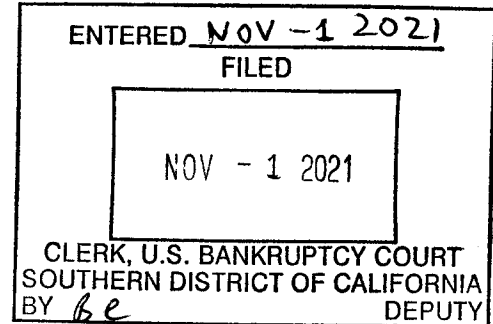


WRITTEN DECISION - NOT FOR PUBLICATION



**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re:	)	Bankruptcy No. 19-07390-LT7
MICHAEL ROY SILVERTHORN,	)	Adversary No. 20-90050-LT
Debtor.	)	
RHONDA DAY, EXECUTOR OF	)	
WANDA G. SILVERTHORN,	)	
Plaintiff,	)	
v.	)	MEMORANDUM DECISION
MICHAEL ROY SILVERTHORN	)	
Defendant.	)	

INTRODUCTION¹

Wanda Silverthorn loved her twin sister Rhonda Day. After Wanda's divorce from Michael Silverthorn, she made Rhonda her heir and executed documents with her employer assigning her employee benefits to Rhonda. But included in the documents was a form designating a beneficiary for her employer-provided life insurance. Wanda completed the form to change her designated beneficiary with one critical omission – she failed to sign the

¹ This opinion is intended only to resolve the dispute between these parties and is not intended for publication.

1 document. After her death, the insurance administrator, thus, paid the benefits to Michael.

2 Rhonda sued and obtained a state court default judgment which provides that the
3 decedent's estate (which she represents) is entitled to the benefits, ordered Michael to
4 transfer the benefits to it, and imposed double damages and awarded attorneys' fees based
5 on a finding that Michael "has in bad faith wrongfully taken, concealed and disposed of the
6 Insurance Benefit[s] belonging to the Estate...".

7 Michael then filed bankruptcy, and Rhonda filed a complaint seeking a judgment that
8 the probate judgment is nondischargeable under 11 U.S.C. § 523(a)(2), (4), & (6)². She
9 then moved for summary judgment on the § 523(a)(6) claim arguing that the probate
10 judgment establishes the claim as a matter of issue preclusion.

11 On summary judgment, the Court found that probate judgment established that
12 Michael had converted the benefits under California state law. The Court also found,
13 however, that the probate judgment did not establish that he acted with the required malice
14 and willfulness for the purposes of a nondischargeability claim under § 523(a)(6). The
15 Court set the matter for trial on the state of mind issues.

16 The Court conducted a trial and heard the testimony of both Michael and Rhonda.
17 For the reasons set forth below, the Court finds that Rhonda has not carried her burden of
18 establishing that Michael acted with malice or willfulness for § 523(a)(6) purposes.

19 At the trial Rhonda also argued that Michael breached a fiduciary duty to her in
20 support of her claim under § 523(a)(4). Alternatively, she argued embezzlement. For the
21 reasons set forth below the Court finds that Rhonda has failed to establish that Michael
22 acted with fraudulent intent or other state of mind as necessary to support a § 523(a)(4)
23 claim.³

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27 ² Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy
Code, 11 U.S.C. §§101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 ³ Rhonda has not pursued the claim under § 523(a)(2). The Court has received no evidence
supporting non-dischargeability on this theory; judgment for Michael on this claim is appropriate.

1 **FACTS**

2 Rhonda Day is the twin sister of Wanda Silverthorn and executor of Wanda's probate
3 estate. Defendant Michael Silverthorn is Wanda's ex-husband. In 1985, Wanda executed a
4 designation of beneficiary form naming Michael, her then husband, as the beneficiary with
5 respect to her Federal Employees Group Life Insurance ("FEGLI").

6 In 1990, Michael and Wanda divorced. Their Marital Settlement Agreement
7 ("MSA") was incorporated into a Dissolution Judgment. In relevant part, it states: "[e]ach
8 party does hereby waive any and all right to inherit the estate of the other at his or her death,
9 or to take property from the other by devise or bequest unless under a will executed
10 subsequent to the date of this agreement..." The MSA, at paragraph 9(a)(4), also states that
11 Wanda was awarded all of her right, title and interest in pension and retirement plans
12 through her place of employment.

13 Even before her divorce was finalized, and consistent with the MSA, Wanda revised
14 her Thrift Savings Plan and Civil Service Retirement beneficiary designation forms to
15 remove Michael as the beneficiary and to designate Rhonda as primary beneficiary. Wanda
16 filled out the forms completely, including having them witnessed where necessary. Wanda
17 also filled out a form removing Michael as a beneficiary of her FEGLI policy. The FEGLI
18 form bore the signatures of witnesses to her signature. But Wanda never signed the form.
19 And in what may have been an extraordinary failure of oversight, Wanda's
20 HR Administrator noted receipt of this incomplete document and filed it.

21 Consistent with her apparent intent to make Rhonda her heir and beneficiary,
22 Wanda's will devised all of her assets to Rhonda and named Rhonda as her executor.

23 After Wanda's death, Rhonda attempted to collect the FEGLI insurance proceeds
24 ("Insurance Benefits"). This proved impossible because of Wanda's failure to sign the
25 FEGLI form. On or about September 18, 2017, Rhonda's attorney, Peter Haas, wrote to
26 Metropolitan Life Insurance Company (MetLife), the FEGLI administrator, seeking
27 payment of the Insurance Benefits to Rhonda. Eight days later, Adam Bice, the Case
28 Management Specialist for MetLife, replied. MetLife denied Rhonda's claim on the ground

1 that she was not the beneficiary because the insured, Wanda, had not signed the FEGLI
2 form required to change the beneficiary designation.

3 And, within weeks of Wanda's death, on or about August 28, 2017, MetLife sent
4 Michael a "beneficiary invite" letter and beneficiary claim form. MetLife acted pursuant to
5 the FEGLI form.

6 Michael and Wanda had not been in regular, or even irregular, communication since
7 their divorce. Michael learned that Wanda died from MetLife.

8 After being rebuffed by MetLife, Mr. Haas took another tack. On October 10, 2017,
9 he wrote to Michael explaining that MetLife had denied Rhonda's claim for the Insurance
10 Benefits, expressing his opinion that the Insurance Benefits belonged to Rhonda, and
11 requesting Michael's cooperation. His brief letter also noted Michael's agreement at the
12 time of the divorce that Wanda received all her pension and retirement plan rights in the
13 Judgment of Dissolution and attached a copy of the document.

14 Upon receipt of Mr. Haas' letter, Michael called MetLife and spoke to Mr. Bice.
15 Michael testified that on that call he was told that he was the beneficiary of the policy and
16 that Rhonda's claim would be denied. Mr. Bice explained that Michael needed to submit a
17 claim form, and Michael asked for another one. He called again on October 16, October 23,
18 October 30, November 2, December 4, and December 8, of 2017. Michael credibly testified
19 that in some or all of these calls Mr. Bice assured him that he was legally entitled to the
20 Insurance Benefits and that MetLife had denied Rhonda's claim to the Insurance Benefits.
21 He also testified that on the call on the 23rd, Mr. Bice helped Michael to fill out the claim
22 form. Michael's testimony was believable.

23 On November 2, 2017, Rhonda's attorneys again wrote to Michael briefly asking for
24 a response to the previous letter and threatening litigation.

25 At some point after having received the second Haas letter, and before November 14,
26 2017, Michael contacted attorney David Arietta regarding the correspondence from
27 Mr. Haas. According to Michael, Mr. Arietta explained that in 98 percent of cases, the
28 beneficiary was entitled to the proceeds of an insurance policy. He testified that Mr. Arietta

1 sent him a retainer agreement, but that he did not believe he could afford the retainer
2 requested, so he did not employ Mr. Arietta. His testimony was believable.

3 In December of 2017, Michael received the Insurance Benefits and deposited them in
4 his bank account. In March of 2018, he purchased real property on Teakwood Way, Vista,
5 CA ("Property") using some of the Insurance Benefits to make the down payment. He
6 testified that he also used some of the Insurance Benefits to repair and maintain the
7 Property.

8 On May 25, 2018, Rhonda, as executor of Wanda's estate, filed a Petition for Return
9 of Property under Cal. P. Code §§ 850 & 859 ("Probate Petition"). Rhonda sought an order:
10 "[r]eturning the property under Probate Code section 850(a)(2)(D)" and "double damages
11 and attorney's fees and costs under Probate Code section 859..." Michael and MetLife were
12 named as defendants. The summons was served on Michael on December 20, 2018.

13 MetLife removed the case to federal court. MetLife answered Rhonda's Probate
14 Petition in federal court after the removal; it included affirmative defenses under the
15 Supremacy Clause of the U.S. Constitution and preemption. MetLife took the position that
16 its obligation under federal law was to pay the Insurance Benefits to the person named in the
17 FEGLI form, in this case, Michael.

18 Rhonda's lawyers filed a motion to remand; the District Court granted it and
19 remanded the matter back to state court.

20 MetLife then filed a motion for judgment on the pleadings. Rhonda's lawyers did not
21 file an opposition. Instead, they dismissed MetLife out of the Probate Petition on
22 September 20, 2019. The court docket states that the motion for judgment was "DROPPED
23 BY COURT." So, the question of whether MetLife correctly paid the Insurance Benefits to
24 Michael was not adjudicated in the probate action.

25 The Probate Court held a hearing on October 24, 2019. Michael, now the only
26 defendant in that action, did not file an answer nor did he appear in the case. According to
27 Michael, he thought MetLife was representing his interest in the case – that MetLife was
28 still there for him. This testimony was believable.

1 Because Michael did not participate (and MetLife was out of the case), the sole
2 evidence presented to the Probate Court at the dispositive hearing (as far as the record in this
3 case shows) was Rhonda's Probate Petition and its attachments.

4 On October 24, 2019, the Probate Court entered an order in favor of Rhonda
5 requiring Michael to transfer the entire Insurance Benefits totaling \$78,166.70 to Rhonda as
6 Executor of the Estate of Wanda Silverthorn ("Probate Judgment"). The Probate Judgment
7 further states that "Michael Silverthorn has in bad faith wrongfully taken, concealed and
8 disposed of the Insurance Benefits belonging to the Estate and, under Probate Code
9 Section 859, shall be liable for twice the value of the insurance benefit[s] totaling
10 \$156,333.40. He is hereby ordered to pay said amount to the Executor." The Probate Court
11 also ordered Michael to pay the Executor's attorneys' fees and costs totaling \$10,460.59.

12 There is no indication on the record as to when the Probate Judgment was served on
13 Michael. Once it was, however, he reached out to an attorney.

14 Michael did not appeal the Probate Judgment. On December 9, 2019, he filed his
15 chapter 7 petition. He obtained his discharge on March 17, 2020, and the case was closed
16 on March 18, 2020.

17 On March 16, 2020, Rhonda filed a complaint seeking a judgment that the Probate
18 Judgment is nondischargeable under Bankruptcy Code § 523(a)(2), (4), & (6) commencing
19 this adversary proceeding.

20 On September 15, 2020, Michael sold the Property. The escrow documents indicate
21 that Michael received \$54,343.55 from the sale. Debtor testified that he split the sales
22 proceeds with his then girlfriend, Karen Davis.

23 On February 5, 2021, Rhonda moved for summary judgment on the § 523(a)(6) claim
24 arguing that the Probate Judgment established the nondischargeability of the claim as a
25 matter of issue preclusion.

26 As noted above, the Court found that the Probate Judgment established that Michael
27 had committed the tort of conversion with respect to the Insurance Benefits under California
28 law, which tort satisfied one element of a claim under § 523(a)(6). The Court, however,

1 also held that the Probate Judgment did not establish the willful and maliciousness
 2 requirements of a claim under § 523(a)(6) as a matter of issue preclusion. The Court set the
 3 matter for trial on these state of mind elements.

4 Trial was held on August 18, 2021, and closing arguments were made the next day.

5 ANALYSIS

6 Section 523(a)(6)

7 Exceptions to discharge are construed strictly against an objecting creditor and in
 8 favor of the debtor. *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992). This
 9 is because "[a] central purpose of the [Bankruptcy] Code is to provide a procedure by which
 10 certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy
 11 a new opportunity in life and a clear field for future effort, unhampered by the pressure and
 12 discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (internal
 13 quotation omitted). Consistent with this purpose, the objecting party bears the burden of
 14 proof, by a preponderance of the evidence, as to each element of the applicable subsection
 15 of 523. *Id.* at 290.

16 Section 523(a)(6) provides that a debtor may not discharge a debt "for willful and
 17 malicious injury by the debtor to another entity or to the property of another entity."
 18 11 U.S.C. § 523(a)(6); *Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706
 19 (9th Cir. 2008). "[T]ortious conduct is a required element for a finding of
 20 nondischargeability under § 523(a)(6)." *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir.
 21 2008). But not all tortious conduct suffices. "The Supreme Court in *Kawaauhau v. Geiger*
 22 (*In re Geiger*) made clear that for section 523(a)(6) to apply, the actor must intend the
 23 consequences of the act, not simply the act itself." *Ormsby v. First Am. Title Co. (In re*
 24 *Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010) (internal citation and quotes omitted). Thus,
 25 both willfulness and maliciousness must be proven; the malicious injury requirement is
 26 separate from the willful injury requirement. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146-
 27 47 (9th Cir. 2002) (conflating the two requirements is grounds for reversal).

Tort Requirement

As noted above, § 523(a)(6) nondischargeability must be based on a tort (or tort-like statutory injury). Rhonda's § 523(a)(6) claim is based on the theory that Michael converted the Insurance Benefits which were Rhonda's property. Under California law, "[c]onversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property right; and damages." *Mendoza v. Continental Sales, Co.*, 140 Cal. App. 4th 1395, 1405 (2006).

For the reasons set forth in the Summary Judgment Order, the Court found that the findings of the Probate Court as set forth in the Probate Court Judgment satisfied the elements of conversion and that issue preclusion as to this element was appropriate – the findings of the Probate Court established that Michael converted an interest in the Insurance Benefits.

Willful Injury

"In [the Ninth] Circuit, § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct. The Debtor is charged with the knowledge of the natural consequences of his actions." *Ormsby*, 591 F.3d at 1206. "In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Su*, 290 F.3d at 1146.

The Probate Court made no finding that Michael intended to injure Rhonda when he accepted, deposited, and used the Insurance Benefits. Also, this is not a case in which it is obvious the injury was intended – Michael's position throughout has been that he thought he was entitled to the Insurance Benefits. On summary judgment the Court could not determine that Michael had the requisite intent to injure Rhonda when he converted the Insurance Benefits. Thus, the matter was tried.

1 Having considered the evidence, the Court finds that Rhonda has not met her burden
2 to establish that Michael intended to injure her, or the probate estate, when he received,
3 retained, and spent the Insurance Benefits nor that he was substantially certain that harm to
4 Rhonda would occur. The Court is convinced that Michael's assertion that he thought he
5 was the proper recipient of the Insurance Benefits is true. Michael testified that he was
6 assured by Mr. Bice at MetLife that he was the lawful recipient. He also testified that he
7 consulted with Mr. Arietta who told him that the beneficiary of an insurance policy was
8 entitled to the proceeds 98 percent of the time:

9 Q. OKAY. AND HOW DID THAT MAKE YOU FEEL, THE
10 98 PERCENT COMMENT THAT HE MADE?

11 A. IT MADE ME FEEL MORE COMFORTABLE IN
12 THINKING THAT ALL ALONG METROPOLITAN LIFE IS
13 SAYING -- SAYING THAT I'M THE BENEFICIARY. WITH THE
14 LETTERS COMING FROM RHONDA, I JUST HAD A SECOND
15 OPINION SO I FELT MORE COMFORTABLE.

16 Dkt. No. 105 at 197:15-21.

17 The Court found Michael to be sincere and consistent in his story both on direct and
18 under cross-examination. And the Court's belief in Michael's testimony is reinforced by
19 evidence of his background and sophistication.

20 Michael is a retired 66 year-old. His education ended at high school. He spent his
21 working life (30 years) as a forklift driver in a grocery warehouse for a single employer. He
22 supplemented his retirement income before COVID as a part time school bus driver for
23 children with special needs. See Defendant's Declaration in Opposition to Summary
24 Judgment, Dkt. No. 58; Plaintiff's Trial Ex. 19. At trial, Michael came across as amiable,
25 considerate (he wept when discussing his ex-wife), trustworthy, but not sophisticated with
26 respect to business or legal matters.

27 Rhonda's own evidence, the declaration of Michael's former long-term girlfriend,
28 Karen Davis, supports the Court's conclusion. Ms. Davis testified that she has known

1 Michael for the last 12 years and that they lived together intimately for 10 of those years. In
2 response to a request to describe his habits and customs in dealing with his business and
3 personal matters, Ms. Davis declared:

4 4. Stated bluntly, Mike does simple. Mike does not do complicated.

5 5. What I mean by that is that if something is easy and obvious he has
6 no problem. But if it requires reading directions or researching an issue he just
7 gets frustrated and nervous and shuts down. He stops trying.

8 6. For example, Mike doesn't do email. I did my best to teach him. I
9 let him use one of my old email addresses. I helped him buy a laptop and set
10 it up for him. I taught him how to go online and read emails. But he still can't
11 send emails or deal with attachments.

12 7. When trying to do something like operate a cell phone or deal with
13 cable tv he always calls me and I do it for him. Even now.

14 8. In this lawsuit, I understand his zoom deposition was continued
15 because he couldn't get on zoom. He called me to get him on zoom at the
16 continued date and I did. Even though we are no longer living together he still
17 calls on me for assistance on technical things frequently.

18 9. In our business dealings which I have observed, like leases and
19 purchasing or selling a house he will look over the first page and immediate
20 look for where he signs. He never reads important things much beyond the
21 first page.

22 10. To be sure, Mike is not dumb. He is witty and fun to be with. He
23 has many endearing qualities, but reading instructions or complex documents
24 is not one of them.

25 Dkt. No. 56, Plaintiff's Ex. 29-1.

26 The evidence before the Court includes the October 10, 2017, Haas Letter, in which
27 Rhonda's counsel opined that Wanda had intended to name Rhonda as the beneficiary under
28 the FEGLI Policy and that Michael had waived any right to Wanda's "pension and/or

1 retirement plans" under the terms of the Judgment of Dissolution. Plaintiff's Tr. Exhibit 6.
2 Rhonda argues that Michael retained the proceeds willfully because he knew as of
3 October 2017 that the Insurance Benefits belonged to Rhonda. There are several problems
4 with this argument. First, Mr. Haas was Rhonda's lawyer – not Michael's. Michael was
5 entitled to question his assertions. Second his assertions were contrary to what Michael was
6 being told by MetLife and inconsistent with the probabilities as outlined by Mr. Arietta.
7 That Michael failed to heed the demands of Rhonda's counsel is not conclusive evidence of
8 willfulness. There is no evidence that Michael believed what he was told by Rhonda's
9 counsel. And this is not unreasonable.

10 Furthermore, even if one assumes that Michael read and understood the Judgment of
11 Dissolution and the MSA which it adopted it, a conclusion the Court does not reach, it does
12 not state as Mr. Haas alleges. The MSA and the Haas Letter referred to Wanda's pension
13 and retirement plans – the FEGLI policy in question was a life insurance policy. Second, in
14 the MSA, upon which the Judgment of Dissolution was based, Michael waived his right to
15 assert a claim to Wanda's retirement and pension plans (again not life insurance policies).
16 Nothing in the MSA expressly discussed insurance. Nor did these documents expressly
17 preclude Michael from retaining life insurance proceeds. That the Probate Court found to
18 the contrary as to entitlement is not dispositive of the issue here which is what did Michael
19 intend and believe.

20 Indeed, Michael testified that he believed that Wanda intentionally failed to sign the
21 form in order to give him the Insurance Benefits. Rhonda argues that this is not believable.
22 The Court heard Michael's testimony and concludes to the contrary. It may be a case of
23 self-delusion, but his testimony appeared sincere. In Michael's mind it was consistent with
24 the fact that Wanda had given him a truck and some gold coins when she had no obligation
25 to do so. Furthermore, the point is not really on the mark.

1 As noted above, Michael testified that the MetLife representative assured him that he
2 was the legal beneficiary of the policy and that they had denied Rhonda's claim. The Court
3 found his testimony to be sincere.⁴

4 Rhonda argues that Michael's testimony is belied by a lack of a record of the alleged
5 statements in the MetLife phone slips prepared by representative Adam Bice. The Court has
6 reviewed the phone slips (Rhonda's Trial Exhibit 12) and does not find them to be complete
7 records of the phone calls. Rather they appear to be very brief summaries of the calls.
8 Based on the nature of the phone slips, the Court would not expect Mr. Bice to have noted "I
9 assured Mr. Silverthorn that he was the legal beneficiary of the Policy." The Court does not
10 find that a lack of such a notation undermines Michael's testimony as to the content of the
11 phone calls. Rhonda did not call Mr. Bice as a witness to refute Michael's claim.

12 Rhonda makes much of the fact that Michael decided not to retain Mr. Arietta. The
13 Court does not find that this decision in any way weighs against Michael's testimony that he
14 believed the Insurance Benefits were his. Further, the Court is not troubled by Michael's
15 inability to recall the amount of the retainer Mr. Arietta requested. This lack of specificity
16 does not undercut his testimony that he believed he could not afford it.

17 As noted above, Michael also testified that Mr. Arietta told him that 98 percent of the
18 time the named beneficiary was entitled to the proceeds of the policy. The Court agrees
19 with Rhonda that without more information this statement really means very little. The
20 point, however, is not the legal merit of this comment. The point is what Michael heard and
21 what it meant to him. The Court heard Michael's testimony and is convinced that he
22 believed Mr. Arietta's statement to mean that he was 98 percent likely to be the legal
23 recipient of the Insurance Benefits. Again, the Court also believes his testimony that
24

25
26 ⁴ Rhonda objected to the testimony on hearsay grounds, which objection the Court
27 overruled. The statements of the MetLife representative were not being presented for the truth of
28 the matter asserted – that Michael was the legal beneficiary – but rather to establish his state of
mind and the reasonableness of his belief that he was the legal beneficiary.

1 between this assertion and those of Mr. Bice, he believed that he was the rightful owner of
2 the Insurance Benefits.

3 Rhonda complains that Michael continues to convert the Insurance Benefits by
4 failing to comply with the Probate Judgment. However, the Probate Judgment was entered
5 in October of 2019, it is not clear when it was served on Michael, and Michael filed his
6 petition shortly thereafter in December of 2019, seeking to discharge the obligation.

7 Michael used the Insurance Benefits, at least in part, to purchase the Property in
8 March of 2018. But this is before Rhonda filed her Probate Petition and well before the
9 Probate Judgment was entered. When Michael purchased the Property all he had was the
10 knowledge that Rhonda and her attorneys asserted that the Insurance Benefits belonged to
11 her, which was contrary to what he had been told by Mr. Arietta and Mr. Bice of MetLife.

12 Rhonda complains that Michael divided the sales proceeds with Karen Davis despite
13 the fact that she had contributed little to the Property. The Court, however, finds that how
14 Michael disposed of the Property sale proceeds does not indicate that he willfully retained or
15 pocketed the Insurance Benefits. If anything, it is evidence of naivetè. The Court ultimately
16 concludes that Michael believed he had a right to Insurance Benefits that was superior to
17 that of Rhonda or the probate estate. Given this conclusion, he did not intend to injure
18 either when he took them.

19 Malice

20 In order to succeed under § 523(a)(6), a creditor must also establish that the debtor
21 acted with malice. "A malicious injury involves (1) a wrongful act, (2) done intentionally,
22 (3) which necessarily causes injury, and (4) is done without just cause or excuse. Malice
23 may be inferred based on the nature of the wrongful act." *Ormsby*, F.3d at 1207 (internal
24 citation and quote omitted).

25 As noted above, the Court has found based on the Probate Judgment that Michael
26 committed a wrongful act – he converted the Insurance Benefits. He does not deny that he
27 did so intentionally. Since the Probate Court determined that Rhonda was rightfully entitled
28

1 to the Insurance Benefits, she was necessary injured by his continued use and possession of
2 them.

3 Having heard the testimony, however, the Court finds that Michael converted the
4 Insurance Benefits with a just excuse within the meaning of the § 523(a)(6) malice standard
5 – he honestly believed that he was the rightful owner.

6 He testified that the MetLife representative consistently told him that he was the
7 legally entitled recipient of the Insurance Benefits. This position was confirmed, at least in
8 Michael's mind, by the comments of Mr. Arietta. He was also told, correctly, that Rhonda's
9 claim had been rejected. Michael called MetLife seven times to check on the status of his
10 claim, and he was consistently reassured that he was the lawful recipient.

11 Michael explained that he believed Wanda had failed to sign the amended form with
12 the intent that he would receive the pay out of this policy. He testified that Wanda had
13 given him a truck and some gold coins when she had no obligation to do so, so he was not
14 surprised that she did not remove him as the beneficiary of the policy. Rhonda has not met
15 her burden of persuading the Court that he was lying on this point.

16 At trial Rhonda made much of the fact that Michael had not contacted Rhonda's
17 counsel. The Court finds this entitled to no weight. In response to the letters Michael
18 contacted MetLife, and he reached out to an attorney. He had no obligation to contact
19 Rhonda's counsel. This is also consistent with Michael's apparently long-standing approach
20 to even moderately complex legal or business issues.

21 **The Probate Court's Finding of Bad Faith**

22 The Probate Court found, based on Rhonda's unchallenged evidence, that Michael
23 had "in bad faith wrongfully taken, concealed and disposed of the Insurance Benefits
24 belonging to the Estate," and based thereon awarded double damages under Probate Code
25 § 859. However, the Probate Court made no finding that Michael acted either with malice
26 or willfully within the § 523(a)(6) sense. In the motion for summary judgment, Rhonda
27 provided no authority for the proposition that a finding of bad faith under § 859 necessarily
28 establishes malice or willfulness under § 523(a)(6) as a matter of law.

1 As the Court explained in a prior tentative ruling, an award of punitive damages
 2 under the California Civil Code, if properly worded, might support a claim for relief under
 3 § 523 (a)(6). However, under California law, an award under Probate Code § 859 is not the
 4 equivalent of an award of punitive damages under Civil Code § 3294. As the Court in
 5 *Hill v. Superior Court* stated:

6 [T]o the extent the alternative bases of recovery under section 859 require
 7 proof of any such misconduct, the section requires only a showing of "bad faith,"
 8 which is not the equivalent of malice required under Civil Code section 3294.

9

10 Finally, and not incidentally, section 859 ends with this sentence: "The
 11 remedies provided in this section shall be in addition to any other remedies available
 12 in law to a person authorized to bring an action pursuant to this part." section 859
 13 double damages are not punitive damages, and the proof required for punitive
 14 damages is not required for section 859 damages.
 15 244 Cal. App. 4th 1281, 1287–89 (2016), as modified (Feb. 25, 2016).

16 The Probate Judgment does not, on its own, establish that Michael converted
 17 Rhonda's property maliciously or willfully for the purposes of § 523(a)(6). It is ambiguous
 18 as to the basis for the bad faith determination.

19 **Section 523(a)(4)**

20 In her trial brief, Rhonda also argued that her claim is non-dischargeable under
 21 § 523(a)(4). That section excepts from discharge debt "for fraud or defalcation while acting
 22 in a fiduciary capacity, embezzlement, or larceny..."

23 11 U.S.C. § 523(a)(4). Rhonda proposes two alternate theories: first that Michael
 24 embezzled the Insurance Benefits and second that Michael breached a fiduciary duty to the
 25 probate estate.

26 **Embezzlement**

27 Federal law, not state law, controls with respect to the definition of embezzlement
 28 pursuant to § 523(a)(4). *First Delaware Life Ins. Co. v. Wada (In re Wada)*, 210 B.R. 572,

1 576 (9th Cir. BAP 1997). Embezzlement is defined as "the fraudulent appropriation of
2 property by a person to whom such property has been [e]ntrusted or into whose hands it has
3 lawfully come." *Id.*

4 To succeed on a claim of embezzlement, a creditor must prove: (1) the property was
5 rightfully in the possession of a non-owner; (2) the non-owner appropriated the property to a
6 use other than which it was entrusted; and (3) circumstances indicating fraud. *Transamerica*
7 *Commercial Finance Corporation v. Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir.
8 1991).

9 Thus, an element of embezzlement is that there are circumstances indicating fraud.
10 *Misik v. D'Arco, (In re D'Arco)*, 587 B.R. 722, 729 (C.D. Cal. 2018), *aff'd sub nom. Misik v.*
11 *D'Arco*, 777 F. App'x 258 (9th Cir. 2019) (citing *Transamerica Comm'l Fin. Corp. v.*
12 *Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir. 1991)). This "requires a showing of
13 fraud in fact involving moral turpitude or an intentional wrong or deceit." *National Bank of*
14 *Commerce v. Hoffman, (In re Hoffman)*, 70 B.R. 155, 162 (Bankr. W.D. Ark. 1986).

15 The Court has considered the evidence and does not find fraud on the part of
16 Michael. Having considered all of the evidence including the testimony of the Michael and
17 his responses on cross-examination, the Court finds that he believed that he was the rightful
18 owner of the Insurance Benefits. There is no evidence that Michael misrepresented
19 anything to anyone throughout this process. The Court finds that Michael acted in
20 accordance with that belief throughout the case.

21 In addition, it is not clear that the other elements were met. The basis for the Probate
22 Court's decision is far from clear, but there is no question that MetLife paid the Insurance
23 Benefits to Michael for his benefit – not Rhonda's. Indeed, MetLife denied Rhonda's claim.
24 There is nothing in the record supporting that Rhonda could have required MetLife to pay
25 the Insurance Benefits to her – she did not pursue this theory in the probate action.

26 **Breach of Fiduciary Duty**

27 In order to render a claim nondischargeable under the breach of fiduciary duty
28 portion of § 523(a)(4), claimant must establish: (1) an express (or technical) trust; (2) that

1 the debt was caused by fraud or defalcation; and (3) that the debtor was a fiduciary to the
 2 creditor at the time the debt was created. *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1459
 3 (9th Cir. 1997); *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996). The broad,
 4 general definition of fiduciary – a relationship involving confidence, trust and good faith –
 5 is inapplicable in the dischargeability context. *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th
 6 Cir. 1986). Instead, § 523(a)(4) nondischargeability results only where the fiduciary
 7 relationship between the debtor and the creditor arises in relation to an express or technical
 8 trust that pre-dates the alleged defalcation. *Lewis*, 97 F.3d at 1185; *Runnion v. Pedrazzini*
 9 (*In re Pedrazzini*), 644 F.2d 756, 758 (9th Cir. 1981). Under section 523(a)(4), it "is not
 10 enough that, by the very act of wrongdoing out of which the contested debt arose, the
 11 bankrupt has become chargeable as a trustee ex maleficio." *Davis v. Aetna Acceptance Co.*,
 12 293 U.S. 328, 333 (1934); *Honkanen v. Hopper (In re Honkanen)*, 446 B. R. 373, 378-379
 13 (9th Cir. BAP 2011). Section 523(a)(4) does not render a claim nondischargeable where the
 14 fiduciary duty arises only after the defalcation. *Blyler v. Hemmeter (In re Hemmeter)*,
 15 242 F.3d 1186, 1189-90 (9th Cir. 2001). Whether the debtor was acting in a fiduciary
 16 capacity within the meaning of section 523(a)(4) is a question of federal law. *Lewis*,
 17 97 F.3d at 1185. State law, however, determines whether the requisite trust relationship
 18 exists. *Id.*

19 Nondischargeability under § 523(a)(4) also requires proof of a particular state of
 20 mind; not all breaches of fiduciary duty suffice. In *Bullock v. BankChampaign, N.A.*, 569
 21 U.S. 267 (2013), the Supreme Court clarified the standard for defalcation under § 523(a)(4),
 22 holding that it requires "a culpable state of mind" with a "knowledge of, or gross
 23 recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Id.* at
 24 269. "[W]here the conduct at issue does not involve bad faith, moral turpitude, or other
 25 immoral conduct, [defalcation] requires an intentional wrong." *Id.* at 273. An intentional
 26 wrong includes "not only conduct that the fiduciary knows is improper but also reckless
 27 conduct of the kind that the criminal law often treats as the equivalent." *Id.* at 274. This
 28 includes "reckless conduct of the kind set forth in the Model Penal Code." *Id.* "Where

1 actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the
2 fiduciary 'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable
3 risk' that his conduct will turn out to violate a fiduciary duty." *Id.* (quoting Model Penal
4 Code § 2.02(2)(c), at 226 (Am. Law Inst. 1985)). A substantial and unjustifiable risk "must
5 be of such a nature and degree that, considering the nature and purpose of the actor's
6 conduct and the circumstances known to him, its disregard involves a gross deviation from
7 the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.*
8 (quoting Model Penal Code § 2.02(2)(c), at 226).

9 As set forth above, a common thread throughout the Court's decision is the Court's
10 finding that Rhonda has not met her burden to establish that Michael intended to injure her,
11 or the probate estate, when he received, retained, and spent the Insurance Benefits, nor that
12 he was substantially certain that harm to Rhonda would occur. The Court is convinced that
13 Michael's assertion that he thought he was the proper recipient of the Insurance Benefits is
14 true. Holding this belief, Michael did not consciously disregard "a substantial and
15 unjustifiable risk" that his conduct would violate a fiduciary duty, even if one existed. Thus,
16 the evidence does not support that he had the state of mind required for § 523(a)(4) breach
17 of fiduciary duty nondischargeability.

18 And there are other potential problems with this theory of nondischargeability.
19 Rhonda does not allege any trust agreement between her and the Michael. Rather, she
20 argues that one is imposed by California Family Code § 721 which provides:

21 (b) Except as provided in Sections 143, 144, 146, 16040, 16047, and 21385 of
22 the Probate Code, in transactions between themselves, spouses are subject to the
23 general rules governing fiduciary relationships that control the actions of persons
24 occupying confidential relations with each other. This confidential relationship
25 imposes a duty of the highest good faith and fair dealing on each spouse, and neither
26 shall take any unfair advantage of the other. This confidential relationship is a
27 fiduciary relationship subject to the same rights and duties of nonmarital business
28

1 partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code,
2 including, but not limited to, the following:

3 (1) Providing each spouse access at all times to any books kept regarding a
4 transaction for the purposes of inspection and copying.

5 (2) Rendering upon request, true and full information of all things affecting
6 any transaction that concerns the community property. Nothing in this section is
7 intended to impose a duty for either spouse to keep detailed books and records of
8 community property transactions.

9 (3) Accounting to the spouse, and holding as a trustee, any benefit or profit
10 derived from any transaction by one spouse without the consent of the other spouse
11 that concerns the community property.

12 Cal. Fam. Code § 721. She asserts that this fiduciary duty is extended beyond marital
13 separation by Family Code § 2102, which provides:

14 (b) From the date that a valid, enforceable, and binding resolution of the
15 disposition of the asset or liability in question is reached, until the asset or liability
16 has actually been distributed, each party is subject to the standards provided in
17 Section 721 as to all activities that affect the assets or liabilities of the other party.
18 Once a particular asset or liability has been distributed, the duties and standards set
19 forth in Section 721 shall end as to that asset or liability.

20 Cal. Fam. Code § 2102 (West).

21 Rhonda's analysis is sound as far as it goes. Michael may have had a fiduciary duty
22 in favor of his former spouse, Wanda, that extended through the distribution of the marital
23 assets. But Rhonda, who has the burden on this point, has provided no authority extending
24 the duty past the spouse's death to the probate estate. The Court does not decide the case on
25 this basis but questions whether insurance proceeds are an asset within the meaning of the
26 statute and whether Michael had a duty that stretched so far. Indeed, if there is a trust here,
27 it might more properly be considered a trust ex maleficio. And such a trust would not
28 support a § 523(a)(4) breach of fiduciary duty claim.

1 The Court determines that Rhonda has failed to establish a claim under Bankruptcy
2 Code § 523(a)(4).

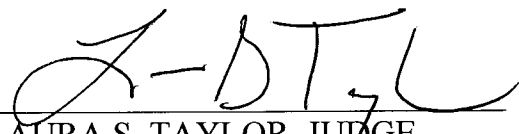
3 **Bankruptcy Code § 523(a)(2)(A)**

4 Rhonda's complaint contains a claim under Bankruptcy Code § 523(a)(2)(A).
5 However, Rhonda has not pursued this claim, and it was neither tried nor briefed. Judgment
6 for Michael is appropriate.

7 **CONCLUSION**

8 For the reasons set forth above the Court finds for the Michael: that Rhonda has
9 failed to establish her claim should be excepted from Debtor's discharge under any of the
10 subsections of Bankruptcy Code § 523(a). The Court finds that the Probate Judgment was
11 discharged in Michael's bankruptcy case.

12 DATED: November 1, 2021

13 
14 LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

RHONDA DAY, EXECUTOR OF WANDA G. SILVERTHORN v. MICHAEL ROY SILVERTHORN,
Adv. No. 20-90050-LT

(In re MICHAEL ROY SILVERTHORN, Bk. No. 18-07390-LT7)

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

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Said envelopes containing such document was deposited by me in the City of San Diego, in said District on November 1, 2021.

/s/ Regina A. Fabre
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