

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

In Re:	)	
	)	<b>JUDGE RICHARD L. SPEER</b>
Andrew Lee Dilts	)	
	)	Case No. 11-3065
Debtor(s)	)	
	)	(Related Case: 10-38340)
United Ohio Insurance Company	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Andrew Lee Dilts	)	
	)	
Defendant(s)	)	

**DECISION AND ORDER**

This cause comes before the Court on the Motion for Summary Judgment filed by the Plaintiff, the United Ohio Insurance Company, a creditor in this case. (Doc. No. 20). The Plaintiff filed its Motion for Summary Judgment in support of its complaint to determine the dischargeability of a particular debt pursuant to 11 U.S.C. § 523(a)(6), excepting from discharge any debt arising from a debtor's willful and malicious conduct. (Doc. No.1). The Defendant, Andrew Dilts, the Debtor in this case, filed a response to the Plaintiff's Motion for Summary Judgment, asking the Court to deny the Motion. (Doc. No. 24). In support of their respective positions, each of the Parties submitted written arguments; as well, each of the Parties filed supporting documentation. The Court has now had the opportunity to review these materials, and based upon this review, the Court, for the reasons set forth below, finds that the Plaintiff's Motion for Summary Judgment should be Denied.

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

**FACTS**

The Debtor, Andrew L. Dilts, is before this Court, having filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. The Debtor filed his petition for relief on December 22, 2010. In the schedules the Debtor filed with his bankruptcy petition, the Debtor listed the Plaintiff, the United Ohio Insurance Company, as a creditor holding a claim in the amount of \$23,419.51.

On April 15, 2011, the Plaintiff commenced the action now before the Court, seeking a determination that its claim, having arisen from a “willful and malicious” injury caused by the Debtor, is a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(6). The circumstances giving rise to the Plaintiff’s action to have its claim determined nondischargeable stem from these uncontroverted facts:

In 2007, the Debtor entered upon property owned by Kurt Sheldon, whom is insured by the Plaintiff, and took possession of some “hog feeders.” The Debtor then sold the “hog feeders” for scrap. As the result of his actions, the Debtor was indicted on a number of criminal counts, including Grand Theft, Theft by Deception, Breaking and Entering, and Possession of Criminal Tools. On these counts, the Debtor thereafter entered a plea of guilty to: (1) three counts of Breaking and Entering, in violation of O.R.C. § 2911.13(B), a fifth degree felony; and (2) Possession of Criminal Tools, in violation of O.R.C. § 2923.24, also a fifth degree felony. An order was then entered, finding the Debtor guilty on these charges.

Pursuant to its contract of indemnity, the Plaintiff paid to Kurt Sheldon the sum of \$23,419.51 as compensation for Mr. Sheldon’s loss of the “hog feeders.” This sum represented the Plaintiff’s assessed cash value of the “hog feeders” at the time of the loss, minus \$2,500.00, representing the insurance policy deductible. Thereafter, having become subrogated to Mr.

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

Sheldon's claim against the Debtor, the Plaintiff commenced a suit in an Ohio state court for conversion and theft, seeking to recover for its loss.

In this state-court proceeding, the Debtor did not respond to a request for admissions made by the Plaintiff; nor did the Debtor file a response to a motion for summary judgment filed by the Plaintiff. An order was subsequently entered, providing "that summary judgment is rendered for Plaintiff United Ohio Insurance Company, and against Defendant Andrew L. Dilts, in the amount of \$25,919.51 plus 4% interest per annum from November 4, 2010 and costs." (Doc. No. 1, Ex. A). In entering summary judgment, the state court did not make any specific findings of fact. It is this judgment against which the Plaintiff seeks a finding of nondischargeability pursuant to 11 U.S.C. § 523(a)(6).

**DISCUSSION**

In this adversary proceeding, the Plaintiff seeks to have the claim it holds against the Debtor/Defendant found to be a nondischargeable debt. A proceeding brought to determine the dischargeability of a particular debt is deemed to be core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I). Accordingly, this Court has the jurisdictional authority to enter final orders and judgments in this matter. 28 U.S.C. § 157(b)(1); § 1334.

Bankruptcy law is designed to afford a debtor a fresh-start. *Stellwagen v. Clum*, 245 U.S. 605, 615, 617, 38 S.Ct. 215, 218, 62 L.Ed. 507 (1918). This benefit, however, is only afforded to the "honest, but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286–87, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); *O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 831 (Bankr. N.D. Ohio 2000). To this end, certain types of debts are, as a matter of public policy, excluded from the scope of a bankruptcy discharge. 11 U.S.C. § 523(a).

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

Included among the types of debts excepted from a bankruptcy discharge are those debts which arise as the result of a “willful and malicious” injury caused by the debtor. This exception to discharge is set forth in § 523(a)(6) which provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

The Plaintiff’s complaint to determine dischargeability is based solely on this provision.

On its § 523(a)(6) cause of action, the Plaintiff seeks summary judgment. The standard for summary judgment is set forth in Rule 56(a) of the Federal Rules of Civil Procedure, as made applicable to this Court by Bankruptcy Rule 7056. Under Rule 56(a), it is provided that the “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

The party moving for summary judgment carries the initial burden to show that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After the moving party has satisfied its burden, the burden shifts to the nonmoving party to set forth “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In making its assessment, the Court must draw all reasonable inferences in favor of the non-moving party. *Brosseau v. Haugen*, 543 U.S. 194, 195, fn. 2, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004).

To except a debt from discharge under § 523(a)(6), the Plaintiff carries the burden to establish, by at least a preponderance of the evidence, the applicability of the provision. *Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 906 (Bankr. N.D.Ohio 1998). For

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

purposes of § 523(a)(6), this means the Plaintiff must show that its injury arose from conduct on the part of the Debtor that was both “willful” and “malicious.” *First Nat’l Bank v. Phillips (In re Phillips)*, 882 F.2d 302, 305 (8<sup>th</sup> Cir.1989). These terms, although they often overlap in their application, are each afforded a separate and distinct meaning. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711-12 (9<sup>th</sup> Cir. 2008).

For purposes of § 523(a)(6), the United States Supreme Court has stated that the “word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). This has been taken to mean that in an action brought under § 523(a)(6), a plaintiff is required to show that the debtor acted with the specific intent to cause injury. *Hoffman v. Anstead (In re Anstead)*, 448 B.R. 202, 205 (Bankr. N.D.Ohio 2011). In turn, the word “malicious,” as used in § 523(a)(6), has been defined by the Sixth Circuit Court of Appeals to require an act done in conscious disregard of one’s duties or without just cause or excuse. *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226, 1229 (6<sup>th</sup> Cir.1991).

The above meanings afforded to the terms “willful and malicious,” make the mental state of the Debtor a key component in an action brought under § 523(a)(6). Adjudicating a debtor’s mental state on a motion for summary judgment, however, is not normally appropriate. *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1127 (6<sup>th</sup> Cir.1981). As this Court recently explained:

The purpose of a summary judgment motion is to avoid the need for a trial, and its attendant costs, where there exists no genuine issues of material fact in dispute. Summary judgment is, therefore, never to be used merely to cut short a trial where factual issues should be explored. A trial, however, is usually necessary to adjudicate issues involving an individual’s state of mind. The reason: Determinations concerning an individual’s state of mind require a subjective assessment of the person’s intent which often can only be made by the trier-of-fact after it has had the opportunity to assess the credibility

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

and the demeanor of witnesses who testify at trial during both direct and cross examination.

*Parcels v. Gurzynski (In re Gurzynski)*, 443 B.R. 777, 779-80 (Bankr. N.D.Ohio 2010) (internal citations omitted). Actions brought under § 523(a)(6) are, therefore, normally required to be adjudicated by trial, not by summary judgment.

Yet, as applied to § 523(a)(6), the entry of summary judgment may still be appropriate where the record before the court does not present a material dispute regarding a debtor's state of mind. *Double v. Cole (In re Cole)*, 428 B.R. 747, 752 (Bankr. N.D.Ohio 2009). In an action brought under § 523(a)(6), this situation may arise when a prior determination regarding a debtor's state of mind has been made in another judicial forum. Often, when this has occurred, the party prevailing in the prior litigation will seek to invoke the doctrine of collateral estoppel. Collier on Bankruptcy ¶ 523.12[5] (Alan N. Resnick & Henry J. Sommer eds., 16<sup>th</sup> ed.).

The collateral estoppel doctrine holds that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). The doctrine, thus, operates to bind parties to prior determinations made in another forum, and is intended “to protect parties from multiple lawsuits and the possibility of inconsistent decisions, and to conserve judicial resources[.]” *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550, 110 S.Ct. 1331, 1335, 108 L.Ed.2d 504 (1990).

As it stands in this case, the Plaintiff's claim against the Debtor was the subject of two prior suits brought in state court, one criminal, one civil. In the criminal case, a plea of guilty was entered by the Debtor; while in the civil case, summary judgment was entered after the Debtor failed to respond to both the Plaintiff's request for admissions and the Plaintiff's motion for summary judgment. Consequently, based upon this procedural posture, in neither the criminal matter or the

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

civil matter did the Debtor undertake to actually litigate the allegations made against him, thereby negating a necessary attribute of the collateral estoppel doctrine.

In its Motion for Summary Judgment, however, the Plaintiff, while not directly seeking to have the collateral estoppel doctrine applied, relies key aspect of the doctrine: Its binding effect of matters raised in prior litigation. To this end, the Plaintiff takes the position that, based upon the record it presented from the criminal and civil cases previously brought against the Debtor, this Court can make an independent finding-of-fact that the Debtor willfully and maliciously caused it injury. For this position, the Plaintiff called attention to the Debtor having “made numerous factual admissions against his interest in the course of the criminal case and the underlying civil case.” (Doc. No. 22, at pg. 2).

Looking first at the criminal matter, the evidence before the Court shows that the Debtor was adjudged guilty on three counts of Breaking and Entering and one count of Possession of Criminal Tools. According to the Plaintiff, this establishes the Debtor’s liability for purposes of § 523(a)(6) because the Debtor “has already admitted to entering the property willfully to take property by theft.” *Id.* at pg. 3. Some support for the Plaintiff’s position can be found in this Court’s decision rendered in the case of *Cincinnati Ins. Co. v. Humphrey*, (*In re Humphrey*), 362 B.R. 860 (Bankr. N.D.Ohio 2006).

In *In re Humphrey*, the debtor misappropriated several large pieces of heavy machinery. *Id.* at 862. The owner of the misappropriated property loss was then indemnified for his loss based upon a policy of insurance held with the plaintiff. *Id.* Based upon his misappropriation of property, a number of criminal charges were brought against the debtor, with the debtor eventually entering a plea of guilty to seven felony counts, including a charge of Grant Theft. *Id.*

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

After the debtor filed for bankruptcy relief, the plaintiff then commenced an adversary proceeding seeking to have its claim against the debtor determined to be a nondischargeable debt. *Id.* As the basis for its complaint, the plaintiff relied on § 523(a)(4), which excludes from discharge any debt arising from an act of larceny committed by a debtor. *Id.* at 864. Disposition of this matter was adjudicated on the plaintiff's motion for summary judgment, with the Court finding the debt nondischargeable. *Id.* at 866.

In finding for the plaintiff, this Court relied on the fact that the *mens rea* requirement for grand theft brought against the debtor, and to which the debtor pled guilty, was at least equal to the culpability level required to sustain a finding of larceny under § 523(a)(4) – with larceny being defined as the “fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner.” *Id.* at 864. Resultantly, based upon this particular circumstance, the Court found that the debtor's plea of guilty for Grand Theft was sufficient to support an independent finding of nondischargability based upon § 523(a)(4)'s exception to discharge for larceny. *Id.* at 866.

Consistent with *In re Humphrey*, there is no reason to suppose that a plea of guilty for theft would not likewise be sufficient to supporting an independent finding of nondischargeability under § 523(a)(6). But this is not what occurred in this case.

The evidence presented to the Court shows that the Debtor, while indicated for the offenses of Grand Theft and Theft by Deception, did not actually enter a plea of guilty to these counts; nor was the Debtor ever convicted on these counts. Instead, the Debtor only pled guilty to the lesser charges brought against him in the indictment. Specifically, the Debtor pled guilty to three counts of Breaking and Entering, in violation of O.R.C. § 2911.13(B), a fifth degree felony; and (2) one count of Possession of Criminal Tools, in violation of O.R.C. § 2923.24, also a fifth degree felony.



**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

Neither of these pleas, however, constitute an admission by the Debtor that he intended to commit the act of theft against Mr. Sheldon's property.

First, to sustain a conviction for breaking and entering under § 2911.13(B), it is provided: "No person shall trespass on the land or premises of another, with purpose to commit a felony." This is contrast to a charge of breaking and entering under § 2911.13(A)<sup>1</sup>, which prescribes: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any *theft offense*, as defined in section 2913.01 of the Revised Code, or any felony." (emphasis added).

The crime of Breaking and Entering under Ohio law, thus, comes in two forms, with the distinction between the two forms being dependent on whether a theft occurred. This case is, therefore, unlike *In re Humphrey* because the Debtor, by pleading guilty to the charges brought against him under § 2911.13(B), and not § 2911.13(A), made no admission that he specifically intended to cause harm to Mr. Sheldon's property by committing the act of theft as occurred in *In re Humphrey*. The same is true of the Debtor's plea of guilty to the charge of Possession of Criminal Tools, in violation of O.R.C. § 2923.24.

Under O.R.C. § 2923.24, the crime of theft is not an element to a charge of Possession of Criminal Tools. In addition, there is no requirement under this statute that a person specifically intend to cause harm to another. Instead, O.R.C. § 2923.24 simply proscribes that, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." O.R.C. § 2923.24(A).

---

<sup>1</sup>

In support of its Motion for Summary Judgment, the Plaintiff put forth that the Debtor was convicted for a violation of this provision. No evidence, however, was provided to the Court of this conviction.

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

Consequently, for these reasons, the Debtor's plea of guilty in the state court criminal matters does not enable the Court to make an independent finding that he acted "willfully and maliciously" for purposes of § 523(a)(6). The result is the same for the civil matter brought by the Plaintiff against the Debtor.

First, contrary to the Plaintiff's position, the Debtor's failure to respond to its request for admissions in the state-court civil matter, while it may have constituted an admission in that forum, does not necessarily operate as an admission in this proceeding. Under Ohio's Rules of Civil Procedure, it is provided: "Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding." OHIO R. CIV. P. 36(B). *See also Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205 (1979), (the doctrine of res judicata, or claim preclusion, does not apply to dischargeability proceedings in bankruptcy).

Second, the state court, in entering summary judgment for the Plaintiff, did not make any specific findings. Consequently, there is nothing to indicate that liability was imposed upon the Debtor for theft, with it being entirely reasonable that the state court based its decision solely on the Plaintiff's cause of action for conversion. However, as it applies to § 523(a)(6), it is well established that not every tort judgment for conversion is exempt from discharge. *Kawaauhau v. Geiger*, 523 U.S. 57, 64 118 S.Ct. 974, 975, 978, 140 L.Ed.2d 90, 92 (1998); *Parcels v. Gurzynski (In re Gurzynski)*, 443 B.R. 777, 780 (Bankr. N.D.Ohio 2010).

This is not to say that the determinations made against the Debtor, both in the criminal matter and civil matter, are not germane to the issue of the Plaintiff's action under § 523(a)(6). At the same time, such determinations are not conclusive, and thus the Court cannot entirely discount the explanations offered by the Debtor for his conduct. In an affidavit submitted to the Court, the Debtor contends that permission was given by Mr. Sheldon to take the hog feeders. The Debtor also set

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

forth that it was his belief that Mr. Sheldon attempted to improperly profit from his loss. (Doc. No. 24, Ex. A).

When presented with a motion for summary judgment, it is not this Court's function to weigh the evidence or make credibility determinations. *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1225 (11<sup>th</sup> Cir. 1999). Rather, the Court's function is only to determine, based on the record, whether there is a genuine issue of material fact requiring trial. If a conflict arises between the evidence presented by both sides, the court must accept as true the allegations of the non-moving party, and "all inferences must be drawn" in its favor. *American Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3<sup>rd</sup> Cir. 2009). Moreover, as here, where the Plaintiff bears the burden of proof at trial, summary judgment can only be entered on a factual issue when evidence is so powerful in the movant's favor that no reasonable trier-of-fact would be free to disbelieve it. *Shakur v. Schriro*, 514 F.3d 878, 890 (9<sup>th</sup> Cir. 2008).

Consequently, for all these reasons, the Court is not persuaded that the record of the criminal and civil matters brought against the Debtor in state court is sufficient to allow this Court to make, without a trial, an independent determination that the Debtor acted "willfully and maliciously" for purposes of § 523(a)(6). In reaching these conclusions, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

**United Ohio Insurance Company v. Andrew Lee Dilts**  
**Case No. 11-3065**

Accordingly, it is

***ORDERED*** that the Motion for Summary Judgment filed by the Plaintiff, United Ohio Insurance Company, be, and is hereby, DENIED.

***IT IS FURTHER ORDERED*** that a Trial is hereby set for Wednesday, February 8, 2012, at 1:30 P.M., in Courtroom No. 1, Room 119, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

Dated: December 20, 2011

---

Richard L. Speer  
United States  
Bankruptcy Judge