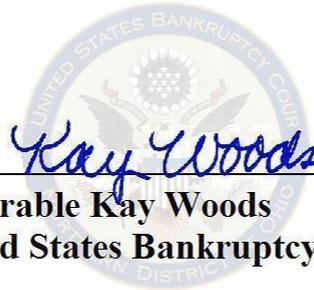


IT IS SO ORDERED.



Dated: March 01, 2007
04:08:46 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RALPH W. SWEGAN,	*	
	*	CASE NUMBER 03-45698
Debtor.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO.,	*	
LLC., LTD.,	*	
	*	
Plaintiff,	*	ADVERSARY NUMBER 04-4256
	*	
vs.	*	
	*	
RALPH W. SWEGAN,	*	
	*	
Defendant.	*	HONORABLE KAY WOODS
	*	
	*	

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

On February 6, 2007, this Court entered a twenty-seven (27) page Memorandum Opinion and Order ("Feb. 6 Order") in the instant adversary proceeding, which denied the Motion for Summary Judgment filed by Buckeye Retirement Co. LLC, LTD. ("Buckeye") and granted

summary judgment in favor of Debtor Ralph W. Swegan ("Debtor"). On February 14, 2007, Buckeye filed Motion of Buckeye Retirement Co., LLC, LTD. for Reconsideration of Court's Order, Dated February 6, 2007, Granting Summary Judgment in Favor of Defendant, Ralph W. Swegan, and Denying Summary Judgment to Plaintiff, Buckeye Retirement Co., LLC, LTD. ("Motion for Reconsideration"). The Motion for Reconsideration is based on what Buckeye characterizes as "clearly erroneous factual findings and legal conclusions" by the Court. (Motion for Reconsideration at 2.) In reality, however, Buckeye (i) repeats arguments made in its Motion for Summary Judgment and characterizes such arguments as undisputed facts, and (ii) cites additional (but not newly decided or binding precedential) case law in support of its position that this Court's construction of § 727(a)(2)(A) and (B) was too narrow.

I. STANDARD FOR REVIEW

Buckeye correctly notes that there is no provision in the Federal Rules of Civil Procedure for a motion for reconsideration. This type of motion, if filed within ten (10) days after entry of the underlying order or judgment, may be deemed to be a motion to alter or amend a judgment pursuant to FED. R. CIV. P. 59(e). *Foman v. Davis*, 371 U.S. 178, 181 (1962) ("The Court of Appeals' treatment of the motion to vacate as one under rule 59(e) was permissible, at least as to the original matter, and we will accept that characterization here.")

"Courts have considerable discretion in determining whether to grant or deny a motion to alter or amend; Rule 59 is silent

with respect to the grounds for such a motion." (12 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, § 59.30[4] (Matthew Bender 3d ed. 2002).) Reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources. *Id.* The decision to grant a motion for reconsideration lies within the sound discretion of the trial court. *Huff v. Metropolitan Life Ins. Co.*, 675 F.3d 119, 122 (6th Cir. 1982).

The purpose of a motion for reconsideration is to correct manifest errors of law or present newly discovered evidence; under traditional standards, such motion should be granted only when there has been a mistake of law or fact or material evidence is discovered that was previously unavailable. *Corretjer Farinacci v. Picayo*, 149 F.R.D. 435, 437 (D.P.R. 1993). A motion to alter or amend must be based on an intervening change in controlling law, newly discovered evidence, or the need to prevent a clear error of law or manifest injustice. *Mobil Oil Corp. V. Amoco Chems. Corp.*, 915 F. Supp. 1333, 1377 (D. Del. 1994). "A motion to amend or alter should be granted if 'the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.'" *Braxton v. Scott*, 905 F. Supp. 455, 457 ((N.D. Ohio 1995), quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). It is not sufficient that the movant is dissatisfied or unhappy with the prior order or judgment. "A Rule 59(e) motion to alter or amend a

judgment may not be used to relitigate the same matters already determined by the court. Furthermore a motion to alter or amend may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment." (12 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 59.30[6]. (Matthew Bender 3d ed. 2002).)

II. BUCKEYE'S BASES FOR RECONSIDERATION

A. The Court's Conclusion About Concealment

Buckeye makes the following two points about this Court's conclusion in the Feb. 6 Order that Debtor's conduct did not constitute "concealment" for purposes of 11 U.S.C. § 727(a)(2)(A) and/or (B): First, Buckeye reiterates its arguments that Debtor's conduct constitutes concealment. Because Buckeye does not offer any new facts regarding Debtor's conduct, the Court concludes that Buckeye merely disagrees with the Court's decision. Second, Buckeye "believes this Honorable Court's interpretation of the term 'concealment' to be too narrow, as that term is applied to actions brought under 11 U.S.C. § 727(a)(2)(A)." (Motion for Reconsideration at 5.)

1. Factual Findings

As set forth below, the Court carefully considered all of the undisputed facts and the arguments in the cross motions for summary judgment and concluded in the Feb. 6 Order that Debtor's conduct did not come within the purview of § 727(a)(2) to warrant a denial of discharge. Buckeye argues that - standing alone - Debtor's answers to two questions in a two-hour pre-petition debtor's

examination warrant denial of discharge. These two questions concerned (i) whether Debtor had a life insurance policy on his life, and (ii) whether Debtor had "receive[d] the proceeds of [a] life insurance policy [on Debtor's deceased wife]?" (Ex. I to Buckeye's Motion for Summary Judgment, Debtor's Examination of Ralph W. Swegan, May 20, 2003, at 29-30 (hereafter "Debtor's Exam at __").) It is undisputed that Debtor answered both of those questions in the negative. (Joint Stipulations of Fact at ¶¶ 5 and 6 (hereafter "Joint Stip."))

It is also undisputed that Debtor had a life insurance policy at the time of the debtor's examination. The Court concluded that, based upon Debtor's disclosure of the life insurance policy in his schedules on January 20, 2004, there was no reasonable inference that Debtor intended to hinder, delay or defraud his creditors when he answered this question incorrectly. (See Feb. 6 Order at 15.) Buckeye argues that Debtor's addition (on January 21, 2004) of his spouse Tatiana V. Swegan¹ as beneficiary on this policy constitutes "'circumstantial evidence' as to [Debtor's] mindset when he testified on May 20, 2003." (Motion for Reconsideration at 13.) Buckeye then opines, "Certainly, a reasonable inference can be made that [Debtor] knew he owned the policy on May 20th when he clearly took steps to change the beneficiary months later." *Id.* The Court, however, disagrees that this action, taken eight months

¹ At the time of the debtor's examination on May 20, 2003, Debtor testified that he was not married. The record does not indicate when Debtor married Tatiana, but presumably it was sometime between May 20, 2003 and January 21, 2004.

later, has bearing on Debtor's state of mind at the debtor's examination.

Debtor testified at the debtor's examination that his wife Deborah died in June 2002. (Debtor's Exam. at 29.) Debtor changed the beneficiary on this policy eight months later and one day after he filed completed schedules that disclosed the life insurance policy. Despite the fact that Debtor has three grown children and several grandchildren (Debtor's Exam at 15-18), he maintained a policy on his life after the death of Deborah without designating a beneficiary. In other words, for more than a year and a half (and well before he filed his bankruptcy petition), Debtor failed to designate anyone as the beneficiary on this policy, which is consistent with not remembering or knowing that the policy was in existence and/or effect. The Court believes that, in view of the entire record, a more reasonable inference is that when Debtor became aware of this life insurance policy, he disclosed it on his schedules and, subsequently, changed the beneficiary designation. Despite Buckeye's characterization that "it strains credulity" to believe Debtor was not aware that he had this life insurance policy, there is no evidence that he knowingly made a false statement when, at the debtor's examination, he denied having a life insurance policy on his life.

Buckeye also complains that Debtor responded that he had not received "proceeds" of a life insurance policy when Deborah died. Immediately after answering this question, Debtor's legal counsel instructed him not to answer any other questions about the life

insurance proceeds on the grounds that Debtor would not answer any questions regarding "income." The colloquy on this subject is as follows:

Mr. Walrath [Buckeye's counsel]: No, I'm trying to clarify this. Number one, he testified that he didn't receive the proceeds of that life insurance policy, so it's obviously not income to him. So I'm trying to find out what happened to it. You have no objection if its not income to him. I'm trying to find out what happened to the proceeds of that life insurance policy.

Mr. Walker [Debtor's counsel]: Rights to the proceeds of the policy, to the extent that he receives them is income to him, not necessarily taxable income, but income nonetheless.

Mr. Walrath: Keith, he told me he didn't receive them. If he didn't receive them, it can't be income to him. I'm trying to find out what happened to those proceeds.

Mr. Walker: It can become future income if it's not property.

Mr. Walrath: That's not what he testified to. He testified that he did not receive them.

Mr. Walker: Right.

(Debtor's Exam at 31.)

Buckeye's counsel strenuously disagreed with Mr. Walker's objections to questions about income and instructions to Debtor not to answer such questions. Nevertheless, that is the legal advice that Debtor's counsel gave to Debtor and upon which Debtor relied. Whether or not Mr. Walker was misinformed, ill-informed, or clever, it appears that he believed that the annuity purchased with the life insurance money upon Deborah's death was "income" to Debtor. Buckeye points to Exhibit Y attached to its Motion for Summary

Judgment as "evidence [that] clearly established that [Debtor] had received the proceeds of his late-wife's policy through monthly annuity payments." (Motion for Reconsideration at 4.) Exhibit Y is a Settlement Certificate regarding Policy No. C6194862 on the life of Deborah S. Swegan. It provides that "One Hundred Thousand and no/100 Dollars Of the proceeds of the policy listed above shall be held by Ohio National and paid to R. Wendell Swegan . . . In 60 Monthly installment of \$1,756.83 each from June 24, 2002 to and including May 24, 2007." Exhibit W is a summary of and copy of life insurance policy no. C 6194861, which lists two insureds: Deborah S. Swegan as Insured 1 and R. Wendell Swegan as Insured 2. The face amount of the policy is \$500,000.00. Ohio National states: "We will pay the death proceeds to the beneficiary after we receive due proof that both insureds died while this contract was in force. If at least one insured is living on the maturity date, we will then pay the cash surrender value to the owner." (Exhibit W at 2 (emphasis added).)

Even after a careful review, the aforementioned language is confusing. Debtor was instructed by legal counsel not to answer each question that counsel deemed to be about income (as opposed to questions about property). Although Exhibit Y is evidence that Debtor was receiving monthly annuity payments, Mr. Walker defined those payments as income to Debtor. Pursuant to Exhibit W, however, it is unclear whether Debtor received insurance proceeds upon Deborah's death or the cash surrender value of the policy. As of the date of the Debtor's examination, Debtor would have received ten (10) monthly annuity payments. His answer that he had not

received the proceeds of the insurance policy on his wife, although probably legally incorrect, is not sufficient to constitute "concealment" for purposes of § 727(a)(2)(A) and warrant denial of discharge. (See Feb. 6 Order at 12-13.)

2. Legal Conclusion Concerning Concealment

Buckeye argues that this Court adopted too narrow a definition of concealment. (Motion for Reconsideration at 4.) Buckeye first appears to chide the Court for relying upon *Kaler v. Craig (In re Craig)*, 195 B.R. 443 (Bankr. D.N.D. 1996) for the test to determine if Debtor's conduct warranted denial of discharge. (Motion for Reconsideration at 4.) This is puzzling to the Court since it is Buckeye that insisted that the *Craig* test is controlling. (Buckeye's Motion for Summary Judgment at 11.) "To succeed on a 727(a)(2)(A) claim, the objecting creditor must prove by a preponderance of the evidence that: (1) the act complained of was done within one year prior to the date of petition filing; (2) the act was that of the debtor; (3) it consisted of a transfer, removal, destruction or concealment of the debtor's property; and (4) it was done with an intent to hinder, delay or defraud either a creditor or an officer of the estate. *Kaler v. Craig (In re Craig)*, 195 B.R. 443, 448 (Bank. D.N.D. 1996) (sic)." (Buckeye's Motion for Summary Judgment at 11.)

Buckeye then directs this Court's attention to two additional (although not recently decided) cases.² These two cases are:

² These cases were not cited by Buckeye in its Motion for Summary Judgment. It is difficult to "reconsider" a case that was never originally presented. The two cases upon which Buckeye relies in the Motion for Reconsideration are not recently decided cases. *In re Sowers* was decided in 1998 and *In re Seeber* was

Hunter v. Sowers (In re Sowers), 229 B.R. 151 (Bankr. N.D. Ohio 1998) and *Fourmigue v. Seeber (In re Seeber)*, 2005 Bankr. LEXIS 2964 (Bankr. E.D. La. 2005). . Both the *Sowers* and the *Seeber* cases deal with actions seeking to deny discharge under § 727(a)(2)(B). This Court does not find that these decisions conflict with this Court's Feb. 6 Order.

As previously noted, Buckeye complains that the Court construed the definition of concealment too narrowly. This Court, however, did not create its definition of concealment from whole cloth. The Feb. 6 Order quoted and relied on *Ransier v. McFarland (In re McFarland)*, 170 B.R. 613, 629 (Bankr. S.D. Ohio 1994), which cited to *Ohio Citizen Trust Company v. Smith (In re Smith)*, 11 B.R. 20, 22 (Bankr. N.D. Ohio 1981) and *Thibodeaux v. Oliver (In re Oliver)*, 819 F. 2d 550, 553 (5th Cir. 1987)

It is significant that Buckeye can only state that it "believes the *Sowers* definition of concealment, while not all-encompassing, to be the more realistic view of acts of concealment." (Motion for Reconsideration at 6 (emphasis added).) Buckeye's strongest argument that this Court's definition and application of concealment is too narrow is that it believes a definition of concealment in connection with significantly different facts is "more realistic." This, in a nutshell, is

Buckeye's

decided in 2005. Buckeye certainly could have brought these cases to the Court's attention in its Motion for Summary Judgment if it believed that they were controlling. The fact of the matter is that Buckeye cited only fraudulent transfer cases in its Motion for Summary Judgment and is attempting to re-litigate or get a "second bite at the apple" by directing the Court's attention to these cases at this late date.

entire argument concerning this Court's "erroneous . . . legal conclusions." (Motion for Reconsideration at 2.)

Buckeye spends almost two pages of its Motion for Reconsideration attempting to persuade this Court that the definition of concealment in *Sowers* is determinative of the instant case. The problem is that the conduct in the *Sowers* case is factually very distinguishable from the conduct of Debtor in this case. In *Sowers*, the debtors failed to disclose at least five significant assets in their schedules and then falsely testified about the existence of these assets at the § 341 meeting. The *Sowers* debtors failed to disclose that they had any interest in the following property: (1) a 1963 Chevrolet Corvette; (2) a Condominium in Florida worth \$42,000.00; (3) certain inventory, supplies and equipment; (4) two accounts receivable totaling \$23,766.00; and (5) a joint credit union account. In addition, these debtors testified that their principal residence was subject to a mortgage, when it was not, and also falsely testified that they had not received any proceeds from the sale of a parcel of real estate when, in fact, they had received \$311,790.83. Moreover, the *Sowers* debtors purchased \$140,000.00 in Travelers Checks the day before they filed their bankruptcy petition and failed to disclose these assets.

In light of these facts, Judge Speer held:

[T]he Court finds that the Defendants did in fact conceal their property. Concealment, in an action under § 727(a)(2)(B), simply means withholding knowledge of an asset by the failure or refusal to divulge owed information. *In re Martin*, 698 F.2d. 883 (7th Cir. 1983, 6 *Collier on Bankruptcy* §

727.02[6][b] (15th Ed. 1998). According to the evidence presented to this Court, the Defendants failed to mention seven facts concerning financial information relating to their bankruptcy estate. In accordance with the foregoing definition, this Court can only come to the conclusion that Defendants did in fact conceal their property.

In re Sowers at 156.

As this Court noted in the Feb. 6 Order, the section of *Colliers* cited by Buckeye in its Motion for Summary Judgment (and as cited in *Sowers*) contains a broad definition of concealment, but such definition is not supported by any of the footnoted cases in *Colliers*. The *Sowers* case also relies on *In re Martin*, but that case provides little support for a sweeping definition of concealment.³

In the *Sowers* case, the debtors not only failed to disclose many significant assets on their schedules, they expressly provided false information, consistent with those schedules, at the § 341 meeting.⁴ These facts are significantly different from the instant case where Debtor failed to accurately answer only two questions at the pre-petition debtor's examination, but he disclosed both matters in the schedules filed in January 2004. Because of the

³ The *Martin* case deals with §§ 727(a)(3) and 727(a)(5) rather than § 727(a)(2). The *Martin* Court explained that: "Section 727(A)(5). . . provides that the court should grant the debtor a discharge, unless 'the debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities.'" *In re Martin*, 698 F.2d at 886. The Court held that "to the extent that the debtor can explain these events [concerning the purchase of a condominium and the down payment therefore] he has an obligation to come forward and do so - he cannot abuse the bankruptcy process by obfuscating the true nature of his affairs and then refusing to provide a credible explanation." *Id.* at 888.

⁴ In addition, they purchased a very large quantity of Travelers Checks the day before filing their bankruptcy petition, which they failed to disclose.

significant differences in the facts, the *Sowers* definition of concealment is not controlling for purposes of the instant case.

Likewise, this Court is not persuaded that *In re Seeber* provides a basis to reconsider the Feb. 6 Order. The *Seeber* debtor was accused of failing to disclose ownership of various assets, including an interest in a house in Florida, certain restaurant supplies and a vehicle. In connection with a divorce, debtor apparently put certain assets in the name of his ex-wife and then claimed that such assets were not property of the estate. The *Seeber* Court found that "the debtor was initially evasive and ultimately, not believable, when testifying. The debtor professed not to recall significant events regarding the Florida property transaction, and contradicted his own testimony on various occasions regarding the details of the transaction." *Id.* at *10. The court found that whatever the agreement may have been with his ex-wife, it did not become part of the property settlement in the divorce. The Court found circumstantial indica of actual fraudulent intent in the fact that the Florida property was taken in the name of the ex-wife without any apparent consideration and that the closing was postponed so that it would occur on the very day the petition of divorce was filed. The court also found that the ex-wife testified that she and the debtor had agreed that she would get the house and he would keep the business, but she remained part owner of the business. The court concluded that the cumulative effect of the transactions involving the divorce and deeding property to the ex-wife was that, "after the Fourmigue judgment was entered, major items of property were shielded from

attachment and/or concealed from creditors." *Id.* at *13. The reasoning, if not the actual words, of the *Seeber* case are consistent with this Court's finding that concealment generally involves a transfer of property where the debtor retains a beneficial interest.

B. The Court's Finding that the Acts Were Not Performed by Debtor

In finding that the second element of the *Craig* test was not met, this Court was persuaded by the fact that Debtor's refusal to answer income and employment questions at the debtor's examination was done in response to express instruction of his legal counsel. The Court found that "although Debtor was being examined, he was directed not to answer certain questions by his legal counsel." (Feb. 6 Order at 11.) The Court went on to provide an extensive analysis of reasonable and good faith reliance on advice of counsel as support for lack of the requisite intent to deny discharge. (See Feb. 6 Order at 13-14.)

Buckeye failed to even acknowledge in its Motion for Summary Judgment that Debtor's refusal to answer certain questions was a direct result of being so instructed by his legal counsel. As the Court noted, "Here, Buckeye does not allege that Debtor did not reasonably and in good faith rely on the advice of his legal counsel; nor can any inference be drawn to that effect." (Feb. 6 Order at 14.) In an about face, however, Buckeye now argues that "[Debtor's] argument that he was reasonably and in good faith relying on advice of his counsel in refusing to divulge owed information as to his income and employment flies in the face of reason." (Motion for Reconsideration at 7.)

Buckeye postulates that the purpose of a debtor's examination is to discover the existence of assets to satisfy a judgment and the most common such asset would be a debtor's income from employment. As a consequence, Buckeye states that "[e]ven the most unsophisticated of debtors in aware of the legal process of garnishment and understands that an employee's paycheck may be garnished to satisfy a judgment." (*Id.*) Whether or not this is true (Buckeye's sweeping generalization is in no way an undisputed fact), Mr. Walker took the position that the examination order only covered questions about property. As a consequence, he maintained that Debtor's income was not the subject of the debtor's examination and instructed Debtor not to answer any questions that had a bearing on income. As the Court noted, "The fact that counsel's objections may have been later overruled by the Court of Common Pleas does not negate Debtor's reasonable and good faith reliance on advice of counsel."⁵

Buckeye also argues that, in the Motion for Summary Judgment, it "direct[ed] the Court's attention to the statute governing debtor's examinations wherein the statute makes it abundantly clear that a 'judgment creditor shall be entitled to an order for the examination of the judgment debtor concerning his . . . income . . . or other means of satisfying the judgment. . .'" (sic) O.R.C. sec. 2333.09." (Motion for Reconsideration at 7.) The Court

⁵ Interestingly, when questions at the debtor's examination concerned probate issues, Mr. Walrath expressly told Debtor that he should seek the advice of his legal counsel about that topic. (See Debtor's Examination at 41.) In this regard, Buckeye acknowledges that a lay person can and should rely on advice of legal counsel.

notes, however, that Buckeye failed to bring this statute to the attention of Debtor and/or Debtor's counsel until well after the debtor's examination. Neither Buckeye's affidavit that procured the order for the debtor's examination nor the order itself references this statute. Indeed, the first time any statute is mentioned is in August 2003 - more than four months after the debtor's examination - when Buckeye filed a Motion to Show Cause dated August 18, 2003. In that motion, Buckeye cites to O.R.C. § 2333.19 (not § 2333.09).

It is illogical for Buckeye to argue that Debtor and/or his counsel were required to know the content and import of this statute when Buckeye failed to bring the statute to their attention. Not only is the statute not mentioned in the order, during the debtor's examination, Mr. Walrath merely asked Mr. Walker on what he relied in making the objections. Mr. Walrath failed to bring this statute to the attention of Debtor or his legal counsel at that time. This is particularly significant since Mr. Walrath (at least initially) indicated that he did not have a copy of the order of the Court of Common Pleas for the debtor's examination and that he did not know what the court had required of Debtor's appearance. (See Debtor's Examination at 26 wherein Mr. Walrath asked Mr. Walker to show him a copy of the order for the debtor's examination. Mr. Walrath stated that, unless Mr. Walker could show him a copy of the order, he would continue to ask questions concerning income. Cf. Debtor's Examination at 76-78 where Mr. Walrath read the entire "Order to Judgment Debtor to Appear in Person" into the record, demonstrating he knew that such

order did not contain any reference to income or a requirement to bring documents.)

Even Buckeye concedes that "it may be arguable whether Debtor's reliance upon his counsel's advice not to answer certain questions related to income and employment was reasonable and in good faith. . . ." (Motion for Reconsideration at 8.) None of the arguments advanced by Buckeye in the Motion for Reconsideration defeat this Court's finding that Debtor reasonably and in good faith relied on the advice of his legal counsel.

Buckeye argues that Debtor's failure to answer the two questions about (i) his life insurance policy and (ii) receipt of proceeds from his late-wife's life insurance policy are enough to satisfy the second prong of the *Craig* test. Buckeye postulates that "when applying the facts to the applicable law, reasonable minds could only conclude that [Debtor's] testimony at his May 20, 2003 debtor's examination regarding his ownership of and receipt of proceeds from insurance policies were acts 'performed by the debtor' as required under the second prong of *Craig*." (*Id.* at 9.) Thus, Buckeye acknowledges that, at most, only Debtor's answers to these two questions come within the "acts performed by the Debtor" prong of the *Craig* test.

Because these two questions were such a small part of the debtor's examination, in the Feb. 6 Order, this Court did not view Debtor's answers to these questions separately in analyzing the second prong of the *Craig* test. The Court will examine each of those two questions separately now. The circumstances surrounding these two questions are factually distinguishable.

Upon being told that he could answer such questions, Debtor answered that his late wife had an insurance policy and that he was the beneficiary of that policy. (Debtor's Examination at 29.) Debtor then answered that he had not received the "proceeds of that life insurance policy." (*Id.* at 29-30.) Immediately thereafter, Mr. Walker instructed Debtor not to answer any questions about the proceeds of the policy on the grounds that such questions dealt with Debtor's income rather than property. The question about receipt of life insurance proceeds comes directly after a long colloquy between Mr. Walrath and Mr. Walker concerning Mr. Walker's objections to questions concerning income. (Debtor's Examination at 23-27.) Mr. Walker clearly expressed his viewpoint that the "insurance proceeds" were future income to Debtor based upon his apparent analysis⁶ that the annuity was an income stream to Debtor. Because Debtor's answer to the question about receipt of the life insurance proceeds is consistent with his counsel's position (as stated on the record), it appears that Debtor's answer to this question was based upon advice of his legal counsel (albeit not a direct instruction not to answer the question at the examination itself).

Debtor's negative answer to the question concerning his own life insurance policy occurred somewhat later in the examination. Mr. Walrath inquired, "You don't have any life insurance policies on your life at this time?" Debtor: "No." (Debtor's Examination

⁶ This Court expresses no opinion as to the reasonableness of Mr. Walker's analysis. The Court simply notes that Debtor answered questions or refused to answer questions upon the advice of legal counsel.

at 41.) Mr. Walrath asked no follow up questions about Debtor's life insurance policies. Based upon the circumstances surrounding this question, it appears that Debtor's answer to this question was an act performed by him.

Debtor's answer to the question about having his own life insurance policy was made without reliance on advice of legal counsel. As a consequence, this Court hereby modifies the Feb. 6 Order, but only to the extent that Debtor's answer to the single question concerning whether he had a life insurance policy constitutes an act performed by Debtor within the meaning of the second prong of the *Craig* test. This modification, however, is not outcome determinative.

C. Court's Finding of No Fraudulent Intent

With respect to this argument, Buckeye merely repeats all of the information previously considered by the Court in the Feb. 6 Order. Buckeye cites to no error of law or fact; Buckeye simply disagrees with the Court's finding that Debtor's conduct does not constitute a "pattern" from which fraudulent intent may be inferred.

First, Buckeye discusses Debtor's transfer of an automobile to his daughter in September 2002. As Buckeye acknowledges, this transfer occurred more than one-year prior to the petition date and, thus, does not itself fall within § 727. Buckeye argues that this conduct "is but one example of [Debtor's] actions to thwart the collection efforts of [Buckeye]," whereas in reality, at best, it constitutes "the only" example of such conduct. Debtor transferred the automobile to his daughter after Second National

Bank had obtained the judgment that was later assigned to Buckeye, but prior to the time of such assignment. This transfer was well known to Buckeye and was the subject of a fraudulent conveyance lawsuit at the time of the debtor's examination. (See Debtor's Examination at 48-49.) The Court's analysis was and continues to be that this transfer was disclosed (whether or not it was wrongful) and, thus, does not constitute a pattern of concealment by failure to disclose.

Second, Buckeye insists that Debtor's failure to produce documents at the debtor's examination is an indicia of fraudulent intent. Buckeye acknowledges - as it must - that "failing to produce requested documents at a debtor's examination does not rise to the level of concealment." (Motion to Reconsider at 10.) This is not much of a concession since the order for Debtor's appearance at the debtor's examination does not require the production of any documents. Buckeye, however, views Debtor's failure to bring documents as circumstantial evidence of his mind set. Buckeye argues that Debtor "could" have produced documents and insists that "an honest debtor would have made an effort to bring with him at least a minimum of documentation relating to his income, assets and property." (Motion for Reconsideration at 11.) Based on this syllogism, Buckeye concludes that Debtor intended to hinder, delay or defraud Buckeye because Debtor brought no documents to the debtor's examination. (*Id.*) Buckeye's assertion of what "an honest debtor" would do, however, is based on Buckeye's wishful thinking and is not supported by any facts. As this Court noted in the Feb. 6 Order, since Debtor was under no compulsion to produce

any documents, there can be no adverse inference from his failure to do so. Buckeye again ignores the position of Debtor's counsel that only property - not income - was to be discussed at the debtor's examination. Debtor's conduct regarding the production (or lack thereof) of documents is consistent with the advice he received from his legal counsel.

As its third point, Buckeye assails the Court's finding that Debtor's refusal to answer questions concerning income and employment at the debtor's examination based upon advice of legal counsel negates fraudulent intent on the part of Debtor. (See Feb. 6 Order at 13-14.) Buckeye merely argues that Debtor's reliance was not reasonable or in good faith.⁷ Buckeye relies on O.R.C. § 2333.09 to support its position, but, as noted earlier, this statutory citation does not appear in (i) Buckeye's affidavit that procured the order for the debtor's examination, (ii) the order for the debtor's examination, or (iii) Mr. Walrath's colloquy with Mr. Walker during the debtor's examination. O.R.C. 2333 (but not this specific subsection) is not mentioned until four months after the debtor's examination - in August 2003. (Exhibit L to Buckeye's Motion for Summary Judgment.) Consequently, this belatedly revealed statutory citation cannot be used as evidence that Debtor knew he was required to answer questions about income. Buckeye argues that it was incumbent on Debtor to ignore the advice of his attorney in order to demonstrate that he did not have fraudulent

⁷ As noted earlier, Buckeye wholly ignored this issue in its Motion for Summary Judgment and raises the issue of lack of good faith reliance for the first time in the Motion for Reconsideration.

intent. (Motion for Reconsideration at 12.) This position is not logical and is not supported by case law.

Buckeye has presented no new information or any reason for this Court to modify its conclusions in the Feb. 6 Order that (i) Debtor's reliance on his legal counsel's advice was reasonable and in good faith, and (ii) this reliance negates any inference of fraudulent intent on Debtor's part.

Fourth, Buckeye points to events after the May 20, 2003 debtor's examination as further evidence of a pattern of fraudulent intent. Buckeye points to Debtor's failure to produce documents on or about October 3, 2003 and attend a rescheduled debtor's examination. Buckeye notes, however, in its Renewed Motion to Show Cause (Exhibit L to Buckeye's Motion for Summary Judgment), that Mr. Walker sent Buckeye a letter dated September 22, 2003 stating that "an unpredictable set of circumstances has arisen to prevent my response" to the document request. (Exhibit L at 2.) Nevertheless, Buckeye summarily jumps to the conclusion that Mr. Walker "never had any legitimate grounds for not producing those documents on May 20, 2003." (*Id.*)

As set forth in the Feb. 6 Order, Debtor's appearance at a subsequent debtor's examination was excused because filing the bankruptcy petition stayed such proceedings. Buckeye's complaint essentially goes to the timing of production of the documents since Buckeye concedes that it received the documents in the course of the bankruptcy case. Although Debtor did not produce the requested documents in October 2003, Debtor has subsequently done so. Even if Debtor had produced the requested documents and presented

himself for an additional rescheduled debtor's examination in the fall of 2003, Buckeye's collection efforts would have been stayed by the filing of Debtor's bankruptcy petition.

The last event that Buckeye uses to attempt to establish the "pattern" of fraudulent intent is Debtor's designation of beneficiary on the life insurance policy eight months after the debtor's examination in May 2003. As set forth, *infra* at pp. 5-6, the Court has already discussed why this conduct does not give rise to an inference of fraudulent intent.

Taken as a whole and as discussed above, this Court does not find that Debtor's conduct establishes circumstantial evidence of an intent to hinder, delay and/or defraud Debtor's creditors.

III. CONCLUSION

Buckeye has failed to establish that the Court committed a manifest error of fact or law that would justify the extraordinary remedy of reconsideration by this Court of the Feb. 6 Order. In the Feb. 6 Order, this Court attempted to provide a thoughtful and thorough analysis of each argument made by the parties in their cross motions for summary judgment. The Court devoted twenty-seven (27) pages to its initial analysis of these issues. This Court has expended considerable time and effort in grappling with the additional cases and re-hashed arguments in the Motion for Reconsideration, all of which was unnecessary. To the extent Buckeye disagreed with this Court's Feb. 6 Order, the proper next step was to file a notice of appeal - not waste the Court's time and resources re-litigating issues already addressed by the Court.

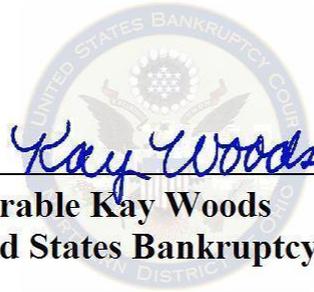
The Feb. 6 Order stands as originally entered with one and only one modification, as follows: Debtor's answer to Buckeye's single question concerning whether Debtor had a life insurance policy constitutes an act performed by Debtor for purposes of meeting the second prong of the *Craig* test. This modification is not in any way outcome determinative.

Buckeye's Motion for Reconsideration is not well taken and is hereby denied, except as set forth above.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: March 01, 2007
04:08:47 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RALPH W. SWEGAN,	*	
	*	CASE NUMBER 03-45698
Debtor.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO.,	*	
LLC., LTD.,	*	
	*	
Plaintiff,	*	ADVERSARY NUMBER 04-4256
	*	
vs.	*	
	*	
RALPH W. SWEGAN,	*	
	*	
Defendant.	*	HONORABLE KAY WOODS
	*	
	*	

O R D E R

For the reasons in this Court's Memorandum Opinion entered on this date, the Court denies Motion of Buckeye Retirement Co., LLC, LTD. for Reconsideration of Court's Order, Dated February 6, 2007, Granting Summary Judgment in Favor of Defendant, Ralph W. Swegan,

and Denying Summary Judgment to Plaintiff, Buckeye Retirement Co., LLC, LTD. filed February 14, 2007. The Order of Court dated February 6, 2007 stands as originally entered with one and only one modification, as follows: Debtor's answer to Buckeye's single question concerning whether Debtor had a life insurance policy constitutes an act performed by Debtor for purposes of meeting the second prong of the *Craig* test. This modification is not in any way outcome determinative.

Buckeye's Motion for Reconsideration is not well taken and is hereby denied, except as set forth above.

IT IS SO ORDERED.

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