

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
DWAIN E. MILLER and *
BRENDA G. MILLER, * CASE NUMBER 03-44861
*
Debtors. *
*

*
MAHONING VALLEY HOSPITAL, INC. *
fka SPECIALTY HOSPITAL OF *
MAHONING VALLEY, INC., * ADVERSARY NUMBER 05-4076
*
Plaintiff, *
*
vs. *
*
DWAIN E. MILLER and *
BRENDA G. MILLER, * THE HONORABLE KAY WOODS
*
Defendants. *
*

M E M O R A N D U M O P I N I O N

This cause came before the Court on Cross-Motions for Summary Judgment. Debtors/Defendants Dwain and Brenda Miller filed their Motion for Summary Judgment on January 31, 2006. With leave of Court, Plaintiff Mahoning Valley Hospital *fka* Specialty Hospital of Mahoning Valley, Inc. filed its Motion for Summary Judgment on March 1, 2006, and its Response to Debtors/Defendants' Motion for Summary Judgment on March 9, 2006. With leave of Court, Debtors/Defendants filed their Response to Plaintiff's Motion for Summary Judgment on July 13, 2006.¹

¹Plaintiff, in its Response to Debtors/Defendants' Motion for Summary Judgment, states that genuine issues of material fact exist that preclude summary judgment. Debtors/Defendants, in their Response to Plaintiff's Motion for Summary Judgment, refer to and reiterate Plaintiff's statement. However, neither party identifies the genuine issue of material fact that precludes summary judgment. The only contested fact in this case is whether an explanation of benefits form accompanied the insurance check. See p. 3 *infra*. However, that factual dispute does not preclude summary judgment. There is sufficient evidence before the Court to support the conclusion that Miller willfully and maliciously converted the insurance check at issue regardless of whether Miller received an explanation

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I. FACTS

The following facts are taken from the Rule 2004 examinations of Debtors/Defendants Dwain Miller ("Miller") and Brenda Miller ("Mrs. Miller") unless otherwise noted ("Tr."). From June 6, 2002 to July 5, 2002, Miller was a patient at Plaintiff Mahoning Valley Hospital ("Plaintiff" or "Mahoning Valley Hospital"). (Explanation of Benefits Form ("EOB Form"), Ex. A attached to Plaintiff's Response to Debtors/Defendants' Motion for Summary Judgment.) Miller was admitted to Mahoning Valley Hospital as a result of an injury he sustained while he was a patient at Northside Hospital.²

On the day he was admitted to Mahoning Valley Hospital, Miller signed a form, captioned "Hospital Care Consent/Conditions of Admission" which included an irrevocable assignment of insurance benefits to the Hospital. (Hospital Care Consent/Conditions of Admission Form ("Admission Form"), Ex. B attached to Plaintiff's Response to Debtors/Defendants' Motion for Summary Judgment.)

Paragraph 2 of the Admissions Form, captioned "Irrevocable Assignment," reads, in pertinent part:

of benefits form.

²Miller testified that, after undergoing hernia surgery at Northside Hospital, someone "dropped a pole on [him] at [Northside Hospital]" and he "wound up in the wound center and five surgeries to follow." (Tr. at 19.) Miller further testified that he has filed a lawsuit against Northside Hospital. (Tr. at 29.)

In consideration of services rendered and to be rendered, I irrevocably assign and transfer to the Hospital all right, title and interest in all benefits payable for Hospital services. The assignment and transfer includes all right, title and interest in all insurance policies [and] employee benefit plans I direct all Responsible Parties to directly pay to the Hospital all Benefits and amounts due for services rendered by the Hospital. This assignment encompasses the total amounts owed to both the Hospital and physicians, consultants, or other providers providing care during this period of care.

(Admission Form at 1.)

At all times relevant to the above-captioned case, Highmark Blue Cross/Blue Shield ("Highmark") provided medical insurance coverage to Miller. (Tr. at 31-32.) On or about October 6, 2002, Miller received a check in the amount of \$43,126.80 from Highmark for the medical services rendered by Plaintiff during Miller's hospitalization. (Highmark check no. 106851853, Plaintiff's Response to Defendants' First Request for Production of Documents at 7.) The check was negotiated solely to Miller. (*Id.*)

According to Miller, the check was not accompanied by any additional documentation, except "a little stub with the amount." (Tr. at 37.)³ However, Rene Halligan,³ the Records Custodian for Highmark, stated that the company's records include a copy of the cancelled check as well as an EOB Form. (Affidavit of Records Custodian dated February 9, 2005, Plaintiff's Response to Defendants' First Request for Production of Documents at 6.) The EOB Form sets forth the hospital charges intended to be covered by the Highmark check.

³Even if the check was not accompanied by an appropriate EOB Form, there was no reasonable or credible basis for Miller to believe that the money belonged to him. See pp. 4-6, 19-20, *infra*.

Miller further stated that the amount of the check, which was considerably larger than any medical insurance check he had received following his hospitalization, and the fact that it was made out exclusively to him with no reference to Plaintiff, prompted him to call his attorney because he "wasn't sure [what to do with the check]." (Tr. at 32, 39.) According to Miller, "Attorney Shackelford"⁴ asked whether Miller was the sole payee listed on the check. When Miller informed Shackelford that his name was the only name on the check, Shackelford told him to "put the check in the bank." (Tr. at 32.)

When Miller was asked why he called Shackelford to inquire about the check, instead of Highmark, Miller responded that he could not recall whether he had called Highmark, but that he "called the attorney because [his] faith was in [Shackelford] at that point." (Tr. at 34.) Miller testified that he felt he had been injured by everybody, and that he "looked to [Shackelford] for [his] guidance because [he] felt like [Shackelford] was the only person that was going to tell [him] what to do." (Tr. at 34-35.)

As a consequence of his discussion with Shackelford, Miller went to National City Bank and deposited the Highmark check in his account on October 7, 2002. (Tr. at 13.) Mrs. Miller testified that Miller signed the Highmark check and took it to the bank himself, and that he did not tell her about it "for some time." (Tr. at 60-61.) She further testified that Miller was responsible for keeping track of

⁴In their Chapter 13 Petition, Debtors/Defendants list "Attorney William Shackelford" in association with a Personal Injury Claim listed on Schedule B.

"the [family] books," because at the time Mrs. Miller was working at a nursing home and "trying to care for [Miller] medically." (Tr. at 61-62.)

Debtors/Defendants used the proceeds of the Highmark check to purchase a residence located at 222 Parkman Road NW, Warren, Ohio and a 1995 Ford Taurus; to fumigate and make improvements to the Parkman Road residence, including new paint, wall-to-wall carpeting, appliances, windows and a security system; and to reimburse Miller's uncle, who had provided financial support throughout Miller's hospitalization and recovery.⁵ (Tr. at 16-21, 40-41.)

Miller testified that, at the time he received the Highmark check, he had been sending \$25.00-50.00 a month to Plaintiff in order to pay his medical bills. According to Miller, he began sending the nominal payments to Plaintiff in response to angry phone calls he received from Plaintiff's collection department demanding payment in full. (Tr. at 33.) When Miller was asked why he chose to buy a house rather than pay what he himself had described as "a massive amount of medical bills," Miller responded:

I was trying my best to provide for my family to make sure we had a place to live and a place - because each time we were behind on the rent, we were having such horrendous conditions to try to live and I thought at least if we had a house we would have that security to know if something - I really thought I was going to die is what I thought. And I thought that if I had a house, at least they⁶ would have a house to live in, a place that was there. I remember

⁵Miller did not sign a promissory note for the money given to him by his uncle. (Tr. at 57.) Miller testified that he and his uncle did not have any type of repayment arrangement, and that he "tried to pay [his uncle] back . . . [j]ust like any relative" (Tr. at 57.)

⁶Debtors/Defendants listed no dependents on their Chapter 13 petition.

that was my thinking at the time. That is why I was really wanting to buy a house.

(Tr. at 39.)

Miller testified that he "felt [he] earned [the \$43,126.80] through all of [his] hospitalization." (Tr. at 15.) At the Rule 2004 exam, Miller explained, "I mean, I was paying payments every month to the hospital or to buy hospitalization and they were paying me in fact." (Tr. at 15.) There is no evidence before the Court to establish the total amount of the monthly payments Miller made to Plaintiff.

Debtors/Defendants purchased the Parkman Road residence on November 1, 2002 and lived there for over a year. (Tr. at 7, 16.) On September 24, 2003, Debtors/Defendants filed their Chapter 13 Petition. In November 2003, Debtors/Defendants moved to Mount Vernon, Illinois. (Tr. at 5-6.) At that time, Debtors/Defendants entered into a land contract⁷ for the Parkman Road residence with Wess Cluckey. (Tr. at 7-8.) As of the date of the Rule 2004 exam, the Cluckey family was still residing at the Parkman Road address. (Tr. at 8.) Debtors/Defendants voluntarily converted their case to a case under Chapter 7 on July 20, 2004. This adversary proceeding was filed on April 7, 2005.

In its Complaint, Plaintiff contends that the debt owed by Miller to Plaintiff for medical services rendered from June 6, 2002 to July 5, 2002 is nondischargeable. Plaintiff argues that the debt at

⁷A land contract is a contract for the purchase of real property in which the seller retains the deed or otherwise continues to have an interest in the property until the buyer makes payments in installments equal to the purchase price.

issue is the product of fraud committed by Miller while he was acting in a fiduciary capacity to Plaintiff, as well as a debt for willful and malicious injury.⁸

II. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational

⁸In the concluding paragraph of its Motion for Summary Judgment, Plaintiff asks this Court, for the first time in the case, to deny Debtors/Defendants' discharge. Because Plaintiff's request to deny Debtors/Defendants' discharge did not appear in the Complaint, and Plaintiff provided no argument in his summary judgment motion to support the denial of the discharge in this case, the Court finds that a denial of Debtors/Defendants' discharge is not supported by the evidence.

fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

III. LAW

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Code. Plaintiff bears the burden of proving that a debt is excepted from discharge. See *Meyers v. Internal Revenue Service (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91, 111 S.Ct. 654, 661 (1991)). Exceptions to discharge are narrowly construed. See *id.* (citing *Grogan*, 498 U.S. at 286-87, 111 S.Ct. at 654).

A. Fraud and Defalcation by a Fiduciary

Section 523(a)(4) of the Bankruptcy Code provides that "a discharge under [the Bankruptcy Code] does not discharge an individual debtor from any debt . . . for . . . fraud and defalcation while acting in a fiduciary capacity" 11 U.S.C. § 523(a)(4) (West 2006).

Bankruptcy courts have determined that the fraud required under § 523(a)(4) "refers to positive fraud, involving moral turpitude" *S.J. Groves & Sons Co. v. Peters (In re Peters)*, 90 B.R. 588, 605 (Bankr. N.D. N.Y. 1988) (cited with favor in *Abdel-Hak v. Saad (In re Saad)*, 319 B.R. 147, 156 (Bankr. E.D. Mich. 2004)). In addition to proving positive fraud, Plaintiff must also prove that a fiduciary relationship existed between the parties. *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996).

The elements of a § 523(a)(4) claim based upon defalcation are: (1) a pre-existing fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss. *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir.

2005) (citing *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178-79 (6th Cir. 1997)).

Unlike fraud, defalcation need not be intentional. *Capitol Indemnity Corp. v. Interstate Agency Inc. (In re Interstate)*, 760 F.2d 121, 125 (6th Cir. 1985). Furthermore, the standard of proof as to defalcation is preponderance of the evidence while fraud requires proof of each element by clear and convincing evidence. See *Peavey Electronics Corp. V. Sinchak (In re Sinchak)*, 109 B.R. 273, 277 (Bankr. N.D. Ohio 1990); *Trell v. Dunlevy (In re Dunlevy)*, 75 B.R. 914, 917 (Bankr. S.D. Ohio 1987).

For purposes of both the fraud and defalcation prongs of § 523(a)(4), the term "fiduciary relationship," is defined by federal, not state, law. *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982) ("The question of who is a fiduciary for purposes of section 17(a)(4) [the predecessor section to § 523(a)(4)] is one of federal law, although state law is important in determining when a trust relationship exists.").

To satisfy § 523(a)(4) in the context of fraud or defalcation, the debtor must hold funds in trust for a third party pursuant to an express or technical trust. *In re Blaszak*, 397 F.3d at 391 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S.Ct. 151, 79 L.Ed. 393 (1934)).

"Four requirements are necessary to establish the existence of an express or technical trust in Ohio: (1) an intent to create a trust; (2) a trustee; (3) a trust *res*; and (4) a definite beneficiary." *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003) (citing *Ternasky v. Rabatin*, 141 N.E.2d 189, 191, 76 Ohio Law Abs. 203 (1957)). Proof of an express trust in Ohio

requires clear and convincing evidence. *Ohio Farmers Insurance Co. v. Hughes-Bechtol, Inc. (In re Hughes-Bechtol, Inc.)*, 2000 WL 1091509, *10 (6th Cir. 2000) (citing *Gertz v. Doria*, 63 Ohio App.3d 235, 237, 578 N.E.2d 534 (1989)).

B. Willful and Malicious Injury

Section 523(a)(6) of the Bankruptcy Code provides that "a discharge under [the Bankruptcy Code] does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523 (West 2006).

The Supreme Court has held that only acts done with intent to cause injury, and not merely acts done intentionally, rise to the level of willful injury for the purposes of satisfying section 523(a)(6). *Kawaauhau v. Geiger*, 523 U.S. 57, 57-58, 118 S.Ct. 974, 975 (1998). In *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999), the Sixth Circuit expanded the definition of "willfulness" to include the debtor's subjective belief that the injury is "substantially certain to result" from his actions. *Id.* at 464.

A person acts maliciously when that person acts in conscious disregard of his or her duties or without just cause or excuse. See *Heyne v. Heyne (In re Heyne)*, 277 B.R. 364, 368 (Bankr. N.D. Ohio 2002) (citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 419 (Bankr. N.D. Ohio 1998)); see also *In re Saad*, 319 B.R. at 156 (citing *Tinker v. Colwell*, 193 U.S. 473, 485-86, 24 S.Ct 505 (1904) (defining "malice" under § 17(a)(2) of the former Bankruptcy Act [now

§ 523(a)(6) as "a wrongful act, done without just cause or excuse") (internal quotation marks and citations omitted)).

As the requirements of the statute are set forth in the conjunctive, a creditor must establish both willfulness and malice in order to prevail in a section 523(a)(6) action. However, two bankruptcy courts in this district have recognized that, in the great majority of cases, the same factual events giving rise to a finding of willfulness will likewise be indicative of malice. *Superior Metal Products v. Martin (In re Martin)*, 321 B.R. 437, 442 (Bankr. N.D. Ohio 2004); *CMEA Title Agency v. Little (In re Little)*, 335 B.R. 376, 383 (Bankr. N.D. Ohio 2005) ("Although the 'willful' and 'malicious' requirements will be found concurrently in most cases, the terms are distinct, and both requirements must be met under § 523(a)(6).") Both courts, however, acknowledge that the "malice" element requires "a heightened level of culpability transcending mere willfulness." *In re Martin*, 321 B.R. at 442, *In re Little*, 335 B.R. at 384.

IV. ANALYSIS

The existence of a fiduciary relationship between Plaintiff and Miller is essential to Plaintiff's fraud and defalcation claims. In its Motion for Summary Judgment, Plaintiff relies exclusively upon Miller's irrevocable assignment of his insurance benefits to Plaintiff in the Admission Form to prove the existence of an express or technical trust.

Because neither party challenges the validity of the assignment at issue in this case, the Court finds that the parties entered into

a valid assignment under Ohio law.⁹ However, Miller's assignment of the insurance proceeds to Plaintiff in the Admission Form imposes, at most, a constructive trust in Ohio:

[T]he assignor of a chose in action has no active duties to the assignee, the assignor's only duties being negative, namely, not to enforce the claim, not to make an assignment of it to a third person, and not otherwise to interfere with the assignee's right to enforce the chose in action. *An assignor who does nevertheless enforce the assigned claim holds the proceeds upon constructive trust for the assignee*

91 Ohio Jur.3d Trusts § 20 (2006) (*quoting* RESTATEMENT (THIRD) of TRUSTS § 5 (West 2006)) (Emphasis added). The constructive trust imposed upon the assignor arises to prevent unjust enrichment, not because of any trust relationship created by the assignment itself. 6 Ohio Jur.3d Assignments § 41 (2006).

In addition to the fact that assignments of choses in action have not been interpreted to create express trusts in Ohio, a cursory review of the assignment language in paragraph 2 of the Admission Form reveals that there is no designation of a trustee or a beneficiary. In other words, because the essential elements of an express or technical trust cannot be gleaned from paragraph 2, there is no evidence that the parties intended to create such a trust. As a consequence, this Court finds that, at most, a constructive trust was imposed by operation of Ohio law upon the proceeds of the Highmark check.

⁹"A valid assignment must comply with fundamental requisites for contracts generally, as respects the legality of object, capacity of parties, consideration, and consent, but any language, however informal, which shows the intention of the owner of a chose in action to transfer it is sufficient." 6 Ohio Jur.3d Assignments § 25 (2006).

Two bankruptcy courts that have examined the nature of insurance benefits under 11 U.S.C. § 541 have reached a similar conclusion. In *In re Rowland*, 140 B.R. 206 (Bankr. S.D. Ohio 1992), a contractor who repaired fire damage to the debtors' residence moved for relief from stay to recover the insurance proceeds. *Id.* at 207. The contractor argued that the debtors held only legal title to the insurance proceeds, and, consequently, the insurance proceeds were not property of the estate pursuant to 11 U.S.C. § 541. *Id.* at 208.

Specifically, the contractor asserted that the insurance proceeds were the subject of a constructive trust. Although the contractor did not produce any evidence of an assignment of rights in the fire insurance policy or the contract to repair the fire damage, he cited the legislative history of § 541 in support of his argument that the debtors held the insurance proceeds in trust for his benefit:

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed.

Id. at 209 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), U.S. Code Cong. & Admin. News 1978 at 5869).

The bankruptcy court in *Rowland*, however, was unwilling to adopt the reasoning of the hypothetical provided in the Senate Report. The bankruptcy court chose instead to read into the Senate Report what it characterized as both an "apparent assumption" and an "unexpressed fact" in the hypothetical, that is, the debtor's prior assignment of

insurance proceeds to the creditor. *Id.* at 209-10. With the assignment of insurance proceeds factored into the hypothetical, the bankruptcy court in *Rowland* agreed that "any payment to the debtors might be held by them in a fiduciary capacity and under a constructive trust so as not to constitute property of the estate" *Id.*

As a result, the bankruptcy court rejected the imposition of a constructive trust in *Rowland* because the contractor produced no evidence that "the debtor [was], at least conceptually, a mere conduit for a payment by the insurer to the . . . creditor." *Rowland*, 140 B.R. at 210 (quoting *In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010, 1012 (Bankr. N.D. N.Y. 1982)). The bankruptcy court concluded that "in the absence of a copy of the insurance policy, it [was] just as easy to infer that the debtors were permitted to retain the proceeds for the damage to their residence regardless of whether the repairs were made" *Id.* at 210.

The bankruptcy court's conclusion in *In re Rowland* that an assignment of insurance benefits was necessary for the imposition of a constructive trust over the proceeds was based upon the rationale first articulated in *In re Moskowitz*, 14 B.R. 677, 680 (Bankr. S.D.N.Y. 1981). In *Moskowitz*, the trustee sought to recover proceeds paid by a medical insurer directly to a hospital for services rendered to debtors and paid within three months of the filing of the petition. Based upon an assignment of insurance proceeds clause executed during the admissions process, as well as an assignment clause in a contract executed between the debtors and the insurance company, the *Moskowitz* Court concluded that "[where] the terms provide for [the insurer] to

pay [the hospital] directly for hospital services rendered to the debtors and [] the debtors were not entitled to be paid directly for expenses incurred during [the debtor's] stay in the hospital," the debtors have no right to receive payments.

The sound reasoning first articulated in *Moskowitz* and ultimately adopted in *Rowland* firmly supports this Court's conclusion that Plaintiff cannot prove the existence of an express or technical trust in the case *sub judice*. At most, Miller's decision to deposit the Highmark check imposed a constructive trust over the proceeds.

However, the defalcation and fraud provisions of § 523(a)(4) apply solely to express or technical trusts, not to constructive trusts that courts may impose as an equitable remedy." *In re Blaszak*, 397 F.3d 386, 391 (*citing Davis*, 293 U.S. at 333). The *Davis* Court explained that "[t]he language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created." *Davis*, 293 U.S. at 333 (*quoting Upshur v. Briscoe*, 138 U.S. 365, 378).

Here, Miller's fiduciary duty arose as direct result of his conversion of the Highmark check, not as a result of an express agreement by the parties. As a consequence, Plaintiff's defalcation and fraud claims must fail as a matter of law.

Although the absence of an express or technical trust in this case is fatal to Plaintiff's § 523(a)(4) claims, the same is not true for Plaintiff's § 523(a)(6) claim. "Ohio law defines conversion as 'an unauthorized act of control or exercise of dominion by one party over the personal property of a second party which deprives the second

party of possession of said property in denial of, or under a claim inconsistent with, the rights of the second party.'" *In re Heyne*, 277 B.R. at 368 (quoting *Saydell v. Gepepetto's Pizza & Ribs Franchise Sys. Inc.*, 100 Ohio App.3d 111, 652 N.E. 2d 218, 227 (1994)).

In Ohio, the assignee of a chose in action is considered to be its legal holder. 6 Ohio Jur.3d Assignments §§ 35, 37 (2006). As such, Plaintiff need only show that the insurance proceeds were the subject of a valid assignment in order to prove that Miller converted the proceeds under Ohio law.

As stated earlier, the Court finds that Miller irrevocably assigned the insurance proceeds at issue in this case to Plaintiff on June 6, 2002. As a consequence, that assignment divested Miller of any right to collect benefits under the Highmark insurance policy for services rendered by Plaintiff from June 6, 2002 to July 5, 2002. Therefore, Miller's act of spending the proceeds of the Highmark check constitutes conversion under Ohio law.

In addition to proving the elements of conversion, Plaintiff must also demonstrate that Miller converted the proceeds of the Highmark check with the intent to cause injury to Plaintiff or with the knowledge that injury was substantially certain to occur. *O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 826 (Bankr. N.D. Ohio 2000). Plaintiff must further show that Miller converted the Highmark check in conscious disregard of his duties or without just cause or excuse. *In re Heyne*, 277 B.R. at 368.

Because Miller relied upon the advice of his attorney, Shackelford, he contends that Plaintiff cannot show that he acted willfully or maliciously in converting the proceeds of the Highmark

check. However, the Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals has recognized that "[t]he majority of cases have held that reliance on the advice of counsel is not a defense to § 523(a)(6)." *The Spring Work, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620, 629 (6th Cir. B.A.P. 2000) (citing *Thompson v. Myers (In re Myers)*, 235 B.R. 838, 846-47 (Bankr. D.S.C. 1998); *United Orient Bank v. Green*, 215 B.R. 916, 928-29 (S.D.N.Y. 1997); *Peabey Assocs., ACP v. Haisfield (In re Haisfield Enters. of Fla.)*, 154 B.R. 803, 809 (Bankr. S.D. Fla. 1993)).

Courts which have allowed the defense have limited it to circumstances where the reliance was "reasonable" and there was evidence that the debtor acted in good faith after fully disclosing all facts to his counsel. *Adell v. John Richards Homes Building Co., L.L.C. (In re John Richards Homes Building Co., L.L.C.)*, 439 F.3d 248, 260 (6th Cir. 2006); *Security Bank of Hebron v. Wehri (In re Wehri)*, 212 B.R. 963, 969 (Bankr. D.N.D. 1997); *Vaughan v. Murray (In re Murray)*, 116 B.R. 473 (Bankr. E.D. Va. 1990).

In the case *sub judice*, Miller simply has not demonstrated that his reliance on his attorney's advice was reasonable. First, Miller has not produced any evidence to establish that he fully disclosed all of the relevant information regarding the Highmark check to Shackelford. For instance, Miller did not provide testimony, by affidavit or otherwise, that he informed Shackelford that he had executed an assignment of his insurance benefits on the date he was admitted to Mahoning Valley Hospital, or that he owed a substantial

sum of money to Plaintiff. As a consequence, the Court cannot determine whether Miller acted in good faith.

Second, according to Miller's testimony, Shackelford simply advised him to deposit the Highmark check in his bank account. In order to insulate Miller's subsequent conduct, he asks this Court to infer from Shackelford's instruction that Shackelford impliedly advised Miller that the proceeds of the Highmark check belonged to him. However, this Court is unwilling to draw such an inference. As a matter of fact, a reasonable inference is that Shackelford told Miller to deposit the proceeds of the Highmark check in the bank to prevent theft or loss. Based upon Miller's testimony, it was unreasonable for him to interpret his attorney's advice as a tacit authorization to spend the proceeds of the Highmark check.

Finally, Miller never testified that he believed the proceeds of the check were intended for his benefit, only that - in his own mind - he believed that he had "earned" the money as a result of his hospitalization. (Tr. at 15.) Miller explained that his \$25.00-50.00 monthly payments to Plaintiff, coupled with his co-payment for his medical insurance, resulted in a *quid pro quo* exchange for the \$43,126.80 check. (Tr. at 15.) Miller's conclusion is patently unreasonable.

At the Rule 2004 exam, Miller recounted the numerous angry phone calls he received from Plaintiff's collection department demanding payment of his medical bill prior to his receipt of the Highmark check. Based upon his execution of the assignment in the Admission

Form¹⁰ and his knowledge of the outstanding bill, it strains credulity to suggest that Miller truly believed that he would receive a \$43,126.80 windfall from his insurance company. Had Miller been expecting a settlement check from Northside Hospital as a result of his lawsuit, a reasonable trier of fact might conclude that he mistook the Highmark check for proceeds of settlement. However, no such evidence is before the Court.

Simply stated, there is absolutely no reason that Miller would receive a \$43,126.80 check from Highmark, except in payment of his outstanding medical bill. As a consequence, Miller cannot rely on his counsel's advice to excuse his conversion of the proceeds of a check that he could never have reasonably believed were intended for his benefit.

There is no question that Miller's decision to cash the Highmark check and to purchase the residence and the automobile were motivated by his dire circumstances. Essentially, Miller admitted to converting Plaintiff's property in order to ensure that his family would be taken care of in the event that his injuries proved fatal. Although, in the short run, Miller's actions were understandable, they were nonetheless willful.

Miller admitted to making a conscious decision to buy the residence and the automobile rather than to forward the proceeds of the Highmark check to Plaintiff. Based upon his execution of the

¹⁰The Sixth Circuit Court of Appeals applies "the cardinal rule that, in the absence of fraud or wilful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions." *Stout v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000) (quoting *Allied Steel and Conveyers, Inc. v. Ford Motor Co.*, 277 F.2d 907, 913 (6th Cir. 1960)).

assignment clause, Miller is presumed to know that the proceeds of the Highmark check were Plaintiff's property. Miller did not produce any evidence to show that the assignment was the product of fraud or willful deceit, or that Miller was not provided an opportunity to read and understand the Admission Form before he signed it. In the absence of such evidence, the Court finds that Miller was aware that the proceeds of the Highmark check belonged to Plaintiff, and that he willfully converted the proceeds in order to provide for his family in the event of his death.

Furthermore, there is no evidence before the Court to establish that Miller had any intention of repaying Plaintiff for the converted funds. According to his testimony, Miller converted the proceeds of the Highmark check because he thought he was going to die, and did not want his family to be homeless. Given Miller's grim assessment of his health at the time, the Court finds that he had no intention of repaying Plaintiff for the converted funds.¹¹ Therefore, the Court finds that Miller knew that injury was substantially certain to occur to Plaintiff. *In re Martin*, 321 B.R. at 441.

Finally, based upon the assignment, Miller acted in conscious disregard of his duty to hold the proceeds of the Highmark check in trust for Plaintiff. Likewise, based upon the evidence before this Court, Miller acted without just cause or excuse. *In re Heyne*, 277 B.R. at 368.

¹¹Miller does not rely on his monthly payments to Plaintiff to demonstrate his intent to progressively pay off the debt. Miller's reliance on such an argument would be misplaced, of course, since it would take him no less than 71 years to pay his hospital bill in full based upon monthly payments in the amount of \$50.00.

A bankruptcy court in Louisiana reached the same conclusion under a similar set of facts *in dicta* in *Baton Rouge Neonatal Associates v. Ward (In re Ward)*, 2003 WL 24027463 (Bankr. M.D. La.). In *In re Ward*, parents of premature twins converted checks negotiated to them totaling \$106,037.53 from Blue Cross/Blue Shield.¹² Like Miller, Mrs. Ward executed an assignment of benefits in favor of the hospital and the hospital-based physician groups as a part of the hospital's admission process. After denying the Ward's discharge pursuant to 11 U.S.C. § 727(a)(2), the Court concluded that the hospital had sustained its burden of proof as to nondischargeability under § 523(a)(6).

The bankruptcy court found that, despite her testimony, Mrs. Ward knew that the Blue Cross checks were intended to pay the hospital and the twins' treating physicians. *Id.* at *3. Furthermore, the bankruptcy court gave no weight to the excuse that Mrs. Ward had no income or savings to support her family when her children were born. *Id.* at *4. As a matter of fact, the bankruptcy court underscored the fact that Mrs. Ward had no income in order to infer that she would not be able to repay the debt, and that the hospital would be substantially certain to suffer a loss as a result of her actions. *Id.* The same is true in the case *sub judice*.

In conclusion, because Miller held neither legal nor equitable title to the proceeds of the Highmark check, his actions in November

¹²Because the hospital in *In re Ward, supra*, was not a Blue Cross network provider, the carrier did not recognize the assignment of benefits and paid the debtors directly. Neither party in this case has explained why Highmark paid Miller directly.

2002 constituted conversion under state law. Furthermore, because Miller has not produced any evidence to contradict the conclusion that he was aware of his duty under the assignment clause but abandoned that duty in a last-ditch effort to provide for his family, his conversion of the proceeds of the Highmark check was willful. Finally, because Miller has failed to articulate any just cause or excuse for his conduct, this Court finds that Miller acted with malice toward Plaintiff.

An appropriate order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

