

11 U.S.C. § 523(a)(6)  
ORS 95.230(1)  
Collateral estoppel  
Constructive fraud  
Issue preclusion

Burt v. Bennett (In re Bennett)

BAP # OR-04-1532-MoRK

6/2/05                    BAP (affirming Radcliffe)                    Unpublished  
(No underlying written Bankruptcy Court opinion)

Pre petition Debtor-husband was appointed as his brother's conservator. Husband was then removed, and sued in state court by his successor. The successor also sued Debtor-wife. The successor obtained a judgment against both Debtors. The judgment against the wife was based on a theory of fraudulent conveyance.

Husband and wife then filed Chapter 7. The then acting conservator filed a Section 523 action against both debtors. At trial, another successor conservator relied on the state court judgment's preclusive effect to make out his § 523(a)(6) claim. The bankruptcy court held against him, and declared the judgment dischargeable as to the wife.

On appeal, the Bankruptcy Appellate Panel (BAP) affirmed. The court reiterated that the issue preclusion law of the forum state controls. In the case at bar, the state court judgment merely recited that judgment against the wife was for "fraudulent conveyance." No other evidence was adduced to show that the state court and jury considered whether the wife had acted with intent to injure, as required by § 523(a)(6). Under Oregon law, intentional injury may be irrelevant to fraudulent conveyance liability, as same may be premised on constructive fraud which requires no intentional injury. Thus, under Oregon law, two of the [five] elements of issue preclusion had not been shown, those being that the issue [intentional injury] in the two proceedings was identical and that the issue was actually litigated and was essential to a final decision on the merits of the prior proceeding. The state court judgment was therefore not entitled to preclusive effect.

**FILED**

**JUN 02 2005**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

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

In re:	)	BAP No.	OR-04-1532-MoRK
ALLAN LEE BENNETT; WANDA MAY	)	Bk. No.	01-64498
BENNETT; WANDA M. BENNETT,	)	Adv. No.	01-06302
Trustee of the Wanda Bennett Trust,	)		
	)		
Debtors.	)		

C. FREDERICK BURT, Conservator for  
Ronny Lynn Bennett,

Appellant,

v.

**MEMORANDUM<sup>1</sup>**

ALLAN LEE BENNETT, WANDA MAY  
BENNETT, and WANDA M. BENNETT,  
Trustee of the Wanda Bennett Trust,

Appellees.

Argued and Submitted on May 20, 2005  
at Eugene, Oregon

Filed - June 2, 2005

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

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding.

Before: MONTALI, RIEGLE<sup>2</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup>This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup>Hon. Linda B. Rieggle, Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Appellant's predecessor obtained a judgment in state court  
2 against debtors and subsequently filed a nondischargeability  
3 action against debtors. Applying the principles of issue  
4 preclusion, the bankruptcy court found that the judgment against  
5 the debtor husband was nondischargeable but that the judgment  
6 against the debtor wife was dischargeable. Appellant appealed  
7 that portion of the judgment declaring the debtor wife's debt to  
8 be dischargeable. We AFFIRM.

9  
10 **I.**  
**FACTS**

11 Beginning in 1992, debtor Allan Lee Bennett ("Allan") served  
12 as conservator for the estate of his brother, Ronny Bennett  
13 ("Ronny"). After Allan was removed as conservator, at least three  
14 successor conservators were appointed (including the current  
15 successor conservator, appellant C. Frederick Burt ("Burt")).

16 One of the successor trustees, Gregory C. Hansen ("Hansen"),  
17 sued Allan in Oregon state court for conversion, breach of  
18 fiduciary duty, and fraudulent conveyance.<sup>3</sup> He also sued debtor  
19 Wanda Bennett ("Wanda"), individually and in her capacity as  
20 trustee of the Wanda Bennett Living Trust ("Trust"), for  
21 fraudulent conveyance. After a jury trial, the state court  
22 entered a judgment (the "Judgment") in January 1997 against Allan  
23 for conversion, breach of fiduciary duty and fraudulent conveyance  
24 and against Wanda and the Trust for fraudulent conveyance. In  
25 addition, punitive damages were awarded against the Trust and  
26 against Wanda in her capacity as trustee of the Trust.

27  
28 <sup>3</sup>The record in this appeal is deficient. The state court  
complaint is not a part of the record; neither is the complaint  
initiating the underlying adversary proceeding.

1 In 2001, Wanda and Allan filed a joint bankruptcy petition.  
2 Mark Hoyt ("Hoyt"), another successor conservator, filed the  
3 underlying adversary proceeding to have the Judgment declared  
4 nondischargeable under 11 U.S.C. § 523(a).<sup>4</sup> Thereafter, Burt was  
5 appointed as successor conservator but did not substitute himself  
6 as plaintiff in the nondischargeability proceeding.

7 Trial commenced in the nondischargeability proceeding on June  
8 4, 2003. On June 11, 2004, the bankruptcy court entered a  
9 judgment in favor of Allan and Wanda, because the real party in  
10 interest (Burt) was not acting as plaintiff. We reversed and  
11 remanded, holding that the bankruptcy court erred in not giving  
12 Burt a reasonable opportunity to substitute himself as plaintiff.  
13 See Memorandum issued by BAP on December 15, 2003, in BAP No. OR-  
14 03-1383-BKMu.

15 Following the remand, Burt was substituted as plaintiff and  
16 the bankruptcy court resumed the trial that originally commenced  
17 in 2003. The bankruptcy court noted that the claims against the  
18 Trust and against Wanda as trustee of the Trust had been dismissed  
19 from the nondischargeability proceeding. Applying the doctrine  
20 of collateral estoppel (now commonly called issue preclusion),<sup>5</sup>

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21  
22 <sup>4</sup>Unless otherwise indicated, all section and rule references  
23 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal  
Rules of Bankruptcy Procedure, Rules 1001-9036.

24 <sup>5</sup>In addressing the preclusive effect of the Judgment, the  
25 bankruptcy court repeatedly referred to issue preclusion or  
26 collateral estoppel. Both this panel and the Oregon Supreme Court  
27 now refer to collateral estoppel as "issue preclusion." See Paine  
28 v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002)  
(noting that "issue preclusion" includes the doctrines of direct  
estoppel and collateral estoppel while "claim preclusion" has  
"often been called 'res judicata' in a non-generic sense"), citing  
Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77  
(continued...)

1 the bankruptcy court held that the portion of the Judgment against  
2 Allan for breach of fiduciary duty was nondischargeable.<sup>6</sup> In  
3 contrast, the court found that the portion of the Judgment against  
4 Wanda and Allan for fraudulent conveyance was dischargeable,  
5 because liability for fraudulent conveyance in Oregon does not  
6 require a showing of intent while section 523(a)(6) does.<sup>7</sup>

7 On August 26, 2004, the bankruptcy court entered its judgment  
8 declaring the Judgment against Allan to be nondischargeable and  
9 against Wanda to be dischargeable. Burt filed a timely notice of

10

11 <sup>5</sup>(...continued)  
n.1 (1984); Drews v. EBI Cos., 795 P.2d 531, 535 (Ore. 1990).

12

13 At one point in its oral decision, the bankruptcy court  
14 stated that "claim preclusion" would apply. As noted above, claim  
preclusion is the more modern nomenclature for "res judicata."  
The Supreme Court has explained the distinctions between claim and  
issue preclusion:

15

16 [W]e use the term "claim preclusion" to refer to "res  
17 judicata" in a narrow sense, i.e., the preclusive effect  
of a judgment in foreclosing litigation of matters that  
should have been raised in an earlier suit. In  
18 contrast, we use the term "issue preclusion" to refer to  
the effect of a judgment in foreclosing relitigation of  
a matter that has been litigated and decided.

19

20 Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373,  
376 n.1 (1985). We believe that the bankruptcy court intended to  
21 state "issue preclusion" instead of "claim preclusion," inasmuch  
as its analysis shows that the relevant issue (breach of fiduciary  
duty by Allan) had been litigated and decided by the state court.

22

23 <sup>6</sup>The Judgment against Allan totalled \$32,504.92 in principal  
and \$612.50 in costs. Allan was found liable in the amount of  
\$32,504.92 on the conversion count, in the same amount for the  
24 breach of fiduciary duty count, and in the same amount for the  
fraudulent conveyance count. Wanda was found individually liable  
25 for the same amount on the fraudulent conveyance count. The  
punitive damages were not assessed against Allan or Wanda  
26 individually.

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28 <sup>7</sup>At oral argument before this panel, counsel for Burt  
conceded that liability for fraudulent conveyance in Oregon does  
not require a finding of intent to defraud; a finding of  
constructive fraud is sufficient.

1 appeal. Neither Allan nor Wanda filed a cross-appeal, but they  
2 did file (on January 12, 2005) a motion for sanctions against  
3 Burt's counsel or for dismissal of the appeal ("Motion for  
4 Sanctions"). We entered an order taking the Motion for Sanctions  
5 under advisement pending resolution of the appeal on the merits.  
6 For the reasons set forth in a separate order, we are denying the  
7 Motion for Sanctions.

8  
9 **II.**  
**ISSUE**

10 Did the bankruptcy court err in refusing to grant preclusive  
11 effect to that portion of the Judgment holding Wanda liable for  
12 fraudulent conveyance?

13  
14 **III.**  
**STANDARD OF REVIEW**

15 We review de novo the preclusive effect of a judgment; the  
16 issue presents a mixed question of law and fact in which the legal  
17 questions predominate. The Alary Corp. v. Sims (In re Associated  
18 Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002).

19  
20 **IV.**  
**DISCUSSION**

21 Issue preclusion applies in nondischargeability proceedings.  
22 Grogan v. Garner, 498 U.S. 279, 284-85 (1991). Because Burt is  
23 arguing that the Judgment against Wanda is preclusive in the  
24 underlying nondischargeability action, he "must introduce a record  
25 sufficient to reveal the controlling facts and pinpoint the exact  
26 issues litigated [in the state court action]." Kelly v. Okoye (In  
27 re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d  
28 110 (9th Cir. 1996).

1 The preclusive effect of a state court judgment is determined  
2 by the law of the state in which the judgment was entered. Gayden  
3 v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir.  
4 1995). In Oregon, "[i]f one tribunal has decided an issue, the  
5 decision on that issue may preclude relitigation of the issue in  
6 another proceeding if five requirements are met:

7 1. The issue in the two proceedings is identical.

8 2. The issue was actually litigated and was essential  
9 to a final decision on the merits in the prior  
proceeding.

10 3. The party sought to be precluded has had a full and  
11 fair opportunity to be heard on that issue.

12 4. The party sought to be precluded was a party or was  
in privity with a party to the prior proceeding.

13 5. The prior proceeding was the type of proceeding to  
14 which this court will give preclusive effect."

15 Nelson v. Emerald People's Util. Dist., 862 P.2d 1293, 1296-97  
16 (Ore. 1993) (internal citations omitted).

17 Here, the bankruptcy court determined that the first two  
18 elements were not present with respect to Burt's  
19 nondischargeability claims against Wanda. The state court  
20 judgment imposed liability on Wanda individually only on the claim  
21 for fraudulent conveyance. Burt contends that the judgment is  
22 preclusive with respect to his nondischargeability claim against  
23 Wanda for "willful and malicious injury" under section 523(a)(6).  
24 We disagree. Because section 523(a)(6) requires a showing of  
25 intent and Oregon fraudulent conveyance law does not, the issues  
26 in the two proceedings were not identical; moreover, no evidence  
27 has been presented that the issue of Wanda's intent was actually  
28 litigated.

1 Under Oregon law, a fraudulent conveyance can be actionable  
2 if a debtor did not receive a reasonably equivalent value for a  
3 transfer and (1) was engaged in a transaction for which its  
4 remaining assets were unreasonably small or (2) reasonably should  
5 have believed that it would incur debts beyond its ability to pay.  
6 Ore. Rev. St. § 95.230(1). In other words, a conveyance may be  
7 fraudulent even without actual intent to hinder, delay or defraud  
8 a creditor. In contrast, section 523(a)(6) requires a showing  
9 that a debtor intended to cause an injury, not just that he  
10 intended to perform the act itself. Kawaauhau v. Geiger, 523 U.S.  
11 57, 61-62 (1998) ("The word 'willful' in (a)(6) modifies the word  
12 'injury,' indicating that nondischargeability takes a deliberate  
13 or intentional injury, not merely a deliberate or intentional act  
14 that leads to injury."); see also Carrillo v. Su (In re Su), 290  
15 F.3d 1140, 1143 (9th Cir. 2002) (noting that Geiger establishes  
16 that section 523(a)(6) does not apply to those debts arising from  
17 unintentionally inflicted injuries). Therefore, because intent to  
18 injure can be irrelevant in a fraudulent conveyance action in  
19 Oregon, and because Burt has introduced no evidence to show that  
20 the state court and jury considered whether Wanda acted with  
21 intent to injure, the issues decided by the state court judgment  
22 with respect to the fraudulent conveyance claim were different  
23 than those presented by a section 523(a)(6) claim. Moreover, no  
24 evidence has been presented that the intent issue was actually  
25 litigated.

26 In his opening brief, Burt cites Impulsora Del Territorio  
27 Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440, 1443 (9th  
28 Cir. 1986) for the proposition that when a wrongful act is "done



1 intentionally, necessarily produces harm and is without just cause  
2 or excuse, it is 'willful and malicious' even absent proof of  
3 specific intent to injure." Id. at 1443. Burt, however,  
4 overlooks that Cecchini's standard for determining willful and  
5 malicious injury under section 523(a)(6) was overruled by the  
6 Supreme Court in Geiger. See Baldwin v. Kilpatrick (In re  
7 Baldwin), 245 B.R. 131, 135 (9th Cir. BAP 2000), aff'd, 249 F.3d  
8 912 (9th Cir. 2001) (noting that Geiger overrules Cecchini).  
9 Consequently, Burt's sole argument on appeal -- that issue  
10 preclusion applies because the state court judgment satisfies  
11 Cecchini's standard for "malicious and willful injury" -- is not  
12 well-taken.

13 The Ninth Circuit's decision in Harmon v. Kobrin (In re  
14 Harmon), 250 F.3d 1240 (9th Cir. 2001) is instructive in the  
15 current appeal. In Harmon, a creditor sued a debtor in state  
16 court on many grounds, alleging facts which would have satisfied  
17 the elements of a section 523(a)(2) claim. Id. at 1246. The  
18 creditor obtained a default judgment against the debtor and then  
19 requested the bankruptcy court to grant preclusive effect to the  
20 state court judgment in a subsequent nondischargeability  
21 proceeding. The Ninth Circuit held that issue preclusion was  
22 inapplicable because the state court had not necessarily decided  
23 the fraud and intent to defraud issue in entering its judgment;  
24 the state court could have entered the judgment without finding  
25 that the debtor had committed actual fraud (or acted with intent

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27

28

1 to defraud). Id. at 1248-49 n.10.<sup>8</sup> In the present case, the  
2 Oregon state court could have imposed liability on Wanda for  
3 fraudulent conveyance without considering or deciding whether she  
4 acted with intent to injure or defraud. Thus, one of the elements  
5 of section 523(a)(6) (intent to injure) was not addressed or  
6 resolved by the state court. The Judgment against Wanda does not  
7 preclude litigation on the section 523(a)(6) issue in bankruptcy  
8 court.

9 Because the state court litigation and the  
10 nondischargeability proceeding did not require similar showings of  
11 intent to harm, the issues presented in each were not identical.  
12 In addition, the element of intent was not necessarily decided in  
13 order for the state court to enter its judgment against Wanda.  
14 Accordingly, under Oregon law, the Judgment against Wanda is not  
15 entitled to preclusive effect in the underlying section 523(a)(6)  
16 action against Wanda. The bankruptcy court did not err and we  
17 affirm.

18 **V.**  
19 **CONCLUSION**

20 For the foregoing reasons, we AFFIRM.  
21  
22

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23 <sup>8</sup>The Ninth Circuit noted in Harmon that the state court could  
24 have granted the plaintiff relief under the California  
25 Corporations Code section entitling partners to rescind  
26 partnership agreements for fraud or misrepresentation because the  
27 state court had found that the debtor had engaged in constructive  
28 fraud. "But such a finding [of constructive fraud on the part of  
the debtor] would be insufficient to establish fraud under  
§ 523(a)(2)(A), because under § 523(a)(2)(A), the debtor must have  
intended to deceive the creditor, but in the case of 'constructive  
fraud . . . it is not necessary to prove deliberate or intentional  
fraud.'" Id. at 1248 n. 10 (internal citation omitted).

U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit  
125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-04-1532-MORK

RE: ALLAN LEE BENNETT AND WANDA MAY BENNETT

A separate Judgment was entered in this case on June 2, 2005.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.  
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

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The undersigned, deputy clerk of the U.S. Bankruptcy  
Appellate Panel of the Ninth Circuit, hereby certifies that a copy  
of the document on which this certificate appears was mailed this date  
to all parties of record to this appeal.

By: Patti Ippolito

Deputy Clerk: June 2, 2005