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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 17-1877

[Filed May 30, 2018]

IN RE ZACHARY N. TROST and KIMBERLY A. TROST, Debtors	)
SHERRY TROST, Plaintiff-Appellee,	)
v.	)
ZACHARY N. TROST and KIMBERLY A. TROST, Defendants-Appellants.	)

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

O P I N I O N

BEFORE: MOORE, COOK, and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. Federal bankruptcy law allows an underwater debtor to discharge certain debts in the hope of a fresh financial start. But there are limits on the law's generosity; not all obligations may be forgiven. One such exception is for debts that arise from causing willful and malicious injuries. A jury found that Zachary and Kimberly Trost (collectively, "Zachary")[1] converted the property of Sherry Trost ("Sherry"), causing Sherry over $100,000 in losses. Zachary says that debt should be forgiven in bankruptcy; Sherry says it cannot be, since the injury was the result of a willful and malicious injury. A bankruptcy court and appellate panel agreed with Sherry. We do too, and thus **AFFIRM**.

I

Sherry Trost is the widow of Fred Trost, the former owner and host of the Michigan television show Michigan Outdoors. R. 70, Joint Statement of the Case, PID 663.[2] Michigan Outdoors accumulated significant debts under Fred's management. *Id.* Because this debt made it impossible for Fred to continue the show, Sherry assumed the show's debts and also took ownership of all its property and assets. *Id*.

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[1] We use Zachary as the signifier for ease of reading and because he features more prominently in this case than does Kimberly.

[2] All citations to the record ("R.") refer to the record in the civil conversion, breach of contract, and fraud suit between Sherry and Zachary Trost, not the proceedings in the bankruptcy court. Those readers interested in a more comprehensive (though largely irrelevant for this appeal's purposes) version of the facts are directed to the bankruptcy court decision. *In re Trost*, 510 B.R. 140 (Bankr. W.D. Mich. 2014).

After Fred's death in 2007, Zachary Trost, Fred's son and Sherry's step son, offered to pay off the show's debts in exchange for the property and assets related to the show, including video editing equipment, videotapes of original episodes, and other assorted show memorabilia. *Id.*; R. 88, Order Granting in Part and Denying in Part Defendants' Motion for Judgment as a Matter of Law, PID 761-62. Sherry agreed, and gave Zachary all the property and assets of the show; Zachary, however, never paid any of the show's debts. *Id*.

So Sherry sued Zachary in June of 2009, for breach of contract, fraud, and conversion.[3] R. 17, Amended Compl., PID 84-86. A three-day jury trial ensued in February 2012, in which Sherry testified, submitted exhibits, and called others to testify—all on the subject of Sherry's ownership of the show's property, the circumstances surrounding the transfer of the property to Zachary, and Zachary's refusal to return the property despite his inability to pay down the debts. Included in this evidence was an email exchange between Zachary and Sherry in which Zachary offered to purchase certain of the show's assets and where they tried to arrange for a return of the property. R. 42-2, Ex. H., PID 487-88. For his part, Zachary did not put on any evidence, and instead moved for judgment as a matter of law. R. 88, PID 756.

The jury returned a verdict for Sherry on both the breach of contract and conversion claims, awarding damages of $194,725.30 and $108,797.06, respectively.

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[3] Certain of Sherry's claims were also brought against Zachary's wife Kimberly.

Id. at PID 757. The district court denied Zachary's motion for judgment as a matter of law with respect to the conversion claim, *id.* at PID 774, but granted his motion on the contract claim due to the lack of a written agreement consistent with the Uniform Commercial Code, *id.* at PID 768.

Zachary appealed the district court's conversion decision, while Sherry cross-appealed on the contract issue. *Trost v. Trost*, 525 F. App'x 335 (6th Cir. 2013). The Sixth Circuit affirmed the district court's refusal to grant judgment as a matter of law on Sherry's conversion claim, and reversed the district court's judgment and reinstated the jury verdict in favor of Sherry on the contract claim. *Id.* at 346. Only the conversion judgment is at issue in this case.

Unable to pay the conversion judgment debt, Zachary filed for Chapter 7 bankruptcy in July 2013. *In re Trost*, 510 B.R. 140, 148 (Bankr. W.D. Mich. 2014). In October 2013, Sherry filed an adversary proceeding asserting, in part, that the conversion judgment debt should be nondischargeable under 11 U.S.C. § 523(a)(6), because the debt arose from the causing of a willful and malicious injury. *Id*. The bankruptcy court granted summary judgment in favor of Sherry on her § 523(a)(6) claim. *Id*. at 153-54. Zachary appealed, and a bankruptcy appellate panel affirmed. *In re Trost*, No. 16-8024, 2017 WL 2799842, at *6 (B.A.P. 6th Cir. June 28, 2017). Zachary's appeal to this court followed.

II

A. The District Court Correctly Granted Summary Judgment in Favor of Sherry

Summary judgment in bankruptcy proceedings, like in ordinary civil litigation, is appropriate when the evidence, taken in the light most favorable to the nonmoving party, reveals no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007); Fed. R. Civ. P. 56(a). We review the district court's grant of summary judgment in favor of Sherry de novo. *Mazur*, 507 F.3d at 1016.

This case presents two questions: first, whether the prior federal court judgment holding Zachary liable for conversion established certain facts that he cannot relitigate in this bankruptcy proceeding; and second, if so, whether those established facts confirm that the conversion judgment debt is nondischargeable in bankruptcy. The bankruptcy court answered "yes" to both of these questions. Whether that was correct turns on the application of three distinct swaths of law: federal bankruptcy law, Michigan tort law, and federal collateral estoppel law.

We begin with federal bankruptcy law. Section 523(a)(6) of the Bankruptcy Code provides an exception to the dischargeability of debts arising from the "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6); *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999). "From the plain language of the statute, the judgment must be for an injury that is both willful and

malicious." *In re Markowitz*, 190 F.3d at 463. A willful injury is "deliberate or intentional"; a malicious one occurs in "conscious disregard of one's duties or without just cause or excuse." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986). The Supreme Court has explained that a nondischargeable "willful and malicious injury" "generally require[s] that the actor intend the consequences of an act, not simply the act itself." *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (citation and internal quotation marks omitted). We have further clarified that a willful and malicious injury occurs only if the debtor (1) desires "to cause the consequences of this act" or (2) "believes that the consequences are substantially certain to result from it." *Markowitz,* 190 F.3d at 464 (citation, internal quotation marks, and brackets omitted). Therefore, the central question is whether Zachary knew that he had encroached on Sherry's property rights, thereby making his conversion willful and malicious.

Whether the debt at issue here so qualifies depends on the circumstances of the Michigan tort law judgment against Zachary. "A judgment arising from the intentional tort of conversion may give rise to a nondischargeable debt under § 523(a)(6)." *In re Hanif*, 530 B.R. 655, 670 (Bankr. E.D. Mich. 2015). But "not every tort judgment for conversion," the Supreme Court has cautioned, "is exempt from discharge." *Geiger*, 523 U.S. at 64 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934)). Michigan defines common-law conversion as the wrongful exertion of domain over an owner's personal property in a manner that is inconsistent with the owner's rights. *See Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 606 (Mich. 1992). In regard to scienter, a converter's actions are

generally willful, unless the converter dos not know about the owner's interest. *Id.* Accordingly, we must "consider the circumstances surrounding the conversion to determine if it falls within the scope of [the § 523(a)(6)] exception." *In re Hanif*, 530 B.R. at 670.

That brings us, finally, to federal collateral estoppel law. Collateral estoppel, sometimes called issue preclusion, "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. Prior tort judgments can serve as a basis for collateral estoppel in nondischargeability proceedings. *Cf. Grogan v. Garner*, 498 U.S. 279, 285 (1991). A party is barred from relitigating an issue already decided when:

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.

Wolfe v. Perry, 412 F.3d 707, 716 (6th Cir. 2005) (citing *Santana–Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005)). To determine whether these five elements are met, bankruptcy courts "look at the entire record of the [prior] proceeding, not just the judgment." *Spilman*

v. Harley, 656 F.2d 224, 228 (6th Cir. 1981).[4] We do the same on appellate review.

Applying this mix of law to the facts here shows that the bankruptcy court got it right on both questions presented in this appeal. The bankruptcy court rightly invoked collateral estoppel to bar Zachary from relitigating certain factual issues determined in the conversion suit. And it correctly concluded that those prior factual determinations showed Zachary caused a willful and malicious injury, rendering his debt nondischargeable under bankruptcy law. We start with the collateral estoppel analysis.

1. Collateral Estoppel

a. Identity of the Issues

The first (and closest) question is whether the issue litigated in the Michigan conversion case was the same as in the bankruptcy dischargeability proceeding. We hold that it was. As the bankruptcy court noted at the outset of its analysis, despite the "technical distinction" between conversion's intentional act requirement and § 523(a)(6)'s intentional injury requirement, "collateral estoppel precludes religitation of *factual* issues that were actually and necessarily determined in the prior action." *In re Trost*, 510 B.R. 140, 152 (Bankr. W.D. Mich. 2014) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). And the record in the conversion case, the bankruptcy court correctly determined, resolved the key factual question at issue in the § 523(a)(6)

[4] Mutuality of the parties is uncontested and thus excluded from the analysis.

dispute—namely, whether Zachary knew that Sherry owned the property.

Recall that under § 523(a)(6), a willful injury is "deliberate or intentional"; a malicious one occurs in "conscious disregard of one's duties or without just cause or excuse." *Wheeler*, 783 F.2d at 615 615. Thus, Zachary's knowledge of Sherry's ownership interest is critical to Sherry's § 523(a)(6) claim. But Zachary's intent, despite the differing *legal* standards for common law conversion and bankruptcy dischargeability, was also a principal *factual* issue in his conversion case. Indeed, the "evidence in the District Court action . . . conclusively established that Zachary and Kim Trost were aware that Sherry Trost owned the assets." *In re Trost*, 510 B.R. at 152. This evidence included testimony by several witnesses that Zachary acquired the property in exchange for his promise to "pay off the debts" Sherry incurred from her late husband, and several emails from Zachary, after he failed to pay off those debts, offering either to return the property or purchase it. *Id.* Surveying the record, the bankruptcy court said it showed "'everyone involved'—including Zachary and Kim—'believed Sherry owned the video library and memorabilia.'" *Id*. (quoting R. 88, District Court Order Granting in Part and Denying in Part Defendants' Motion for Judgment as a Matter of Law, PID 773). And yet despite his "awareness of [Sherry's] ownership interest in the property and her repeated demands for its return," Zachary and Kim clung to the property. *Id.* The factual issue—whether Zachary knew Sherry owned the property—is therefore identical in each action.

Zachary creatively, yet unsuccessfully, tries to avoid this conclusion. He argues that the only tort claim that involved sufficiently identical issues for collateral estoppel was fraud; and furthermore, that since he was absolved on that score, he has already negated any finding that he intended to cause Sherry's injury. Appellants' Br. at 21-22 ("Indeed, a finding of 'no fraud' simply cannot logically result in a conclusion that there is no genuine issue of material fact that a person '*intended* to cause actual damage through willful and malicious behavior."). This is wrong, for two reasons. First, to qualify as a nondischargeable debt under § 523(a)(6), an injury must only be "willful and malicious"; it need not constitute fraud. Indeed, Congress created a fraud-specific exception to discharge in § 523(a)(2)(A), which bars discharge for any debts arising from "false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). While a fraudulent action may often produce a nondischargable "willful and malicious injury," the universe of wrongful action that may cause such injuries is much broader than common-law fraud. To wit, we have recognized that "[d]ebts arising out of [various] types of misconduct satisfy the willful and malicious injury standard: intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises." *In re Best*, 109 F. App'x 1, 5 (6th Cir. 2004) (collecting cases). And second, Zachary overlooks—as he did in making the same argument before the bankruptcy appellate panel—that the burden of proof for fraud claims under Michigan law, clear and convincing evidence, is substantially more severe than it is for conversion, preponderance of the evidence. *Bitkowski v. Merrill Lynch, Pierce, Fenner*

& Smith, Inc., 866 F.2d 821, 823 (6th Cir. 1987). That the record did not yield clear and convincing evidence of fraud says nothing about whether the record reveals facts showing that Zachary acted willfully and maliciously in converting Sherry's property.

The first element of collateral estoppel is therefore satisfied.

b. Actually Litigated

The factual issue of whether Zachary took property that he knew belonged to Sherry was actually litigated and decided in the district court. The bankruptcy court found "no question whatsoever that the Plaintiff's conversion claim, and the factual issues related thereto, were actually litigated," referencing the jury's conversion verdict, the district court order upholding that verdict, and the Sixth Circuit's affirmance. *In re Trost*, 510 B.R. at 151. We agree. This case's litigation history is robust, and much of the litigation has centered on the dispute of who owned the memorabilia, whether Zachary knew who owned the property, and whether Zachary held onto the property despite that knowledge and Sherry's repeated requests for its return. *Id.* at 152 (citing district court and Sixth Circuit review of the factual record). Therefore, the factual question of whether Zachary knowingly took Sherry's property has been litigated.

c. Necessary to the Judgment

At first blush, there may appear some question whether the evidence about Zachary's knowledge of ownership was *necessary* to the judgment. After all, as a general matter, one can be liable for conversion under Michigan law on showing only an intent to *act*, without

an accompanying intent to *injure*. But when we "look at the entire record of the [conversion] proceeding, not just the judgment," *Spilman*, 656 F.2d at 228, it is evident the judgment against Zachary depended on finding much more. The jury instructions are especially revealing here. *See Wheeler*, 783 F.2d at 614 (considering jury instructions to determine what the verdict required the jury to find). In the civil trial, the jury was instructed that it could find Zachary liable only if Sherry proved by a preponderance of the evidence that Zachary obtained her property through deceit or false representations. *In re Trost*, 510 B.R. 140 (citing R. 72, Proposed Jury Instructions, PID 699). Implicit in the jury's verdict against Zachary, then, is a finding that Zachary *knew* Sherry owned the property and that he acted deceitfully to obtain it. Without the testimony and other evidence demonstrating that Zachary knew Sherry was the rightful owner of the memorabilia, that he obtained it by promising to help her pay her late husband's debts, and that he refused to return it after reneging on that promise, Zachary very well could have escaped liability. He cannot argue, then, that the factual issue of his knowledge was not necessary to the conversion judgment against him.

d. Full and Fair Opportunity to Litigate

This last requirement is largely addressed by the analysis in the two preceding sections. An issue that was actually litigated and was necessary to the judgment will almost always present parties with a full and fair opportunity to litigate. Zachary certainly had such an opportunity in his conversion case—though he for some reason chose not to take it. *In re Trost*, 510

B.R. at 145. The bankruptcy court's analysis here is instructive:

> To the extent the Defendants may have believed they had an ownership interest in the videotapes and memorabilia that was superior to the Plaintiff's interest, or were otherwise "unaware" of the Plaintiff's interest in the property, *they had a full and fair opportunity to present evidence of that belief in the District Court action. They did not do so, despite the fact that the parties' competing interests in the assets were directly at issue in the conversion claim*. Instead, they stipulated before trial that Sherry Trost and JoAnn Cribley took "ownership" of Fred Trost's television show, and all of its assets and liabilities. When Sherry Trost and JoAnn Cribley offered more detailed testimony at trial about how Sherry Trost acquired the tapes and other assets from ZNT, *the Defendants offered no evidence to contradict that testimony. If they were truly not aware that Sherry Trost owned the property, the Defendants offered no explanation why Zachary Trost offered to return or purchase the property in his email correspondence*. Likewise, the Defendants offered not one whiff of "just cause or excuse" to explain why they failed to return the property to the Plaintiff, even after her repeated demands culminated in the filing of the District Court action, a three day jury trial, and a subsequent appeal.

Id. at 153 (emphasis added). Zachary had the chance to litigate the issue we now hold he is precluded from relitigating—and that is all issue preclusion requires.

It does not matter that Zachary chose not to take that chance.

All five elements required for the application of collateral estoppel are satisfied. The bankruptcy court therefore properly held that the conversion case precluded Zachary from contesting whether he knew Sherry owned the property.

2. Whether the factual record in the prior proceeding rendered Zachary's debt nondischargeable

Unable to relitigate scienter, Zachary must show that the facts established in the conversion case stop short of showing willfulness and malice as required by § 523(a)(6). He cannot do so. "To the contrary, the factual findings that were necessary to the prior determination that the Defendants converted the Plaintiff's property convincingly establish that the Defendants' actions were also willful and malicious under § 523(a)(6)." *In re Trost*, 510 B.R. at 152. That is true under either *Wheeler* or *Markowitz*, our prior cases explicating the standard for willful and malicious injuries. The evidence shows that Zachary's actions were "willful" in that he knew Sherry owned the property when he did not return it, and that they were malicious in that he acted in clear disregard for Sherry's superior rights. *See Wheeler*, 783 F.2d at 615. And if the record is equivocal on whether Zachary *wanted* "to cause the consequences of [his] act"—Sherry losing her property—it is clear that he knew "those consequences [were] substantially certain to result from it." *Markowitz,* 190 F.3d at 464.

The same kinds of facts that emerged in Zachary's conversion case have supported a willful and malicious finding in other bankruptcy proceedings. In *In re Hanif*, the plaintiff's conversion suit alleged that the defendant's actions excluding plaintiff from the business were "deliberate and on-going over a period of time." 530 B.R. at 670. The court, taking those allegations as true because the defendant defaulted, said they demonstrated willful and malicious intent: "That pattern of conduct could lead to only one result—[p]laintiff's exclusion from the business. That result was entirely foreseeable and substantially certain to occur." *Id.* So too here. Zachary's pattern of conduct—taking Sherry's property by promising to help her pay debts, failing to do so, and yet repeatedly refusing to return the property—could lead only to Sherry being wrongfully deprived of her property. Consider, also, *In re Cox*, 243 B.R. 713 (Bankr. N.D. Ill. 2000). Because the facts in the conversion case there revealed the defendant "was aware of Fidelity's interest and knew that selling of the car parts was substantially certain to cause an injury to that interest," the court said he acted both willfully and maliciously. *Id.* at 720. The facts show much the same in this case: Zachary knew Sherry owned the property—indeed he implicitly acknowledged as much by alternately promising to return and offering to buy it—so he at the very least knew that he was substantially certain to injure Sherry by refusing to return her property.

Contrast further clarifies our conclusion. This case is easily distinguished from prior ones where tort judgments failed to render a debt nondischargeable. In *In re Lowery*, for example, the record in the debtor's

conversion case revealed "no indication" that the court "actually considered and determined Lowery's subjective intent to cause injury or the probability of injury." 440 B.R. 914, 928 (Bankr. N.D. Ga. 2010). That meant Lowery's tort case did not address the issue presented by § 523(a)(6)'s "willful and malicious" requirement. *Id.* Similarly, in *In re Longley*, the court examining an underlying conversion judgment could find no "evidence that Longley intended to injure [the creditor] or its lien interest," even though ample evidence showed he intentionally transferred a vehicle he did not own. 235 B.R. 651, 657 (B.A.P. 10th Cir. 1999). As such, the record in the conversion case against Longley could not answer the question whether Longley willfully and maliciously caused injury. *Id.* In stark contrast to both *Lowery* and *Longley*, the record here is replete with evidence regarding Zachary's subjective intent. The facts show that Zachary knew he was not the rightful owner of the memorabilia, and that he nevertheless held onto it despite Sherry's repeated demands for its return. *In re Trost*, 510 B.R. at 152.

In light of all this, we agree with the bankruptcy court that the "factual record" in the conversion case "mandates the factual and legal conclusion that the . . . conversion of [Sherry's] property" was both willful and malicious. *Id.* at 153. As there is no genuine issue of material fact regarding whether Zachary willfully or maliciously caused Sherry's injury, the conversion

judgment debt is nondischargeable and summary judgment in favor of Sherry was proper.[5]

III

For the fifth time and before a fifth court, Zachary argues that he did not intentionally cause Sherry Trost's injury when he deprived her of property valued at over $100,000. The first court found otherwise, the second affirmed, and every one since has rejected relitigation of this question. We hold the same today. Therefore, the bankruptcy court's grant of summary judgment in favor of Sherry is **AFFIRMED.**

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[5] Zachary's remaining argument that, even if he caused Sherry an injury, the debt she complains of in this case is not related to that injury, is a red herring. Zachary says that "the injury complained-of by [Sherry] (the taxes and debts from the television show) already existed at the time [Zachary] breached their promise to pay the debts purportedly in exchange for the memorabilia." Appellants' Br. at 17; *see also id.* at 19 (suggesting Sherry's only injury was "the taxes and the debts that already existed"). Not so. The jury determined the value of the property converted was $108,797.06. While the jury based that determination on the value of the debts that Zachary agreed to pay in exchange for Sherry's property, that does not mean those debts constituted Sherry's injury. *See Trost*, 525 F. App'x at 343. The *injury* remains the loss of property wrought by Zachary's conversion; that doesn't change simply because the *value* of that property—and thus the damages awarded for Sherry's injury—was assessed by reference to Sherry's debts.

APPENDIX B

By order of the Bankruptcy Appellate Panel, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8024-1(b). See also 6th Cir. BAP LBR 8014-1(c).

File Name: 17b0005n.06

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

No. 16-8024

[Filed June 28, 2017]

IN RE: ZACHARY N. TROST; KIMBERLY A. TROST, *Debtors*.	)
SHERRY TROST, *Plaintiff-Appellee*,	)
v.	)
ZACHARY N. TROST; KIMBERLY A. TROST, *Defendants-Appellants*.	)

Appeal from the United States Bankruptcy Court for the Western District of Michigan at Grand Rapids. No. 13-05887—James D. Gregg, Judge.

Decided and Filed: June 28, 2017

Before: DELK, PRESTON, and WISE, Bankruptcy Appellate Judges.

COUNSEL

ON BRIEF: Michael R. Behan, Okemos, Michigan, for Appellants. Troy R. Hendrickson, Chandler, Arizona, for Appellee.

OPINION

PAULETTE J. DELK, Bankruptcy Appellate Panel Judge. Debtors-Appellants Zachary Trost and Kimberly Trost appeal the Bankruptcy Court's order granting summary judgment to Plaintiff-Appellee Sherry Trost holding the debt owed to her non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). The debt arose from a judgment against Zachary and Kimberly for common law conversion. The Bankruptcy Court found that the judgment established the elements of willful and malicious conversion of Sherry's property by Zachary and Kimberly. Accordingly, the Bankruptcy Court granted summary judgment to Sherry on the basis of collateral estoppel. For the reasons stated, we affirm.

ISSUE ON APPEAL

The issue on appeal is whether the Bankruptcy Court erred in applying the doctrine of collateral estoppel to grant summary judgment to Sherry.

JURISDICTION AND STANDARD OF REVIEW

Under 28 U.S.C. § 158(a)(1), this Panel has jurisdiction to hear appeals "from final judgments,

orders, and decrees" issued by the Bankruptcy Court. For purposes of appeal, an order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S. Ct. 1494, 1497 (1989) (citation and quotation marks omitted). A partial summary judgment order "that does not dispose of all parties and all claims is generally not immediately appealable[.]" *Bonner v. Perry*, 564 F.3d 424, 427 (6th Cir. 2009). "Once the remaining parts of a case are dismissed or otherwise resolved, a grant of partial summary judgment becomes a final judgment." *Anderson v. Fisher (In re Anderson)*, 520 B.R. 89, 90–91 (B.A.P. 6th Cir. 2014) (citing *J.D. Pharm. Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.,* 893 F.3d 1201, 1208 (11th Cir. 1990)).

In the present case, the Bankruptcy Court granted summary judgment on the § 523(a)(6) count of the complaint in May 2014. However, because other counts of the complaint were still pending, the Panel dismissed an earlier appeal of the judgment as interlocutory. Once all other counts of the complaint were dismissed, the litigation of the adversary case ended on the merits. Thus, the judgment entered in May 2014 is now appealable.

> A grant of summary judgment is a conclusion of law, reviewed de novo. *Medical Mutual of Ohio v. K. Amalia Enters., Inc*., 548 F.3d 383, 389 (6th Cir. 2008). "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a

> matter of law." *Id*. (citing *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007)). "Under a de novo standard of review, the reviewing court decides the issue independently of, and without deference to, the trial court's determination." *Menninger v. Accredited Home Lenders* (*In re Morgeson*), 371 B.R. 798, 800 (6th Cir. BAP 2007) (citing *Treinish v. Norwest Bank Minn., N.A.* (*In re Periandri*), 266 B.R. 651, 653 (6th Cir. BAP 2001)). "The determination of the applicability of collateral estoppel is also reviewed de novo." *Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620, 623 (6th Cir. BAP 2000) (citing *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999)).

In re Anderson, 520 B.R. at 91.

FACTS

This case involves the family of Fred Trost, the former star and owner of a television show called Michigan Outdoors. Michigan Outdoors ran for over 20 years locally in the western part of Michigan. During its time, the show accumulated significant debts, including, but not limited to, a multi-million dollar civil judgment known as the "Buck Stop Judgment." Initially, Fred or his businesses were responsible for the debts. However, at some point, Sherry, Fred's second wife, and nonparty JoAnn Cribley took ownership of the show and its assets, and agreed to assume liability for the show's debts so that Fred could continue to operate the show. Sherry incurred substantial tax liability as a result.

Debtor-Appellant Zachary is the son of Fred Trost and stepson of Sherry. Debtor-Appellant Kimberly is Zachary's wife. Zachary worked on the show with his father over the years. He also tried to manage the show's debts and keep it operational.

Following Fred's sudden death in July 2007, Sherry and Zachary came to an agreement. Zachary agreed to pay off the debts Sherry had incurred running the show, including tax debts and outstanding loans, in exchange for the assets that Sherry owned related to the show, including videotapes and memorabilia. Zachary took the assets from Sherry and tried to monetize them but was mostly unsuccessful. For two years Sherry's repeated requests that Zachary pay off the debts were largely ignored. When she ultimately demanded that he return the assets, Zachary refused.

In June 2009, Sherry sued Zachary and Kimberly for breach of contract and common law conversion in the United States District Court for the Western District of Michigan ("District Court"). During a three-day jury trial, in February 2012, Sherry testified, submitted exhibits, and called others to testify. "The trial evidence detailed the property at issue, how Sherry came to own it, the circumstances surrounding the formation of Sherry's contract with Zachary, Sherry's partial performance of it, and Zachary's breach." *Trost v. Trost*, 525 F. App'x 335, 339 (6th Cir. 2013) (unpublished). On the other hand, Zachary and Kimberly chose not to put on evidence and moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The District Court took the motion under advisement and submitted the case to the jury. The jury awarded Sherry $194,725.30 on the

breach of contract claim. Additionally, the jury found both Zachary and Kimberly liable on the conversion claim, awarding Sherry $108,797.06 for tortious conduct.

After the jury's verdict, the District Court granted Zachary and Kimberly's motion for judgment as a matter of law regarding the breach of contract claim based on the statute of frauds, but denied the motion as to the conversion claim. Zachary and Kimberly appealed the denial of their motion regarding the conversion claim to the United States Court of Appeals for the Sixth Circuit ("Court of Appeals"). Sherry cross-appealed regarding her dismissed breach of contract claim. The Court of Appeals affirmed the District Court's decision on the conversion claim, but reversed the District Court's decision on the breach of contract claim and reinstated the jury's judgment on that claim.[1]

On July 23, 2013, Zachary and Kimberly filed a voluntary chapter 7 bankruptcy petition in the Western District of Michigan. Sherry filed an adversary proceeding on October 8, 2013, asserting that the debt should be excepted from discharge under § 523(a)(2) due to Zachary and Kimberly's fraud and/or § 523(a)(6) because it was the result of a willful and malicious injury. She also sought denial of Zachary and Kimberly's discharge under § 727(a) or dismissal of their bankruptcy case for lack of good faith.

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[1] The contract claim is not relevant to the current issue before the Panel.

On February 1, 2014, Sherry filed a motion for summary judgment only on the § 523(a)(6) count of her complaint. Sherry argued that the judgment for common law conversion established all of the elements required to hold the debt nondischargeable pursuant to § 523(a)(6) and that Zachary and Kimberly were precluded from arguing otherwise. Zachary and Kimberly filed a cross motion for summary judgment on all counts of the complaint. The Bankruptcy Court held a hearing on March 21, 2014, and issued an opinion granting Sherry's motion for summary judgment on the § 523(a)(6) count and denying Zachary and Kimberly's cross motion for summary judgment on May 12, 2014.[2] Zachary and Kimberly timely appealed.

DISCUSSION

In the present case, Sherry asserted that the amount owed to her by Zachary and Kimberly pursuant to the judgment for conversion is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code. The Bankruptcy Court agreed and granted summary judgment. The Panel has examined the record and determines that the previously litigated facts establish the elements required to find the debt nondischargeable.

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[2] Zachary and Kimberly attempted to immediately appeal the Bankruptcy Court's judgment. However, because some counts of the complaint were still pending, the BAP dismissed the appeal for lack of jurisdiction. On June 2, 2016, the remaining count of the complaint was voluntarily dismissed. Accordingly, the § 523(a)(6) judgment is incorporated into the final order dismissing the last count, which then ended the case. Thus, the Panel now has jurisdiction to review this matter.

A. Collateral Estoppel

Collateral estoppel, sometimes called issue preclusion, "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 v. Campbell* (*In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999) (citations omitted). "The party asserting issue preclusion bears the burden of proof as to all elements and must introduce a sufficient record to reveal the controlling facts and the exact issues litigated." *Chudzinski v. Hanif* (*In re Hanif*), 530 B.R. 655, 664 (Bankr. E.D. Mich. 2015) (citation omitted). Issue preclusion applies in nondischargeability litigation. *Grogan v. Garner*, 498 U.S. 279, 284–285, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

Under federal law, the following elements must be present for the application of collateral estoppel based on a federal judgment:

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.

Wolfe v. Perry, 412 F.3d 707, 716 (6th Cir. 2005). *See also John Richards Home Bldg. Co., LLC v. Adell* (*In re*

John Richards Home Bldg. Co., LLC), 404 B.R. 220, 237 (E.D. Mich. 2009) (citations omitted) (federal courts apply federal law when determining preclusive effect of prior federal judgment).

All of the elements required for collateral estoppel are met. Zachary and Kimberly do not credibly dispute that elements four and five above are satisfied here. Therefore, on appeal, this Panel considers whether the other three elements are satisfied, and concludes that they are. Intentional torts may cause a "willful and malicious injury" under § 523(a)(6). The jury in the prior District Court action weighed and decided the facts in issuing the conversion judgment. And those facts were necessary to the judgment for common law conversion. Accordingly, the Bankruptcy Court did not err in applying collateral estoppel.

B. Common Law Conversion

Michigan law defines common law conversion "as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins. Co. v. Allstate Ins. Co*., 486 N.W.2d 600, 606 (Mich. 1992) (citations omitted). Common law conversion "can be committed unwittingly if [the converter is] unaware of the plaintiff's outstanding property interest." *Id*. (citations omitted). However, if the converter's actions are willful, then the conversion is an intentional tort. *Id. See also Crestmark Bank v. Electrolux Home Prods*., 155 F. Supp. 3d 723, 748 (E.D. Mich. 2016), *citing In re Pixley*, 456 B.R. 770, 787-88 (Bankr. E.D. Mich. 2011).

Zachary and Kimberly argued to the Bankruptcy Court and this Panel that their conversion of Sherry's

property was "unknowing" rather than intentional. They made the same faulty argument to the District Court and the Court of Appeals. Following the jury's verdict against Zachary and Kimberly, the District Court entered an order denying their Rule 50(a) motion as to the conversion claim. In affirming the District Court's ruling, the Court of Appeals succinctly summarized the District Court's findings:

> [T]he court readily rejected Zachary and Kim's challenge to the conversion claim. It noted ample evidence showing that Sherry controlled the video library and the memorabilia, which she gave Zachary as part of the bargain to pay off debts she incurred running Fred's show. Zachary's email asking Sherry "how and when" she wanted to "take back" the property, as well as his overture to buy it from her, supported the view that the property was Sherry's. Zachary and Kim never suggested that they owned the property, or that Sherry did not. The court found the evidence fully supported the jury's conclusion that Sherry owned the property or, minimally, had an interest in it superior to theirs, and that the duo **acted tortiously** in keeping it after Sherry demanded its return.
>
> The court also rejected Kim's argument that the evidence was insufficient to hold her liable for conversion. Kim was involved in initially taking possession of the property and was "fully aware" of the negotiations between Zachary and Sherry. The jury, for example, was presented with an email Kim wrote to JoAnn on August 12, 2008, lamenting that if "the stock market had not

> dropped like it did, we would be able to pay off all the bills and everyone would be happy," and relating the difficulties of getting Tara to "come through to get the bills paid." In another email, responding to JoAnn's observation that Zachary "has thrown in the towel on the mess his dad left behind," Kim acknowledged that Zachary "feels like this is all his problem" because "his dad left him with this debt and he is responsible for it." And later, after Sherry demanded the return of her property, Kim did nothing, even though some of it was in her home. As neither Zachary nor Kim took the stand to contest any of this, the court concluded, the jury could reasonably find both defendants liable for conversion.

Trost, 525 F. App'x at 340 – 41 (emphasis added).

In affirming the District Court's ruling on the motion for judgment as a matter of law, the Court of Appeals also reviewed the evidence regarding Zachary and Kimberly's knowledge that the property they held belonged to Sherry. Although this evidence was recited in the context of an argument on appeal that Kimberly should not be held responsible, the language confirms that the evidence supported the finding that this was an intentional conversion by both.

> The record shows that Kim participated in taking Sherry's property, equally possessed it in her home, knew that Sherry demanded its return, and aided in the refusal to comply. Sherry testified that Kim helped her husband move the property to their home. Kim knew that she and Zachary had property for which Sherry expected payment, but explained to JoAnn that

> stock market losses made it difficult to come up with the money. Kim also confirmed Zachary's aim to honor the agreement in emails to JoAnn. Later, when Sherry's attorney sent a written demand to their home seeking return of the property, neither Zachary nor Kim responded. And in spite of being sued almost three years before the jury was impaneled, the property remained in their joint home.

Trost, 525 F. App'x at 343.

As noted by the Bankruptcy Court, the Sixth Circuit Court of Appeals has offered guidance on how to assess the preclusive effect of a prior judgment, stating that "the bankruptcy court should look at the entire record of the [prior] proceeding." *Spilman v. Harley*, 656 F.2d 224, 228 (6th Cir. 1981). This the Bankruptcy Court did and, noting that Zachary and Kimberly did not refute it, correctly concluded that the evidence presented in the District Court action established that Zachary and Kimberly's conversion of Sherry's property was an intentional, not unwitting, conversion. Specifically, the Bankruptcy Court held:

> The evidence in the District Court action also conclusively established that Zachary and Kim Trost were aware that Sherry Trost owned the assets. Several witnesses testified at trial that Sherry and Zachary Trost entered into an agreement whereby Zachary would pay off the debts from Fred Trost's television show in exchange for the tapes and other memorabilia. *Trost*, 525 F. App'x. at 339. . . . As the District Court succinctly stated, "everyone involved"—including Zachary and Kim—"believed Sherry

> owned the video library and memorabilia." Order Granting in Part and Denying in Part Defendants' Motion for Judgment as a Matter of Law, USDC Dkt. No. 88 at 18.

Trost v. Trost (*In re Trost*), 510 B.R. 140, 152 (Bankr. W.D. Mich. 2014). Accordingly, the Bankruptcy Court's determination that Zachary and Kimberly's conversion of Sherry's property was intentional was fully supported by the evidence recited by the District Court in its ruling on Zachary and Kimberly's motion for judgment as a matter of law, and by the Court of Appeals in its decision affirming the District Court. Zachary and Kimberly are precluded from now arguing that they mistakenly believed that they owned the property and that this was a case of negligent conversion.

C. Nondischargeability pursuant to § 523(a)(6)

Pursuant to § 523(a)(6), any debt which arises from a "willful and malicious injury by the debtor to another entity or to the property of another entity" is not discharged. This requires the debtor to have committed an act similar to an intentional tort. *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90 (1998). The alleged injury must have been both willful and malicious. *In re Markowitz*, 190 F.3d at 463. Willfulness is present when the debtor "'desires to cause [the] consequences of his act, or ... believes that the consequences are substantially certain to result from it.'" *Id*. at 464 (citation omitted). "An act is 'malicious' if it is undertaken 'in conscious disregard of one's duties or without just cause or excuse.'" *Phillips v. Weissert* (*In re Phillips)*, 434 B.R. 475, 483 (B.A.P. 6th Cir. 2010) (quoting *Wheeler v. Laudani*, 783 F.2d

610, 615 (6th Cir. 1986)). "Malicious" acts do "'not require ill-will or specific intent to do harm.'" *Id.* "Conversion of property clearly falls within the misdeeds contemplated in 11 U.S.C. § 523(a)(6)—willful and malicious injury to persons or property." *Kasishke v. Frank* (*In re Frank*), 425 B.R. 435, 443 (Bankr. W.D. Mich. 2010). *See also Steier v. Best* (*In re Best*), 109 F. App'x. 1, 4 (6th Cir. June 30, 2004) ("Debts arising out of these types of misconduct satisfy the willful and malicious injury standard: intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises.").

In the present case, the District Court and the Court of Appeals cited the evidence in support of the jury's verdict that Zachary and Kimberly intended to deprive Sherry of her property. The evidence reflects that Zachary and Kimberly both knew that the property belonged to Sherry and they intentionally withheld it from her, refusing to return it in spite of her repeated requests. Being deprived of her property was an injury to Sherry and it was intentional. It was malicious in that Zachary and Kimberly had a clear duty to return the property to Sherry, consciously disregarded the duty and had no just cause for doing so. Thus, the elements of a willful and malicious injury are met.

The foregoing discussion illustrates that the first, second and third criteria for application of collateral estoppel are present: the issues before the Bankruptcy Court were identical to those resolved in the District Court proceeding, the issues were actually litigated before the District Court, and the resolution of those

issues were necessary to the judgment on the merits by the jury in the District Court. The Bankruptcy Court did not err in its determination that the debt owed to Sherry by Zachary and Kimberly is non-dischargeable pursuant to § 523(a)(6).

D. Other Arguments on Appeal

In the civil case, the jury returned a verdict that Zachary and Kimberly did not defraud Sherry. On appeal, Zachary and Kimberly argue that the finding of "no fraud" negates collateral estoppel and "should have been conclusive as to the 'intent to cause injury' requirement of Non-Dischargeability under § 523(a)(6)." (Appellants' Br. at 5.) This argument ignores the differences between § 523(a)(2) and § 523(a)(6). Fraud is not a required element of § 523(a)(6). While an action that is fraudulent often produces a willful and malicious injury pursuant to § 523(a)(6), not all types of willful and malicious injury stem from fraud.

In addition, the elements and burden of proof for a fraud claim under Michigan law are different than for a conversion claim.

> It is well established under Michigan law … that fraud can be established only by clear and convincing evidence that the defendant made a material representation that was false; that he knew was false or made recklessly without knowledge of its truth; that he made with the intent that it should be acted upon by the plaintiff; that the plaintiff acted in reliance thereon; and thereby suffered injury.

Bitkowski v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 866 F.2d 821, 823 (6th Cir. 1987) (citing *Disner v. Westinghouse Elec. Corp.*, 726 F.2d 1106, 1111-12 n.11 (6th Cir. 1984); *Hi-Way Motor Co. v. Int'l Harvester Co.*, 247 N.W. 2d 813, 816 (Mich. 1976)). Conversely, to establish the tort of conversion based upon the definition set forth in *Foremost Ins. Co. v. Allstate Ins. Co*., *supra*, the plaintiff must carry the burden of proof by only a preponderance of the evidence. *In re Stewart*, 499 B.R. 557, 566 (Bankr. E.D. Mich. 2013). While the jury in the present case determined that Sherry did not establish that Zachary and Kimberly committed fraud by clear and convincing evidence, it did determine that a preponderance of the evidence established that Zachary and Kimberly committed conversion. The jury's finding regarding fraud, based on a different set of elements and a different burden of proof, in no way undermines its conclusion regarding conversion.

Zachary and Kimberly also argued that the Bankruptcy Court committed reversible error by refusing to consider Zachary's mental health as it related to intent. The doctrine of collateral estoppel precludes re-litigation of this issue. A jury reached a verdict that Zachary and Kimberly committed the intentional tort of conversion. The intent element required to hold the debt non-dischargeable under § 523(a)(6) is the same one already litigated in the District Court action with respect to the conversion claim and cannot now be challenged based on evidence previously rejected or not provided in that action.

Finally, Zachary and Kimberly argue that the amount of damages awarded by the jury for the conversion ($108,797.06) was the amount of tax

obligations that Sherry owed the IRS and did not actually arise from the conversion of the videotapes and memorabilia. Again, this argument fails owing to the doctrine of collateral estoppel. The jury determined the amount of damages arising from the conversion. The District Court found sufficient evidence to support the jury verdict, and the Court of Appeals affirmed the District Court's decision not to grant Zachary and Kimberly's post-trial motion for judgment as a matter of law on this count. The Appellants are estopped from now arguing that the amount awarded is incorrect. Moreover, the Court of Appeals already explained how "it was appropriate for the jury to set the value of the property when it was converted by the amount of the debts that Zachary agreed to pay in exchange for it." *Trost*, 525 F. App'x at 343. The Bankruptcy Court was correct not to revisit this issue.

CONCLUSION

For the reasons stated, the Bankruptcy Court's order granting summary judgment to Plaintiff Sherry Trost is AFFIRMED.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

Case No. GL 13-05887-jtg
Chapter 7
Hon. John T. Gregg
Adv. Proc. No. 13-80266-jtg

[Filed February 3, 2016]

In re:	)
	)
ZACHARY N. TROST and	)
KIMBERLY A. TROST,	)
Debtors.	)
	)
SHERRY TROST,	)
Plaintiff,	)
	)
v.	)
	)
ZACHARY N. TROST and	)
KIMBERLY A. TROST,	)
Defendants.	)
	)

MEMORANDUM DECISION REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES: Troy R. Hendrickson, Esq., TROY RICHMOND HENDRICKSON, PLLC, Tempe, Arizona, for Sherry Trost. Michael R. Behan, Esq., SCHRAM,

BEHAN & BEHAN, Okemos, Michigan, for Zachary N. Trost and Kimberly A. Trost.

This matter comes before the court in connection with cross motions for summary judgment filed by Sherry Trost, the plaintiff in this adversary proceeding (the "Plaintiff"), and Zachary N. Trost and Kimberly A. Trost, the defendants in this adversary proceeding (collectively, the "Defendants"). In their motions, the parties assert that the doctrine of collateral estoppel precludes the relitigation of certain facts and issues which were determined in a prior proceeding. For the following reasons, the court shall deny both motions.

INTRODUCTION

To some extent, this adversary proceeding relates to events that occurred more than twenty years ago, when Fred Trost, the deceased father and husband of Zachary Trost and the Plaintiff, respectively, claimed that products sold by Buckstop Lure Company, Inc. ("Buckstop") contained cow urine, and not deer urine as advertised.[1] *Buckstop Lure Co. v. Trost (In re Trost)*, 164 B.R. 740, 741 (Bankr. W.D. Mich. 1994). The products apparently contained deer urine after all, as Buckstop obtained a judgment for defamation against Fred Trost and Fred Trost Enterprises, Inc. in the amount of $4 million in the Circuit Court for Montcalm County, Michigan. *See also Trost v. Buckstop Lure Co., Inc.*, 644 N.W.2d 54, 58, 249 Mich. App. 580 (2002) (affirming denial of relief from judgment for alleged lack of jurisdiction).

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[1] Kimberly Trost is married to Zachary Trost.

Confronted with the collection efforts of his creditors, including Buckstop, Fred Trost sought relief under Chapter 7 of the Bankruptcy Code in 1992. The bankruptcy of Fred Trost was hardly a success though, as this court ultimately revoked his discharge. *In re Trost*, 164 B.R. at 749. The judgment obtained by Buckstop and the revocation of Fred Trost's discharge set in motion a series of transfers, transactions and broken promises, all of which culminated in the entry of a judgment for common law conversion in favor of the Plaintiff and against the Defendants in the United States District Court for the Western District of Michigan (the "District Court"). *Trost v. Trost*, Case No. 1:09-cv-580 (W.D. Mich. March 8, 2012), *aff'd*, 525 Fed. Appx. 335 (6th Cir. 2013).

After the Defendants filed their own bankruptcy, the Plaintiff commenced this adversary proceeding. Relying on factual determinations made in the District Court action, this court previously granted summary judgment to the Plaintiff with respect to a cause of action for willful and malicious injury under section 523(a)(6). *Trost v. Trost (In re Trost)*, 510 B.R. 140, 153-54 (Bankr. W.D. Mich. 2014).[2] The motions for summary judgment currently before this court concern

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[2] The Plaintiff was previously awarded damages in the amount of $108,797.06 for her claim under section 523(a)(6). *Id*. at 154. Assuming *arguendo* that the Plaintiff eventually prevails on her claim under section 523(a)(2)(A), it is unlikely that she will be entitled to even $1.00 more. Rather, the damages sought under the two claims are arguably duplicative. *See Trost*, 525 Fed. Appx. at 346 (citations omitted) (election of remedies doctrine – "the legal version of the idea that a plaintiff may not have his cake and eat it too" – prevents double recovery on conversion and breach of contract claims).

the Plaintiff's cause of action under section 523(a)(2)(A) and raise the following issues:

> (i) whether the jury verdict finding that the Plaintiff failed to prove claims sounding in fraud by clear and convincing evidence is entitled to collateral estoppel in this adversary proceeding; and
>
> (ii) whether the jury verdict which allegedly includes a finding of "deceit and/or false representations" in connection with the Plaintiff's claim for common law conversion is entitled to collateral estoppel in this adversary proceeding.

JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

As the parties note in their motions, the facts are undisputed and have previously been established on several occasions.[3] This court sees no need to recite them any differently in this Memorandum Decision.

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[3] As previously recognized by this court, "[t]he Sixth Circuit's factual summary is binding on this court and is entirely consistent with the findings of the trial court." *In re Trost*, 510 B.R. at 144 n.4.

A. The Agreement Between Sherry Trost and Zachary Trost

> Plaintiff, Sherry Trost, is the widower [sic] of Fred Trost. Fred Trost started a television show in Michigan in 1982, titled Michigan Outdoors. Michigan Outdoors was a dba of Fred Trost Enterprises, Inc. Fred Trost Enterprises, Inc. accumulated significant debts, including, but not limited to, a significant multi-million dollar civil judgment known as the "Buck Stop Judgment." Plaintiff married Fred Trost on July 29, 1988. . . The "Michigan Outdoors" tape library owned by Fred Trost Enterprises, Inc. was bought by ZNT Marketing, Inc., a company owned by Zachary Trost and JoAnn Cribley at [t]he auction held when all assets related to the television show were seized due to the Buck Stop Judgment. Fred Trost continued to operate his show[;] however[,] the debts from Fred Trost Enterprises, Inc. followed Fred Trost and made it impossible for him to own or operate the show in his own name or to own any assets of the show. In fact, Fred Trost was going to have to shut down the show and the business because of the debt. Fred Trost was to receive a significant inheritance from his parents upon their passing[;] however[,] these funds would not be available in time to save the show. Plaintiff and nonparty JoAnn Cribley agreed to take ownership of the show and its assets and agreed to take on the show's debts in their names so that Fred Trost could continue to operate the show. Plaintiff and JoAnn Cribley became officers and owners of Practical Sportsman, Inc.

> In 2002, a non-profit corporation, Practical Sportsman Foundation, was set up in order to continue the operation of the show. Again, JoAnn Cribley and Sherry Trost were officers of Practical Sportsman Foundation. Practical Sportsman Foundation took on debts of the previous business entities and incurred additional debt. Fred Trost remained in charge of the running of the business, including finances and bookkeeping. . .
>
> Fred Trost became suddenly ill in May 2007. After several months in the hospital, Fred Trost passed away in July 2007 prior to receiving his inheritance or paying any of the debts from the show. . .
>
> Zachary Trost and [his sister] Tara Trost received an inheritance from Fred Trost's parents.

In re Trost, 510 B.R. at 143-44 (citing USDC Dkt. Nos. 69 and 81; *Trost*, 525 Fed. Appx. at 337-38 (citations omitted)).

Sometime after Fred Trost died, the Plaintiff agreed to give Zachary Trost the assets that she owned relating to the Michigan Outdoors show, including videotapes, raw footage and other memorabilia. *Trost*, 525 Fed. Appx. at 338. In exchange for these assets, Zachary Trost agreed to pay off the debts that the Plaintiff incurred from producing and administering the show. *Id*. Zachary Trost, however, did not pay off the debts as he had promised. *Id*. Instead, while attempting to profit from the assets, Zachary Trost

ignored the Plaintiff's repeated requests to satisfy the Plaintiff's debts and to return the assets to her. *Id*.

B. The District Court Litigation and Related Appeal

In 2009, the Plaintiff commenced a civil action in the District Court against the Defendants for, among other things, breach of contract, fraud, common law conversion and statutory conversion. *In re Trost*, 510 B.R. at 144 (citing USDC Dkt. No. 17).[4] Approximately three years later and in preparation for trial, the parties jointly filed proposed jury instructions which, in large part, mirrored the Michigan Model Civil Jury Instructions. Mich. M. Civ. JI 128.01, 128.03.[5] With respect to the Plaintiff's claim for "Fraud Based on False Representation," the jury instruction was based on the model instruction and stated as follows:

> M Civ JI 128.01 Fraud
> Based on False Representation
>
> Plaintiff claims that Defendant Zachary Trost defrauded her. To establish fraud, [P]laintiff has the burden of proving each of the following elements by clear and convincing evidence:
>
> a. Defendant made a representation of a material fact.

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[4] Notably, the Plaintiff asserted a claim for conversion against both Defendants but asserted fraud-based claims against only Zachary Trost. (USDC Dkt. No. 72 at pp. 30-31, 34.)

[5] The Defendants raised certain objections to the proposed jury instructions, none of which are relevant for purposes of this matter.

b. The representation was false when it was made.

c. Defendant knew the representation was false when he made it, or defendant made it recklessly, that is, without knowing whether it was true.

d. Defendant made the representation with the intent that the Plaintiff rely on it.

e. Plaintiff relied on the representation.

f. Plaintiff was damaged as a result of her reliance.

(USDC Dkt. No. 72 at p. 30.)

With respect to the Plaintiff's claim for "Fraud Based on Bad Faith Promise," the jury instruction was again based on the model instruction and stated as follows:

M Civ JI 128.03 Fraud Based on Bad Faith Promise

Plaintiff claims that Defendant Zachary Trost defrauded her by making a promise of future conduct. To establish this, Plaintiff has the burden of proving each of the following elements by clear and convincing evidence:

a. Defendant promised that he would pay off all the debts of the show if Plaintiff gave him all the property from the show.

b. At the time Defendant made the promise, he did not intend to keep it.

c. Defendant made the promise with the intent that Plaintiff rely on it.

d. Plaintiff relied on the promise.

e. Plaintiff was damaged as a result of her reliance.

(USDC Dkt. No. 72 at p. 31.)

The jury instructions also addressed the Plaintiff's claim for common law conversion. However, for some reason, the parties did not use a form jury instruction for the claim of common law conversion. *See* Mich. Non-Standard Civ. JI 28:1. Instead, the parties submitted the following jury instruction with respect to common law conversion:

> *Foremost Ins. Co. v. Allstate Ins. Co.*,
> 439 Mich. 378, 391, 486 N.W.2d 600
>
> (1992) Common Law Conversion
>
> The tort of common law conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.
>
> Plaintiff claims the Defendants Zachary and Kim Trost converted her property by obtaining that property through deceit and/or false representations. *To establish this Plaintiff has the burden of proving that Defendant or Defendants obtained Plaintiff's property by deceit and/or false representations.*

(USDC Dkt. No. 72 at p. 34 (emphasis added).) The jury instruction further provided that the Plaintiff

must prove all of the elements of common law conversion by a preponderance of the evidence. (*Id*.) In the absence of any objection and at the request of the parties, the District Court adopted the proposed jury instruction for common law conversion. (USDC Dkt. No. 81.)

In early February 2012, the District Court conducted a three day jury trial. *Trost*, 525 Fed. Appx. at 339. During her case in chief, the Plaintiff and three other witnesses testified. *Id*. The Plaintiff also offered over twenty exhibits into evidence. *Id*. After the Plaintiff concluded her case in chief, the Defendants rested without testifying and without calling a single witness or offering any other evidence. *Id*. at 340. Instead, the Defendants filed a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) at the conclusion of the trial. *Id*. The District Court took the motion under advisement and submitted the case to the jury. *Id*.

On February 8, 2012, the jury returned a verdict finding in favor of the Plaintiff and against the Defendants for common law conversion in the amount of $108,797.06. (USDC Dkt. No. 86.) The jury also found in favor of the Plaintiff and against Zachary Trost for breach of contract in the amount of $194,725.30. (*Id*.) However, the jury found that the Plaintiff did not prove either of her fraud-based claims by clear and convincing evidence. (*Id*.)

One month later, the District Court entered a detailed order granting in part, and denying in part, the Defendants' motion for a judgment as a matter of law. (USDC Dkt. No. 88.) The District Court concluded that the Defendants were not entitled to a judgment as

a matter of law on the counts for fraud and conversion. *See In re Trost*, 510 B.R. at 146-47 (summarizing decision of District Court as it relates to common law conversion). The District Court also concluded that the Defendants were entitled to a judgment as a matter of law on the breach of contract count, and thus vacated the jury verdict in this regard.

The Defendants appealed the denial of their motion with respect to the conversion claim to the Sixth Circuit Court of Appeals, which affirmed the District Court by rejecting all of the Defendants' arguments related to common law conversion. *Trost*, 525 Fed. Appx. at 341-44.[6]

C. The Non-Dischargeability Action

Approximately two months after the decision from the Sixth Circuit, the Defendants jointly filed for relief under Chapter 7 in this court. Shortly thereafter, the Plaintiff commenced this adversary proceeding by filing a complaint [Adv. Dkt. No. 1] alleging that the debt owed to her by the Defendants should be declared non-dischargeable. According to the Plaintiff, the debt owed to her resulted from the Defendants' fraudulent conduct under section 523(a)(2) and constituted a

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[6] The Sixth Circuit reversed and remanded the District Court's decision to vacate the jury verdict with respect to breach of contract. *Id*. at 346. The Sixth Circuit stated that because the damages for the claims of common law conversion and breach of contract were co-extensive, the Plaintiff would need to elect her remedy so as to avoid a double recovery. *Id*.; *see also supra* at n.2. The Plaintiff also appealed. However, the court need not discuss the Plaintiff's issues on appeal as they are irrelevant to this Memorandum Decision.

willful and malicious injury to the Plaintiff's property under section 523(a)(6).[7]

In February 2014, the Plaintiff filed a motion for summary judgment with respect to willful and malicious injury under section 523(a)(6) [Adv. Dkt. No. 10]. On the same day, the Defendants filed their own motion for summary judgment on all counts of the Plaintiff's complaint [Adv. Dkt. No. 11]. In a written opinion dated May 12, 2014, this court granted the Plaintiff's motion for summary judgment as to willful and malicious injury under section 523(a)(6) and denied the Defendants' motion on the same count. *In re Trost*, 510 B.R. at 153-54. This court concluded that the facts evidencing common law conversion in the District Court, as affirmed on appeal by the Sixth Circuit, were entitled to collateral estoppel in this adversary proceeding. *Id*. at 153.

Approximately two weeks later, the Defendants filed a notice of appeal, which was dismissed by the Bankruptcy Appellate Panel for the Sixth Circuit. *Trost v. Trost (In re Trost)*, Case No. 14-8033 (B.A.P. 6th Cir. Dec. 8, 2014). The Panel concluded that it lacked jurisdiction because this court's decision on the motion for summary judgment was not a final order due to the remaining count under section 523(a)(2)(A). *Id*. at p. 2.

In July 2015, the parties filed their cross motions for summary judgment which are the subject of this

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[7] The complaint also initially sought denial or revocation of the Defendants' discharge under section 727(a) and dismissal of the Defendants' bankruptcy case for lack of good faith. The Plaintiff has since voluntarily dismissed these causes of action [Adv. Dkt. Nos. 45 and 50].

Memorandum Decision. In her motion, the Plaintiff contends that the Defendants are precluded by the doctrine of collateral estoppel from asserting that they did not obtain the Plaintiff's property through false representation or other fraudulent means. Specifically, the Plaintiff argues that the jury's finding of common law conversion also encapsulated a finding of "deceit and/or false representations" based on the express language of the jury instruction. As such, the Plaintiff asserts that the jury already determined the issue of fraudulent representation for purposes of section 523(a)(2)(A) in this adversary proceeding.

In response to the Plaintiff's motion, the Defendants argue that the jury separately determined that the Defendants were not liable for fraud and fraudulent misrepresentation. The Defendants thus claim that this court cannot conclude that the jury verdict finding common law conversion supersedes the verdict finding no fraudulent conduct on the part of the Defendants.

The Defendants' motion for summary judgment presents similar legal arguments. In their motion, the Defendants contend that the Plaintiff is collaterally estopped from claiming any fraud on the part of the Defendants because the jury rendered a verdict in which it found that the Plaintiff had not satisfied her burden with respect to her two claims sounding in fraud.

In response, the Plaintiff first stresses that under Michigan law, she was required to satisfy her burden by clear and convincing evidence. However, because claims under section 523(a) require only a showing by a preponderance of the evidence, the Plaintiff argues that the verdict from the District Court does not

preclude the claim under section 523(a)(2)(A) in this adversary proceeding. The Plaintiff also contends that the District Court's decisions to deny the Defendants' motion for summary judgment and subsequent motion for judgment as a matter of law on the fraud count now preclude the Defendants from seeking summary judgment in this adversary proceeding.[8]

This court held a hearing regarding the cross motions, after which the court took the matter under advisement.[9] Upon careful review and consideration of the pertinent facts and applicable law, the court shall deny both motions.

LEGAL STANDARD

Under Rule 7056 of the Federal Rules of Bankruptcy Procedure, incorporating Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056; *see McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 195 (6th Cir. 1996) (citing *Celotex Corp. v. Catrett*,

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[8] In their pleadings, both parties have mentioned the alleged mental illness of Zachary Trost at the time he agreed to assume responsibility for payment of certain debts in exchange for the assets related to Michigan Outdoors. However, at this stage of the proceeding, the parties have not provided this court with any substantial evidence or argument on this issue that would require further discussion. The court notes that neither the District Court nor the jury found any argument regarding mental illness compelling.

[9] The court conducted two informal settlement conferences with the parties after the hearing on the cross motions.

477 U.S. 317, 322 (1986)). The court should not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). Instead, the court should only determine whether there is a genuine issue of material fact. *Id*.

The moving party bears the initial burden to demonstrate that no genuine issue of material fact exists by identifying, among other things, the portions of the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Upon such a showing, the burden then shifts to the non-moving party to demonstrate a genuine issue of material fact for trial. *Id*. at 324-25.

The evidence and all reasonable inferences drawn therefrom must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). However, production of a mere "scintilla of evidence" in support of an essential element of a claim will not forestall summary judgment. *Anderson*, 477 U.S. at 252. The non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586 (citations omitted); *see Berryman v. Rieger*, 150 F.3d 561, 566 (6th Cir. 1998) (non-moving party must provide more than mere allegations or denials). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

When parties file cross motions for summary judgment, the standard of review does not change. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 n.6 (6th Cir. 1999) (citing *Atl. Richfield Co. v. Monarch Leasing Co.*, 84 F.3d 204, 206 (6th Cir. 1996)). The court must consider each motion separately on the merits because each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. *Id.* (citing *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)).

DISCUSSION

A. False Pretenses, False Representations or Actual Fraud – 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge "any debt – for money, property, [or] services . . . to the extent obtained by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). In order to except a debt from discharge under section 523(a)(2)(A), a creditor must satisfy the following elements:

(i) the debtor obtained money, property, services or credit;

(ii) through a material misrepresentation;

(iii) that, at the time, the debtor knew was false or made with gross recklessness as to its truth;

(iv) the debtor intended to deceive the creditor;

(v) the creditor justifiably relied on the false representation; and

(vi) such reliance was the proximate cause of the loss.

AT&T Universal Card Servs., Inc. v. Rembert (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)); *Flagstar Bank, FSB v. Stricker (In re Stricker)*, 414 B.R. 175, 181 (Bankr. W.D. Mich. 2009). A creditor bears the burden of proof of each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *In re Rembert*, 141 F.3d at 281. Exceptions to discharge are to be strictly construed against the creditor. *Id*.

B. Principles of Collateral Estoppel

In their cross motions, the parties attempt to rely solely on determinations from the District Court in support of their arguments. The Plaintiff contends that the jury verdict finding the Defendants liable for common law conversion also establishes that the Defendants committed a form of fraud, thereby resulting in a non-dischargeable debt. Conversely, the Defendants contend that the jury verdict finding that Zachary Trost did not engage in fraudulent conduct precludes this court from entering judgment in favor of the Plaintiff.

The doctrine of collateral estoppel, also known as issue preclusion, "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." *In re Markowitz*, 190 F.3d at 461 (citations omitted); *see Spilman v. Harley*, 656 F.2d 224, 227 (6th Cir. 1981) (bankruptcy court not required to redetermine all underlying facts). The Sixth Circuit has explained that:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

United States v. Stauffer Chemical Co., 684 F.2d 1174, 1180 (6th Cir. 1982) (citations omitted). "Principles of collateral estoppel apply in non-dischargeability actions." *Livingston v. Transnation Title Ins. Co. (In re Livingston)*, 372 Fed. Appx. 613, 617 (6th Cir. 2010) (citations omitted).

Where, as in this adversary proceeding, a federal court has previously entered a judgment, the federal law of preclusion must generally be applied to determine the preclusive effect of that judgment. *J.Z.G. Resources v. Shelby Ins. Co.*, 84 F.3d 211, 213–14 (6th Cir. 1996) (stating federal issue and claim preclusion principles should be applied in successive federal

diversity actions) (citations omitted); *see John Richards Home Bldg. Co., LLC v. Adell (In John Richards Home Bldg. Co., LLC)*, 404 B.R. 220, 237 (E.D. Mich. 2009) (citations omitted) (federal courts apply federal law when determining preclusive effect of prior federal judgment).

However, when a federal court is exercising diversity jurisdiction, some debate exists as to whether to apply collateral estoppel under federal law or the law of the State in which the federal court sits. In *Semtek Int'l Inc. v. Lockheed Martin Corp*., the United States Supreme Court held that federal common law provides that when a federal court is exercising its diversity jurisdiction, principles of preclusion are determined by adopting "the law that would be applied by state courts in the State in which the federal diversity court sits." 531 U.S. 497, 508 (2001); *see Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (affirming *res judicata* effect of federal judgment determined by federal common law); *Ranir, LLC v. Dentek Oral Care, Inc*., 2010 WL 3222513, at *2 (W.D. Mich. Aug. 16, 2010) (recognizing in diversity cases that federal law incorporates rules of preclusion applied by State in which rendering court sits). Although the Supreme Court discussed the rule in the context of *res judicata*, or claim preclusion, the Court used broad language that arguably also requires this rule to be applied to collateral estoppel, or issue preclusion. *Semtek*, 531 U.S. at 507-08. Since *Semtek*, courts have adopted inconsistent interpretations of the rule. *Compare*, *e.g.*, *Gamble v. Overton (In re Overton)*, 2009 WL 512159, at *3 (Bankr. D. Idaho Jan. 26, 2009) (rule applies only to claim preclusion) *with Goodwin v. Beckley (In re Beckley)*, 2013 WL 865541, at *4-5 (Bankr. D. Idaho

Mar. 7, 2013) (rule applies to claim preclusion and issue preclusion).

This court finds it unnecessary to immerse itself in this issue, as any such determination in the context of this adversary proceeding would be purely academic. *See Matosantos Commercial Corp. v. Applebee's Int'l, Inc*., 245 F.3d 1203, 1208 (10th Cir. 2001) (declining to decide which principles of collateral estoppel to apply post-*Semtek*, because result would be same under federal law and State law).[10] Michigan law, as the law of the State in which the District Court sits, and federal law are nearly identical, as discussed below. *Compare People v. Gates*, 452 N.W.2d 627, 630, 434 Mich. 146 (1990) *with Verizon North, Inc. v. Strand*, 367 F.3d 577, 583 (6th Cir. 2004). As such, this court's analysis and ultimate conclusions would be the same regardless of whether Michigan or federal collateral estoppel principles are applied. *See Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000) (recognizing pre-*Semtek* that whether federal or state law collateral estoppel principles were applied did not affect outcome); *In re Trost*, 510 B.R. at 150 n.7 (same).[11]

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[10] The court's treatment of this issue in this adversary proceeding should not be misinterpreted as indifference to the issue on the whole. To the contrary, as noted in *Semtek*, the issue of which principles of preclusion to apply could be of extreme importance to the ultimate outcome and is designed to prevent forum shopping. *Semtek*, 531 U.S. at 504.

[11] In her motion, the Plaintiff acknowledges that it does not matter which law applies, while the Defendants take no position.

In order for collateral estoppel to apply under Michigan law, the following elements must be satisfied:

> (i) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> (ii) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> (iii) the prior proceeding must have resulted in a final judgment on the merits; and
>
> (iv) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Hinchman v. Moore, 312 F.3d 198, 202 (6th Cir. 2002) (quoting *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001) (citing *Gates*, 452 N.W.2d at 630, 434 Mich. at 154).

Similarly, in order for collateral estoppel to apply under federal law, the following elements must be satisfied:

> (i) the issue in the subsequent litigation is identical to that resolved in the earlier litigation;
>
> (ii) the issue was actually litigated and decided in the prior action;
>
> (iii) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation;

(iv) the party to be estopped was a party to the prior litigation (or in privity with such a party); and

(v) the party to be estopped had a full and fair opportunity to litigate the issue.

Verizon North, Inc. v. Strand, 367 F.3d at 583 (citations omitted).

"Courts are not required to give preclusive effect to contradictory or inconsistent findings of fact." *Tweedie v. Hermoyian (In re Hermoyian)*, 466 B.R. 348, 360-61 (Bankr. E.D. Mich. 2012) (citing *Sanderson Farms, Inc. v. Gasbarro*, 299 Fed. Appx. 499 (6th Cir. 2008)); *see Gates*, 452 N.W.2d at 631, 434 Mich. at 158 (collateral estoppel applies only where basis of judgment clear, definite and unequivocal) (citing *Dowling v. United States*, 493 U.S. 342, 351-52 (1990)). The party asserting preclusive effect has the burden of satisfying all of the elements of collateral estoppel. *Spilman*, 656 F.2d at 229 (federal law) (citations omitted); *In re Hermoyian*, 466 B.R. at 362 (state law) (citations omitted).

C. Application to the Cross Motions in This Adversary Proceeding

Because the parties have filed cross motions for summary judgment, the court must review each motion independently to determine whether the District Court action precludes further litigation under section 523(a)(2)(A) in this adversary proceeding.

1. The Plaintiff's Motion

Applying the elements of collateral estoppel, this court concludes that the Plaintiff's motion for summary judgment must be denied. As an initial matter, the District Court action clearly resulted in a final judgment on the claim of common law conversion, the jury instruction for which included "deceit and/or false representations." The jury verdict as to common law conversion was reinforced by the District Court when it denied the Defendants' motion for judgment as a matter of law, which was affirmed by the Sixth Circuit on appeal. Finally, the Defendants had an opportunity to litigate in the District Court and in fact did so as named defendants throughout the proceeding.

The court next turns to the issue of whether a finding of "deceit and/or false representations" was necessary to the jury's verdict with respect to common law conversion. In her motion, the Plaintiff contends that the "verdict, the judgment and affirmation of the judgment depended directly on the issue litigated, whether Defendants obtained Plaintiff's property by deceit and/or false representation." The Plaintiff further argues that the "Plaintiff could only succeed on her conversion claim in the federal diversity action if she proved that Defendants obtained her property through deceit and/or false representation." The Plaintiff's arguments are misplaced.

Notwithstanding the Plaintiff's suggestions to the contrary, it does not appear that the jury, or the District Court for that matter, made any finding that the Defendants obtained the Plaintiff's property through "deceit and/or false representations." The jury verdict was a general verdict. Because the completed

jury verdict form is silent as to particularized findings, including with respect to "deceit and/or false representations," this court must review the entire record from the District Court to determine the rights, facts and issues that were determined as part of that proceeding. *Spilman*, 656 F.2d at 228; *Gates*, 452 N.W.2d at 631-32, 434 Mich. at 158-59 (entire record from prior proceeding used to supplement general jury verdict in order to determine if finding necessary and essential). After undertaking such review, this court has not identified anything in the record from the District Court that supports the Plaintiff's argument that the jury found any "deceit and/or false representations." Rather, the jury found that the Defendants were not liable to the Plaintiff for either of the two claims sounding in fraud. (USDC Dkt. No. 86 at p. 2.)

In addition, after setting forth the requirements for common law conversion under Michigan law, the District Court upheld the general verdict as a matter of law without *any* reference to "deceit and/or false representations." (USDC Dkt. No. 88 at pp. 16-19.) The District Court explained the basis for its decision as follows:

> [The Defendants] initially took possession of the property with Sherry's blessing. This was essentially Zachary's project, but as the email exhibits suggest, Kim Trost, as Zachary's wife and a party of the "family," was fully aware of what was happening. Zachary, e.g., e-mailed JoAnn Cribley on July 25, 2008 that, "Kim and I are still planning to help you and Sherry out." [citation omitted]. The evidence also shows that

> Zachary continued to hold and exercise control over the property in their home, and neither one returned any of it, despite demands by both Sherry and her attorney, even up to the time of trial. Rather, they stopped talking to Sherry. *This behavior constituted conversion as defined above*, and significantly, neither Zachary nor Kim took the stand to deny it. Based on the testimony and exhibits Sherry Trost produced, there was a sufficient basis for the jury to make a finding of common law conversion against Zachary and Kim Trost.

In re Trost, 510 B.R. at 147-48 (citing USDC Dkt. No. 88 at pp. 18-19.) (emphasis added). Finally, other than the jury instruction itself, the Plaintiff has not directed this court to anything in the record from the District Court in support of her argument that "deceit and/or false representations" were determined.[12] This court therefore concludes that no finding of "deceit and/or false representations" was made in the prior proceeding before the District Court.

However, even if the jury had found "deceit and/or false representations" in connection with the claim of

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[12] The court relies on the parties to identify the relevant portions of the record for the court to consider. *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001) (citation omitted) (trial court does not have duty to search entire record for absence of issue of material fact). The court declines to adopt what has been referred to as a "wholesale" approach, and instead requires a "retail" approach. *See also New Products Corp. v. Tibble (In re Modern Plastics Corp.)*, __ B.R. __, 2016 WL 245908, at *3 n.6 (Bankr. W.D. Mich. Jan. 21, 2016) (requiring documentspecific admission of exhibits).

common law conversion as the Plaintiff contends, any such determination must still be necessary. An issue is "necessarily determined" if it is essential to the judgment. *See*, *e.g.*, *In re Livingston*, 372 Fed. Appx. at 617 (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (citation omitted)); *Morris v. Charron (In re Charron)*, 541 B.R. 656, 668 (Bankr. W.D. Mich. 2015) (issue must be recognized as important by parties and by trier as necessary) (quoting *Restatement (Second) of Judgments* § 27 at cmt.j). In other words, "'[i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded.'" *General Motors, LLC v. Gunner (In re Gunner)*, 2013 WL 663733, at *4 (Bankr. E.D. Mich. Jan. 30, 2013) (quoting *Restatement (Second) of Judgments* § 27 (1982) (emphasis added)); *see* 18 Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 4421 (2d ed. 2013) (collateral estoppel "attaches only to determinations that were necessary to support the judgment entered in the first action.").

In a recent decision from the Bankruptcy Appellate Panel for the Sixth Circuit with facts similar to those in the present adversary proceeding, the Panel considered whether elements of fraud were necessarily determined by the state court in connection with a default judgment for statutory conversion. Concluding that the plaintiff was not entitled to collateral estoppel, the Panel explained:

> As noted above, statutory conversion under Michigan Compiled Laws § 600.2919a does not require circumstances indicating fraud. Section

600.2919a(a) defines statutory conversion as "[a]nother person's stealing or embezzling property *or* converting property to the other person's own use" (emphasis added).

Allegations of fraud, even if deemed admitted based on a defendant's default, cannot be "necessarily determined" for purposes of issue preclusion if they were not an essential element for a finding of statutory conversion. *See In re Markowitz,* 190 F.3d at 462 (in holding that the state court jury's finding of legal malpractice did not decide issue of "willful and malicious injury" under § 523(a)(6), the Sixth Circuit noted that the state court recognized a requested special interrogatory on the question of willful and malicious injury "was neither necessary nor essential to [the state court] judgment"); *In re Pixley,* 456 B.R. at 787–89 (allegations in state court complaint that injury to plaintiff was "willful" within the meaning of § 523(a)(6) were not "necessary to" or "essential to support" judgment for statutory conversion under Michigan law). And since Michigan law does not require circumstances of fraud for statutory conversion under Michigan Compiled Laws § 600.2919a(a), the state court judgment cannot have issue preclusive effect as to the third element of nondischargeability for embezzlement under § 523(a)(4). Therefore, the bankruptcy court erred when it granted summary judgment for Plaintiffs based on the issue preclusive effect of the prior state court judgment.

Dantone v. Dantone (In re Dantone), 477 B.R. 28, 39-40 (B.A.P. 6th Cir. 2012). This court finds the decision in *Dantone* to be persuasive and consistent with the interpretations of other courts when applying principles of collateral estoppel under federal law and Michigan law. *See*, *e.g.*, *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005) (applying federal collateral estoppel principles to conclude that the date illegal alien last entered country was not necessary and essential to judgment on legality of alien's presence in the country); *Gates*, 452 N.W.2d at 631-32 (citing *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)); *contra Stoehr v. Mohamed*, 244 F.3d 206, 208-09 (1st Cir. 2001) (finding of fraud in connection with violation of consumer protection statute entitled to collateral estoppel effect in non-dischargeability action because no theory of liability other than fraud pursued and state court made specific findings of fact).

In this adversary proceeding and similar to *Dantone*, it was unnecessary for the jury to find "deceit and/or false representations" in connection with a claim for common law conversion. *See In re Dantone*, 477 B.R. at 39-40. Under Michigan law, common law conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 606, 439 Mich. 378 (1992) (citations omitted). It is generally "viewed as an intentional tort in the sense that the converter's actions are willful." *Id*. However, common law conversion can also "be committed unwittingly if [the converter is] unaware of the plaintiff's outstanding property interest." *Id*.

After conducting some independent research, this court has been unable to identify any decisions which require a finding of "deceit and/or false representations" in order to establish common law conversion under Michigan law, nor has the Plaintiff directed the court to any. The court concludes that the finding of "deceit and/or false representations" (to the extent it was even made by the jury) was not necessary to determine common law conversion in the District Court action.[13] As such, the Plaintiff is not entitled to collateral estoppel for purposes of section 523(a)(2)(A), and her motion for summary judgment must be denied.[14]

2. The Defendant's Motion

The Defendants' motion for summary judgment must also be denied, albeit for entirely different reasons. In their motion, the Defendants contend that the Plaintiff is collaterally estopped from claiming any fraud on the part of the Defendants because the jury rendered a verdict in which it found that the Plaintiff had not satisfied her burden with respect to claims sounding in fraud. The Plaintiff counters, quite

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[13] Such conclusion does not affect the jury verdict with respect to common law conversion and, subsequently, the determination of the District Court as a matter of law. The Plaintiff was required to establish all of the elements of common law conversion under Michigan law, which it did. *See Trost*, 525 Fed. Appx. at 341-44; *In re Trost*, 510 B.R. at 153-54.

[14] Because any determination of "deceit and/or false representations" was not made, or at the very least, was unnecessary, this court need not address the remaining elements of collateral estoppel.

convincingly, that summary judgment cannot be granted in favor of the Defendant because the burden of proof for fraud is not the same in this adversary proceeding as it was in the District Court action.[15]

The United States Supreme Court has observed that different burdens of proof may preclude the application of collateral estoppel in non-dischargeability actions. *See Grogan v. Garner*, 498 U.S. 279, 284-85 (1991).[16] In *Grogan*, the Supreme Court intimated that a higher burden of proof in a prior proceeding would not subject a plaintiff to collateral estoppel in a subsequent proceeding. *Id*. at 285. The Supreme Court stated that a plaintiff "who successfully obtained a fraud judgment in a jurisdiction that

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[15] The Plaintiff further argues in her response brief that she is not precluded by the jury verdict from alleging fraud in this adversary proceeding because Kimberly Trost was not alleged to have defrauded the Plaintiff in the action before the District Court. The court declines to address this issue, as the different burdens of proof preclude summary judgment.

[16] Since *Grogan*, bankruptcy courts have overwhelmingly recognized that the burden of proof is a threshold inquiry that must be made in order to determine if the precise issue in this adversary proceeding is the same issue as in the prior proceeding. *See*, *e.g.*, *Wilmers v. Yeager (In re Yeager)*, 500 B.R. 547, 555 (Bankr. S.D. Ohio 2013); *Fire Safe Protection Servs., LP v. Ayesh (In re Ayesh)*, 465 B.R. 443, 448 n.2 (Bankr. S.D. Tex. 2011); *S.L. Pierce Agency, Inc. v. Painter (In re Painter)*, 285 B.R. 669, 675-76 (Bankr. S.D. Ohio 2002); *Thompson v. Myers (In re Myers)*, 235 B.R. 838, 843 (Bankr. D. S.C. 1998); *Jerry Katzman, M.D. Ophthalmic Assocs., P.A. v. Owens (In re Owens)*, 123 B.R. 434, 438 (Bankr. M.D. Fla. 1991) (citation omitted); *Tankersley v. Lynch (In re Lynch)*, 2014 WL 1096307, at *5-8 (Bankr. E.D. Mich. Mar. 7, 2014) (citation omitted).

requires proof of fraud by clear and convincing evidence would . . . be indifferent to the burden of proof regarding nondischargeability, because he could invoke collateral estoppel in any event." *Id*. Importantly, the Supreme Court further noted that "[t]his indifference would not be shared, however, by a creditor who either did not try, or tried *unsuccessfully*, to prove fraud in a jurisdiction requiring clear and convincing evidence but who nonetheless established a valid claim by proving, for example, a breach of contract involving the same transaction." *Id*. at 285 n.12 (emphasis in original); *see also Marlene Indus. Corp. v. N.L.R.B*, 712 F.2d 1011, 1016 (6th Cir. 1993) (noting pre-*Grogan* that "vast majority of courts" recognize that difference in burden of proof is factor to consider when applying doctrine of collateral estoppel).[17]

The underlying rationale is fairly straightforward – even though a court may have previously determined that a higher burden of proof was not satisfied, such determination does not necessarily foreclose a party from satisfying a lower burden under the same set of facts in a subsequent proceeding. Thus, the following two rules can generally be used to determine whether to apply collateral estoppel where different burdens of proof exist:

> (i) If the burden of proof in the prior proceeding was greater than the burden of proof

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[17] This court finds the observations of the Supreme Court in *Grogan* to be highly persuasive as *dicta*, if not controlling altogether. *See Ellmann v. Baker (In re Baker)*, 791 F.3d 677, 682 (6th Cir. 2015) (*dicta* of Supreme Court must be strongly considered absent reason for disregarding it) (citation omitted).

> in the present proceeding, the plaintiff would not be collaterally estopped from relitigating an unfavorable determination in the prior proceeding.
>
> (ii) If the burden of proof in the prior proceeding was less than or equal to the burden of proof in the present proceeding and all other elements of collateral estoppel are satisfied, the plaintiff would be collaterally estopped from relitigating an unfavorable determination in the prior proceeding.

Applying these relatively simple rules, it is clear that the issue in this adversary proceeding is not the same as the issue in the prior proceeding. Under Michigan law, a plaintiff is required to prove fraud by clear and convincing evidence. *See*, *e.g.*, *Hi-Way Motor Co. v. Int'l Harvester Co*., 247 N.W.2d 813, 816, 398 Mich. 330 (1976). However, in non-dischargeability actions under section 523(a) of the Bankruptcy Code, a plaintiff need only prove fraud by a preponderance of the evidence. *Grogan*, 498 U.S. at 291; *Rembert*, 141 F.3d at 281 (citation omitted).

Because the burden of proof for the fraud-based claims in the District Court action was higher, the Plaintiff is not precluded from pursuing his claim under section 523(a)(2)(A) in this adversary proceeding. The Defendants' motion for summary judgment must therefore be denied.

CONCLUSION

For the foregoing reasons, both motions for summary judgment are denied. The court shall enter separate orders consistent with this Memorandum Decision.

Signed: February 3, 2016

/s/ John T. Gregg
John T. Gregg
United States Bankruptcy Judge