RECORD NO. 23-2084

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN RE: DEBORAH FAYE PARKER

Debtor.

DAN GREGORY MARTIN,

Plaintiff - Appellant,

v.

DEBORAH FAYE PARKER,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

OPENING BRIEF OF APPELLANT

SUBMITTED BY:

_____
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DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2084 Caption: Dan Gregory Martin v. Deborah Faye Parker

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dan Gregory Martin
(name of party/amicus)

who is Plaintiff - Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☑YES ☐NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

Appellant states that the named Defendant-Appellee is the sole Debtor in the bankrutpcy proceeding below, and is an individual resident of the Commonwealth of Virginia. No creditors' committee has been formed in the bankruptcy case.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Brian H. Richardson Date: 2/26/2024

Counsel for: Plaintiff - Appellant

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RECORD NO. 23-2084

DAN GREGORY MARTIN,

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DEBORAH FAYE PARKER,

Defendant - Appellee.

OPENING BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 158(d)(1).

This case arises from an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Virginia in which, after an evidentiary hearing, the Bankruptcy Court determined that a debt owed by the debtor, Deborah Faye Parker ("Parker"), to Dan Gregory Martin ("Martin") was non-dischargeable pursuant to the embezzlement exception set forth in 11 U.S.C. § 523(a)(4). JA 611. The subject of the appeal is the Bankruptcy Court's *Final Order and Judgment* entered in the adversary proceeding on November 23, 2022 (the "Bankruptcy Court Order") (JA 268-269), with its accompanying *Findings of Fact and Conclusions of Law* (JA 252-267).

Parker appealed the Bankruptcy Court Order to the United States District Court for the Eastern District of Virginia. The District Court had initial appellate jurisdiction over this matter pursuant to 28 U.S.C. § 158(a)(1). The District Court reversed the Bankruptcy Court with its *Order* and accompanying *Memorandum Opinion* entered on September 11, 2023 (the "District Court Order"), ruling that the Bankruptcy Court committed "clear error" and reversing the Bankruptcy Court's factual finding that Parker acted with fraudulent intent. JA 605-608.

Martin timely appealed the District Court's reversal of the Bankruptcy Court Order to this Court by filing his notice of appeal on October 11, 2023. JA 609-611.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in determining the evidence was insufficient to support the Bankruptcy Court's determination that a State Court Judgment debt owed by Parker, for her refusal to turn over assets of an estate for administration, was non-dischargeable under 11 U.S.C. § 523(a)(4)?
2. Did the District Court err by substituting its judgment for that of the Bankruptcy Court when the District Court found the Parker had a good-faith belief, where the Bankruptcy Court found, after an evidentiary

hearing, that the facts showed that Parker had fraudulent intent in refusing to turn over estate assets for administration?

3. Did the District Court err when it looked behind a final judgment order of a Virginia State Court and made findings that the Virginia State Court erred, as a basis for reversing the Bankruptcy Court's determination that the debt was non-dischargeable?

STATEMENT OF THE CASE

A fundamental goal of the Bankruptcy Code is to provide a fresh start "to an honest but unfortunate debtor" by granting a discharge of prior debts. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Certain debts, however, are excepted from discharge by statute where they result from the debtor's wrongful behavior. It is the role of the Bankruptcy Court to ensure that debtors are not allowed to hide fraudulent behaviors behind the Bankruptcy Code.

This case centers on the Bankruptcy Court's finding of a pattern of wrongful behavior by the debtor, Parker, in connection with a long-running dispute regarding assets belonging to the Estate (the "Estate") of Morton H. Poindexter, Jr. ("Morton"), which Parker refused to turn over to the executor and converted to her personal use before filing for bankruptcy protection. JA 262. Parker's sole purpose in filing her bankruptcy petition was to avoid paying the debt owed to Martin, both in his individual capacity and as the

executor for Morton's Estate, despite freely admitting that she is, and has always been, fully able to pay the debt from her assets. JA 257, JA 422.

Background

Morton is Parker's father. JA 253. Peggy L. Martin ("Peggy") is Martin's mother. JA 253. Peggy and Morton lived together for many years at their home in Roanoke County, Virginia until their deaths, but were never married. JA 253. Martin considered himself to be a stepson to Morton. JA 351. Parker and Morton were estranged for the majority of the time Peggy and Morton lived together. JA 352.

In April, 2004, as part of their estate planning, Morton and Peggy entered into an agreement they called the "Post Marital Agreement" (the "Agreement"). JA 253. Under the Agreement, they agreed to execute reciprocal wills providing that, upon the first of them to die, the surviving party would receive all of the estate assets, and upon the second of them to die, their collective estate assets would then pass to their children, with two-thirds of their combined estates passing to Martin, and one-third split between Morton's three children. JA 253. Parker was therefore entitled to only a one-ninth share of Morton's and Peggy's combined estates. JA 449, JA 552, JA 590. The Agreement also set limits on annual gift transfers to children during the life of the surviving party. JA 042, JA 053.

Peggy died in April 2009, and her entire estate, which included multiple generations of Martin's family's assets, passed directly to Morton, in accordance with the Agreement and the terms of her will. JA 357, JA 590. In

the intervening time between Peggy's death and Morton's death, Parker reconnected with Morton, and as a result of several conversations Parker had with Morton, Parker was added as a joint account holder on his bank accounts and designated beneficiary on his other financial assets. JA 381-382. Parker does not dispute that, prior to Morton's death and the receipt of his assets, she had a copy of his will and was aware of the Agreement between Morton and Peggy. JA 410.

Morton passed away in August, 2013. JA 041, JA 053. Thereafter, Parker, who was conveyed only one-ninth of the Estate assets under Morton's and Peggy's will, took possession of all of Morton's financial assets. JA 386.

Dispute and State Court Lawsuit

After Morton passed, Parker refused to provide his original will to Martin as the Executor of Morton's Estate until Martin hired an attorney to demand its production. JA 359-360, JA 366-367. After Martin's repeated requests to turn over Morton's assets for estate administration were refused by Parker, Martin filed a lawsuit against Parker in the Circuit Court for Roanoke County, Virginia, both individually as a beneficiary of the Estate, and in his capacity as Executor for the Estate (the "State Court Lawsuit"). JA 074-079.

The State Court Lawsuit included requests for alternative forms of relief that all focused on Parker's refusal to turn over the Estate assets. JA 074-079. While the State Court Lawsuit was ongoing, Parker used some of Estate assets to fund her purchase for luxury items, make home improvements, and for other matters of personal benefit to herself. JA 410-419.

On September 10, 2019, Martin obtained judgment against Parker in the Circuit Court for the County of Roanoke, Virginia, in the principal amount of $151,501.00 (the "State Judgment"). JA 082-084. The State Judgement was entered in favor of Martin both individually for amounts due him as a beneficiary, and also in his capacity as Executor for the Estate. JA 084.

Parker immediately took steps to delay execution proceedings and avoid satisfying her debt to the Estate and to Martin. JA 085-089. Parker refused to respond to debtor interrogatory proceedings for more than nine months, while she simultaneously transferred and shuffled her assets out of her individual name, including conveying and liquidating real property. JA 142-147.

Despite always having the ability and means to satisfy the State Judgment debt, Parker initiated the bankruptcy proceedings by filing her Petition under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Eastern District of Virginia on December 24, 2021. (Bankr. Case No. 21-12073-KHK). JA 436-483. The schedules filed with her petition list only three debts: Martin's claim from the State Judgment, a funeral expense (that is truly a debt of Morton's Estate, and not hers personally), and a credit card that had a zero balance immediately prior to the petition filing. JA 453-455. The claims register in the bankruptcy case demonstrates that at the time the bankruptcy petition was filed, Parker ran up a store credit account, and her personal credit card within three weeks before filing, from a zero balance. JA 499-522. The only real

debt that Parker owed at the time of filing for bankruptcy protection was the State Judgment owed to Martin. JA 420-422.

Adversary Proceeding before the Bankruptcy Court

Martin filed his original Complaint (the "Complaint"), initiating the adversary proceeding in the Bankruptcy Court on March 28, 2022, and his First Amended Complaint (the "Amended Complaint") on April 8, 2022. JA 017-028, JA 040-049. In both the initial Complaint and the Amended Complaint, Martin sought a determination by the Bankruptcy Court that the debt owed pursuant to the State Judgment was non-dischargeable pursuant to the provisions of 11 U.S.C. §§ 523(a)(2)(A); 523(a)(4); or 523(a)(6), and set forth his factual allegations in support thereof. JA 040-049.

Parker did not file any motion challenging the sufficiency of the pleadings under Rule 12 or any other applicable rule. JA 052-056. On April 28, 2022, Parker filed her *Answer to First Amended Complaint to Determine Dischargeability* (the "Answer"). JA 052-056.

Evidence Presented at Trial

Following discovery and standard pre-trial proceedings, the Bankruptcy Court held a bench trial on the merits of the Amended Complaint in connection with these proceedings on November 2, 2022 (the "Trial"). At Trial, the Bankruptcy Court heard witness testimony from Parker and Martin, along with one of Parker's attorneys who was called as a Defense witness. JA 330, JA 369, JA 378, JA 424. All of Martin's exhibits were admitted into

evidence except for Exhibit 7 (the Agreement) and Exhibit 14 (Deed of Gift)[1]. JA 249.

Regarding the circumstances surrounding the way Parker came to be named as a co-party on Morton's financial accounts, the Bankruptcy Court took evidence that: (1) Parker had spent most of her life "estranged" from Morton (JA 352); (2) Parker testified that after Peggy's death, she saw her father "a lot more" corroborating Martin's testimony that they were previously not close (JA 380-381); (3) Parker was placed on Morton's financial accounts only after the death of Peggy (JA 254); (4) Parker initially testified "absolutely not" when asked if she had influenced Morton's financial decisions, but later testified "I suggested" and "I put 100 [thousand] in" regarding convincing Morton to transfer money to the annuity (JA 383, JA 386-387).

Regarding the nature of the relationship between Parker and Martin, the Bankruptcy Court took evidence that: (1) Parker and Martin were "barely on speaking terms" with one another (JA 258); (2) Parker refused Martin's requests as Executor to turn over Morton's will for probate (JA 352-353); (3) there was a "hostile situation" between Parker and Martin even after Morton's will had been admitted to probate (JA 354); (4) Parker testified that in her opinion it was "not" unfortunate that she didn't know Martin well (JA 378);

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[1] Parker asserted blanket objections to all of Martin's proposed exhibits at Trial, including Exhibits 14, 15, and 18, all of which were also included in Parker's own exhibit set. *Compare* Martin's Exhibits: JA 138-140, JA 141, and JA 144, to Parker's Exhibits: JA 169-173, JA 177, and JA 193.

and (5) Martin was only able to procure Morton's will for probate after repeated attempts and confrontations (JA 394-395).

Regarding the contents and terms of Morton's will, the Bankruptcy Court took evidence that: (1) the will had been executed in conjunction with the Agreement and at the same time as Peggy's will (JA 111-117); (2) the Agreement is explicitly referenced and reaffirmed in the eighth clause of Morton's will (JA 112); (3) Parker was aware and "had actual knowledge of the terms" of Morton's will prior to his death, and had a copy with her when she visited him at the hospital (JA 254, JA 262, JA 384); and (4) Parker's fraudulent intent can be inferred, in part, from her failure to turn over the financial assets to the Executor despite her knowledge of the terms of Morton's will (JA 262).

Regarding Parker's actions to avoid satisfaction of the debt owed after the State Judgment was entered, the Bankruptcy Court took evidence that: (1) Parker testified that she always had the resources and ability to pay the debt owed to Martin, but she just does not want to pay (JA 422); (2) Parker's "only reason" to file for bankruptcy protection was to not pay Martin (JA 420); (3) the claims register in the bankruptcy case shows that the only other debts with proofs of claim on file are a credit card statement showing all charges were incurred during the 3-week period prior to the Petition date, after the card had been paid off in full, and a store credit account that had similarly been paid in full two weeks prior to the bankruptcy filing (JA 499-522); (4) after the State Judgment was entered, Parker created an LLC to which she transferred real

property because she was concerned about the judgment (JA 141, JA 176-177); (5) Parker is actually not insolvent, listing $794,051.00 in assets against only $188,890.00 in liabilities as of her Petition date (JA 441, JA 443); (6) Parker's state court appeal was noticed on October 8, 2019, but her attorney indicated that she had been directed "in no uncertain terms" not to prosecute the appeal, and in fact took no action beyond filing the notice of appeal (JA 144-147); (7) Parker took unfair advantage of the Covid-19 pandemic by refusing to respond to written interrogatories "for 9 months" when her "goal was to push everything out as much as possible" through that failure to respond (JA 142-143); (8) in cross-examination, Parker was rendered speechless when challenged about her purposeful delays after the State Judgment was entered (JA 422-423); and (9) Parker delayed turning the original will over to the Executor for probate until demanded by an attorney (JA 254).

Regarding Parker's appropriation of Morton's financial assets to herself, the Bankruptcy Court took evidence that: (1) Parker spent much of the money on luxury items, including a ring with a solitary diamond, purchasing a vacation timeshare, taking a Royal Caribbean Cruise while the State Court Lawsuit was still pending, home renovations, credit card payoff, and paying down her marital home mortgage (JA 255-256, JA 411-412); (2) Parker "went about liquidating [Morton's] financial accounts" and combined those funds with her personal accounts after becoming fully informed of the will and the Agreement (JA 254-255); (3) Parker's bank account statements

show that the funds were transferred through multiple accounts, some of which were newly created for the transfers (JA 118-138); (4) Parker has not paid "one cent" of the State Judgment to Martin (JA 138); (5) Parker testified that the money she received from Morton's financial accounts was used for the luxury items listed (JA 417-418); (6) Parker does not dispute the validity of the debt owed to Martin (JA 420, JA 455); and (7) the money that flowed to Parker's hands, and which she wrongfully appropriated to her own use, included assets that had passed from Martin's grandmother's estate to his father's estate, to Peggy's estate, and then to Morton pursuant to the Agreement and Peggy's will (JA 357-358).

Upon the conclusion of Trial, the Bankruptcy Court took the matter under advisement. JA 252-269. On November 23, 2022, the Bankruptcy Court issued its *Final Order and Judgment* (JA 268-269), with its accompanying *Findings of Fact and Conclusions of Law* (JA 252-267) (referenced collectively hereafter as the "Non-Dischargeability Order"), in which the Bankruptcy Court determined that the State Judgment debt owed to Martin was non-dischargeable pursuant to the embezzlement exception of 11 U.S.C. § 523(a)(4). JA 252-269. Although Parker's actions to delay and evade collection of the State Judgment did not, on their own, rise to the degree of fraud required for the other alternative exceptions to discharge raised in the Amended Complaint, the Bankruptcy Court, after considering all the evidence before it, determined that the embezzlement exception to discharge applied because although Parker may have come into possession of Morton's assets

lawfully, she acted with fraudulent intent when she failed to turn the financial assets over to the Executor of Morton's Estate. JA 257-266.

Appeal to the District Court

Parker appealed the Non-Dischargeability Order to the District Court citing as assignments of error that (1) Martin failed to plead embezzlement, and (2) the evidence was insufficient to support the Bankruptcy Court's ruling. JA 280-302. In her appeal to the District Court, Parker did not identify any specific instances of "clear error" in the Bankruptcy Court's factual findings and did not cite to the Record on Appeal for any of its factual assertions and characterizations of the evidence from the Bankruptcy Court. JA 280-302, JA 303-326. Instead, Parker, citing no legal authority for her position as to the elements required, or unsatisfied at Trial, argued that there was no support for the Bankruptcy Court's finding of intent, asserting at oral argument that "it's very hard for [Parker] to show [the District Court] something that does not exist." JA 548-549.

The District Court reversed the Bankruptcy Court upon the second assignment of error, citing "clear error" on its factual finding that Parker had fraudulent intent. JA 589-608. The District Court did not reach Parker's first assignment of error regarding pleading embezzlement, and Parker did not appeal or cross-appeal this issue. JA 594.

Martin now appeals the District Court's reversal of the Bankruptcy Court. JA 609-611.

SUMMARY OF ARGUMENT

The State Judgment forms the basis for Martin's claim against Parker in the bankruptcy case, and is the end result of a Virginia Circuit Court having heard witness testimony, examined the underlying facts and documents, and determined on the merits that Parker owes a valid debt to Martin, individually and as Executor of the Estate, in the liquidated judgment amount because she refused to turn over Estate assets to which Martin was legally entitled.

There can be no dispute that the State Judgment debt is owed to Martin. Parker, for her part, does not dispute that the debt is owed, and even testified that she has the ability to pay the debt (both now and when her bankruptcy petition was filed) -- she simply does not want to pay it. JA 257, JA 422.

The Bankruptcy Court was tasked with inferring Parker's intent based upon the totality of the evidence, which included her actions before, during and after the State Court made its ruling. After Trial on the merits, the Bankruptcy Court considered all the evidence before it and determined that the State Judgment debt was non-dischargeable, and excepted from discharge under the embezzlement exception of 11 U.S.C. § 523(a)(4) because Parker came into possession of Morton's assets lawfully, but converted them with fraudulent intent.

The Bankruptcy Court was clear in finding that Parker acted with fraudulent intent in the Non-Dischargeability Order. JA 262. Rather than give the required due regard to the Bankruptcy Court's opportunity to judge the credibility of witnesses in making its factual finding of Parker's fraudulent

intent, the District Court improperly substituted its own judgment for that of the Bankruptcy Court, looking behind not only the Bankruptcy Court, but also the Virginia Circuit Court, and erred in its review. JA 589-607. Accordingly, the District Court should be reversed, and the Bankruptcy Court should be affirmed.

ARGUMENT

I. Standard of review as to all assignments of error.

The District Court's judgment when sitting in review of the Bankruptcy Court is reviewed *de novo* by this Court, with the same standard of review that would be applied in the District Court. *J.A. Jones, Inc., v. Tessler,* (*In re J.A. Jones, Inc.)*, 492 F.3d 242, 249 (4th Cir. 2007). Accordingly, the Bankruptcy Court's legal conclusions are subject to *de novo* review by this Court, but the Bankruptcy Court's factual findings underlying those conclusions are reviewed for clear error. *See, e.g.*, *In re Bus. Commc'ns of VA, Inc.*, 416 B.R. 476, 481 (E.D. Va. 2009). Exceptions to discharge are traditionally interpreted narrowly to promote and protect the overarching goal of the "fresh start." *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999). However, the courts "are equally concerned with ensuring that perpetrators of fraud are not allowed to hide behind the skirts of the Bankruptcy Code." *Id.*, *citing Cohen v. de la Cruz*, 523 U.S. 213, 214

(1998). This is because the Bankruptcy Code is not "focused on the unadulterated pursuit of the debtor's interest" but necessarily utilizes Section 523 to balance the "competing interests" of "[b]arring certain debts from discharge" against "wiping the bankrupt's slate clean." *Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023).

II. Bankruptcy Court determination that the State Judgment debt was non-dischargeable under embezzlement exception of 11 U.S.C. § 523(a)(4) was well supported by factual findings upon which there is no clear error.

The Bankruptcy Court's determination of non-dischargeability is well reasoned and supported by the record in this case.

Section 523(a)(4) of the Bankruptcy Code provides that "[a] discharge under Section 727 . . . of this title does not discharge an individual debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).

It is well settled that for purposes of dischargeability under Section 523(a)(4), "[e]mbezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Dixon v. Wilkerson (In re Wilkerson)*, 644 B.R. 349, 371 (Bankr. E.D. Va. 2022); *Cook v. Knight (Matter of Knight)*, 621 B.R. 529, 537 (Bankr. N.D. Ga. 2020).

For courts in this jurisdiction, embezzlement under Section 523(a)(4) has two elements[2] which the Bankruptcy Court considered: "(1) debtor's appropriation of property for debtor's benefit, and (2) appropriation with fraudulent intent or by deceit." *In re Wilkerson*, 644 B.R. at 371 (citing *The Credit Experts, LLC v. Santos (In re Santos)*, Case No. 11-17789-BFK, 2012 WL 2564366, *6 (Bankr. E.D. Va., July 2, 2012)). *See also Caviness v. Lane (In re Lane)*, 445 B.R. 555, 565 (Bankr. E.D. Va. 2011) ("embezzlement requires a showing that '(1) the person was lawfully entrusted with property or property lawfully came into the hands of that person, and (2) the property was fraudulently appropriated.'") (quoting *Johnson v. Davis (In re Davis)*, 262 B.R. 665, 672 (Bankr. E.D. Va. 2001)). The Bankruptcy Court's finding that these elements were satisfied is supported in the record and should not have been disturbed.

a. Appropriation and Conversion Elements were Established

Whether applying the Bankruptcy Court's two element test, or the four-part test proposed by the District Court, both courts agree and there is no dispute that Parker came into lawful possession of property of Morton's estate

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[2] The District Court appears to have split these two recognized elements into a four-element test drawn from criminal law precedent, stating that "distilled to its essence, 'the traditional concept of embezzlement' requires a (i) fraudulent (ii) conversion of (iii) the property of another (iv) by one with lawful possession thereof." JA 594. (Citing to criminal case precedent found in *Moore v. United States*, 160 U.S. 268, 269 (1895); *United States v. Stockton*, 788 F.2d 210, 217 (4th Cir. 1986); *United States v. Sampson*, 898 F.3d 270, 277 (2d Cir. 2018); and 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.6 (3d ed. 2017)).

and that she appropriated or converted property belonging to Martin for her use. Those elements of embezzlement analysis were satisfied. The issue was whether the Bankruptcy Court erred in finding fraudulent intent.

b. No Clear Reversible Error in Bankruptcy Court's Findings of Fact in Non-Dischargeability Order

In reviewing the evidence, the Bankruptcy Court was called upon to determine dischargeability of the State Judgment debt, in light of the facts and circumstances surrounding the $151,501.00 in monies already adjudicated by the Virginia State Court in a final order to be due and owing to Martin or the Estate, and which Parker refused to turn over. *See Heckert v. Dotson (In re Heckert)*, 272 F.3d 253, 257 (4th Cir. 2001) (bankruptcy court called upon and authorized "to determine whether or not the state judgment is dischargeable").

In reversing the Bankruptcy Court, the District Court identified what it deemed to be instances of clear error in the Bankruptcy Court's findings of fact regarding whether the funds were property of the Estate and whether Parker acted with fraudulent intent. JA 602-605.

As an initial matter, although the District Court determined that the evidence had not demonstrated that funds were property of the Estate under its "property of another" element (JA 594), the District Court, in its own analysis going behind the State Court, ultimately concluded that of the full pool of Morton's financial assets in Parker's possession, a "portion of the Funds, totaling $144,849.53, *was* part of Morton's Estate," and could be embezzled. JA 602. Therefore, even under the District Court's review,

Morton's financial assets should not have been withheld from the Executor under Virginia law.

The balance of the District Court's analysis focused on the central element of fraudulent intent. JA 602-607. The District Court determined that the evidence before the Bankruptcy Court fell "far short of the fraudulent intent required for embezzlement." JA 605.

The Bankruptcy Court's finding of fraudulent intent on the part of Parker is a finding of fact that should not have been disturbed except upon clear error. *Rish Equip. Co. v. Joe Necessary and Son, Inc. (In re Joe Necessary and Son, Inc.)*, 475 F. Supp. 610, 614 (W.D. Va. 1979) ("finding of . . . intent calls for a factual finding by the Bankruptcy Judge"). In this jurisdiction, a "plaintiff need not prove that the debtor acted with an intent to harm, but only whether there was an intent to convert." *In re Wilkerson*, 644 B.R. at 372.

c. Finding of Fraudulent Intent Not Clearly Erroneous

"The clearly erroneous standard is a demanding one." *Bate Land Co. LP v. Bate Land & Timber LLC* (*In re Bate Land & Timber LLC)*, 877 F.3d 188, 198 (4th Cir. 2017). It is not clearly erroneous for a trial court to weigh evidence and reach a conclusion that another party would have disagreed with had it been in sitting in the place of the finder of fact. *Id.* The United States Supreme Court has set a clear standard for this analysis when it stated that "[i]f the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the [court sitting on appeal] may not reverse it even

though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 565 (1985). This standard applies "even when the [trial] court's findings do not rest on credibility determinations, but are based on . . . documentary evidence or inferences from other facts." *Id.*

Intent can be inferred from the debtor's actions as well as surrounding circumstances. *Hall v. Blanton*, 149 B.R. 393, 394 (Bankr. E.D. Va. 1992); *see also Universal Bank, N.A. v. Grause*, 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (explaining that direct proof of intent can be impossible to obtain, thus intent can be inferred from surrounding circumstances). Courts have used a broad definition for circumstances indicating fraud. *See In re Fox*, 370 B.R. 104, 116 (6th Cir. 2007) ("[C]ourts have defined fraud as encompass[ing] any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.") (internal quotations omitted).

The Bankruptcy Court, upon reviewing the evidence presented, found that Parker acted with fraudulent intent when she wrongfully refused to turn over certain financial assets to the Executor of Morton's Estate, and appropriated them to her personal use, including for the purchase of luxury items, such as buying a vacation timeshare real estate, a Royal Caribbean Cruise, home renovations, jewelry, a solitary diamond, other personal expenses, and making a lump sum payment to her marital home that she owns as tenants by the entireties with her husband – despite having *actual knowledge* of the will, the Agreement, the instruction and desire of Morton,

the direction from the Executor of his Estate, and ultimately the State Judgment all indicating these funds should have gone to Martin. JA 262, JA 409-416.

All of these purchases and expenditures were made while the State Court Lawsuit was already pending, or shortly after the State Judgment had been entered. JA 118-147.

The Bankruptcy Court, as the finder of fact, "may infer intent from the debtor's actions and surrounding circumstances" for the purposes of inquiry under section 523(a)(4). *KMK Factoring, L.L.C., v. McKnew* (*In re McKnew)*, 270 B.R. 593, 632 (Bankr. E.D. Va. 2001). The Bankruptcy Court's inferences and factual findings are entitled to significant deference, and should not be disturbed except upon a showing of clear error.

The District Court focused heavily on what it described as Ms. "Parker's unimpeached and uncontradicted testimony" regarding her intent (JA 604), and found that her testimony supported "a conclusion that Parker acted with a 'good-faith belief' that the funds were hers—and thus lacked the intent necessary for embezzlement." JA 604.

Importantly, the Fourth Circuit has provided guidance on how such testimony should be interpreted because

> [t]he problems inherent in ascertaining whether a debtor has acted with fraudulent intent are obvious. Ordinarily, the debtor will be the only person able to testify directly concerning his intent. 'Because a debtor is unlikely to testify directly that his

> intent was fraudulent, the courts may deduce fraudulent intent from all the facts and circumstances of a case.'

Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249, 252 (4th Cir. 1987) (quoting *In re Devers*, 759 F.2d 751, 754 (9th Cir. 1985)). The *Williamson* Court went on to note that determinations of intent rely upon assessments of both the "credibility" and the "demeanor" of the debtor, supporting deference to the findings of a bankruptcy court. *Id.*

Here, although the Bankruptcy Court did not note an explicit finding of Parker's credibility in its Non-Dischargeability Order (JA 252-267, JA 604), the Bankruptcy Court did explicitly find that she had acted with fraudulent intent, despite her personal testimony to the contrary. JA 262. It can be inferred from the Bankruptcy Court's explicit finding that she acted with fraudulent intent that the Bankruptcy Court did not find Parker's testimony to be credible on this issue. The Bankruptcy Court's assessment of her demeanor is also apparent in the trial transcript. At one point in the proceedings, the Bankruptcy Court cautioned Parker about repeatedly attempting to testify with hearsay evidence stating, "Ma'am, this is now the third or fourth time that I've sustained the objection. And if you feel a need to get in hearsay testimony after I've sustained the objection a number of times, that would be a mistake, because it won't help your case." JA 395.

Finding that Parker "wrongfully took the Plaintiff's money in the first place" (JA 259), the Bankruptcy Court correctly determined that the State Judgment debt was non-dischargeable under the embezzlement exception.

The District Court, in reversing the Bankruptcy Court, impermissibly substituted its judgment for that of the Bankruptcy Court and focused almost exclusively upon Parker's testimony in its analysis of intent (JA 604), while the Bankruptcy Court made clear that it reviewed and considered all the relevant evidence before it, including, but not limited to, the circumstances surrounding the way in which Parker came to be named as a party on the bank accounts of Morton, the relationship between Parker and Martin, the Will of Morton, Parker's knowledge of the Agreement between Morton and Martin's mother, and Parker's actions to avoid satisfaction of the debt owed to Martin. JA 252-257, JA 261-267.

The Bankruptcy Court recognized that it must "consider whether the debtor acted in good faith" and in this instance, also noted that a debtor cannot get by on a claim of good faith "merely by playing ostrich and burying his head deeply in the sand." JA 263 (Bankruptcy Court *quoting Robinson v. Worley*, 849 F.3d 577, 586 (4th Cir. 2017)).

The Bankruptcy Court considered evidence regarding Parker's good-faith belief defense, or lack thereof. JA 263. It is particularly noteworthy that the evidence clearly showed Parker's actions to place the money beyond creditor reach were undertaken while there was an active State Court Lawsuit specifically challenging her claim of entitlement to the funds, and her ongoing appropriation continued after the State Judgment was entered against her. JA 118-147. If her belief was actually in "good-faith" then she would have taken steps to safeguard the funds while the State Court Lawsuit was pending and

to return the funds after the Virginia state court ruled that she was not entitled to them. Instead, Parker acted to prevent their recovery. JA 118-147. By her actions, she demonstrated her intent.

In light of these facts, the Bankruptcy Court carefully and thoroughly weighed the evidence before it, and determined that Parker's actions, while "lawful" in coming into possession of Morton's financial assets, were nonetheless "wrongful" and contributed to the Court's factual finding that she acted with the requisite "fraudulent intent" in her appropriation of the $151,501.00. JA 262-263.

d. Bankruptcy Court's Conclusions of Law were Not in Error and were Properly Based on the Final State Judgment

Each of the Bankruptcy Court's conclusions of law to which the District Court ascribed error is focused on the impact of Morton's will on whether the funds are assets of Morton's Estate. Specifically, the District Court found error as a matter of law in the Bankruptcy Court's (i) "failure to distinguish funds that passed through Morton's will from those that did not" and also (ii) where the Bankruptcy Court did not delve into the distinction between an analysis of "whether Martin had a cause of action against Parker for damages" from "whether the funds belonged to Martin upon Morton's death." JA 602, JA 605. The District Court's analysis on these issues went beyond the scope of what the *Bankruptcy Court* is authorized or called upon to do for determination of dischargeability. *Heckert v. Dotson (In re Heckert)*, 272 F.3d 253, 257 (4th Cir. 2001).

The duty of the Bankruptcy Court to determine the dischargeability of a debt arising from a state court judgment has been clearly established in the Fourth Circuit:

> "[W]hen a prior state court judgment is the debt at issue . . . the bankruptcy court, in an adversary proceeding to determine whether the debt is dischargeable, cannot issue its own judgment on the debt to replace the state court judgment previously obtained. All the bankruptcy court is called upon, or authorized to do, is to determine whether or not the state judgment is dischargeable."

Heckert v. Dotson (In re Heckert), 272 F.3d 253, 257 (4th Cir. 2001).

An appellate court may, in certain circumstances and when necessary, take judicial notice of matters, including state court proceedings. Fed. R. Evid. 201(b). Generally, an appellate court does not consider facts outside the record on appeal before it, but may take judicial notice when appropriate. *Colonial Penn Ins. Co., v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989). However, even the judicial notice authority under the Federal Rules of Evidence and Fourth Circuit precedent is subject to limitation.

> "It is one thing for a federal court to look at a state court docket in asserting jurisdiction . . . or to note a subsequent arson conviction . . . . It is materially different to rest a . . . decision . . . on the basis of evidence never presented to the [trial] court, particularly when such evidence was not requested until after oral argument."

United States v. Vann, 660 F.3d 771, 775-76 (4th Cir. 2011).

Here, the District Court erred in its reliance on evidence never presented to the Bankruptcy Court. *Id.* Because the State Judgment order had already liquidated the amount of the claim asserted in the bankruptcy case, there was no need for the Bankruptcy Court to go and parse the State Court's ruling and further trace the financial assets, or determine which amounts would have flowed to Morton's Estate but for Parker's taking them. *In re Heckert*, 272 F.3d at 257. The task before the Bankruptcy Court was to determine the "true nature" of the State Judgment debt. *See Archer v. Warner*, 538 U.S. 314, 316 (2003) (creditor claim in bankruptcy court was technically a simple promissory note, but the note was part of an overall fraudulent scheme by debtor warranting exception from discharge); *Brown v. Felsen*, 442 U.S. 127, 138 (1979); *Hilgartner v. Yagi*, *(In re Hilgartner)*, 643 B.R. 107, 117 (E.D. Va. 2022) ("bankruptcy courts should consider 'the true nature of the debt.'") aff'd *In re Hilgartner*, 91 F.4th 186, 192 (4th Cir., 2024); *Benich v. Benich (Matter of Benich)*, 811 F.2d 943, 945 (5th Cir. 1987) ("The Bankruptcy Code requires the bankruptcy court . . . to determine the true nature of the debt, regardless of the characterization placed on it by the parties' agreement or the state court proceeding. . . . in order to determine its dischargeability.")

The District Court, on its own initiative, and after oral argument, appears to have *sua sponte* pulled state court records and dissected the State Court Lawsuit, attempting to retrace funds from their source, and determined that the Bankruptcy Court committed error by not splitting up the State

Judgment award into the parts that would have flowed to the Estate, from those that would not. Such an analysis and parsing, however, is outside of the purview of what the Bankruptcy Court is called upon, or even authorized, to do when determining the dischargeability of the State Judgment debt. *In re Heckert*, 272 F.3d at 257.

In doing so, the District Court took upon itself to reach its own determination of the amounts that should have been awarded in the State Judgment and to supplement the record on appeal to support its own determination. This is not the role of the District Court when sitting in appellate review of the Bankruptcy Court.

There was no error of law in the Bankruptcy Court's determination that "[w]here there is a final state court judgment, the bankruptcy court 'cannot issue its own judgment on the debt to replace the state court judgement previously obtained.'" JA 262. This is because the Bankruptcy Court found "there is already a State Court Judgment liquidating the amount of the Plaintiff's damages" at $151,501.00. JA 262-263.

The Bankruptcy Court correctly determined that it would be inappropriate as a matter of law for the Bankruptcy Court to review or alter "the amount of a state court judgment . . . in a bankruptcy dischargeability action." JA 262-263. The District Court erred in ruling that the Bankruptcy Court should have parsed out the amount of the State Judgment debt in this way.

CONCLUSION

Bankruptcy Courts must strike a delicate balance between protecting the overarching goal of granting the honest, but unfortunate debtor a "fresh start" and "ensuring that perpetrators of fraud are not allowed to hide behind the skirts of the Bankruptcy Code." *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999) *citing Cohen v. de la Cruz*, 523 U.S. 213, 214 (1998). The exceptions to discharge provided under Section 523 are designed to balance the "competing interests" of "[b]arring certain debts from discharge" against "wiping the bankrupt's slate clean." *Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023).

With knowledge of the Agreement, the terms of Morton's will, and the State Court's ruling that the assets belonged to Martin and Morton's Estate, Parker wrongfully withheld significant financial assets that should have been administered through Morton's Estate, and appropriated them to her personal benefit. This was embezzlement, and the Bankruptcy Court correctly ruled the debt excepted from discharge.

Where, as here, the Bankruptcy Court has determined, based upon ample evidence before it, that a debtor acted with fraudulent intent in appropriating money in its possession, which should have been turned over to the Executor of a decedent's Estate for administration in due course, such a debtor cannot be allowed to hide behind the Bankruptcy Code.

For the foregoing reasons, Plaintiff-Appellant requests that this honorable Court REVERSE the District Court and AFFIRM the Bankruptcy Court's Final Order and Judgment.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Plaintiff-Appellant asserts that the issues raised in this appeal maybe more fully developed through oral argument and, therefore, respectfully requests the same.

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RESPECTFULLY SUBMITTED,

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Dated: February 26, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opening Brief of the Appellant is compliant with type-volume limits because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this brief was prepared with a proportionally spaced typeface (Times New Roman) using Microsoft Word in 14 point font, and contains 6,709 words.

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