

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
CHRISTOPHER DAVID OSBORNE, \*  
\* CASE NUMBER 04-45358  
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Debtor. \*  
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DIANA M. DiPOFI, \*  
\* ADVERSARY NUMBER 05-4042  
\*  
Plaintiff, \*  
\*  
vs. \*  
\*  
CHRISTOPHER D. OSBORNE, \*  
\* THE HONORABLE KAY WOODS  
\*  
Defendant. \*  
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M E M O R A N D U M O P I N I O N  
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This cause is before the Court on the parties' cross motions for summary judgment on the issue of whether the marital debt, owed by Debtor Christopher D. Osborne ("Debtor") to Plaintiff Diana M. DiPofi ("Plaintiff"), pursuant to a decree dissolving the marriage of Debtor and Plaintiff, is non-dischargeable pursuant to 11 U.S.C. § 523(a)(15).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(i). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

## I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998).

The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## II. FACTS

The parties filed a petition of dissolution of marriage in the Court of Common Pleas for Ashtabula County, Ohio (the "Domestic Relations Court") on October 28, 2003 and were granted a divorce on January 21, 2004.<sup>1</sup> The divorce decree incorporates a separation agreement entered into by the parties and filed with the Domestic Relations Court on October 28, 2003. As part of the divorce decree, Debtor was ordered to pay Plaintiff the sum of \$11,527.58 (the "Marital Debt") within ninety days of the separation agreement in exchange for Plaintiff's assumption of the parties'

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<sup>1</sup>Plaintiff and Debtor were married on March 27, 1999. During the marriage the parties had two children, who are now two and six years old.

credit card debt. (Plaintiff's Response, Exs. A, B.) The separation agreement specifically labeled the aforementioned sum "marital debt." (*Id.*) To date, Debtor has failed to pay \$10,527.58 of the Marital Debt. (Plaintiff's Response, Ex. C.)

Subsequent to the parties' divorce, on November 1, 2004, Debtor petitioned the Court for relief under Chapter 7 of the Bankruptcy Code and is seeking to have the outstanding portion of his Marital Debt discharged.

Plaintiff initiated this adversary proceeding seeking a determination that the Marital Debt is non-dischargeable. Debtor alleges that the Marital Debt is dischargeable under 11 U.S.C. § 523(a)(15)(A) and (B), which provides that marital debt is dischargeable if (A) the debtor does not have the ability to pay from income or property not reasonably necessary for the maintenance or support of the debtor or debtor's dependents or (B) discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the debtor.

In 2004, Debtor earned \$12.00 per hour from his employment at Arrow Glass, which equated to annual gross income of \$27,784.00. Debtor earned another \$560.00 as a result of being self employed. (Debtor's Motion for Summary Judgment, Ex. A.) Currently, Debtor is working and receives biweekly net pay of \$468.65, after deductions for taxes and child support. (*Id.*) Debtor projected his net income for 2005 as \$12,184.90, which is the equivalent of \$1,015.40

per month ((\$468.65 times 26 pay periods divided by 12 months).<sup>2</sup>  
 (Id.)

Debtor sets forth his monthly expenditures in Schedule J to the petition and in Exhibit B to his motion for summary judgment,<sup>3</sup> as follows:

Item	Schedule J	Exhibit B
Rent	\$400.00	\$400.00
Electricity and Heating Fuel	\$154.00	\$154.00
Water and Sewer	\$29.00	\$29.00
Telephone	\$50.00	\$50.00
Home Maintenance	\$100.00	N/A
Food <sup>4</sup>	\$0.00	\$200.00
Clothing	\$50.00	\$50.00
Medical and Dental Expenses	\$50.00	N/A
Transportation	\$40.00	\$80.00
Recreation	\$25.00	N/A
Charitable Contributions	\$25.00	N/A
Renter's and Auto Insurance	\$93.00	\$100.00
Automobile Loan	\$220.00	\$220.00
Child Support <sup>5</sup>	\$0.00	\$611.00
Student Loans	\$0.00	\$72.00
Diapers	N/A	\$20.00
Children's Activities <sup>6</sup>	N/A	\$50.00
Total	\$1,236.00	\$2,036.00

In order to get an "apples to apples" comparison, child support in the amount of \$611.00 must be deducted from the expenses listed on Exhibit B since that amount is deducted from gross income

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<sup>2</sup>Debtor's petition lists his monthly income after taxes and child support as \$1,050.00, however the Court finds that \$1,015.40 accurately reflects Debtor's monthly income. (See Debtor's Motion for Summary Judgment, Ex. A.)

<sup>3</sup>Debtor's Exhibit B is in response to Interrogatory No. 20 of Plaintiff's Interrogatories.

<sup>4</sup>Since Debtor rents his residence, the Court believes that Debtor made an error and intended to list the \$100.00 in Schedule J for food and not for home maintenance.

<sup>5</sup>Child support is deducted from Debtor's monthly gross income to arrive at a monthly net income of \$1,015.40. As a consequence, it cannot also be counted as an expenditure.

<sup>6</sup>Debtor is required to pay 50% of the children's extracurricular activities pursuant to the separation agreement, which was incorporated into the divorce decree.

to arrive at net income (see Schedule I to petition). Thus, the true expenses for Debtor on Exhibit B would be \$1,425.00. Using either of these documents, Debtor's monthly expenditures (\$1,236.00 or \$1,425.00) exceed Debtor's current monthly net income of \$1,015.40. Debtor also anticipates that his ability to meet his financial obligations will diminish due to projected increases in energy and gasoline prices.

Debtor alleges that Plaintiff currently earns \$40,537.00 per year and receives child support in the amount of \$7,212.00.<sup>7</sup> (Debtor's Motion for Summary Judgment, Ex. A.) This equates to a net income of \$3,170.05 per month.<sup>8</sup> Plaintiff was also employed part-time at Youngstown State University during the fall of 2005, for which she received compensation in the amount of \$2,400.00. (Plaintiff's Response, Ex. D.) However, because Plaintiff does not have tenure at either her full-time or part-time teaching positions, she could be terminated from either teaching position depending upon the school district's financial situation and/or the university's needs. (*Id.*)

Furthermore, Debtor argues that Plaintiff needs to complete only one more class before she is eligible to receive a master's degree. If Plaintiff receives her master's degree, Debtor asserts that her gross earnings will increase by approximately \$6,000.00. (Debtor's Motion for Summary Judgment, Ex. E.) Finally, Debtor notes that Plaintiff claims both children for tax purposes.

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<sup>7</sup>Debtor notes that child support is not taxable to Plaintiff.

<sup>8</sup>Plaintiff receives \$2,559.05 in net pay and \$611.00 for child support which totals \$3,170.05. (Plaintiff's Response, Ex. D.)

Plaintiff's income barely meets her current expenses. Plaintiff states that her estimation of expenses does not include anticipated increases in gasoline and utility prices. (See *Id.* at 5-6; Plaintiff's Response, Ex. D.) Plaintiff's expenses include: (i) \$476.00 per month house payment; (ii) monthly utility bills; (iii) \$23,383.10 loan;<sup>9</sup> (iv) \$12,535.69 in credit card debt used to pay monthly expenses; (v) \$20,150.59 in student loans; and (vi) her share of the children's expenses and extracurricular activities.<sup>10</sup> (Debtor's Motion for Summary Judgment, Ex. E; Plaintiff's Response, Ex. D.) These expenses essentially deplete Plaintiff's income in its entirety. Debtor acknowledges this fact by stating, "Plaintiff is eligible for relief under the Bankruptcy Code." (Debtor's Motion for Summary Judgment at 7.)

Despite Debtor's argument that Plaintiff might complete her master's degree and be eligible to earn more money, this is entirely speculative and not considered by the Court. In addition, Plaintiff counters that Debtor's argument that she benefits from receipt of child support is unfounded because the Domestic Relations Court calculated child support by apportioning the amount necessary to raise the parties' two children to each party based upon such party's share of their total combined income. Plaintiff states that she bears sixty percent (60%) of the cost of supporting the children whereas Debtor's support obligation is only forty percent (40%).

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<sup>9</sup>Plaintiff consolidated the credit card debt incurred during the marriage with other debt obligations.

<sup>10</sup>The Court believes these expenditures, provided by the parties, to be illustrative and not an exhaustive list.

(Plaintiff's Response, Ex. A.) Furthermore, Plaintiff claims her expenses for the children outweighs the Debtor's because, as the residential parent, she pays for the children's shelter and other costs of raising the children.

### III. DISCUSSION

The statutory basis for Plaintiff's complaint to determine the dischargability of the Marital Debt rests entirely on the discharge exception in Section 523(a)(15) of the Bankruptcy Code. Debtor's response rests solely on the limitations of this section, as set forth in Section 523(a)(15)(A) and (B).<sup>11</sup> Section 523(a)(15) states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt--

. . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . **or**

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse,

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<sup>11</sup>The limitations set forth in Section 523(a)(15) were eliminated by the Bankruptcy Abuse and Consumer Protection Act ("BAPCPA"). Since Debtor petitioned this Court for relief prior to the effective date of BAPCPA, the limitations are still applicable to this proceeding.

or child of the debtor[.]

11 U.S.C. § 523(a)(15) (emphasis added). Since the two limitations of Section 523(a)(15) are in the disjunctive, a marital debt will be discharged upon a finding that either of the limitations in Subsections (A) or (B) are applicable.

Plaintiff bears the initial burden of proving the debt arose from a separation agreement or divorce decree. *Biederman v. Stoodt (In re Stoodt)*, 302 B.R. 549, 555 (N.D. Ohio 2003). Once a plaintiff establishes its burden, the burden then shifts to the debtor to establish, by a preponderance of the evidence, that one of the two limitations in Section 523(a)(15) are applicable to the proceeding. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (6th Cir. B.A.P. 1998). In the instant case, there is no question that the Marital Debt arose out of the separation agreement, which was incorporated into the divorce decree. (See Plaintiff's Response, Exs. A, B.) Therefore, Plaintiff has carried her burden and Debtor must establish, by a preponderance of the evidence, that one of the two limitations set forth in Section 523(a)(15) is applicable in this case.

For Debtor to meet his burden, Debtor must prove he does not have the ability to pay the Marital Debt from income or property not reasonably necessary for his maintenance or support. If Debtor proves he does not have the ability to pay, then the Marital Debt is dischargeable. To determine Debtor's ability to pay, the Court must conduct a two-step analysis. *Bubp v. Romer (In re Romer)*, 254 B.R. 207, 212 (N.D. Ohio 2000). First, the Court must deter-

mine if Debtor has any disposable income to pay the Marital Debt. *In re Romer*, 254 B.R. at 212. If Debtor does not have any disposable income, the Marital Debt must be discharged. *Id.* Second, if Debtor is found to have disposable income, the Marital Debt is still discharged unless Debtor can realistically pay, after considering the total amount of debt involved, in a reasonable time. *Id.* However, if Debtor cannot realistically pay the debt in full in a reasonable time, the Court can discharge a portion of the Marital Debt. *Id.*

In determining if Debtor has the ability to pay, the Court can take into account Debtor's property, future earnings potential and disposable income. *Id.*; *In re Stoodt*, 302 B.R. at 556. To determine Debtor's disposable income, the Court must subtract from Debtor's income those expenses that are reasonably necessary, based on Debtor's financial condition, to be expended for Debtor's maintenance or support. *In re Romer*, 254 B.R. at 212. The Court can make an independent evaluation of Debtor's financial condition and adjust Debtor's expenses downward and/or adjust Debtor's income upwards. *Id.* These adjustments ensure that Debtor's financial position reflects a true and accurate picture of Debtor's finances and protects the former spouse from having her debt discharged due to "fuzzy" math. *Id.*

In the instant case, Debtor works as a laborer for Arrow Glass, and receives monthly net income from his employment in the amount of \$1,015.40. This amount is a fair representation of Debtor's current and future earnings potential; Debtor has not

placed himself in a position of earning less than he is capable.<sup>12</sup> Furthermore, Debtor's petition states that he does not own any real property and owns only \$1,230.00 in personal property.<sup>13</sup> As a result, Debtor does not own any property that would affect his ability to pay the Marital Debt. Therefore, the Court will use Debtor's asserted monthly income amount of \$1,015.40 to calculate Debtor's ability to pay.

Debtor listed his current expenses in Schedule J and in Exhibit B to his Motion for summary Judgment. The Court has reviewed both sets of expenses and finds the following to reflect reasonable and necessary expenditures for the maintenance and support of Debtor and his dependents:

<b>Items</b>	<b>Reasonable and Necessary Expenses</b>
Rent	\$400.00
Electricity and Heating Fuel	\$154.00
Water and Sewer	\$29.00
Telephone	\$50.00
Home Maintenance	\$0.00
Food	\$200.00
Clothing	\$50.00
Medical and Dental	\$50.00
Transportation	\$80.00
Recreation	\$25.00
Charitable Contributions	\$0.00
Renter's and Auto Insurance	\$93.00
Automobile Loan	\$220.00
Student Loans	\$72.00
Children Expenses	\$50.00
<b>Total</b>	<b>\$1,473.00</b>

Debtor's net income, after child support, of \$1,015.40

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<sup>12</sup>Although Debtor earned \$560.00 in self-employment for the tax year 2004, Debtor's earnings from self-employment are minimal and do not warrant a finding by this Court that Debtor's future earnings should be increased for purposes of this action.

<sup>13</sup>Debtor's personal property includes three bank accounts totaling \$30.00, home furnishings valued at \$1,000.00 and clothing valued at \$200.00.

minus necessary and reasonable expenses of \$1,473.00 demonstrates that Debtor does not have any disposable income.<sup>14</sup> Indeed, at this rate, Debtor's debt will increase by \$427.60 per month. Therefore, Debtor does not have the ability to pay the Marital Debt in addition to his maintenance and support. As a result, pursuant to Section 523(a)(15)(A) of the Bankruptcy Code, the Marital Debt must be discharged.

The Court does not need to address the second prong, *i.e.*, Subsection (B) of Section 523(a)(15), because Debtor does not have any disposable income to pay the Marital Debt. The limitations on the exception to discharge in Section 523(a)(15) are in the disjunctive. Since Subsection (A) is applicable here, the Marital Debt does not come within the exception to discharge and is, therefore, dischargeable. As a consequence, this Court does not need to address Debtor's argument that Section 523(a)(15)(B) applies.<sup>15</sup>

#### IV. CONCLUSION

Viewing the evidence and its inferences in the light most favorable to Debtor, the Marital Debt is subject to discharge.

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<sup>14</sup>Even if the Court found Debtor's monthly net income to be \$1,050.00 (see footnote 2, *supra*) and Debtor's expenses to be \$1,236.00 (see p. 5, *supra* - Schedule J amounts) Debtor's income would still be insufficient for his maintenance and support. Using the higher net income and lower monthly expenses still does not result in any disposable income.

<sup>15</sup>However, if this argument were not moot, the Court would find that the benefit to Debtor of discharging the Marital Debt would outweigh the detrimental consequences to Plaintiff because Debtor's standard of living would be greater than or equal to Plaintiff's standard of living. See *In re Stoodt*, 302 B.R. at 558. Debtor acknowledges the equivalence of their respective standards of living by conceding that Plaintiff may have to seek bankruptcy protection if the Marital Debt is discharged. ("Plaintiff is eligible for relief under the Bankruptcy Code." (Debtor's Motion for Summary Judgment at 7.)) The Court understands the financial burden this decision will place on the Plaintiff; nevertheless the Court is bound by the plain language in Section 523(a)(15).

There is no genuine issue of fact that Debtor does not have the ability to pay the Marital Debt, as set forth in Section 523(a)(15)(A). As a consequence, the exception to discharge in 11 U.S.C. § 523(a)(15) is not applicable and the Marital Debt is subject to discharge.

Accordingly, Debtor's Motion for Summary Judgment is hereby granted and Plaintiff's Cross Motion for Summary Judgment is hereby denied.

An appropriate order will enter.

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**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
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O R D E R  
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For the reasons set forth in this Court's Memorandum Opinion entered this date, Debtor's Motion for Summary Judgment is hereby granted and Plaintiff's Cross Motion for Summary Judgment is hereby denied.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE