

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: August 19 2005

A blue ink signature of Mary Ann Whipple, written in a cursive style.

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 05-30778
)	
Robert Farrell,)	Chapter 7
Della Farrell,)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

MEMORANDUM AND ORDER DENYING MOTION OBJECTING TO EXEMPTIONS

This case came before the court for hearing on the Chapter 7 Trustee's Motion Objecting to Exemptions [Doc. # 17] and Debtor's response [Doc. # 19]. The Trustee objects to exemptions claimed by Debtors under Ohio Revised Code § 2329.66(A)(12)(c) and (d). The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district. This is a core proceeding that the court may hear and decide under 28 U.S.C. § 157(b)(1) and (b)(2)(B). Having considered the motion, Debtor's response, and the arguments of counsel, for the reasons discussed below, the court will deny the motion in part, as to the objection to the exemption claimed under Ohio Revised Code § 2329.66(A)(12)(c), and continue the motion for further proceedings, as to the objection to the exemption claimed under Ohio Revised Code § 2329.66(A)(12)(d).

BACKGROUND

For purposes of this motion, the following facts are undisputed. Debtors, Robert and Della Farrell, filed a joint Chapter 7 bankruptcy petition on February 8, 2005. They list a personal injury claim for an

undetermined amount in their amended schedules. The claim is for injuries incurred by Della Farrell as the result of her use of Vioxx and for loss of consortium due to those injuries experienced by her husband, Robert Farrell. Debtors claim a \$10,000 exemption under Ohio Revised Code § 2329.66(A)(12)(c) and an exemption for an unknown amount under § 2329.66(A)(12)(d) in any payments they might receive in the future as a result of the personal injury claim. The issue now before the court involves only the \$10,000 exemption under § 2329.66(A)(12)(c).¹ The Trustee argues that only Della Farrell, the injured party, is entitled to the exemption and, as such, it should be limited to \$5,000.

LAW AND ANALYSIS

Section 2329.66(A)(12)(c) of the Ohio Revised Code provides an exemption for a person's right to receive "a payment, not to exceed five thousand dollars, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the person or an individual for whom the person is a dependent." While the Trustee concedes that an exemption in the amount of \$5,000 is proper with respect to payment for injuries incurred by Della Farrell, she argues that Robert Farrell is not entitled to an exemption as he sustained no bodily injury. Under Bankruptcy Rule 4003(c), the party objecting to the exemption, in this case the Trustee, has the burden of establishing that the debtor is not entitled to the claimed exemption. *In re Andrews*, 301 B.R. 211, 213 (Bankr. N.D. Ohio 2003). In making this determination, and in order to further the fresh-start policy of the Bankruptcy Code, exemption statutes are to be liberally construed in a debtor's favor. *Id.*

For Robert Farrell to claim an exemption under § 2329.66(A)(12)(c), he must either (1) personally suffer a personal bodily injury, or (2) an individual of whom he is a dependent must suffer such an injury. *In re Turner*, 190 B.R. 836, 841 (Bankr. S.D. Ohio 1996). The court finds that he did not suffer a "personal bodily injury" and, thus that he may not claim an exemption under the first scenario. But the court further finds that the Trustee did not meet her burden of establishing that Mr. Farrell was not entitled to an exemption under the second scenario.

Under the first scenario, Robert Farrell may claim an exemption only if the loss of consortium experienced by him constitutes a "personal bodily injury" as contemplated by the statute. The Ohio exemption statute does not define "personal bodily injury." Nevertheless, absent ambiguity, a term that is not defined by statute is interpreted according to its plain and ordinary meaning. *State v. Stallings*, 150 Ohio

¹ Section 2329.66(A)(12)(d) provides for an exemption in a person's right to receive "[a] payment in compensation for loss of future earnings of the person or an individual of whom the person is or was a dependent, to the extent reasonably necessary for the support of the debtor and any of the debtor's dependents." The Trustee has also objected to this claimed exemption but will file, after further investigation, a status report in 120 days.

App. 3d 5, 11 (2002). Ohio courts commonly refer to the dictionary as a resource in determining the plain and ordinary meaning of a term. *See, e.g., Stadium Lincoln-Mercury, Inc. v. Heritage Transport*, 160 Ohio App.3d 128, 137 (2005) (using Merriam-Webster’s Collegiate Dictionary); *Peat v. Univ. Hosp. Health Sys. Bedford Med. Ctr.*, 159 Ohio App.3d 638, 641 (2005) (using Black’s Law Dictionary).

Black’s Law Dictionary defines “personal injury” as follows: “1. In a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury. 2. Any invasion of a personal right, including mental suffering and false imprisonment. -- Also termed private injury.” Black’s Law Dictionary (8th ed. 2004). It defines “bodily injury” as “[p]hysical damage to a person’s body. – also termed *physical injury*.” *Id.* (emphasis in original). Thus, “bodily injury” is a subcategory of “personal injury” and, as such, further defines the type of personal injury. *See Owen v. Vieira (In re Owen)*, 2002 WL 531570, *3 (S.D. Ill. 2002) (considering the meaning of the term “personal bodily injury” as used in a similar Illinois exemption statute and finding that “the word ‘bodily’ would commonly be understood to narrow the meaning of the phrase to include only damage to a person’s body). As defined above and as the court finds is commonly understood, “personal bodily injury” is not ambiguous and means physical damage to a person’s body. *Id.* at *4.

Applying this definition to Mr. Farrell’s claim for loss of consortium, the court finds that any payment compensating him for such loss does not constitute payment on account of his personal bodily injury. In so finding, the court relies not only on the dictionary definition of “bodily injury” but also on the interpretation given by Ohio courts, albeit in a different context, of the relationship between a loss of consortium claim and a claim for bodily injury.

Under Ohio law, consortium “consists of society, services, sexual relations and conjugal affection which includes companionship, comfort, love and solace.” *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St.2d 65, syllabus ¶ 3 (1970). In *Tomlinson v. Skolnik*, 44 Ohio St. 3d 11 (1989)², the Ohio Supreme Court was faced with the issue of whether an automobile insurance policy provision was a valid restriction on liability coverage where recovery was limited for all causes of action arising out of bodily injury to one person to a single limit of liability. The central issue in that case was whether a consortium claim constitutes a separate claim for “bodily injury” within the coverage provided in the insurance policy. *Id.* at 12. As the term “bodily injury” was not defined in the policy, the court found that it must be given its “natural and commonly accepted meaning.” *Id.* The court explained that “[t]he words ‘bodily injury’

² *Tomlinson* was overruled on other grounds by *Schaefer v. Allstate Ins. Co.*, 76 Ohio St.3d 553 (1996), which was in turn superseded by Ohio Revised Code § 3937.18(G).

are commonly and ordinarily used to designate an injury caused by external violence. . .” and that, by contrast, “an action for loss of consortium involves, not an injury to the complainant’s body, but rather an injury to the complainant’s relationship with his or her spouse. . . .” *Id.* at 14. The court concluded that, although a spouse of a person incapacitated “‘suffers great pain and endures constant anguish,’ . . .such physical manifestations do not render a claim for loss of consortium a ‘bodily injury’ as that term is commonly understood.” *Id.* (citing *Clouston*, 44 Ohio St. 3d at 73); see *Cincinnati Ins. Co. v. Phillips*, 52 Ohio St. 3d 162, 166 (1990) (Brown, J., concurring) (stating “[c]laims for wrongful death (and loss of consortium) are not claims ‘for bodily injury’ although they may be claims arising out of bodily injury”); *Wilson v. Smith*, 2005 WL 236306 (Ohio App. Feb. 2, 2005) (unreported) (holding that damages for loss of consortium are not “damages for bodily injury”); *Campo v. Daniel*, 2002 WL 31883370 (Ohio App. Dec. 26, 2002). But see *Young v. IBP, Inc.*, 124 Ohio Misc. 2d 31, 34 (2003) (finding, without discussion, that spouse had a \$5,000 exemption in claim for loss of consortium under § 2329.66(A)(12)(c)).

In holding that loss of consortium does not constitute a “personal bodily injury” under § 2329.66(A)(12)(c), the court is mindful of the fact that several bankruptcy cases applying Ohio law have held otherwise. See, e.g., *In re Young*, 93 B.R. 590 (Bankr. S.D. Ohio 1988); *In re Hartney*, 1990 WL 250985 (Bankr. N.D. Ohio 1990)(unreported); *In re Tosti*, 276 B.R. 204 (Bankr. S.D. Ohio 2001); *In re Wears*, 311 B.R. 489 (Bankr. S.D. Ohio 2003). In *Wears*, the court overruled the trustee’s objection to a spouses claimed exemption for his loss of consortium stating only that he was a party to the personal injury settlement and that “some portion of it is attributable to his claim.” *Wears*, 311 B.R. at 491. In *Hartney* and *Tosti*, the courts cite with approval, but without further discussion, the holding in *Young*. *Hartney*, 1990 WL 250986 at *2; *Tosti*, 276 B.R. at 205-6. In *Young*, the court found that a spouse properly claimed an exemption for her claim of loss of consortium, relying upon language in the Ohio Supreme Court’s decision in *Clouston* that “the ‘gist’ of the wife’s action for loss of the consortium of her husband against a defendant who either intentionally or negligently causes injury to her husband is the *direct hurt* which she has suffered by reason of the loss. . .,” as well as the principle that exemption statutes should be liberally construed in debtor’s favor. *Young*, 93 B.R. at 594-95. However, *Young* was decided before the Ohio Supreme Court’s decision in *Tomlinson*, which cited the same language from *Clouston* but found that loss of consortium was not a “bodily injury.” See *Tomlinson*, 44 Ohio St. 3d at 14. While exemption provisions susceptible to both a favorable and unfavorable interpretation should be construed in favor of the debtor, the term “personal bodily injury,” as determined by the Ohio Supreme Court, is clear and unambiguous.

Notwithstanding the foregoing discussion, Mr. Farrell is still entitled to claim an exemption under

§ 2329.66(A)(12)(c) if, under the second scenario, he is entitled to a payment on account of personal bodily injury of an individual of whom he is a dependent. *See Turner*, 190 B.R. at 841. The Trustee does not dispute the fact that Mrs. Farrell sustained a personal bodily injury. A claim for loss of consortium is a derivative claim, “*deriving from* a spouse’s claim for bodily injury.” *Tomlinson*, 44 Ohio St. 3d at 14. Thus, any award to Mr. Farrell for loss of consortium is a payment “on account of personal bodily injury” of Mrs. Farrell. *See Turner*, 190 B.R. at 841. And if Mr. Farrell is a dependent of his wife, he is entitled to an exemption under the plain meaning of § 2329.66(A)(12)(c). “Dependent” is not defined in § 2329.66. However, under Ohio law, an obligation of mutual support is imposed upon married persons. Ohio Rev. Code § 3103.03(A). And the Ohio legislature has provided that a person who “fail[s] to provide adequate support to . . . [t]he person’s spouse, as required by law, . . . is guilty of nonsupport of dependents, a misdemeanor of the first degree.” Ohio Rev. Code § 2919.21(A)(1) and (G)(1). While “dependent” may be susceptible to other interpretations, in such cases, as indicated above, the exemption statute should be construed in favor of the debtor. The Trustee has offered no evidence indicating that Mr. Farrell is not a dependent of his wife under Ohio law. The court therefore finds that he is entitled to a \$5,000 exemption under § 2329.66(A)(12)(c) for his loss of consortium claim. *See Turner*, 190 B.R. at 841.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee’s Motion Objecting to Exemptions [Doc. # 17] be, and hereby is, **DENIED**, and Debtors claim of exemption in the amount of \$10,000 pursuant to Ohio Rev. Code § 2329.66(A)(12)(c) is allowed; and

IT IS FURTHER ORDERED that the Trustee shall file a status report on or before December 17, 2005, regarding Debtors’ exemption claim under § 2329.66(A)(12)(d).