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This matter is before the Court upon the Motion for Summary Judgment filed on behalf of Plaintiff Ronald S. Paloski, D.O., Inc. ("Plaintiff") on January 22, 2007. Defendant Diane E. Pallai ("Defendant") failed to respond to the Motion for Summary Judgment.

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). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

In its Motion for Summary Judgment, Plaintiff contends that "Defendant is collaterally estopped from disputing any of the operative facts in this case, and, that the facts established in state court and through admissions entitle Plaintiff to judgment as a matter of law." (Pl.'s Mot. at p. 4.) As a consequence, Plaintiff concludes that a debt owed by Defendant to Plaintiff in the amount of \$99,839.10 is nondischargeable pursuant to the exceptions to discharge listed in 11 U.S.C. §§ 523(a)(2)(debts for fraud), (a)(4)(debts for fraud or defalcation by a fiduciary, larceny, or embezzlement), and/or (a)(6)(debts for willful and malicious injury).

#### **I. Standard for 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 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 (1986).

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, 1479 (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.

## II. Law

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Code. Plaintiffs bear the burden of proving by a preponderance of the evidence 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. § 523(a)(2)(A)

Sections 523(a)(2)(A) of the Bankruptcy Code implements the long standing Congressional policy that a debtor who incurs a debt through fraudulent means is not, with respect to that particular debt, entitled to the benefits of a bankruptcy discharge. *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). Section 523(a)(2)(A) provides, in its entirety:

(a) A discharge under section 727. . .of this title does not discharge an individual debtor from any 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 or an insider's financial condition;

11 U.S.C. § 523 (West 2006).

To satisfy § 523(a)(2)(A), Plaintiff must prove that: (i) Debtor obtained something of value through material misrepresentations that Debtor knew were false or that Debtor made with gross recklessness; (ii) Debtor intended to deceive Plaintiff; (iii) Plaintiff justifiably relied on Debtor's false representations; and (iv) Plaintiff's reliance was the proximate cause of their losses. *Rembert v. AT&T Universal Card Servs., Inc.*, 141 F.3d 277, 280 (6th Cir. 1998).

**B. § 523(a)(4)**

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, embezzlement, or larceny." 11 U.S.C. § 523(a)(4)(West 2006).

Embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). "A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *Id.* at 1173.

**C. § 523(a)(6)**

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. 147, 156 (Bankr. E.D. Mich. 2004)(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.

#### **D. Collateral Estoppel**

Generally, the doctrine of collateral estoppel "precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action." *Markowitz*, 190 F.3d at 461 (quoting *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, bankruptcy courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984).

The doctrine of collateral estoppel is applicable in bankruptcy proceedings. See *Grogan*, 498 U.S. at 284, 111 S.Ct. at 658. "[T]he party asserting preclusion bears the burden of proof."

*Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304, 310 (6th Cir. 2005) (quoting *United States v. Dominguez*, 359 F.3d 839, 842 (6th Cir.), cert. denied, 543 U.S. 848, 125 S.Ct. 261 (2004)).

In Ohio, the following elements must be established to apply the doctrine of collateral estoppel: 1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; 2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; 3) The issue in the present suit must have been identical to the issue in the prior suit; and 4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. *Gonzalez v. Moffit (In re Moffitt)*, 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000).

Plaintiff in the case *sub judice* relies upon Defendant's prior conviction for theft, as well as a civil consent judgment, in order to invoke the doctrine of collateral estoppel. Although a guilty plea in a criminal prosecution constitutes a complete admission of a defendant's guilt in that criminal proceeding in Ohio, see Ohio R. Crim. P. 11(B)(1); *State of Ohio ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 662 N.E.2d 370, 372 (1996), Ohio courts have concluded that the "mutuality" requirement is not met when a private party plaintiff attempts to invoke offensive collateral estoppel based upon a defendant's criminal conviction. *Culberson v. Doan*, 72 F.Supp.2d 865, 872 (S.D. Ohio 1999)(citing *Phillips v. Rayburn*, 113 Ohio App.3d 374, 382, 680 N.E.2d 1279, 1284 (4th Dist. 1996)); *Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 905 (Bankr. N.D. Ohio 1998); *North American Science Associates*

*v. Clark (In re Clark)*, 222 B.R. 114, 117 (Bankr. N.D. Ohio 1997).

Ohio courts cite policy concerns first articulated in *Walden v. State*, 47 Ohio St.3d 47, 51-52, 547 N.E.2d 962, 965-67 (1989), including the procedural and discovery differences between civil and criminal forums as well as the defendant's dilemma over whether to testify on his/her own behalf or present any defense at the criminal trial, for their adoption of the minority view that additional litigation involving the facts and legal issues underlying the conviction is the proper practice. *Culberson*, 72 F. Supp.2d at 873; *Phillips*, 113 Ohio App.3d at 382, 680 N.E.2d at 1284; *In re Chapman*, 228 B.R. at 906; *In re Clark*, 222 B.R. at 117.

Despite Ohio's proscription of the use of collateral estoppel with respect to prior criminal convictions, a criminal conviction may nevertheless be admitted into evidence in a subsequent civil case and accorded whatever weight the factfinder deems appropriate. *Phillips*, 113 Ohio App.3d at 382, 680 N.E.2d at 1284, *In re Chapman*, 228 B.R. at 905.

A consent judgment in Ohio has the same binding effect as one entered by the court after summary adjudication or full trial. *Columbus v. Alden E. Stilson & Assoc.*, 90 Ohio App.3d 608, 614-615, 630 N.E.2d 59 (10th Dist. 1993)(citing *Horne v. Woolever*, 170 Ohio St. 178, 163 N.E.2d 378 (1959) and *Sponseller v. Sponseller*, 110 Ohio St. 395, 144 N.E. 48 (1924)). However, collateral estoppel only applies to factual findings that are incorporated into the agreed judgment entry. *Nye v. Ohio Bd. of Examiners of Architects*, 165 Ohio App.3d 502, 507-508, 847 N.E.2d 46, 50 (10th Dist. 2006); *In re Clark*, 222 B.R. at 117 ("[A]ny factual determination to be given preclusive effect must have been necessary to the prior

judgment.") In other words, where a consent judgment is not clearly based upon conduct which would give rise to a nondischargeable debt under 11 U.S.C. § 523, collateral estoppel does not apply at the summary judgment stage of the proceedings.

For instance, the bankruptcy court in *In re Clark* refused to give collateral estoppel effect to a consent judgment entered in a civil case premised upon multiple claims including breach of contract, tortious interference with business relationships, misappropriation of property, and fraudulent diversion of business, because the judgment did not identify the specific claims upon which the judgment was based. *In re Clark*, 222 B.R. at 117-118.

The *Clark* Court wrote:

Though it appears that the factual determinations necessary for judgments based on most of these causes of action would be adequate to show nondischargeability under § 523(a)(2), (4), and (6), at least one is not. One of the causes of action in the state court proceeding was breach of employment contract, which could be based on facts which would not give rise to a nondischargeable debt under the Bankruptcy Code. Accordingly before this Court could give any preclusive effect to the civil consent judgment, a trial would be necessary at least to determine which portion of the consent judgment related to breach of contract, and whether this portion also arose from willful and malicious actions of the Debtor. Such a trial would be tantamount to a trial of the underlying dischargeability issues.

*Id.*

### III. Facts

The following facts are taken from the Affidavit of Plaintiff Ronald S. Paloski, Plaintiff's principal shareholder, unless otherwise noted. (Paloski Aff. ¶ 1.) Plaintiff is an Ohio professional corporation located in Warren, Ohio which provides physician and general medical services. (*Id.* ¶ 2.) At all times relevant to the above-captioned action, Defendant was employed by

Plaintiff as its office manager. (*Id.* ¶ 4.) As part of her duties, Defendant was entrusted with processing accounts receivable and payable, reconciliation and balancing of accounts, issuance of checks drawn on Plaintiff's bank account, and depositing funds into Plaintiff's bank account. (*Id.* ¶¶ 5, 9.)

During her employment, Defendant wrote 130 checks made payable to herself from Plaintiff's corporate checking account in the aggregate amount of \$100,328.83. (*Id.* ¶ 6, Defendant's Answers to Plaintiff's Requests for Admissions ¶ 2.) Plaintiff never authorized the issuance of the checks. (Paloski Aff. ¶ 7, Def.'s Answers to Pl.'s Req. for Admis. ¶ 3.) Defendant concealed the issuance of the checks by falsely listing the checks on the check ledger as being paid to various vendors. (Paloski Aff. ¶ 8.) Defendant also falsified deposit tickets by depositing less than the amount(s) listed on the tickets. (*Id.* ¶ 10.) Plaintiff converted the remainder of the money to her own use in the aggregate amount of \$3,620.00. (*Id.* ¶ 11.)

As a result of her actions, a criminal action was commenced against Defendant in the Trumbull County Court of Common Pleas in Case No. 1997CR00280. On November 10, 1997, Defendant pled guilty to two counts of felony theft in violation of R.C. § 2913.02(A)(1) and/or (2) and/or (3). (Journal Entry dated January 22, 1998 in Case No. 1997CR00280.) R.C. § 2913.02(A) reads, in pertinent part:

No person, with the purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the owner or person authorized to give consent;

(3) By deception.

OHIO REV. CODE ANN. § 2913.02 (West 1997). Defendant received a suspended sentence, conditioned upon restitution to Plaintiff in the amount of \$103,948.83, to be paid in monthly installments of \$250.00. (Journal Entry dated January 22, 1998 in Case No. 1997CR00280.)

During the pendency of the criminal case, Plaintiff filed a civil complaint ("Civil Complaint") against Defendant in Trumbull County Court of Common Pleas Case No. 97-CV-1669. (*Id.* ¶ 13.) In the Civil Complaint, Plaintiff alleges that "Defendant either negligently, intentionally, or improperly obtained funds in the [sic] of \$103,948.83 from the Plaintiff." (Civil Complaint at ¶ 6.) The Agreed Judgment Entry in Case No. 97-CV-1669, dated January 12, 1998 ("Consent Judgment"), reads, in pertinent part:

The parties agree that the Defendant is obligated to the Plaintiff in the amount of One Hundred Three Thousand Nine Hundred Forty Eight Dollars and Eighty Three Cents (\$103,948.83). Subsequent to the filing of the Complaint, the Defendant has paid, for the benefit of the Plaintiff, the sum of Fifteen Thousand Dollars (\$15,000.00), thus reducing the balance owed to the Plaintiff to the sum of Eighty Eight Thousand Nine Hundred Forty Eight Dollars and Eighty Three Cents (\$88,948.83). The Defendant has agreed to pay an additional lump sum of Thirty Six Thousand Nine Hundred Seventy Four Dollars and Forty One Cents (\$36,974.41). Thereafter, the remaining balance of Fifty One Thousand Nine Hundred Seventy Four Dollars and Forty Two Cents (\$51,974.42) will be paid in monthly installments, commencing January 15, 1998, in the amount of One Hundred Fifty Dollars (\$150.00). Such payments are to continue monthly until the real estate collateral of the Defendant is sold or liquidated and the Judgment is paid in full.

(Consent Judgment dated January 12, 1998 at p. 1-2.)

Defendant filed her Chapter 7 petition on July 7, 2005. As of that date, Defendant owed Plaintiff \$99,839.10. (Paloski Aff. ¶ 18.)

#### IV. Analysis

Plaintiff's Motion for Summary Judgment is premised upon three arguments: First, Plaintiff asserts that Defendant is collaterally estopped from relitigating the issues of fact and law in this case based upon Defendant's criminal conviction. Second, Plaintiff contends that Defendant is collaterally estopped from relitigating the issues of fact and law in this case based upon the Consent Judgment. Third, Plaintiff argues that, based upon Defendant's criminal conviction and the Consent Judgment, as well as the additional evidence before this Court, no genuine issue of material fact exists and Plaintiff is entitled to summary judgment as a matter of law.

Turning to Plaintiff's first argument, it is clear that despite her prior conviction for theft, Defendant is not collaterally estopped from relitigating the issues of fact or law in the above-captioned case. Ohio courts have rejected the application of collateral estoppel to criminal convictions based upon the numerous policy concerns listed in Section II.D of this Memorandum Opinion. As a consequence, collateral estoppel is inappropriate with respect to Defendant's criminal conviction.

Plaintiff's second argument is equally unavailing. Like the consent judgment in *In re Clark, supra*, the Consent Judgment in the case *sub judice* does not reveal whether it is premised upon Defendant's intentional or negligent conduct as alleged in the Civil Complaint. Consequently, a trial "tantamount to a trial of the underlying dischargeability issues" is necessary because

Plaintiff cannot rely on factual findings that were not incorporated in the Consent Judgment. See *In re Clark*, 222 B.R. at 118.

Finally, Plaintiff argues that no genuine issue of material fact exists that precludes summary judgment in its favor in this case. The undisputed evidence before this Court (taken from the Paloski affidavit and Defendant's Responses to Plaintiff's Request for Admissions) establishes that Plaintiff entrusted its money to Defendant, and Defendant appropriated Plaintiff's money for a use other than that for which it was entrusted. See *In re Brady*, 101 F.3d at 1173. Furthermore, Defendant's efforts to conceal her conduct (including, but not limited to, false entries on the check ledger) are more than sufficient to raise the spectre of fraud. *Id.* As such, Plaintiff has successfully demonstrated each element of its § 523(a)(4) claim against Defendant.

Accordingly, the Court finds that Defendant's debt to Plaintiff in the amount of \$99,839.10 is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).<sup>1</sup>

An appropriate order will follow.

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<sup>1</sup>Because Plaintiff is entitled to summary judgment as a matter of law on its § 523(a)(4) claim, the Court need not address Plaintiff's §§ 523(a)(2) and (a)(6) claims.

