninth Circuit authority controls our decision here;  
16 we AFFIRM the bankruptcy court's orders.

17  
18  
19 \* The Hon. Peter C. McKittrick, United States Bankruptcy  
Judge for the District of Oregon, sitting by designation.

20 <sup>1</sup> Appellants submitted two separate briefs on appeal. The  
21 briefs are identical, save for an additional paragraph in  
22 Tomkow's brief at page 19, lines 7-22.5 (and references to  
Appellant's name and record citation). As discussed in this  
23 opinion, we conclude that the argument addressed in that  
paragraph lacks merit. We address both appeals in this opinion.  
24 The BAP Clerk of Court is instructed to enter this disposition  
in both appeals.

25  
26 <sup>2</sup> Unless otherwise indicated, all chapter and section  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
27 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure. All "Civil Rule" references are to the Federal Rules  
28 of Civil Procedure.

1 **FACTS**

2 During the late 1990s, Appellants and Barton co-founded  
3 start-up companies including RIL, which owned or controlled  
4 various patents relating to authentication and verification of  
5 emails and electronic payments. Barton later suffered a stroke  
6 and was sidelined from active involvement in the businesses.  
7 Afterward, his relationship with Appellants deteriorated to the  
8 point that he commenced state court litigation seeking unpaid  
9 compensation and reimbursement of expenses.

10 During that litigation, Barton discovered that Appellants  
11 had taken control of his 6,016,500 common stock shares in RIL  
12 and returned them to the company treasury, thereby divesting him  
13 of an equity interest in the company. In response, he commenced  
14 a second action against Appellants and RIL, among others, in  
15 California state court alleging causes of action including  
16 conversion and fraud.

17 The state court ruled in Barton's favor on both the  
18 conversion and fraud causes of action and against Appellants and  
19 RIL. It determined that Appellants had acted with malice,  
20 oppression, and fraud and, thus, that Barton was entitled to  
21 punitive damages. The state court then conducted a second phase  
22 of trial to quantify punitive damages.

23 Following the parties' submission of the punitive damages  
24 issue to the state court, Appellants each filed a chapter 13  
25 petition.

26 In a revised statement of decision and ruling on punitive  
27 damages, the state court awarded Barton the value of his  
28

1 converted stock in RIL.<sup>3</sup> It ultimately entered an amended  
2 judgment awarding Barton compensatory damages in the amount of  
3 \$2,840,060, damages for emotional distress, and \$880,021.91 in  
4 prejudgment interest. For punitive damages, the state court  
5 awarded \$250,000 against Khan and \$150,000 against Tomkow. In  
6 so doing, it found that Khan and Tomkow acted with malice,  
7 oppression, and fraud. Appellants appealed from the state court  
8 judgment to the California Court of Appeal.

9 In the meantime, Barton filed an adversary complaint  
10 against Appellants in the bankruptcy court, seeking a  
11 nondischargeability determination under § 523(a)(2)(A), (a)(4),  
12 and (a)(6) based on the state court judgment.

13 The California Court of Appeal subsequently affirmed the  
14 state court's determination of Appellants' liability based on  
15 conversion. But, because the determination of conversion was  
16 supported by substantial evidence, it did "not consider whether  
17 [Appellants] were additionally liable under theories of fraud,  
18 breach of fiduciary duty and unfair competition." It affirmed  
19 the punitive damages award based on a finding of malice and  
20 deceit. The California Supreme Court denied Appellants'  
21 petition for review of the appellate court's decision. Thus,  
22 that decision is now final. In response, Barton moved for  
23 summary judgment on his nondischargeability complaint in the  
24 bankruptcy court.

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25  
26 <sup>3</sup> Based on stipulations between Barton and Appellants, the  
27 bankruptcy court entered orders granting stay relief to proceed  
28 in the state court action. See 2:13-bk-19713-WB, Dkt. Nos. 9,  
16; 2:13-bk-19712-WB, Dkt. Nos. 9, 16.

1 Appellants opposed the motion. They asserted primarily  
2 that pursuant to Zevnik v. Superior Court, 159 Cal. App. 4th 76  
3 (2008), where a trial court decided a case based on alternate  
4 grounds and the court of appeal affirmed on only one of those  
5 grounds, issue preclusion was available only on the ground  
6 affirmed by the appellate court. Appellants pointed out that  
7 the California Court of Appeal had affirmed the state court  
8 judgment only on Barton's conversion claim under California law;  
9 thus, they argued, the state court judgment was not entitled to  
10 issue preclusion based on the state court's ruling of fraud or  
11 breach of fiduciary duty in relation to the § 523(a)(2)(A) or  
12 (a)(4) claims. At best, Appellants contended, the state court  
13 judgment for conversion potentially supported a claim under  
14 § 523(a)(6). But, even then, they asserted, Barton barely  
15 addressed the conversion claim in his motion for summary  
16 judgment. And, they noted, conversion under California law did  
17 not establish a § 523(a)(6) claim conclusively. Appellants also  
18 argued that the punitive damages award on the conversion claim,  
19 to the extent affirmed on appeal, fell short of establishing a  
20 § 523(a)(6) claim. Finally, Tomkow argued that Barton neglected  
21 to address the fact that, with respect to the punitive damages  
22 award, there was a difference in liability between Khan and  
23 Tomkow; namely, the amount of damages assessed against  
24 Appellants reflected a difference in the level of culpability.

25 In response, Barton argued that binding Ninth Circuit  
26 precedent - DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir.  
27 2003) - established that the California Court of Appeal's  
28 affirmance of any ground contained in the state court judgment

1 implicitly ratified all of the trial court's reasoning in the  
2 judgment.

3 At the hearing, the bankruptcy court determined that the  
4 state court judgment was entitled to issue preclusive effect for  
5 the § 523(a)(2)(A) and (a)(6) claims and, thus, granted summary  
6 judgment in Barton's favor on them. It, however, denied the  
7 motion as to the § 523(a)(4) claim. In response, Appellants'  
8 counsel orally requested direct appeal certification to the  
9 Ninth Circuit. The bankruptcy court agreed that additional  
10 briefing and a hearing on Appellants' request were warranted.

11 The bankruptcy court then entered judgments determining  
12 that, with the exception of the damages award for emotional  
13 distress, the state court judgment was excepted from Appellants'  
14 discharges under § 523(a)(2)(A) and (a)(6). Appellants timely  
15 appealed.

16 Appellants made good on their request and filed a motion  
17 for direct appeal certification. They stated that the  
18 bankruptcy court "understandably rejected application of the  
19 Zevnik rule based on a Ninth Circuit decision [DiRuzza]  
20 predating Zevnik and that applied the 1865 California Supreme  
21 Court's Skidmore case." As a result of DiRuzza, they urged the  
22 bankruptcy court to certify the appeal directly to the Ninth  
23 Circuit under 28 U.S.C. § 158(d)(2)(A); they opined that the  
24 Ninth Circuit could and would then certify the question to the  
25 California Supreme Court.

26 Barton opposed the motion, and the bankruptcy court agreed  
27 with him. It concluded at a subsequent hearing that Appellants  
28 had not satisfied 28 U.S.C. § 152(d)'s requirements for direct

1 appeal certification. It believed that the law in the Ninth  
2 Circuit was clear and that there was no dispute requiring  
3 resolution among the California courts. The bankruptcy court  
4 noted that the Ninth Circuit had considered and rejected the  
5 Zevnik analysis in DiRuzza and that the California Supreme Court  
6 also had, but declined, the opportunity to revisit the issue.

7 The bankruptcy court subsequently entered an order denying  
8 Appellants' motion. Appellants amended their notice of appeal  
9 to include this order.

10 **JURISDICTION**

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
12 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
13 § 158.

14 **ISSUES**

15 1. Whether the bankruptcy court erred in granting summary  
16 judgment in Barton's favor on his § 523(a)(2)(A) claim based on  
17 the issue preclusive effect of the fraud claim in the state  
18 court judgment, given that the California Court of Appeal  
19 affirmed that judgment on another ground.

20 2. Whether the bankruptcy court erred in granting summary  
21 judgment in Barton's favor on his § 523(a)(6) claim based on the  
22 issue preclusive effect of the state court judgment.

23 3. Whether the bankruptcy court erred in denying  
24 Appellants' motion for direct appeal certification to the Ninth  
25 Circuit.

26 **STANDARDS OF REVIEW**

27 We review de novo the bankruptcy court's decisions to grant  
28 summary judgment and to except a debt from discharge under

1 § 523(a). See Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219,  
2 1221-22 (9th Cir. 2010); Oney v. Weinberg (In re Weinberg),  
3 410 B.R. 19, 28 (9th Cir. BAP 2009); see also Carrillo v. Su  
4 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002)  
5 (nondischargeability presents mixed issues of law and fact and  
6 is reviewed de novo).

7 We also review de novo the bankruptcy court's determination  
8 that issue preclusion was available. Black v. Bonnie Springs  
9 Family Ltd. P'Ship (In re Black), 487 B.R. 202, 210 (9th Cir.  
10 BAP 2013). If issue preclusion was available, we then review  
11 the bankruptcy court's application of issue preclusion for an  
12 abuse of discretion. Id. A bankruptcy court abuses its  
13 discretion if it applies the wrong legal standard or misapplies  
14 the correct legal standard, or if its factual findings are  
15 illogical, implausible, or without support in inferences that  
16 may be drawn from the facts in the record. See  
17 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
18 Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262  
19 (9th Cir. 2009) (en banc)).

20 We may affirm the decision of the bankruptcy court on any  
21 basis supported by the record. See Hooks v. Kitsap Tenant  
22 Support Servs., Inc., 816 F.3d 550, 554 (9th Cir. 2016).

## 23 **DISCUSSION**

### 24 **A. Standards**

25 **Summary judgment.** Summary judgment is appropriate where  
26 the movant shows that there is no genuine dispute of material  
27 fact and the movant is entitled to judgment as a matter of law.  
28 Fed. R. Civ. P. 56(a) (applicable in adversary proceedings under



1 Rule 7056). The bankruptcy court must view the evidence in the  
2 light most favorable to the non-moving party when determining  
3 whether genuine disputes of material fact exist and whether the  
4 movant is entitled to judgment as a matter of law. See Fresno  
5 Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th  
6 Cir. 2014). And, it must draw all justifiable inferences in  
7 favor of the non-moving party. See id. (citing Anderson v.  
8 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

9 **Issue preclusion in a nondischargeability proceeding.** The  
10 bankruptcy court may give issue preclusive effect to a state  
11 court judgment as the basis for excepting a debt from discharge.  
12 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
13 2001). The party asserting preclusion bears the burden of  
14 establishing the threshold requirements. Id. This means  
15 providing "a record sufficient to reveal the controlling facts  
16 and pinpoint the exact issues litigated in the prior action."  
17 Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP  
18 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Ultimately, "[a]ny  
19 reasonable doubt as to what was decided by a prior judgment  
20 should be resolved against allowing the [issue preclusive]  
21 effect." Id.

22 We apply the forum state's law of issue preclusion when  
23 determining if issue preclusion is appropriate based on a state  
24 court judgment. In re Harmon, 250 F.3d at 1245. Here we must  
25 apply California law.

26 **California issue preclusion.** California permits  
27 application of issue preclusion to an existing judgment:  
28 (1) after final adjudication; (2) of an identical issue;

1 (3) actually litigated in the former proceeding; (4) necessarily  
2 decided in the former proceeding; and (5) asserted against a  
3 party in the former proceeding or someone in privity with a  
4 party. See DKN Holdings LLC v. Faerber, 61 Cal. 4th 813, 825  
5 (2015). In addition, the court must determine that issue  
6 preclusion "furthers the public policies underlying the  
7 doctrine." In re Harmon, 250 F.3d at 1245 (citing Lucido v.  
8 Super. Ct., 51 Cal. 3d 335, 342-43 (1990)); see also Khaligh v.  
9 Hadaegh (In re Khaligh), 338 B.R. 817, 824-25 (9th Cir. BAP  
10 2006).

11 **B. Based on binding Ninth Circuit authority, the bankruptcy**  
12 **court appropriately gave issue preclusive effect to the**  
13 **fraud claim in the state court judgment; thus, it did not**  
14 **err in granting summary judgment in Barton's favor on his**  
15 **§ 523(a) (2) (A)<sup>4</sup> claim.**

16 Appellants focus the majority of their appellate arguments  
17 on one narrow issue: whether the bankruptcy court could give  
18 issue preclusive effect to the state court judgment's fraud  
19 determination, given that the California Court of Appeal did not  
20 review that aspect of the judgment on appeal. They acknowledge  
21 that under Ninth Circuit authority, DiRuzza, the entire judgment  
22 is subject to issue preclusion. They contend, however, that the  
23 law in California has developed in the past 15 years such that  
24 the Ninth Circuit's decision no longer correctly reflects  
25 California law.

26 Based on an early California Supreme Court case, DiRuzza  
27 adhered to the "general California rule" that, "even if the

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28 <sup>4</sup> The elements for actual fraud under California law match  
those of § 523(a) (2) (A). See Tobin v. Sans Souci Ltd. P'ship  
(In re Tobin), 258 B.R. 199, 203 (9th Cir. BAP 2001).

1 appellate court refrains from considering one of the grounds  
2 upon which the [trial court's] decision . . . rests, an  
3 affirmance of the decision below extends legal effects to the  
4 whole of the lower court's determination, with attendant  
5 collateral estoppel effect." 323 F.3d at 1156 (internal  
6 quotation marks and citation omitted). We acknowledge that  
7 subsequent California Courts of Appeal decisions have disagreed  
8 with DiRuzza and make compelling arguments in support of their  
9 position to the contrary. That said, DiRuzza remains  
10 controlling precedent in our circuit. Consequently, we conclude  
11 that issue preclusion was available and that the bankruptcy  
12 court did not abuse its discretion in giving preclusive effect  
13 to the fraud determination in the state court judgment.

14 **1. The general California (or traditional) rule.**

15 At the outset, we note that an unpublished federal district  
16 court case - Flying J, Inc. v. Pistacchio, 2008 WL 906396, at  
17 \*33-43 (E.D. Cal. Mar. 31, 2008), aff'd, 351 F. App'x 236 (9th  
18 Cir. 2009) - provides a highly detailed overview of the  
19 pertinent cases, including DiRuzza, People v. Skidmore, 27 Cal.  
20 287 (1865), and the three California Courts of Appeal cases that  
21 Appellants contend have changed the legal landscape in  
22 California: Zevnik, 159 Cal. App. 4th 76; Newport Beach Country  
23 Club, Inc. v. Founding Members of Newport Beach Country Club,  
24 140 Cal. App. 4th 1120 (2006); and Butcher v. Truck Insurance  
25 Exchange, 77 Cal. App. 4th 1442 (2000).

26 A brief description of these cases as they relate to the  
27 general California rule follows.

28 **DiRuzza.** The Ninth Circuit examined whether issues decided

1 by a California trial court and crucial to its decision were  
2 entitled to preclusive effect after the court of appeal affirmed  
3 on different grounds. 323 F.3d at 1153. The Ninth Circuit  
4 acknowledged that California case law addressing the issue was  
5 sparse but that Skidmore, a venerable California Supreme Court  
6 case, "support[ed] the conclusion that an appellate court's  
7 affirmance for any reason implicitly ratifie[d] all reasoning  
8 given in the court below." Id. In doing so, it noted that "a  
9 nebulous exception to the rule and a recent California appellate  
10 decision [Butcher] cut against the timeworn precedent and may  
11 counsel in favor of more selective application of collateral  
12 estoppel principles." Id. It concluded, however, that Skidmore  
13 was controlling because the California Supreme Court had not  
14 "undermin[ed] the authority of its early holding" and  
15 notwithstanding Butcher's analysis. Id.

16 **Skidmore**. As explained in DiRuzza, Skidmore involved a  
17 judgment in defendants' favor. On initial appeal, the  
18 California Supreme Court "affirmed the judgment, but relied upon  
19 a procedural issue—misjoinder—in reaching its decision." Id. at  
20 1154. This issue was corrected and the case made its way to the  
21 court a second time, for a determination as to whether the  
22 plaintiff could pursue the action again. "The court determined  
23 that, regardless of its previous opinion's reliance on the  
24 misjoinder issue, the . . . [underlying recommendation] report  
25 and resulting judgment, which reached the merits of the case,  
26 had been affirmed by the judgment accompanying [its] previous  
27 opinion." Id. Thus, the California Supreme Court determined,  
28 the plaintiff was precluded from bringing the action a second

1 time, "as the merits of the case had already been adjudicated .  
2 . . ." Id. The Ninth Circuit quoted the following language  
3 from Skidmore:

4 The Court, in examining the judgment in connection  
5 with the errors assigned, found that there was at  
6 least one ground upon which the judgment could be  
7 justified, and therefore very properly refrained from  
8 considering it in connection with the other errors.  
9 But the affirmance, still, was an affirmance to the  
10 whole extent of the legal effect of the judgment at  
11 the time when it was entered in the court below. The  
12 Supreme Court found no error in the record, and  
13 therefore not only allowed it to stand, but affirmed  
14 it as an entirety, and by direct expression.

15 Id. at 1154-55 (quoting 27 Cal. at 292-93).

16 Subsequent courts have referred to this rule as the general  
17 California rule, the Skidmore rule, or the traditional rule.

18 **Skidmore's "progeny."** Following Skidmore, two decisions  
19 were issued that bear mention based on subsequent case law  
20 discussion: Bank of America National Trust & Savings Association  
21 v. McLaughlin Land & Livestock Co. ("McLaughlin"), 40 Cal. App.  
22 2d 620 (1940), and Natural Soda Products Co. v. City of Los  
23 Angeles, 109 Cal. App. 2d 440 (1952).

24 As noted by Flying J, 2008 WL 906396, at \*35, McLaughlin  
25 reached the same conclusion as Skidmore, although it did not  
26 refer to Skidmore. Instead, McLaughlin relied on a rule  
27 expounded in the Corpus Juris ("CJ"), providing that "[a]  
28 general affirmance of a judgment on appeal makes it res judicata  
as to all the issues, claims, or controversies involved in the  
action and passed upon by the court below, although the  
appellate court does not consider or decide upon all of them."  
40 Cal. App. 2d at 628-29 (quoting 34 C.J. 773). Thus, the  
McLaughlin panel determined that, where the ruling of the

1 district court (sitting as the bankruptcy court) was predicated  
2 on two alternate grounds and the Ninth Circuit affirmed the  
3 decision on the first ground, the district court's entire  
4 decision was entitled to preclusive effect. Id. at 629.

5 Natural Soda reiterated the general rule delineated by  
6 Skidmore and McLaughlin. In doing so, however, it stated that  
7 "the rule [was] not without exceptions, and where a finding  
8 [was] unnecessary and immaterial the rule of collateral estoppel  
9 [did] not operate." 109 Cal. App. 2d at 446.

10 As the Ninth Circuit in DiRuzza observed, "[a]fter Natural  
11 Soda, all was generally quiet on the [issue preclusion] front in  
12 the courts of California for almost fifty years." 323 F.3d at  
13 1156. Enter Butcher.

14 **2. The trilogy of recent California Courts of Appeal**  
15 **cases and the "modern" rule.**

16 Butcher. As noted by DiRuzza, 323 F.3d at 1156, Butcher  
17 made no reference to Skidmore at all. There, a panel of the  
18 Second District Court of Appeal examined the preclusive effect  
19 of a federal court judgment based on diversity jurisdiction in  
20 an insurance coverage action. It noted that there were two  
21 lines of cases: (1) cases following "the rule that the appellate  
22 court in the prior action determines the preclusive effect of  
23 its judgment, i.e., the judgment [was] conclusive on the []  
24 ground" affirmed by the appellate court, as reflected in Moran  
25 Towing & Transportation Co. v. Navigazione Libera Triestina,  
26 S.A., 92 F.2d 37 (2d Cir. 1937), and the Restatement (Second) of  
27 Judgments; and (2) cases holding "that it [was] the judgment of  
28 the trial court, which [was] affirmed, that governs the

1 preclusive effect, i.e., the judgment [was] conclusive on both  
2 grounds," as reflected in McLaughlin. 77 Cal. App. 4th at 1456.

3 The first line of cases relies heavily on the Restatement  
4 (Second) of Judgments § 27<sup>5</sup> and embodies the "modern" approach  
5 approved of by the three California Courts of Appeal decisions.  
6 The Butcher panel observed that the rule cited by the McLaughlin  
7 panel, based on the CJ, was subsequently abandoned in favor of  
8 the rule followed by the Second Restatement. It, thus,  
9 "conclude[d] [that] the reasoning of the McLaughlin court has  
10 not withstood the test of time, and it would be unwise to follow  
11 a rule that looks only to the judgments, without taking account  
12 of the reasons for those judgments as stated in the appellate  
13 courts' opinions." Id. at 1460.

14 The Ninth Circuit, in DiRuzza, concluded that while  
15 Butcher advance[d] plausible arguments against the  
16 general California rule, . . . it [came] from an  
17 intermediate appellate court which failed to  
18 acknowledge that the California Supreme Court, in  
19 Skidmore, had addressed the subject. Until we receive  
a definitive indication that Skidmore no longer  
represents the law of California, we will adhere to  
that case's precepts.

20 323 F.3d at 1156. The Ninth Circuit, thus, rejected the Butcher  
21 panel's analysis.

22 **Newport Beach Country Club**. Newport Beach, decided by a  
23 panel of the Fourth District Court of Appeal, was issued three

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24  
25 <sup>5</sup> The Restatement (Second) of Judgments § 27 comment o  
26 (1982) provides that when "a judgment rendered by a court of  
27 first instance is reversed by the appellate court and a final  
28 judgment is entered by the appellate court (or by the court of  
first instance in pursuance of the mandate of the appellate  
court), this latter judgment is conclusive between the parties."

1 years after DiRuzza. The Newport Beach panel held that, where  
2 "a trial court judgment decide[d] a case on two alternate  
3 grounds, and the appellate court affirm[ed] based on one ground,  
4 the judgment [was] binding under principles of res judicata and  
5 collateral estoppel only on the ground addressed by the  
6 appellate court." 140 Cal. App. 4th at 1123. The Newport Beach  
7 panel, thus, "decline[d] to follow [Skidmore] because subsequent  
8 developments in California law and the trend of decisions ha[d]  
9 weakened that case's authority to the point where [it could]  
10 conclude it no longer reflect[ed] the views of the California  
11 Supreme Court." Id.

12 After examining Skidmore, McLaughlin, DiRuzza, Butcher,  
13 Moran Towing, and the Second Restatement, the Newport Beach  
14 panel expressly rejected what it referred to as the  
15 "traditional" Skidmore rule in favor of the "modern" rule  
16 established in the Second Restatement. It agreed with Butcher's  
17 observation that the traditional rule "ha[d] not withstood the  
18 test of time." 140 Cal. App. 4th at 1130. Although Skidmore  
19 was a California Supreme Court case, the Newport Beach panel did  
20 not believe it controlled for several reasons. First, it stated  
21 that since Skidmore was decided, "the law of res judicata ha[d]  
22 undergone tremendous change culminating in the Restatement  
23 Second of Judgments." Id. at 1131. And it noted that "[t]he  
24 California Supreme Court ha[d] expressed approval of . . . [and]  
25 cited approvingly to section 27 and the comments to it." Id.  
26 Second, it stated that the Skidmore rule was inconsistent with  
27 its duty as an appellate court under the California state  
28 constitution, which required that it "set forth its decisions in



1 writing 'with the reasons stated.'" Id. at 1132. It concluded  
2 with its belief that if the California Supreme Court were  
3 presented with the issue again, it would adopt the modern rule  
4 as expressed in the Second Restatement. Id.

5 **Zevnik**. In the most recent case, a panel in another  
6 division of the Second District Court of Appeal agreed with  
7 Newport Beach and Butcher, concluding "that the governing rule  
8 of law [was] that if a trial court relie[d] on alternative  
9 grounds to support its decision and an appellate court  
10 affirm[ed] the decision based on fewer than all of those  
11 grounds, only the grounds relied on by the appellate court  
12 [could] establish collateral estoppel." 159 Cal. App. 4th  
13 at 79. In doing so, it also examined the cadre of cases  
14 discussed above.

15 In a departure from Newport Beach, however, the Zevnik  
16 panel concluded that it "need not decide whether Skidmore  
17 retain[ed] viability because [it] read the opinion narrowly to  
18 apply only to res judicata, not collateral estoppel." Id.  
19 at 88.

### 20 **3. Analysis.**

21 Against this extensive backdrop of case law, we conclude,  
22 as did the bankruptcy court, that DiRuzza remains good law and  
23 thus binds the Panel. Although Appellants make compelling  
24 arguments based on recent cases by panels of the California  
25 Courts of Appeal, we cannot turn a blind eye to binding  
26 precedent from the Ninth Circuit. Nor is this a situation where  
27 the Ninth Circuit's reasoning or theory in DiRuzza is clearly  
28 irreconcilable with a decision of the California Supreme Court,

1 the only intervening higher authority on a matter of California  
2 state law. See Rodriguez v. AT & T Mobility Servs. LLC,  
3 728 F.3d 975, 979 (9th Cir. 2013) (“[T]he relevant court of last  
4 resort must have undercut the theory or reasoning underlying the  
5 prior circuit precedent in such a way that the cases are clearly  
6 irreconcilable. But it is not enough for there to be some  
7 tension between the intervening higher authority and the prior  
8 circuit precedent.”) (internal quotation marks and citations  
9 omitted); Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003)  
10 (en banc).

11 Here, the California Supreme Court has neither overruled  
12 Skidmore nor adopted the modern rule announced in Butcher,  
13 Newport Beach, and Zevnik. In the absence of a decision by the  
14 California Supreme Court contrary to the Skidmore rule, we  
15 remain bound by DiRuzza.<sup>6</sup> In Flying J, the district court

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17 <sup>6</sup> Some justices of the California Courts of Appeal no  
18 longer follow Skidmore. As stated, we are bound by Ninth  
19 Circuit authority; thus, we, without question, follow DiRuzza  
and, as a result, Skidmore.

20 The Appellants, no doubt, will urge the Ninth Circuit to  
21 directly certify this question for review by the California  
22 Supreme Court or to reconsider DiRuzza en banc. We acknowledge  
23 that the Ninth Circuit implicitly rejected such a request in  
Flying J. In anticipation of such a renewed request, however,  
we note our concerns as bankruptcy judges.

24 Decisions regarding dischargeability are weighty ones. The  
25 failure to discharge a debt may leave a debtor incapable of a  
26 normal future financial life. And bankruptcy courts frequently  
consider the issue preclusive effect of California judgments in  
determining whether a debtor can discharge a debt.

27 In cases involving California judgments that have gone  
through appeal, the bankruptcy courts need certainty regarding  
the law we must apply; DiRuzza currently supplies this

(continued...)

1 arrived at the same conclusion, stating that:

2 Because the California Supreme Court's decision in  
3 Skidmore and the Ninth Circuit's decision in DiRuzza  
4 are binding law of the state and Ninth Circuit,  
5 respectively, and a federal trial court does not have  
6 the authority to change the state law of California  
7 even if a Supreme Court decision is criticized and not  
8 followed by more recent intermediate California  
9 appellate decisions, see Butcher, Newport Beach, and  
10 Ze[v]nik, the rule of Skidmore applies.

11 2008 WL 906396, at \*41. We note that the Ninth Circuit affirmed  
12 the district court in Flying J in 2009, although its memorandum  
13 decision does not refer to the DiRuzza/Skidmore issue. See  
14 351 F. App'x 236.

15 \_\_\_\_\_  
16 <sup>6</sup>(...continued)  
17 certainty.

18 Given the impact of our dischargeability decisions,  
19 however, we also should know the assumptions of the California  
20 Court of Appeal panel reviewing a California judgment. In order  
21 to do justice, we need to know either that the panel jurists  
22 assume that issues they do not decide will have preclusive  
23 effect, as is the rule articulated in Skidmore, or that the  
24 panel jurists assume that issues not decided are not entitled to  
25 preclusive effect in other proceedings. Given the current state  
26 of law, we do not have complete certainty that our  
27 interpretation of a specific California Court of Appeal decision  
28 is consistent with the interpretation of the jurists who decided  
the matter on appeal. We do not know whether a failure to  
address a claim means that the panel agreed that the state court  
below correctly decided the issue or whether the panel detected  
error but did not raise it given that the judgment could be  
affirmed on another basis. In situations where only an issue  
**not** decided on appeal subsequently supports a nondischargeable  
judgment, as may be the case here, the current disconnect  
between Skidmore and certain jurists of the California Courts of  
Appeal may lead to inequitable results.

We acknowledge that this is a problem that neither the  
Ninth Circuit nor the BAP nor the trial courts can solve in any  
absolute sense. It apparently will require that the California  
Supreme Court either reiterate its holding in Skidmore or state  
that it is no longer the law.

1 We also recognize certain limitations in the precedential  
2 value of decisions of the California Courts of Appeal. For  
3 example, the justices of the Courts of Appeal – divided into six  
4 geographical districts – are not bound by decisions of either  
5 sister districts or even panels within the same district. See  
6 Froyd v. Cook, 681 F. Supp. 669, 672 n.9 (E.D. Cal. 1988)  
7 (collecting cases). And it is well established that  
8 “[d]ecisions of every division of the District Courts of Appeal  
9 are binding . . . upon all the superior courts of this state,  
10 and this is so whether or not the superior court is acting as a  
11 trial or appellate court.” Auto Equity Sales, Inc. v. Super.  
12 Ct., 57 Cal. 2d 450, 455 (1962). That said, where California  
13 Courts of Appeal decisions conflict, the superior court “can and  
14 must make a choice between the conflicting decisions.” Id. at  
15 456.

16 Here, Butcher, Newport Beach, and Zevnik theoretically bind  
17 the California trial courts, but the trial courts clearly remain  
18 bound by Skidmore. See Auto Equity Sales, Inc., 57 Cal. 2d at  
19 455 (“The decisions of [the California Supreme] [C]ourt are  
20 binding upon and must be followed by all the state courts of  
21 California.”). Further, the precedential value of a California  
22 Court of Appeal decision does not extend to another panel within  
23 the same appellate district, let alone to another appellate  
24 district in California. As the case law reflects, appellate  
25 panels in the Second and Fourth District Courts of Appeal did  
26 not follow Skidmore; it remains to be seen whether other panels

1 of the California Courts of Appeal will follow suit.<sup>7</sup>

2 Appellants do not argue that the other elements of  
3 California issue preclusion were not satisfied as to Barton's  
4 § 523(a)(2)(A) claim. On this record, we conclude that issue  
5 preclusion was available with respect to the fraud claim based  
6 on the state court judgment and that the bankruptcy court did  
7 not abuse its discretion in applying issue preclusion to the  
8 state court judgment. As that left no genuine dispute of  
9 material fact for the bankruptcy court to adjudicate, it did not  
10 err in granting summary judgment in Barton's favor on his  
11 § 523(a)(2)(A) claim.

12 **C. The bankruptcy court properly granted summary judgment on**  
13 **Barton's § 523(a)(6) claim.**

14 Section 523(a)(6) excepts from discharge debts arising from  
15 a debtor's "willful and malicious" injury to another person or  
16 to the property of another. Barboza v. New Form, Inc.  
17 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). The  
18 "willful" and "malicious" requirements are conjunctive and  
19 subject to separate analysis. Id.; In re Su, 290 F.3d at  
20 1146-47.

21 A "malicious" injury requires: "(1) a wrongful act,  
22 (2) done intentionally, (3) which necessarily causes injury, and

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23  
24 <sup>7</sup> For example, in People ex rel. Brown v. Tri-Union  
25 Seafoods, LLC, 171 Cal. App. 4th 1549, 1574 (2009), one panel in  
26 the First District Court of Appeal appears to approve the  
27 position advanced by Newport Beach. In an unpublished case,  
28 however, another panel in the First District Court of Appeal  
distinguished Newport Beach. See Borrette Lane Estates, LLC v.  
Warren, 2010 WL 292754, at \*5-6 & n.4 (Cal. Ct. App. Jan. 26,  
2010).

1 (4) is done without just cause or excuse.” Petralia v. Jercich  
2 (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001) (internal  
3 quotation marks and citation omitted).

4 The willful injury requirement speaks to the state of mind  
5 necessary for nondischargeability. An exacting requirement, it  
6 is satisfied when a debtor harbors “either a subjective intent  
7 to harm, or a subjective belief that harm is substantially  
8 certain.” In re Su, 290 F.3d at 1144; see also In re Jercich,  
9 238 F.3d at 1208. The injury must be deliberate or intentional,  
10 “not merely a deliberate or intentional **act** that leads to  
11 injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis  
12 in original). Thus, “debts arising from recklessly or  
13 negligently inflicted injuries do not fall within the compass of  
14 § 523(a)(6).” Id. at 64. Under California law, an award of  
15 punitive damages under California Civil Code (“CC”) § 3294  
16 requires a finding of fraud, malice, or oppression. Only fraud  
17 and one aspect of malice, as that term is defined for the  
18 purposes of the California punitive damages statute, satisfy the  
19 willful injury requirement of § 523(a)(6). Plyam v. Precision  
20 Dev., LLC (In re Plyam), 530 B.R. 456 (9th Cir. BAP 2015).

21 Appellants contend that the bankruptcy court erred in  
22 determining that the fraud finding in the punitive damages award  
23 of the state court judgment established the willful and  
24 malicious injury requirements necessary for nondischargeability  
25 under § 523(a)(6). More specifically, they contend that the  
26 bankruptcy court erred because the California Court of Appeal  
27 “did not carry the [state court judgment’s] conjunctive findings  
28 [of fraud, malice, and oppression] forward into its [d]ecision.”

1 Instead, the California Court of Appeal's decision "affirmed the  
2 award of punitive damages based solely on the finding of there  
3 being substantial evidence of 'malice and deceit' with no  
4 reference to fraud." Under Plyam, Appellants contend that  
5 "malice" by itself in a punitive damages award under CC § 3294  
6 does not, without an accompanying finding of "intentional  
7 malice," establish the willful injury requirement under  
8 § 523(a)(6). They similarly argue that under California law,  
9 "deceit" may include negligent misrepresentation, which does not  
10 require an intent to defraud.

11 Issue preclusion was available. First, the state court's  
12 ruling on conversion and punitive damages satisfied  
13 § 523(a)(6)'s requirement of an underlying tort and "malicious"  
14 injury. And there is no dispute that this aspect of the state  
15 court judgment was affirmed by the California Court of Appeal.  
16 Conversion under California law does not per se establish the  
17 necessary state of mind for § 523(a)(6) nondischargeability  
18 because intent is not a necessary element. But there is no  
19 question that it establishes a tort that can support a  
20 § 523(a)(6) nondischargeability claim and a wrongful act that  
21 necessarily causes injury as required for a finding of  
22 § 523(a)(6) malicious injury. And there is also no question  
23 that the acts of conversion were intentional and without just  
24 cause or excuse. The California Court of Appeal as well as the  
25 trial court made clear findings that Tomkow and Khan harmed  
26 Barton intentionally, with malice, and through deceit. On this  
27 record, then, § 523(a)(6) malice was established through  
28 specific findings at both the trial court and appellate court

1 level.

2 Second, given the foregoing discussion of DiRuzza and  
3 Skidmore, we similarly conclude that the bankruptcy court  
4 appropriately gave issue preclusive effect to the state court's  
5 punitive damages award, which was based on findings of fraud,  
6 malice, and oppression; this satisfies § 523(a)(6)'s willfulness  
7 requirement.

8 The trickier issue is one we need not decide: whether, if  
9 issue preclusion is based only on the appellate court's  
10 affirming the conversion determination (i.e., the modern trend),  
11 rather than the entirety of the trial court's decision (i.e.,  
12 Skidmore), a **willful** injury is established. The California  
13 Court of Appeal's decision gives us pause in two respects.  
14 First, a determination of conversion, even if intentional, does  
15 not necessarily establish an intent to injure or a substantial  
16 certainty that injury will occur. Thus, the California Court of  
17 Appeal's decision, in isolation, may not establish § 523(a)(6)  
18 willfulness. Second, the California Court of Appeal limited its  
19 affirmance of the punitive damages award to "malice" and  
20 "deceit," which could differ in substance from the trial court's  
21 finding of fraud, malice, and oppression for the purposes of CC  
22 § 3294.

23 We acknowledge that the labels used by the California Court  
24 of Appeal may not be sufficient for a § 523(a)(6) willfulness  
25 determination. Given the extensive comment that underscores  
26 these conclusions, however, this is a close call. As we  
27 acknowledge, we must draw all justifiable inferences in favor of  
28 the Appellants. Accordingly, we decline to affirm on this



1 basis. Instead, we affirm because binding Ninth Circuit  
2 authority, as the bankruptcy court recognized, compels this  
3 result notwithstanding any limitations in the basis for  
4 affirmance. Thus, the bankruptcy court appropriately gave issue  
5 preclusive effect to the punitive damages award, and it did not  
6 err in granting summary judgment in Barton's favor on his  
7 § 523(a)(6) claim.

8 **D. Even though lesser punitive damages were assessed against**  
9 **him, Tomkow was equally complicit in willfully injuring**  
10 **Arnold.**

11 Tomkow alleges that both the California state court and the  
12 Court of Appeal recognized that his conduct was less egregious  
13 than that of Khan's for purposes of the punitive damages award.  
14 He contends that they found that he was complicit in the  
15 conversion and, thus, that his liability was imputed based on  
16 Khan's acts. Tomkow asserts that a subjective state of mind  
17 cannot be imputed for the purposes of § 523(a)(6).

18 Tomkow's argument is unavailing. First, the Ninth Circuit  
19 has imputed the knowledge and intent of a business partner to a  
20 debtor for the purposes of § 523(a)(6). See Impulsora Del  
21 Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440  
22 (9th Cir. 1986). As this Panel has recognized, however, that  
23 decision predates the United States Supreme Court's decision in  
24 Geiger and, thus, "the continued efficacy of Cecchini as  
25 precedent on related questions is compromised." See Sachan v.  
26 Huh (In re Huh), 506 B.R. 257, 268 (9th Cir. BAP 2014) (en  
27 banc).

28 Second, the California state court and Court of Appeal  
determined that both Khan and Tomkow engaged in conversion. In

1 its initial statement of decision, the state court found:

2 Tomkow and Khan determined that Barton was making  
3 little or no contributions to the success of [RIL].  
4 Tomkow provided the idea and technical savvy and Khan  
5 proved to be a skilled fundraiser to keep the company  
6 afloat. What was Barton's role they wondered, and if  
7 indeed he was not even providing legal counsel, why  
8 should he continue as a shareholder of [RIL]? . . .  
9 The manner by which Khan and Tomkow attempted to  
10 separate him from that ownership gives rise to a  
11 proper claim for punitive damages.

12 The state court made no distinction between Khan and Tomkow.

13 True, in its revised decision, the state court found that  
14 Tomkow's conduct was less onerous and that he was "complicit in  
15 the conversion of [Barton's] shares." That said, the finding  
16 does not impact or negate the state court's prior finding of  
17 intent.

18 The California Court of Appeal then reaffirmed that  
19 "Barton's harm resulted from K[ha]n **and** Tomkow's malice and  
20 deceit, not mere accident." (Emphasis added.) That Tomkow's  
21 conduct was less egregious than Khan's is reflected in the  
22 reduced amount of punitive damages assessed individually against  
23 Tomkow. This distinction, however, does not change the analysis  
24 of the § 523(a)(6) willful injury requirement.

25 **E. The bankruptcy court did not err in denying Appellants'**  
26 **motion for direct appeal certification.**

27 Appellants also contend that the bankruptcy court erred by  
28 denying their application for direct appeal certification to the  
29 Ninth Circuit pursuant to Rule 8006 and 28 U.S.C.  
30 § 158(d)(2)(A)(i)-(iii). They urge us to reverse the bankruptcy  
31 court's ruling.

32 Although the case law on this issue is sparse, it does not

1 appear that a denial of an application for direct appeal  
2 certification under Rule 8006 and 28 U.S.C.  
3 § 158(d)(2)(A)(i)-(iii) is a final order. For example, denial  
4 of a 28 U.S.C. § 1292(b) certification is not appealable. See  
5 May v. Warner Amex Cable Commc'ns, 871 F.2d 1088 (6th Cir. 1989)  
6 (table); see also McCall v. Deeds, 849 F.2d 1259 (9th Cir. 1988)  
7 (denial of Civil Rule 54(b) certification is not appealable);  
8 Mem'l Hosp. for McHenry Cty. v. Shadur, 664 F.2d 1058 (7th Cir.  
9 1981) (court of appeals reviewed matter by petition for writ of  
10 mandamus after denial of 28 U.S.C. § 1292(b) certification).

11 Even if such an order is final and subject to review when  
12 joined with the final decision on summary judgment, for the  
13 reasons discussed above, we conclude that the bankruptcy court  
14 did not err in denying the application. As stated, the  
15 bankruptcy court correctly determined that it was bound by  
16 DiRuzza and Skidmore. As a result, whether it believed that the  
17 matter was of public importance or required resolution of  
18 conflicting decisions is irrelevant. Finally, even if the  
19 bankruptcy court erred in denying Appellants' application –  
20 something that we do not determine – Appellants now have a  
21 direct path of appeal to the Ninth Circuit without the need for  
22 a Rule 8006 certification. Reversing the bankruptcy court on  
23 this point would be impractical and a waste of judicial  
24 resources.

#### 25 CONCLUSION

26 Based on the foregoing, we AFFIRM.  
27  
28