THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-15681
	)	
KARL EDMOND TRAVIS,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
DR. WILFRED ANDERSON,	)	Adversary Proceeding No. 98-1332
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
KARL EDMOND TRAVIS,	)	
	)	**MEMORANDUM OF OPINION**
Defendant.	)	

In 1995, the Creditor-Plaintiff Dr. Wilfred Anderson provided medical services to the Debtor-Defendant Karl Travis. Dr. Anderson filed a claim for reimbursement with the Debtor's insurance company; the insurer sent the Debtor a check without an indication that it related to these medical services. The Debtor used the insurance proceeds to pay other bills. The Debtor filed his Chapter 7 case on July 28, 1998, at which time Dr. Anderson's bill was still unpaid. Dr. Anderson filed this complaint under 11 U.S.C.§ 523 seeking a determination that the debt is non-dischargeable on grounds of false pretenses, fraud or conversion because the Debtor did not use the insurance proceeds to pay Dr. Anderson's bill. The trial was held on June 18, 1999.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered in this District on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

The Debtor sought medical treatment from Dr. Wilfred Anderson (the "Plaintiff" or "Dr. Anderson") on April 13, 1995. At that visit, the Debtor gave the office information about his health insurance carried through the National Association of Letter Carriers Health Benefit Plan ("the Insurer"). The Debtor paid a $50 co-pay and was told that the office would submit a request for any additional payments to the Insurer. He sought treatment from Dr. Anderson at least one other time, which was no later than November 1995.[1] The treatments consisted of physical examinations, laboratory work, and prescriptions for sexually transmitted diseases.

Sometime in 1995, Dr. Anderson's office submitted claims for reimbursement to the Insurer in the amount of $1,519 for physical examinations and laboratory work for four visits. There was no evidence as to the exact date on which the claims were submitted. The Insurer sent a check to the Debtor in the amount of $1,070 payable only to the Debtor ("the Check"). The Debtor received the Check in about November 1995. The Check did not have any notation that it

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[1] The parties disagree as to the number of times the Debtor came to Dr. Anderson's office. Dr. Anderson says there were four visits, as documented in the medical records. The Debtor says that there were only two and that the other two bills are fraudulent. The Court notes that the medical records are sketchy (Plaintiff's Exh.7) and do not necessarily prove that the Debtor received all of the medical services billed. In light of the disposition of this Adversary Proceeding, however, it is not necessary to resolve that issue.

was for payment of services rendered by Dr. Anderson. The Debtor had not received any checks directly from any insurance carrier in the past.

The Debtor admitted that he cashed the Check and paid some bills with it. While he also admitted that he made no effort to find out why the Check had been sent to him, he testified that it never occurred to him that the money related to Dr. Anderson's treatment because he could not imagine that treatment for a sexually transmitted disease could result in such a high bill. There was no credible evidence that the Debtor knew the amount of the bill before he received the Check.

The Debtor also testified that he had been hospitalized for hernia surgery at some point before he received the Check[2] and that other letter carriers had told him that they had received payments from the Insurer after they had surgery. Although the Debtor did not directly submit any claim to the Insurer related to that surgery, he thought the hospital or the surgeon might have done so, causing the Insurer to issue the Check to him.

Angelina Johnson, Dr. Anderson's office manager, testified that she called the Insurer--on an unidentified date--and was told that the insurer had sent a $1,519 check to the Debtor. When she called the Debtor–again on an unidentified date–he said that he had the Check and would mail it to Dr. Anderson. She called him again a month later when the Check had not arrived; the Debtor told her then that he had spent the money, but would make monthly payments to pay the bill.

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[2] Plaintiff's Exhibit 7 indicates that Dr. Anderson referred the Debtor to Dr. Warren for a hernia problem after the April 13, 1995 office visit. The Debtor testified that it was Dr. Warren who performed the hernia surgery. The surgery, then, presumably took place after April 13, 1995.

The Debtor's account of Dr. Anderson's collection efforts was different. He testified that Dr. Anderson called him to ask about the outstanding bill. By that time, the Debtor had already cashed the Check and spent the money. He did agree to pay the bill over time, but failed to do so.

The Court finds the Debtor's version of the Check cashing to be more credible. For the Plaintiff's version to be accurate, Ms. Johnson's first collection phone call would have had to be made in the window of time after the Debtor received the check, but before he cashed it. In the absence of any dates to establish when the claim was submitted, when Dr. Anderson's office called the Insurer, and when Dr. Anderson's office called the Debtor, the Court finds it more likely than not that the first collection phone call was not made during that window of time. That leads the Court to conclude that the Debtor had cashed the Check and spent the money before anyone from Dr. Anderson's office called to ask about the unpaid bill.

THE POSITIONS OF THE PARTIES

Dr. Anderson's counsel acknowledged in closing argument that the Debtor had the right to receive payment under his insurance contract directly from the Insurer. This non-dischargeability claim is based on what happened after the Debtor got the check. Dr. Anderson argues that the Debtor knew that: Dr. Anderson would submit an insurance claim, the money was "earmarked" for him, the money was not earmarked for the Debtor, and the Debtor had a fiduciary duty to find out whose money it was. He argues that the Debtor kept the money under the false pretense that it was his, which also amounts to fraud and conversion. Dr. Anderson cites 11 U.S.C. §523(a)(2)(A) as the basis for this claim.

The Debtor argues that there was no intent. He claims he had never gotten a check for medical payments directly from any insurer, did not even think that the Check might relate to Dr. Anderson because the amount of the Check was so large and the treatment provided had seemed so minimal, and thought that it related instead to his hernia surgery. He also contends that there was no misrepresentation made to the Insurer or to Dr. Anderson. While his counsel admits that the Debtor may have been negligent in his handling of these funds, he denies that Dr. Anderson proved fraud.

DISCUSSION

11 U.S.C. § 523(a)(2)(A)

A discharge under 11 U.S.C. § 727(b) does not discharge an individual from a debt:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition; . . . .

11 U. S.C. § 523(a)(2)(A). Exceptions to discharge are to be narrowly construed against the creditor and in favor of the debtor based on the Bankruptcy Code's policy to give honest debtors a fresh start. *Mfrs. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082 (6th Cir. 1988).

In order to have a debt declared non-dischargeable under this section, a creditor must prove that the debtor obtained property through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth; the debtor intended to deceive the creditor; the creditor justifiably relied on the misrepresentation; and the reliance was the proximate cause of the loss. *In re Rembert,* 141 F.3d 277 (6th Cir. 1998). A false pretense is

"an implied misrepresentation or conduct intended to create or foster a false impression." *Blascak v. Sprague (In re Sprague),* 205 B.R. 851, 859 (Bankr. N.D. Ohio 1997). The debtor's intent is measured by a subjective standard. *In re Rembert.* The question is whether it is more probable than not that the debtor had a fraudulent intent, taking into account all of the circumstances. *Id.* The creditor has the burden of proving each element under § 523 by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Dr. Anderson argues that the Debtor kept the Check under false pretenses, the false pretense being that the money belonged to him. The Debtor denies knowing that the Check related to Dr. Anderson or having committed any fraud.

Dr. Anderson's case cannot get beyond the first part of this analysis: did the Debtor obtain the Check through a material misrepresentation known to the Debtor to be false when made or made with gross recklessness as to its truth? Dr. Anderson admitted that the Debtor had the right to receive the Check from his insurance company. If he had the right to receive it, then he did not obtain it through a material misrepresentation. Dr. Anderson's argument that the Debtor *kept* the Check under false pretenses is not established by the evidence. Dr. Anderson did not prove that the Debtor made an implied misrepresentation or created a false impression to keep the Check. As found above, by the time anyone from Dr. Anderson's office called the Debtor, the Check had been cashed and spent. Even going beyond that first element, Dr. Anderson did not prove, or argue, that he justifiably relied on any misrepresentation or that any such reliance was the proximate cause of his loss. Dr. Anderson did not meet his burden of proof under § 523(a)(2)(A).

Dr. Anderson also argued in support of his false pretenses argument that the Debtor had a fiduciary duty to investigate the source of the Check. The Debtor did not cite any law in support of this argument and there was no evidence to establish that such a duty exists. To the extent that the argument is that Dr. Anderson and the Debtor had a fiduciary or privileged relationship as doctor and patient, that does not establish that a fiduciary relationship existed between them with respect to paying the bill.

11 U.S.C. § 523(a)(6)

Under § 523(a)(6) of the Bankruptcy Code, a discharge under 11 U.S.C. § 727 does not discharge a debtor from a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." The United States Supreme Court has determined that this section requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998); see *Salem Bend Condominium Assoc. v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345 (B.A.P. 6th Cir. 1998). Debts arising from intentional torts are, therefore, not dischargeable under § 523(a)(6).

While not citing to this section or addressing the *Geiger* standard, Dr. Anderson argues that the Debtor converted the Check. Conversion under Ohio law "is generally defined as the wrongful assuming of unauthorized control over the personal property of another, whether it is done purposefully or not." *Fulks v. Fulks*, 95 Ohio App. 515, 518, 121 N.E.2d 180, 182 (1953). The tort of conversion is not necessarily a fraudulent or an intentional tort. If a debt for conversion is based on a deliberate or intentional act and injury, however, it is not dischargeable under §523(a)(6). *J. Bowers Construction Co. v. Williams (In re Williams)*, 233 B.R. 398

(Bankr. N.D. Ohio 1999); *First Liberty Bank v. LaGrone (In re LaGrone)*, 230 B.R. 900 (Bankr. S.D. Ga. 1999).

The evidence did not establish a conversion claim. As noted above, the Debtor had the right to have the Check paid to him directly. There was no evidence that the Check was the personal property of Dr. Anderson. The Debtor owed a debt to Dr. Anderson; the Debtor's Insurer issued the Check to cover part of that debt. While the Debtor had an obligation to pay the medical bill, there was no evidence that the Debtor had a legal duty to do so by delivering the Check itself or the direct proceeds of the Check to Dr. Anderson. The Check was not, therefore, the property of Dr. Anderson. As the Check was not Dr. Anderson's property, the Debtor did not convert it when he failed to turn it over to Dr. Anderson.

CONCLUSION

The Plaintiff, Dr. Wilfred Anderson, did not meet his burden of proof under 11 U.S.C. §523. A separate judgment will be entered granting judgment in favor of the Debtor, Karl Travis, on the Amended Complaint.

Date: 28 June 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on:

LuAnn Mitchell, Esq.
Oscar Trivers, Esq.
Brian Bash, Trustee

Date: Joyce L. Gordon, Secretary

By: 6/28/99

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DR. WILFRED ANDERSON,	)	Adversary Proceeding No. 98-1332
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
KARL EDMOND TRAVIS,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment on the Amended Complaint is entered in favor of the Defendant-Debtor Karl Travis.

Date: 28 June 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: LuAnn Mitchell, Esq.
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