NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARRY AMOS, an individual; RUSSELL BROCK, an individual; M. RICHARD VAIL, an individual; and RICHARD DAVIS, an individual, Plaintiffs/Appellees, v. KATHI SWAGERTY, Defendant/Appellant,	1 CA-CV 09-0498 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2004-016064

Commissioner Lindsay Best Ellis, Retired

REVERSED AND REMANDED

Warner Angle Hallam Jackson & Formanek, PLC — Phoenix
By Jack D. Klausner
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By Roger L. Cohen
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Attorneys for Defendant/Appellant

S W A N N, Judge

¶1 Kathi Swagerty appeals from the superior court's order denying her motion to quash a writ of garnishment against her wages. She contends that her sole and separate property may not be garnished to collect on a domesticated North Carolina bankruptcy judgment entered against Robert Swagerty, from whom she is legally separated. Despite Kathi's discharge from the underlying debt, the superior court determined that Robert's creditors could garnish Kathi's post-separation wages to collect on the judgment. For the reasons that follow, we reverse the court's order and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 In January 2002, Robert and Kathi Swagerty, then married and residents of North Carolina, filed for Chapter 7 Bankruptcy in the United States Bankruptcy Court, Eastern District of North Carolina. The Swagertys listed Barry Amos, Russell Brock, M. Richard Vail, and Richard Davis (collectively, "Appellees") as creditors. On July 26, 2002, the bankruptcy court discharged the Swagertys' debts. Appellees, however, filed an adversary proceeding seeking to have their claims declared non-dischargeable. After a trial, the bankruptcy court declared Appellees' claims non-dischargeable against Robert only pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(4) based on

Robert's fraudulent actions against Appellees.[1] The bankruptcy court issued a judgment in favor of Appellees and against Robert for over $1,700,000 ("bankruptcy judgment"). The bankruptcy judgment ran against Robert only, and expressly denied Appellees' request to grant an exception to discharge with respect to claims against Kathi.

¶3 At some point during the adversary proceeding, the Swagertys moved to Arizona. Appellees domesticated the bankruptcy judgment in Arizona. *See* Revised Uniform Enforcement of Foreign Judgments Act, A.R.S. §§ 12-1701 to -1708 (2003).

¶4 On June 7, 2007, Appellees filed applications for writ of garnishment seeking to garnish stock the Swagertys owned as well as Robert's wages. The Swagertys objected and argued that their community property could not be garnished. The court overruled the Swagertys' objection and found that their community property could be garnished because "the tort committed by Robert Swagerty was done for the benefit of the marital community and . . . the debt would be community if

[1] Since the relevant time, 11 U.S.C. § 523 has not changed in a manner material to this decision. Section 523(a)(2)(A) (2006) provides that a debt may not be discharged if money or property was obtained by false pretenses, false representations, or fraud. Similarly, section 523(a)(4) precludes discharge of a debt obtained by fraud while acting in a fiduciary capacity. Here, the bankruptcy court determined that Robert committed fraud and breached his fiduciary duties to Appellees in connection with Appellees' investments in limited liability companies Robert managed and controlled.

incurred in Arizona." The Swagertys filed an appeal, but later abandoned the appeal.

¶5 Thereafter, the Swagertys filed a motion for relief from the garnishment order pursuant to Ariz. R. Civ. P. 60(c)(4) or (6), arguing that the order was void because Kathi was discharged from the bankruptcy judgment and, therefore, the debt was not enforceable against her after-acquired community property. The court denied the motion, finding:

> [S]ubsequently acquired community property of Kathi Swagerty is properly subject to garnishment under Arizona Law and that this is consistent with current bankruptcy law as it relates to the innocent spouse's community property being subject to garnishment while her separate property remains protected.

The Swagertys appealed from this order, but later withdrew the appeal.

¶6 On September 11, 2008, Appellees filed an application for writ of garnishment seeking to garnish Kathi's wages. The Swagertys objected, and the court ultimately determined that Kathi's wages were subject to garnishment.

¶7 In February 2009, Robert and Kathi entered into a consent decree of legal separation. Thereafter, Kathi moved to quash the writ of garnishment against her wages. She argued that her wages were now her separate property, and therefore were not subject to garnishment to satisfy the bankruptcy

judgment. After oral argument, the court denied the motion to quash, explaining:

> [U]nder Hamlin v. Community Garden Bank, 182 Ariz. 627, 898 P.2d 1005 (App. 1995), [the Swagertys'] legal separation agreement does not affect [Appellees'] rights to pursue collection of the North Carolina Bankruptcy Judgment ("Debt"). This Court has already ruled on September 15, 2008 . . . and it is law of the case, that the post-petition community property of Defendant Kathi A. Swagerty is properly subject to garnishment for payment of the Debt. Thus, despite the Legal Separation Agreement, the separate property wages of Kathi A. Swagerty are subject to continuing garnishment until the Debt is satisfied.

Kathi timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(F)(3).

DISCUSSION

¶8 Kathi contends that the superior court erred as a matter of law by permitting Appellees to garnish her sole and separate wages. Specifically, Kathi contends: (1) the bankruptcy judgment is Robert's separate debt; (2) the garnishment order conflicts with the United States Bankruptcy Code ("Code") and the bankruptcy judgment, and therefore violates the doctrine of federal preemption; and (3) the superior court erred by applying *Hamlin*. These are issues of law that we review *de novo*. *Cmty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 630, 898 P.2d 1005, 1008 (App. 1995) (we review issues of law *de novo*); *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000) (property

characterization is an issue of law that we review *de novo*); *Hutto v. Francisco*, 210 Ariz. 88, 90, ¶ 7, 107 P.3d 934, 936 (App. 2005) (we review federal preemption issues *de novo*); *Paczosa v. Cartwright Elementary Sch. Dist. No. 83*, 222 Ariz. 73, 77, ¶ 14, 213 P.3d 222, 226 (App. 2009) (we review the court's application of law to facts *de novo*).

A. Nature of the Debt

¶9 First, Kathi contends that the bankruptcy judgment constitutes Robert's separate debt. Based on its prior rulings, the superior court determined the bankruptcy judgment was a community debt. There was no error in this finding.

¶10 Pursuant to A.R.S. § 25-215(C) (2007), "[t]he community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state." Similarly, the community is liable for intentional torts of either spouse if the act was intended to benefit the community. *Selby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342, 349 (1982).

¶11 In its earlier rulings, the court had found the debt would have been a community debt had it been incurred in Arizona. Additionally, the court found that the Swagertys' community property was liable for the debt because Robert's tort benefitted the community. Therefore, the court determined that the debt was community. *See Wine v. Wine*, 14 Ariz. App. 103,

105, 480 P.2d 1020, 1022 (1971) (defining community debt as "obligations incurred during a marriage for the community or by virtue of the community property or income"). The court's rulings are consistent with Arizona law. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Greene*, 195 Ariz. 105, 108, ¶ 12, 985 P.2d 590, 593 (App. 1999) (holding that a domesticated foreign judgment against one spouse could be enforced against community property).

¶12 Similarly, the characterization of a debt as community in nature under Arizona law does not conflict with the Code or the bankruptcy judgment. Under the Code, community property is liable for a debt if a debt constitutes a community claim. *In re Maready*, 122 B.R. 378, 381 (B.A.P. 9th Cir. 1991); *see also* 11 U.S.C. § 101(7) (2006) (a "community claim" is one that arises prior to the commencement of a bankruptcy proceeding for which community property is liable). Generally, "[i]f the debtor's property is liable for a claim against either [the debtor or the debtor's spouse], that claim is a 'community claim.'" *In re Sweitzer*, 111 B.R. 792, 793 (Bankr. W.D. Wis. 1990) (citation omitted). State law determines whether a creditor holds a community claim. *In re Soderling*, 998 F.2d 730, 733 (9th Cir. 1993) (citing *Sweitzer,* 111 B.R. at 793); *In re Rollinson,* 322 B.R. 879, 882 (Bankr. D. Ariz. 2005). Further, subsequently acquired community property may be used to

satisfy a debt from which one spouse is discharged and the other spouse is not. *See In re LeSueur*, 53 B.R. 414, 416 (Bankr. D. Ariz. 1985) ("[T]he Code's clear policy is that the economic sins of either spouse shall be visited upon the community when a discharge is denied.").

¶13 Here, the superior court, applying Arizona law, appropriately determined that Appellees hold a community claim. There was no error in the court's previous rulings allowing Appellees to garnish the Swagertys' community property to satisfy the bankruptcy judgment.[2]

B. Federal Preemption

¶14 Next, Kathi contends that the court's order allowing garnishment of her sole and separate wages conflicts with the bankruptcy judgment and the Code, and therefore violates the doctrine of federal preemption. Appellees contend that this argument is waived.

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[2] Kathi contends that the debt cannot be community because it was incurred while the parties resided in North Carolina -- a state that does not recognize community property law. Appellees take a position at the other extreme end of the spectrum -- they contend that once the parties took up residence in Arizona, the claim became a community debt and even after termination of the community by legal separation, Kathi remains permanently liable on the debt because the family court's orders are not binding upon creditors. We view both positions as incorrect. Married couples may move to Arizona with existing debts, and these are to be characterized according to Arizona law. But once the community terminated, Kathi's income became her separate property. The force of a federal judgment holding her personally immune from collection then inured to her benefit and acts to protect her separate property.

¶15 Addressing Appellees' argument first, we decline to find this argument waived. Generally, arguments not raised in the superior court are waived on appeal. *Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7, 130 P.3d 1000, 1002 (App. 2006). This rule is procedural, not jurisdictional. *Id.* at ¶ 8. Here, although Kathi did not raise the federal preemption issue in her motion to quash, she discussed preemption at oral argument on that motion. Moreover, in her motion to quash, Kathi asserted that she was discharged from the bankruptcy judgment. In view of the obvious preemption implications of any bankruptcy judgment, we find this sufficient to put the issue before the superior court and to preserve the issue for appeal. *See Long v. City of Glendale*, 208 Ariz. 319, 330 n.7, ¶ 36, 93 P.3d 519, 530 n.7 (App. 2004); *Alano Club 12, Inc. v. Hibbs*, 150 Ariz. 428, 434-35, 724 P.2d 47, 53-54 (App. 1986).

¶16 Pursuant to the preemption doctrine, federal law supersedes conflicting state law. *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, ¶ 57, 18 P.3d 722, 737 (App. 2001); *see also City of Phoenix v. Ariz. Dep't of Envtl. Quality*, 205 Ariz. 576, 580, ¶ 13, 74 P.3d 250, 254 (App. 2003) (noting that the goal in preemption cases is to determine whether state law is consistent with the purpose and structure of a federal statute). Federal courts have plenary power to administer bankruptcy cases. *In re McGhan*, 288 F.3d 1172, 1179 (9th Cir.

2002); 28 U.S.C. § 1334(a) ("[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11."). It is well settled that state courts have no authority to modify discharge orders. *McGhan*, 288 F.3d at 1179-80; *see also Miller v. Nat'l Franchise Servs., Inc.*, 167 Ariz. 403, 405, 807 P.2d 1139, 1141 (App. 1991) ("State laws and actions which are inconsistent with federal bankruptcy law are preempted by the Code.").

¶17 "A Chapter 7 bankruptcy discharge releases the debtor from personal liability for her pre-bankruptcy debts." *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005) (citation omitted); *accord* 11 U.S.C. § 727(b). "A discharge is the 'legal embodiment of the idea of the fresh start; it is the barrier that keeps the creditors of old from reaching the wages and other income of the new.'" *Ybarra*, 424 F.3d at 1022 (citation omitted). Once a debtor receives a discharge, pre-bankruptcy creditors are precluded from collecting property from the debtor. 11 U.S.C. § 524(a). Therefore, a debtor is entitled to injunctive relief under the Code if a creditor seeks recovery of a discharged debt. *Flexmaster Aluminum Awning Co. v. Hirschberg*, 173 Ariz. 83, 87, 839 P.2d 1128, 1132 (App. 1992).

¶18 Here, Kathi received a discharge of all debts listed in her bankruptcy petition. This included Appellees' claims. Further, the district court issued the bankruptcy judgment

against Robert only, and expressly provided that Appellees "have and recover nothing from Kathi A. Swagerty." The superior court's garnishment order, however, allows Appellees to recover on the bankruptcy judgment from Kathi's sole and separate property. This order directly conflicts with both the bankruptcy court's discharge order and the bankruptcy judgment. Pursuant to the preemption doctrine, the garnishment order cannot be upheld.[3]

C. Application of *Hamlin*

¶19 Appellees contend that *Hamlin* is on point and controlling. We disagree.

¶20 In *Hamlin*, a creditor obtained a default judgment against the wife for unjust enrichment based on her husband's unauthorized use of funds for the benefit of the community. 182 Ariz. at 629, 898 P.2d at 1007. In determining whether the creditor could garnish the wife's post-dissolution earnings, we found that the default judgment established a community obligation for which the wife was jointly liable. *Id.* at 630-32, 898 P.2d at 1008-10. Applying Arizona law, we held that the former spouses remained jointly liable for the community debt

[3] Further, the bankruptcy judgment is res judicata as to Kathi's liability on the debt and Appellees' ability to collect on the debt from Kathi. *See Forty-Four Hundred E. Broadway Co. v. 4400 E. Broadway*, 135 Ariz. 265, 267, 660 P.2d 866, 868 (App. 1982) (bankruptcy judgments are entitled to full faith and credit, and res judicata prevents re-adjudication of issues litigated in bankruptcy proceedings).

after their divorce, and therefore the creditor could garnish the wife's post-dissolution wages. *Id.* at 631, 898 P.2d at 1009.

¶21 *Hamlin* is distinguishable from the present case for the simple reason that it did not involve bankruptcy. *See In re Oliphant*, 221 B.R. 506, 509 (Bankr. D. Ariz. 1998) (addressing *Hamlin* in a bankruptcy case concerning dischargeability of a debt incurred by one spouse during marriage and stating, "[i]f this case did not involve a bankruptcy, [the creditor] would be able to collect on its judgment from [the innocent spouse's] post divorce separate property"). Moreover, in *Hamlin*, the creditor actually obtained a judgment against the wife. 182 Ariz. at 629, 898 P.2d at 1007. Here, by contrast, Kathi received a discharge of Appellees' claims and was expressly excluded from the bankruptcy judgment on which Appellees are now trying to collect. To apply the holding in *Hamlin* under these circumstances would be to elevate state community property law over federal bankruptcy law and violate the doctrine of federal preemption. Further, application of *Hamlin* would be inconsistent with case law protecting an innocent spouse's separate property from liability. *See, e.g., Alberta Secs. Comm'n v. Ryckman*, 200 Ariz. 540, 30 P.3d 121 (App. 2001) (modifying a foreign judgment obtained against the husband based on his securities violations in order to preclude recovery

against the wife's sole and separate property); *LeSueur*, 53 B.R. 414 (concluding that the wife's separate property was not liable for a debt from which she but not her husband was discharged in bankruptcy proceedings).

¶22 We therefore conclude that the court erred as a matter of law by refusing to reverse the order allowing Appellees to garnish Kathi's sole and separate property.

D. Attorney's Fees

¶23 Appellees request attorney's fees on appeal pursuant to A.R.S. § 12-349. That statute gives a court discretion to award attorney's fees if a party or attorney "[b]rings or defends a claim without substantial justification" or "brings or defends a claim solely or primarily for delay or harassment." A.R.S. § 12-349(A)(1)-(2). As our resolution of this appeal demonstrates, we do not find that Kathi defended against the garnishment without justification or primarily for delay or harassment. Accordingly, we deny Appellees' request for fees. As the prevailing party, we award Kathi her costs on appeal. A.R.S. § 12-341.

CONCLUSION

¶24 For the reasons set forth above, we reverse the superior court's order declining to quash the writ of garnishment against Kathi's wages, and remand for further proceedings as appropriate.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge