IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 7**
JAMES STEPHEN WRIGHT **CASE NO. 10-01246EE**
JANE ANN WRIGHT

GERALD BUTLER

VS. **ADVERSARY NO. 10-0041EE**

JAMES STEPHEN WRIGHT AND
JANE ANN WRIGHT

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Edward Ellington, Judge

MEMORANDUM OPINION ON THE
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the *Motion for Summary Judgment* (#18) filed by Gerald Butler (Butler) and the *Defendants' Response to Motion for Summary Judgment* (#26) filed by James Stephen Wright and Jane Ann Wright (Debtors). Having considered same and the *Brief in Support of Motion for Summary Judgment* (#19); the *Statement of Undisputed Material Facts* (#20); the *First Supplement to Statement of Undisputed Material Facts* (#21); and the *Rebuttal Brief in Support of Motion for Summary Judgment* (#27) filed by Butler and the *Defendants' Response to Motion for Summary Judgment* (#26) and the attached *Memorandum in Support of*

Defendants' Response to Motion for Summary Judgment (#26-1) filed by the Debtors, the Court finds that summary judgment should be granted and that the debts owed to Butler are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

FACTS

In 2006, Butler filed an action against the Debtors in the United States District Court for the Middle District of Florida (Florida Litigation). In the Florida Litigation, Butler filed an *Amended Complaint* (Amended Complaint) on or about October 23, 2006.

In the Amended Complaint, Butler sets out the following: Butler and his then wife, Christian Lee (Lee), purchased a condominium in Destin, Florida. Lee is the sister of the Debtor, Jane Ann Wright. Several years after the purchase of the condominium, Butler and Lee began divorce proceedings. Around the same time the divorce proceedings began, Butler alleges that the Debtors gave to Lee the document necessary to transfer ownership of the condominium to the Debtors, namely a quitclaim deed. Lee executed the quitclaim deed and transferred the condominium to her brother-in-law and sister, the Debtors. Butler alleges he had no knowledge of the quitclaim deed and that Lee forged his name on the deed. The Debtors then sold the property to third parties. Butler did not receive any of the proceeds from the sale of the condominium. Among other grounds, Butler's Amended Complaint demanded a judgment for compensatory damages against both Debtors individually for fraud and breach of fiduciary duty. Butler also requested punitive damages against both Debtors.

The Florida Litigation went to trial before a jury. On June 5, 2009, the jury returned a verdict in favor of Butler. As to the Debtor, **Jane Ann Wright**, the verdict states in pertinent part (hereinafter, Jane Ann Wright Verdict):

VERDICT

SPECIAL INTERROGATORIES
TO THE JURY AS TO DEFENDANT JANE ANN WRIGHT

Do you find from a preponderance of the evidence:

1. That the Defendant, Jane Ann Wright, made one or more false statements, omissions or misrepresentations to the Plaintiff?

Yes ✔ No ____

2. That the false statement(s), omission(s) or misrepresentation(s) concerned a material fact?

Yes ✔ No ____

3. That the Defendant, Jane Ann Wright, knowingly, or with the reckless disregard for the facts, made the false statement(s), omission(s) or misrepresentation(s) to the Plaintiff?

Yes ✔ No ____

4. That the Defendant, Jane Ann Wright, intended to induce the Plaintiff to rely upon the false statement(s), omission(s) or misrepresentation(s)?

Yes ✔ No ____

5. That Plaintiff reasonably relied upon the false statement(s), omission(s) or misrepresentation(s) and suffered injury or damages as a result?

Yes ✔ No ____

. . . .

6. What sum of money do you find from a preponderance of the evidence to be total amount of the Plaintiff's damages?

$ $34,800.00

7. Do you find that under the circumstances of this case, by clear and convincing evidence, that punitive damages are warranted against Defendant, Jane Ann Wright?

Yes ✔ No ____

8. Did Plaintiff and Defendant, Jane Ann Wright, have a fiduciary relationship?

Yes ✔ No ____

. . . .

9. Did Defendant, Jane Ann Wright, breach her fiduciary duty to Plaintiff?

Yes ✔ No ____

. . . .

10. Based on a preponderance of the evidence, state the total sum amount of damages suffered by Plaintiff for breach of fiduciary relationship between the Defendant, Jane Ann Wright, and Plaintiff, but not already included in the damages, if any, awarded in Question 6.

$ $7,500.00 [1]

As to punitive damages, the verdict as to **Jane Ann Wright** states in pertinent part (hereinafter, Jane Ann Wright Punitive Verdict):

VERDICT

SPECIAL INTERROGATORIES
TO THE JURY AS TO DEFENDANT JANE ANN WRIGHT

1. What is the total amount of punitive damages, if any, which you find, by the greater weight of the evidence, should be assessed against Defendant, Jane Ann Wright?

$ $7,500.00

. . . .

2. At the time of the loss or damage to GERALD BUTLER, did defendant JANE ANN WRIGHT have a specific intent to harm GERALD BUTLER and did the conduct of JANE ANN WRIGHT in fact harm GERALD BUTLER?

Yes ✔ No ____

3. Was the wrongful conduct of JANE ANN WRIGHT motivated solely by unreasonable financial gain and was the unreasonable dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, actually know by JANE ANN WRIGHT?

Yes ✔ No ____ [2]

On June 16, 2009, United States District Court Judge Elizabeth A. Kovachevich signed the

[1] *Statement of Undisputed Material Facts*, Docket No. 20, Exhibit A, January 27, 2011.

[2] *Statement of Undisputed Material Facts*, Docket No. 20, Exhibit A-1, January 27, 2011.

Final Judgment as to Defendant Jane Ann Wright (Jane Ann Wright Judgment). The Jane Ann Wright Judgment provided for compensatory damages in the amount of $42,300.00 and punitive damages in the amount of $7,500.00, for a "total of $49,800.00 that shall bear interest at the rate prescribed by 28 U.S.C. Section 1961, for which let execution issue."[3]

As to the Debtor, **James Stephen Wright**, the verdict states in pertinent part (hereinafter, James Stephen Wright Verdict):

VERDICT

SPECIAL INTERROGATORIES
TO THE JURY AS TO DEFENDANT JAMES STEPHEN WRIGHT

Do you find from a preponderance of the evidence:

1. That the Defendant, J. Stephen Wright, made one or more false statements, omissions or misrepresentations to the Plaintiff?
Yes ✔ No ____

2. That the false statement(s), omission(s) or misrepresentation(s) concerned a material fact?
Yes ✔ No ____

3. That the Defendant, J. Stephen Wright, knowingly, or with the reckless disregard for the facts, made the false statement(s), omission(s) or misrepresentation(s) to the Plaintiff?
Yes ✔ No ____

4. That the Defendant, J. Stephen Wright, intended to induce the Plaintiff to rely upon the false statement(s), omission(s) or misrepresentation(s)?
Yes ✔ No ____

5. That Plaintiff reasonably relied upon the false statement(s), omission(s) or misrepresentation(s) and suffered injury or damages as a result?
Yes ✔ No ____

[3]*Statement of Undisputed Material Facts*, Docket No. 20, Exhibit B, January 27, 2011.

. . . .

6. What sum of money do you find from a preponderance of the evidence to be total amount of the Plaintiff's damages?

$ $34,800.00

7. Do you find that under the circumstances of this case, by clear and convincing evidence, that punitive damages are warranted against Defendant, J. Stephen Wright?

Yes ____ No ✔

8. Did Plaintiff and Defendant, J. Stephen Wright, have a fiduciary relationship?

Yes ✔ No ____

. . . .

9. Did Defendant, J. Stephen Wright, breach his fiduciary duty to Plaintiff?

Yes ✔ No ____

. . . .

10. Based on a preponderance of the evidence, state the total sum amount of damages suffered by Plaintiff for breach of fiduciary relationship between the Defendant, J. Stephen Wright, and Plaintiff, but not already included in the damages, if any, awarded in Question 6.

$ $0 [4]

On June 16, 2009, United States District Court Judge Elizabeth A. Kovachevich signed the *Final Judgment as to Defendant J. Stephen Wright* (James Stephen Wright Judgment). The James Stephen Wright Judgment provided for compensatory damages in the amount of $34,800.00, "that shall bear interest as prescribed by 28 U.S.C. Section 1961, for which let execution issue."[5]

The Debtors were and are legal residents of the State of Mississippi. Both the Jane Ann Wright Judgment and the James Stephen Wright Judgment were duly enrolled as foreign judgments in the Circuit Court of Madison County, Mississippi, on February 19, 2010.

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[4] *Statement of Undisputed Material Facts*, Docket No. 20, Exhibit G, January 27, 2011.

[5] *Statement of Undisputed Material Facts*, Docket No. 20, Exhibit H, January 27, 2011.

On March 31, 2010, the Debtors filed a petition under Chapter 11 of the United States Bankruptcy Code. On May 11, 2010, Butler filed the above styled adversary proceeding as provided by Federal Rule of Bankruptcy Procedure 7001(6) to determine the dischargeability of the Jane Ann Wright Judgment and the James Stephen Wright Judgment pursuant to 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(4).[6]

The Debtors converted their case to a Chapter 7 on January 18, 2011. The Debtors received their *Discharge of Debtor* on May 26, 2011.

Butler filed his *Motion for Summary Judgment* (Motion), *Brief in Support of Motion for Summary Judgment* (Butler's Brief), and the *Statement of Undisputed Material Facts* (Statement of Facts) on January 27, 2011. In his Motion, Butler states that he filed a complaint "alleging that the debt owed by the Debtors is nondischargeable under §USC 523(a)(2)(A) [sic]."[7] Butler then requests the Court to enter a judgment in Butler's favor since there was no genuine issue of material fact. The *First Supplement to Statement of Undisputed Material Facts* was filed by Butler on January 28, 2011. Attached as an exhibit to the *First Supplement to Statement of Undisputed Material Facts* is a document which showed that on June 25, 2010, the Debtors voluntarily dismissed their appeal of the Jane Ann Wright Judgment and the James Stephen Wright Judgment which they had filed with the United States Court of Appeals for the Eleventh Circuit. Therefore, both judgments are now final.

Without prompting or instructions from the Court, the parties filed a *Case Management*

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[6]Hereinafter all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

[7]*Motion for Summary Judgment*, Docket No. 18, ¶ 1, January 27, 2011.

Order on February 14, 2011. The *Case Management Order* states that "[t]he Court shall determine Plaintiff's Complaint based upon the Motion for Summary Judgment and responses thereto." *Case Management Order*, Docket No. 22, p. 1, February 14, 2011.

On March 15, 2011, the Debtors filed *Defendants' Response to Motion for Summary Judgment* (Response). Attached to the Response was *Memorandum in Support of Defendants' Response to Motion for Summary Judgment.* Included in the Debtors' memorandum is a *Motion to Strike a Portion of Butler's Brief*.

Butler filed his *Rebuttal Brief in Support of Motion for Summary Judgment* on March 24, 2011.

CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

II. Motion to Strike

Before considering the substantive issues involved in this adversary, the Court must first address a procedural matter. In their *Memorandum in Support of Defendants' Response to Motion for Summary Judgment* (Memorandum), the Debtors included a *Motion to Strike a Portion of Butler's Brief* (Motion to Strike), namely the second paragraph. The Debtors state that the second paragraph recites from the Amended Complaint attached to Butler's Brief, and therefore, the second paragraph should be stricken because it is not evidence. The Debtors do not cite any rule or case law in support of their Motion to Strike.

Federal Rule of Civil Procedure 7 is made applicable to bankruptcy cases by Rule 7007 of

the Federal Rules of Bankruptcy Procedure. Rule 7 states that "[a] request for a court order must be made by motion."[8]

While the Motion to Strike is styled as a motion, it does not satisfy the rules regarding matters of form because it is buried within the Debtors' Memorandum. "[A] . . . memorandum is not a pleading from which the Court grants relief." *In re Gilmore, Jr.*, 198 B.R. 686, 692 n. 4 (Bankr. E.D. Tex. 1996), *amended in part on reh'g*, 1996 WL 1056889 (Bankr. E.D. Tex. 1996), *aff'd*, *United States v. Gilmore*, 226 B.R. 567 (E.D. Tex. 1998). "[B]ecause a memorandum or brief does not constitute a pleading, a request for relief contained therein cannot constitute a written motion." *In re Allegheny Health, Educ. & Research Foundation*, 233 B.R. 671, 683 (Bankr. W.D. Pa. 1999); *see also Vidalia Dock & Storage Co., Inc. v. Donald Engine Service, Inc.*, 2008 WL 115199, *2 (W.D. La. Jan. 9, 2008) (Motion in brief was "deemed deficient."). Consequently, the Court finds that the Motion to Strike contained in the Debtors' Memorandum is not properly before the Court and will not be considered.

Although the Court is not considering the Motion to Strike because it is not properly before the Court, the Court notes that in considering the Amended Complaint, the Court does not take the Amended Complaint to determine the truth of what is pled. Rather, the Amended Complaint simply establishes what Butler pled in the Florida Litigation.

III. Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure,[9] as amended effective December 1, 2010,[10]

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[8]Fed. R. Civ. P. 7(b)(1).

[9]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

[10]The Notes of Advisory Committee to the 2010 amendments state that the standard for granting a motion for summary judgment has not changed, that is, there must be no genuine dispute as to any

provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, "the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.' *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986)." *Newton v. Bank of America (In re Greene)*, 2011 WL 864971, *4 (Bankr. E.D. Tenn. March 11, 2011).

"The moving party bears the burden of showing the . . . court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." *Hart v. Hairston*, 343 F. 3d 762, 764 (5th Cir. 2003).

Once a motion for summary judgment is pled and properly supported, the burden shifts to the non-moving party to prove that there are genuine disputes as to material facts by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, . . . admissions, interrogatory answers, or other materials."[11] Or the non-moving party may "show[ ] that the materials cited do not establish the absence . . . of a genuine dispute."[12] When proving that there are genuine disputes as to material facts, the non-moving party cannot rely "solely on allegations or denials contained in the pleadings or 'mere scintilla of evidence in support of the nonmoving party will not be sufficient.' *Nye v. CSX*

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material fact and the movant is entitled to a judgment as a matter of law. Further, "[t]he amendments will not affect continuing development of the decisional law construing and applying these phrases."

[11]Fed. R. Bankr. P. 7056(c)(1)(A).

[12]Fed. R. Bankr. P. 7056(c)(1)(B).

Transp., Inc., 437 F. 3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986)." *Newton*, 2011 WL 864971 at *4. "[T]he nonmovant must submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of the cause of action." *Malacara v. Garber*, 353 F. 3d 393, 404 (5th Cir. 2003). "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*, 106 S.Ct at 1356 (citations omitted).

When considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matshushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). The court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d. 202 (1986).

IV. Application to the Case at Bar

A. Issue Preclusion/Collateral Estoppel[13] in Bankruptcy Courts

"*Issue preclusion* bars relitigation of issues that have been actually litigated. . . .The most

[13]Issue preclusion is also known by the term collateral estoppel. The *Restatement (Second) of Judgments* replaced the terms *res judicata* and *collateral estoppel* with the clearer terms of *issue preclusion* and *claim preclusion*. Since the adoption of the *Restatement Second*, the United States Supreme Court has "consistently urged courts to use the terms *claim preclusion* and *issue preclusion*, rather than *res judicata* and *collateral estoppel* as they apply *Restatement (Second)* analysis." *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 Am. Bankr. L.J. 839, 843 (Fall 2005) (footnotes omitted).

frequent application of *issue preclusion* in bankruptcy cases arises in connection with contests over the dischargeability of a particular debt." *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 Am. Bankr. L.J. 839, 852-53 (Fall 2005). "Although bankruptcy courts have exclusive jurisdiction to determine the dischargeability of debts under the Bankruptcy Code, it is well established that issue preclusion, also called collateral estoppel, may apply in bankruptcy dischargeability proceedings. *See generally Grogan v. Garner,* 498 U.S. 279, 284, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); *Schwager v. Falas (In re Schwager),* 121 F. 3d 177, 181 (5th Cir. 1997)." *Cornwell v. Loesch,* 2004 WL 614848, *2 (N.D. Tex. Feb. 27, 2004). "[I]n only limited circumstances may bankruptcy courts defer to the doctrine of collateral estoppel and thereby ignore Congress' mandate to provide plenary review of dischargeability issues." *Dennis v. Dennis (In re Dennis),* 25 F. 3d 274, 278 (5th Cir. 1994).

In *Grogan v. Garner,*[14] the United States Supreme Court held that the doctrine of issue preclusion may apply in § 523(a) litigation in the bankruptcy court in order to prevent the relitigation of "those elements of the claim that are identical to the elements required for discharge and that were actually litigated and determined in the prior action. See Restatement (Second) of Judgments § 27 (1982)." *Grogan,* 498 U.S. at 284 (footnote omitted).

In the case at bar, the Jane Ann Wright Judgment and the James Stephen Wright Judgment were entered by a federal district court in the State of Florida. The United States Court of Appeals for the Fifth Circuit has consistently held that "when a federal court renders a decision in a diversity case, the decision's preclusive effect is measured by federal principles of preclusion." *Terrell v. DeConna,* 877 F.2d 1267, 1270 (5th Cir. 1989); *see also Agrilectric Power Partners, Ltd. v. General Elec. Co.,* 20 F. 3d 663, 664 (5th Cir. 1994) (holding that "[f]ederal law determines the preclusive

[14]498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991).

effect of a prior federal judgment."); *Recoveredge L.P. v. Pentecost*, 44 F. 3d 1284, 1290 (5th Cir. 1995) ("Although the court's judgment in the conspiracy case was based on state law, federal law determines the judgment's preclusive effect.").

According to the Fifth Circuit, issue preclusion under federal law encompasses three elements: "(1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action." *Recoveredge*, 44 F. 3d at 1290; *Stripling v. Jordan Production Co., LLC*, 234 F. 3d 863, 868 (5th Cir. 2000); *Harris v. Coregis Insurance Co.*, 2005 WL 1362337, *2 (S.D. Miss. June 2, 2005); *Sidney v. Ragucci, (In re Ragucci)*, 433 B.R. 889, 894 (Bankr. M.D. Fla. 2010). In order to apply the elements of issue preclusion to the case at bar, the Court must now look to § 523(a).

B. Dischargeability under § 523(a)(2)(A)

1. Generally

In order for the Jane Ann Wright Judgment and the James Stephen Wright Judgment to be excepted from discharge, Butler bears the burden of proving his allegations under § 523(a)(2)(A) by a preponderance of the evidence. *Grogan*, 498 U.S. at 287-88; *Cadle Co. v. Pratt (In re Pratt)*, 411 F.3d 561, 565 (5th Cir. 2005). "The exceptions are construed strictly against the creditor and liberally in favor of the debtor." *The Cadle Co. v. Duncan (In re Duncan)*, 562 F. 3d 688, 695 (5th Cir. 2009). However, the Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan*, 498 U.S. at 287 (citation omitted).

Specifically as to fraud, the Supreme Court has found that in the historical development of the discharge exceptions, Congress has consistently provided that judgments based in fraud should

be excepted from discharge.[15] *See Brown v. Felsen*, 422 U.S. 127, 60 L. Ed. 2d 767, 99 S. Ct. 2205 (1979). Indeed, in ruling that the preponderance of the evidence standard was the proper standard of proof under § 523(a), the Supreme Court stated that "our conclusion that the preponderance standard is the proper one is that . . . application of that standard will permit exception from discharge of all fraud claims creditors have successfully reduced to judgment." *Garner*, 498 U.S. at 290.

Section 523(a)(2)(A) states in pertinent part:

> **11 U.S.C. § 523. Exceptions to discharge**
>
> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (2) for money, property, services, . . . to the extent obtained, by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition;

11 U.S.C. § 523(a)(2)(A).

"Section 523(a)(2)(A) contemplates frauds involving 'moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.'" *Allison v. Roberts, (In re Allison)*, 960 F. 2d 481, 483 (5th Cir. 1992) (citation omitted); *see also First Nat'l Bank LaGrange v. Martin (In re Martin)*, 963 F. 2d. 809, 813 (5th Cir. 1992). "In defining the elements of non-dischargeability under § 523(a)(2)(A), the Fifth Circuit has recognized a distinction between the somewhat overlapping elements of proof required for (1) 'false pretenses or false representations' and (2) 'actual fraud." *Lanier v. Futch (In re Futch)*, 2011 WL 576071, *17 (Bankr.

[15] *Id.* at 290.

S.D. Miss. Feb. 4, 2011).

First, in order to fall under § 523(a)(2)(A), a debtor must have obtained something–money, property or services. Once the creditor has proven that the debtor obtained something, the creditor must show that the debtor used fraud or a false representation/pretense to obtain that something. The Fifth Circuit "has distinguished between dischargeability actions based on false representations and those based on fraud, but each requires that the debtor have made a misrepresentation on which the creditor relied and so was damaged." *2008 EFK, LLC. v. Dillon (In re Dillon),* 446 B.R. 260, 265 (Bankr. N.D. Tex. 2010) (footnote & citations omitted).

2. False Pretense or False Representation

Under § 523(a)(2)(A), a debtor's representation will be a false pretense or false representation if it was: "(1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other party." *Allison,* 960 F. 2d at 483 (citation omitted). "There is a subtle distinction between a false pretense and a false representation in that a false pretense involves conduct that creates a false impression while a false representation involves an express statement. *Futch,* 2011 WL 576071 at * 17 (citation omitted).

3. Fraud

To prove actual fraud under § 523(a)(2)(A), a creditor must show "(1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance." *GE Capital Corp. v. Acosta (In re Acosta),* 406 F. 3d 367, 372 (5th Cir 2005). The fraud contemplated under § 523(a)(2)(A) can be based on any type of behavior calculated to impart a misleading impression, and "thus, it is not relevant whether the representation is express or

implied." *Green v. Bandi (In re Bandi)*, 2010 WL 4024769, *2 (Bankr. E. D. La. Oct. 13, 2010) (footnote omitted). In order to find fraud, an affirmative statement is not required–a failure to disclose or the debtor's silence can constitute a false representation. "[A]n intent to deceive can be inferred from a 'reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation'" *Id.* (footnote omitted). Under § 523(a)(2)(A) the creditor must have justifiably, and not reasonably relied upon the fraudulent misrepresentation, which was the proximate cause of his/her loss. "As opposed to the objective reasonable man, justification is a subjective inquiry, depending on the particular plaintiff and the particular circumstances." *Id.* (footnote omitted).

C. Applying § 523(a)(2)(A) Elements to the Case at Bar

1. Florida Litigation Record

As stated previously, the party requesting issue preclusion bears the burden of proof. Therefore, to support an application of issue preclusion, Butler must provide an adequate record from the Florida Litigation. The Debtors alleged that Butler did not provide the Court with a "clear and substantial record"[16] from the Florida Litigation which would be sufficient to meet his burden for issue preclusion to apply under § 523. However, the Debtors do not provide the Court with any case law to support their contention that Fifth Circuit precedent requires Butler to provide a "clear and substantial record" as opposed to some other less exacting standard.

In support of his Motion, Butler submitted the Jane Ann Wright Verdict, the Jane Ann Wright Punitive Verdict and the James Stephen Wright Verdict along with both judgments which were entered by the district court. In addition, Butler attached to his brief a copy of the Amended

[16]*Memorandum in Support of Defendants' Response to Motion for Summary Judgment*, Docket No. 26-1, p. 2, March 15, 2011.

Complaint he had filed in the Florida Litigation.

In addressing the issue of what record is required, the Fifth Circuit has clearly stated that "a full record from the prior action is not required for a bankruptcy court to apply issue preclusion. Rather, the produced record must only provide a sufficient basis upon which the bankruptcy court may determine that issue preclusion may be applied." *Cornwell*, 2004 WL 614848 at *3 (citations omitted). In addition, the Fifth Circuit noted that in *Grogan v. Garner*, the Supreme Court did not require presentation of the full trial record to the bankruptcy court. "The successful plaintiffs in *Grogan* introduced only 'portions of the record' from the prior state case into evidence before the bankruptcy court." *Sheerin v. Davis (In re Davis)*, 3 F. 3d 113, 115 (5th Cir. 1993) (citation omitted).

In *Davis*, the Fifth Circuit found that the state court opinion and the jury questions which were introduced into evidence in the bankruptcy court contained sufficient detail to allow the application of issue preclusion. *Id.; see Matter of Allman*, 735 F. 2d 863, 865 (5th Cir. 1984) *cert. denied*, 469 U.S. 1086, 105 S. Ct. 590, 83 L. Ed. 2d 700 (1984); *Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F. 2d 1253, 1257 (5th Cir. 1984), *cert. denied*, 469 U.S. 817, 105 S. Ct. 83, 83 L.Ed. 2d 32 (1984); *Carey Lumber Co. v. Bell*, 615 F. 2d 370, 376-78 (5th Cir. 1980); *see also Cornwell*, 2004 WL 614848 at * 4 (district court found that a record consisting of the "'well pled complaint'" from the civil case, as well as the Kansas Court's Journal Entry of Judgment was sufficient.).

The Debtors state that the facts in the Fifth Circuit case of *Shuler*[17] are similar to the case at bar. The Court disagrees. In *Shuler*, the creditor alleged that the debtor obtained services from him, the preparation of tax documents, by false pretenses. The creditor obtained a default judgment

[17]*Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F. 2d 1253 (5th Cir. 1984), *cert. denied*, 469 U.S. 817, 105 S. Ct. 83, 83 L.Ed. 2d 32 (1984)

against the debtor in state court. After the debtor filed bankruptcy, the creditor objected to the discharge of the debt pursuant to § 523(a)(2)(A). The creditor submitted the judgment, answers to interrogatories and admissions. In affirming the bankruptcy court's refusal to accept the determination in the state court judgment that the debt was for services obtained by false pretenses, the Fifth Circuit concluded that the record was insufficient to accord that determination collateral estoppel/issue preclusion effect. Very little evidence was produced in the state court proceedings to support the default judgment. For that reason, the judgment did not contain sufficient detailed facts to allow the court to determine what specific facts support the false pretense conduct. *Shuler,* 722 F. 2d at 1257-58.

In the case at bar, unlike in the *Shuler* case, a complaint and amended complaint were filed, and answer(s) were filed in the Florida Litigation. The Debtors and Butler then tried their case before a jury and, as shown in their answers to the special interrogatories, the jury made specific findings. In support of his motion for summary judgment, Butler submitted his Amended Complaint, the verdicts and judgments from the Florida Litigation. The Amended Complaint shows what Butler alleged in the Florida Litigation. The jury verdicts and judgments show that after both sides had presented their evidence and arguments, the jury found in Butler's favor. The Debtors have not produced any evidence to show that the matter was not fully litigated or that they were not given an opportunity to present their case to the jury. Unlike the record presented in *Shuler*, the Court finds that the it can discern from the record presented the factual issues which were "'actually and necessarily decided in [the] prior suit.' *Brown v. Felsen, supra,* 442 U.S. at 139 n. 10, 99 S.Ct at 2313 n. 10." *Id.,* at 1255. Consequently, the Court finds that the record submitted by Butler is sufficient for issue preclusion to apply.

2. Money, Property or Services

As stated previously, in order to prevail under § 523(a)(2)(A), a creditor must first prove that a debtor obtained something–money, property or services. Once the creditor has shown that the debtor obtained something, the creditor must show that the debtor used fraud or a false representation/pretense to obtain that something.

The Supreme Court has defined property in the context of a discharge as "denot[ing] something subject to ownership, transfer, or exclusive possession and enjoyment." *Gleason v. Thaw*, 236 U.S. 558, 561, 35 S. Ct. 287, 289, 59 L. Ed. 717 (1915). Butler's Amended Complaint alleges that the Debtors fraudulently obtained and then sold the condominium he and his then-wife owned in Destin, Florida. In the answer to question number 5 in both verdicts, the jury found that Butler suffered injury or damages as a result of the Debtors' actions. In question number 6, the jury calculated that the amount of those damages was $34,800.00. Therefore, the Court finds that Butler has shown that the Debtors did obtain something.

As to the next step, whether the Debtors obtained something through fraud or false representation/pretense, the Court finds that in his Amended Complaint, Butler alleged that he and the Debtors entered into an agreement that when the condominium was sold, Butler would receive proceeds from the sale. The Jane Ann Wright Verdict and the James Stephen Wright Verdict (Collective Verdicts) both clearly show that the jury found that both Debtors "made one or more false statements, omissions or misrepresentations to [Butler]."[18] Therefore the Court finds that Butler has shown that the Debtors used a false representation/pretense or fraud to obtain the something.

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[18]*Verdict Special Interrogatories to the Jury as to Defendant Jane Ann Wright,* question 1, p. 1.; *Verdict Special Interrogatories to the Jury as to Defendant James Stephen Wright,* question 1, p. 1.

3. Fraud

"Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another–something said, done or omitted with the design of perpetrating what is known to be a cheat or deception." *Anderson v. Wendt (In re Wendt),* 381 B.R. 217, 223 (Bankr. S. D. Tex. 2007). As stated previously, in order to prove nondischargeability for actual fraud under § 523(a)(2)(A), a creditor must show that "(1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance." *Acosta,* 406 F. 3d at 372.

The jury found that the fraud or "deceit, artifice or trick" was accomplished through the Debtors' false statements, omissions or misrepresentations to Butler. As such, the Court finds that Butler has met the first two elements of his § 523(a)(2)(A) claim and has shown that the Debtors knowingly and intentionally made false representations to Butler.

As to the third element required for a finding of fraud, Butler must show that the representations were made with the intention and purpose to deceive him. "An intent to deceive may be inferred from 'reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation.'" *Id.* (citation omitted) "Debts that satisfy the third element, the scienter requirement, are debts obtained by frauds involving 'moral turpitude or intentional wrong, and any misrepresentations must be knowingly and fraudulently made.'" *Acosta,* 406 F. 2d at 372 (citation omitted).

Butler's Amended Complaint alleges that the Debtors fraudulently obtained and then sold the condominium he and his then-wife owned in Destin, Florida. The first ground for relief in

Butler's Amended Complaint was a request for compensatory and punitive damages because of the Debtors' fraudulent actions. The Florida Litigation concluded with a jury verdict in favor of Butler for compensatory and punitive damages against Jane Ann Wright and for compensatory damages against James Stephen Wright.

The word "fraud" is not mentioned anywhere in the Collective Verdicts. As noted previously, the parties litigated the matter in the United States District Court for the Middle District of Florida. Under Florida law,[19] the essential elements to establish a cause of action for common-law fraud or misrepresentation are:

> (1) a false statement of fact, (2) known by the defendant to be false at the time it was made, and (3) made for the purpose of inducing the plaintiff to act in reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representations; and (5) resulting damage to the plaintiff.

Stowell v. Ted S. Finkel Investment Services, Inc., 641 F. 2d 323 (5th Cir. 1981).

Even though the Collective Verdicts do not specifically use the word "fraud," the Collective Verdicts address each element necessary for a finding of fraud. The Collective Verdicts establish that the Debtors made a false statement of fact (questions 1 & 2), that the Debtors knew to be false (question 3), that induced Butler to rely upon the false statement and resulted in damages to Butler (questions 4 & 5). Therefore, the Court may infer that the issue of fraud was actually and fully litigated before the jury and that the a finding of fraud was a necessary predicate for the jury to award compensatory damages against both Debtors and punitive damages against Jane Ann Wright.

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[19]Since the property in question is located in the State of Florida and the trial was held in Florida, the Court assumes that Florida law was applied. However, even if the district court applied Mississippi law, the Court finds that there is not a crucial difference between the elements necessary for establishing a fraudulent misrepresentation under Florida law and those necessary for establishing fraudulent misrepresentation under Mississippi law. *See Saucier v. Coldwell Banker JME Realty,* 644 F. Supp. 2d 769, 785 (S.D. Miss. 2007); *Smith v. Union Nat'l Life Ins. Co.,* 187 F. Supp. 2d 685, 650 (S.D. Miss. 2001); *Spragins v. Sunburst Bank,* 605 So. 2d 777, 780 (Miss. 1992).

See Miller v. Grimsley (In re Grimsley), 2011 WL 2173740, * 16 (Bankr. S. D. Ohio May 31, 2011) ("The Court may infer that the jury found that the Debt arose from fraudulent conduct . . . . The findings by the state court–both stated and inferred establish the factual predicate for a grant of summary judgment on . . . § 523(a)(2)(A).")

Therefore, the Court finds that Butler has met the scienter element of § 523(a)(2)(A) and has shown that the fraud committed by the Debtors involve moral turpitude or intentional wrong and that the misrepresentations were knowingly and fraudulently made.

The forth and fifth elements of § 523(a)(2)(A) require a showing that Butler justifiably relied upon a false statement, omission or misrepresentation which caused him to sustain a loss. In questions number 4 and 5, the jury found that the Debtors intended to induce Butler to rely upon the false statement, omission or misrepresentation, that Butler did reasonably rely upon the false statement, omission or misrepresentation, and that Butler suffered an injury or damages.

In their Response, the Debtors state that "§ 523(a)(2)(A) requires that reliance on a false statement, misrepresentation or omission be '*justifiable,*' a far different test and finding from the one of 'reasonable reliance' which is all that Butler's jury interrogatories find."[20] The Court agrees with the Debtors that § 523(a)(2)(A) requires justifiable reliance and not reasonable reliance. However, contrary to the Debtors' assertions, "[justifiable reliance is] a less exacting standard than reasonable reliance." *Futch*, 2011 WL 576071 at * 20; *see Field v. Mann*, 516 U.S. 59, 74, 116 S. Ct. 437, 446, 133 L. Ed. 2d 351 (1995).

In discussing reasonable and justifiable reliance, the Supreme Court stated in *Field*:

> "Although the plaintiff's reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man.

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[20]*Defendants' Response to Motion for Summary Judgment*, Docket number 26, p. 4, March 15, 2011.

> Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases."

Field, 516 U.S. at 70-71 (quoting *Restatement (Second) of Torts* § 545A, Comment b (1976)). Since the jury found that Butler had met the more stringent requirement of reasonably relying upon the Debtors' false statement, omission or misrepresentations, the Court finds that Butler has shown that he justifiably relied upon the false statement, omission or misrepresentations for purposes of § 523(a)(2)(A).

"Collateral estoppel applies in bankruptcy courts only if, *inter alia*, the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question–that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue–and the facts supporting the court's findings are discernible from that court's record." *Dennis v. Dennis (In re Dennis)*, 25 fed 274, 278 (5th Cir. 1994) (citations omitted). Upon a review of the entire record before the Court, and in particular, the findings of the jury, as stated and inferred, in the Collective Verdicts and judgments, the Court finds that Butler met the grounds to allow application of issue preclusion to prove his nondischargeability claim under § 523(a)(2)(A) without the need for any supplemental evidence: the issue at stake in the Florida Litigation was identical, namely, fraud; the Collective Verdicts show that the issue of fraud was actually litigated; and fraud was a necessary part of the judgments.

Consequently, the Court finds issue preclusion applies and the debts owed Butler are nondischargeable pursuant to § 523(a)(2)(A).

4. Punitive Damages

The jury awarded punitive damages against the Debtor, Jane Ann Wright. In *Cohen v. De La Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), the Supreme Court addressed the

issue of whether all damages resulting from a finding of actual fraud were excepted from discharge under § 523(a)(2)(A). The Supreme Court held that upon a review of the historical pedigree of the discharge exception for fraud and a review of the general policies underlying the exceptions to discharge, "'any debt . . . for money, property, services, or . . . credit, to the extent obtained by' fraud encompasses any liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor." *Cohen*, 523 U.S. at 223. Consequently, the Court finds that the award of punitive damages against Jane Ann Wright are also nondischargeable pursuant to § 523(a)(2)(A).

D. Other Dischargeability Grounds

Since the Court has found the debts to Butler to be nondischargeable under § 523(a)(2)(A) for fraud, the Court will not address Butler's related claims of false pretense or false representation based on the first two prongs of § 523(a)(2)(A). Nor will the Court address Butler's claim under § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity.[21]

CONCLUSION

In their Response and Memorandum, the Debtors ask the Court to strike the Amended Complaint in its entirety and submit unsupported allegations and general denials in reply to Butler's Statement of Facts. The Debtors have not submitted or identified any evidence in the record to show the existence of a disputed material fact. *See Malacara*, 353 F. 3d at 404. The Debtors do not assert that the matter was not fully and completely litigated in the Florida Litigation or that the issues decided by the jury and memorialized in the Collective Verdicts were not the findings of the jury. Instead, the Debtors simply object to the "characterizations" made by Butler in his Statement of

[21]Because of the provisions of the *Case Management Order*, the parties dispute whether Butler waived his claim under § 523(a)(4) by failing to raise it in his Motion. The Court's resolution of the § 523(a)(2)(A) claim also renders it unnecessary for the Court to address that issue.

Facts. The Debtors have not shown the existence of any "disputes over facts that might affect the outcome of the suit under the governing law [in order to] properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct 2502, 2510, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is genuine if a reasonable jury could return a verdict for the non-moving party based on the applicable law in relation to the evidence presented. *Id.* at 249. Applying these standards as established by the Supreme Court, the Court finds that the Debtors have not shown a dispute as to any material fact.

According to their *Schedule I - Current Income of Individual Debtor(s)*, James Stephen Wright is a licensed attorney and Jane Ann Wright is a realtor, so both are well educated in the laws surrounding the transfer of real property. After the completion of the trial on the Amended Complaint, the jury in the Florida Litigation found that the Debtors had committed fraud against Butler.

Butler has met the elements necessary to allow issue preclusion to apply and prohibit the relitigation of facts decided in the Florida Litigation. Butler has shown by a preponderance of the evidence that those facts support his claim that the debt should not be discharged. Therefore, Butler is entitled to a nondischargeable judgment pursuant to § 523(a)(2)(A) as a matter of law. This finding is in keeping with the Supreme Court's holding in *Garner* that "all fraud claims creditors have successfully reduced to judgment"[22] should be excepted from discharge.

A separate judgment consistent with this opinion will be entered in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure.

This the 24th day of June, 2011.

/s/ EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

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[22]*Garner*, 498 U.S. at 290.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 7**
JAMES STEPHEN WRIGHT **CASE NO. 10-01246EE**
JANE ANN WRIGHT

GERALD BUTLER

VS. **ADVERSARY NO. 10-0041EE**

JAMES STEPHEN WRIGHT AND
JANE ANN WRIGHT

FINAL JUDGMENT ON THE
MOTION FOR SUMMARY JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith,

IT IS THEREFORE ORDERED that the *Motion for Summary Judgment* (#18) filed by Gerald Butler is well taken and is hereby granted.

IT IS FURTHER ORDERED that the *Final Judgment as to Defendant, Jane Ann Wright* (Docket #144) entered in the United States District Court for the Middle District of Florida, Case No. 8:06-CV-165-T-17TBM, in the total amount of $49,800.00, plus interest at the rate prescribed by 28 U.S.C. § 1961, is hereby held to be nondischargeable pursuant to § 523(a)(2)(A).

IT IS FURTHER ORDERED that the *Final Judgment as to Defendant, James Stephen Wright* (Docket #143) entered in the United States District Court for the Middle District of Florida, Case No. 8:06-CV-165-T-17TBM, in the total amount of $34,800.00, plus interest at the

rate prescribed by 28 U.S.C. § 1961, is hereby held to be nondischargeable pursuant to § 523(a)(2)(A).

SO ORDERED this the 24th day of June, 2011.

/s/ EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE