IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re HENRY E. NEEL, JR., Debtor.	No. 94-21102 Chapter 7
MELESSA D. NEEL, Plaintiff, *v*. HENRY E. NEEL, JR., Defendant.	Adv. Pro. No. 95-2038 [affirmed E.D. Tenn. No. 2:96-CV-140; 07-02-1996] [affirmed 6th Circuit 1997 WL 525366; 08-21-1997]

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action seeking a nondischargeability determination under 11 U.S.C. § 523(a)(5)[1] upon an indebtedness in the amount of $48,320.77 which arose from a state of Mississippi court order entered on January 30, 1991. Pending before the court are the parties' cross-motions for summary judgment, each asserting that there is no genuine issue as to any material fact. For the reasons set forth below, the court finds that plaintiff's motion for summary judgment should be granted and that debtor's motion for summary judgment should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

I.

From the motions and briefs of the parties, it appears that there is no dispute that on January 30, 1991, the parties were engaged in postdivorce proceedings before the Chancery Court of DeSoto County, Mississippi, and that an agreement was reached between the parties which was submitted for approval by the court in the form of an agreed order. Although a copy of the agreed order is uncertified and otherwise has not been properly submitted by affidavit, the copy which is attached as an

[1]Although the plaintiff in her complaint filed on July 28, 1995, requests a nondischargeability determination pursuant to 11 U.S.C. § 523(a)(4), it is clear from the allegations in the complaint that plaintiff is proceeding under subsection (5) of 11 U.S.C. § 523(a).

exhibit to the plaintiff's motion has not been objected to by the debtor in this regard. Accordingly, the court deems the inadequacy as to its authenticity to be waived[2] by debtor and will consider the agreed order for the purposes of ruling on the pending motions.

The agreed order provides, *inter alia*, as follows:

> This Order shall not be construed to prevent payment of previously accrued child support or unreimbursed medical expenses of the children. The court finds that the sum of $10,000.00 is currently due as child support arrearage and the sum of $48,320.77 is currently due as unreimbursed medical expenses of the children under prior orders. Judgment is hereby granted Melessa D. Neel Simpson against Henry E. Neel, Jr., for $10,000.00 child support arrearage and $48,320.77 for unreimbursed medical expenses, the total of the two sums, being $58,320.77, for all of which execution is to issue and interest shall accrue from this date at legal rates. All payments toward this judgment shall be applied first to the child support arrearage, which shall be paid full with interest, before any payment under this judgment shall be applied to the unreimbursed medical expenses. Amounts paid for unreimbursed medical expenses shall be paid directly to Melessa D. Neel Simpson for the use and benefit of the medical care providers and not to the providers directly.

Although the debtor was represented by counsel during the negotiations leading up to the agreed order, he takes the position in this proceeding that plaintiff is unable to substantiate that unreimbursed medical bills amounting to

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[2]*See, e.g.,* 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2722 (1983) and cases cited therein.

$48,320.77 were actually incurred and that he only agreed to this amount at that time because he had no resources to pay any amount. The debtor further argues that the plaintiff does not have clean hands in this matter because she filed a chapter 13 bankruptcy proceeding after the agreed judgment was entered and failed to list the judgment indebtedness from her ex-husband as an asset, and thereafter discharged some of the medical bills upon the conversion of the case to chapter 7. In any event, the debtor contends that he has no resources to pay the judgment amount from his present monthly income of $572.00.

In response, the plaintiff contends that the agreed order is *res judicata* and that debtor may not go behind the money judgment therein to challenge the amount. Plaintiff takes the position that the unreimbursed medical expenses are in the nature of support for her and the parties' minor children, that the expenses were indeed incurred over a period of several years, and that the expenses were actually paid by the plaintiff and were not discharged in bankruptcy. Plaintiff also attaches to her motion what appears to be a certified copy of an order dated June 27, 1994, from the DeSoto County Chancery Court citing the debtor for contempt in failing to pay any amount towards that $48,320.77 portion of the money judgment contained in the agreed order and ordering the debtor to "be incarcerated

in the DeSoto County Jail until he purges himself of said contempt."

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "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." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994), *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986). *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), *rehearing denied* (1990). As stated above, both the plaintiff and debtor have moved for summary judgment in this action, with each asserting that with respect to certain issues in this case there are no genuine issues of material fact and that each is entitled to judgment as a matter of law. Accordingly, it would appear that this case is ripe for summary

judgment.

III.

11 U.S.C. § 523(a)(5) provides in pertinent part that a discharge under § 727 does not discharge an individual debtor from any debt:

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, ... but not to the extent that ...
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

The law in the Sixth Circuit is clear that if the agreed order from the DeSoto County Chancery Court which grants plaintiff judgment against the debtor for $48,320.77 in unreimbursed medical expenses was intended and is actually determined to be "in the nature of support," then that is the end of the inquiry and the *Calhoun* analysis is inapplicable. *See Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993), *discussing Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983); *see also Silverstein v. Glazer (In re Silverstein)*, 186 B.R. 85, 87 (Bankr. W.D. Tenn. 1995)(no need to apply *Calhoun* analysis as obligation clearly designated by parties as

support and parties acknowledged debt was for child support).[3] Accordingly, the first question is whether the agreed order containing the judgment for unreimbursed medical expenses was intended to be and actually is in the nature of support. Of course, the burden of demonstrating that the obligation is in the nature of support rests with the plaintiff. *See, e.g., Chism v. Chism (In re Chism)*, 169 B.R. 163, 168 (Bankr. W.D. Tenn. 1994).

In addressing this question, the court turns to the complaint filed by plaintiff which contains the following

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[3]In *Calhoun*, the Sixth Circuit Court of Appeals presented a four-step analysis for determining whether an obligation not designated as support in a divorce decree or related order was actually in the nature of support. First, the court had to determine if the state court or the parties intended to create a support obligation. Second, whether the obligation had the actual effect of providing necessary support, a so-called "present needs" test. Third, if the first two conditions were satisfied, the court must determine if the obligation is so excessive as to be unreasonable under traditional concepts of support. Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. *In re Calhoun*, 715 F.2d at 1109-10. Prior to the *Fitzgerald* decision in 1993, several courts applied the *Calhoun* test not only to situations where it was necessary to determine whether something not denominated as support was actually support, but also in cases wherein there was no question that the obligation at issue was support. *See In re Fitzgerald*, 9 F.3d at 520. However, the Sixth Circuit made it clear in *Fitzgerald* that where there is no question that something denominated as support is exactly that, the *Calhoun* analysis, including the present needs and the reasonableness inquiries, is not to be applied. *Id*.

pertinent allegations at paragraphs 3, 4 and 5, respectively:

> 3. The parties were divorced by Order of the Chancery Court of DeSoto County, Mississippi entered September 16, 1983. That Judgment required Defendant to be responsible for all medical bills of the parties' minor children.
>
> 4. Subsequent to the divorce, Defendant failed to comply with the Court Orders which necessitated numerous Contempt Actions and findings, resulting in, among other things, a money judgment for Plaintiff on January 30, 1990[4] for $58,320.77. The balance unpaid is $48,320.77, plus 8% from January 30, 1994.
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> 5. Said Judgment is for support of Plaintiff and the minor children and is nondischargeable in bankruptcy.

In his answer, the debtor fully admits the allegations contained in paragraph 3 of the complaint which establishes that the divorce judgment required the debtor to be responsible for all medical bills of the parties' minor children. As to the allegations contained in paragraphs 4 and 5 of the complaint, the debtor does deny in paragraph 6 of his answer that the money judgment of $48,320.77 is nondischargeable. However, nowhere in the debtor's answer does he either specifically or generally deny that the money judgment contained in the agreed order was "for support of Plaintiff and the minor children." Rather, the

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[4]Although the plaintiff alleges that the agreed order was entered on January 30, 1990, and the agreed order itself purports to have been entered on that date, the first paragraph of that order recites that the hearing occurred on January 30, 1991, and the notary public's attestation at the end of the order likewise evidences a date of January 30, 1991.

debtor simply avers that "[w]hile the amount complained of by the plaintiff may nominally be seen as a support obligation, the obligation is so excessive and unreasonable that the debt should be dischargeable under existing case law (citing *Calhoun* and *Fitzgerald*)." *See* debtor's answer at para. 7.

Accordingly, the facts are undisputed that the original divorce judgment, as intended by the parties and the trial court, created and designated a support obligation on the part of debtor to be responsible for all medical bills of the parties' minor children, that debtor failed to comply with this support obligation which in turn gave rise to the January 30, 1991 agreed order containing the money judgment of $48,320.77 for the unreimbursed medical expenses of the parties' minor children, and that the money judgment contained in the agreed order of January 30, 1991 is actually in the nature of support for plaintiff and the parties' minor children. In light of these undisputed facts, and despite debtor's argument to the contrary, the four-step *Calhoun* analysis is simply not applicable in a case such as this one. *See Fitzgerald,* 9 F.3d at 521; *In re Silverstein*, 186 B.R. at 87. As a result, it matters not that the debtor is allegedly without any resources to pay the money judgment of $48,320.77, or that this amount is

"excessive and unreasonable." *Id.*[5]

Having made the determination that the January 30, 1991 agreed order containing the money judgment of $48,320.77 falls within the purview of 11 U.S.C. § 523(a)(5), the court need only address the debtor's remaining arguments concerning the validity of the indebtedness and the plaintiff's alleged unclean hands. The debtor contends that the amount of the money judgment, $48,320.77, was agreed to only because he did not have the resources to pay any amount and that the plaintiff did not actually incur unreimbursed medical expenses in this amount for their children's medical treatment. As proof of this latter fact, the debtor refers the court to the plaintiff's deposition transcript wherein she states that she does not now have the documentary evidence to substantiate the entire amount. The plaintiff did testify during her deposition that she incurred

[5]The debtor, while admitting that subsection (15) of § 523(a) which was added by the Bankruptcy Reform Act of 1994 is not applicable to this case since it was filed prior to October 22, 1994, requests that the court look to its language for guidance in making a determination that the debtor does not have the ability to pay the judgment amount and that the benefit to the debtor in discharging that obligation outweighs the detrimental consequences to the plaintiff. However, even if § 523(a)(15) was available to the debtor, it would nonetheless be nonapplicable because there is no question that we are dealing with support and not property settlement or some undenominated or mislabeled obligation "not of the kind described in paragraph (5)" of § 523(a). Accordingly, whether the money judgment of $48,320.77 is excessive is simply irrelevant.

and paid this amount in unreimbursed medical expenses over a period of several years. Notwithstanding, the plaintiff takes the position that the doctrine of *res judicata* prevents the debtor from now going behind the agreed order and challenging the validity of the amount of the judgment.

Bankruptcy courts recognize and apply the basic principles of *res judicata* in determining the effect to be given in bankruptcy proceedings to judgments rendered in other forums. *Comer v. Comer (In re Comer)*, 723 F.2d 737, 739 (9th Cir. 1984). Generally, the fact that a judgment is agreed to rather than being a product of a judicial decision does not alter the *res judicata* effect thereof. *See Baker v. Internal Revenue Service (In re Baker)*, __ F.3d ___, 1996 WL 11294, *3 (9th Cir. 1996)(for *res judicata* purposes, agreed judgment is judgment on the merits); *Internal Revenue Service v. Teal (Matter of Teal)*, 16 F.3d 619, 622 (5th Cir. 1994)(agreed judgment entitled to full *res judicata* effect); *Pollack v. F.D.I.C. (In re Monument Record Corp.)*, 71 B.R. 853, 858 n.5 (Bankr. M.D. Tenn. 1987)(in federal courts, judgment entered by agreement of the parties is *res judicata* to the same extent as if entered after contest). The fact that the debtor may have agreed to the judgment amount because he did not have the resources to pay it at that time

provides no basis for this court to grant any legal or equitable relief as the judgment amount is *res judicata* in this dischargeability proceeding. *See, e.g., In re Comer*, 723 F.2d at 740 (*res judicata* barred court from looking behind default judgment to determine precise amount of unpaid alimony and child support and evidence of factual amount of debt was irrelevant as to court's determination of the nature of the debt for nondischargeability purposes). The same holds true for the debtor's argument that the plaintiff can not substantiate the judgment amount with documentary evidence today.

Debtor also argues that the plaintiff has unclean hands because she filed for bankruptcy on at least one occasion after the agreed order was entered, but did not list the money judgment of $48,320.77 as an asset therein. The debtor further argues that the plaintiff has discharged all or perhaps a portion of the medical expenses which constitute the money judgment. However, in neither event does the debtor offer any authority for this court to grant relief upon that basis. If the plaintiff failed to list the money judgment as an asset in the bankruptcy proceeding and that failure constituted fraud as complained by debtor, his avenue of relief, if not foreclosed by time, is before the bankruptcy court wherein the alleged fraud was committed. And as to the latter argument that the expenses

which constitute the money judgment of $48,320.77 have been discharged, the debtor of course may seek relief before the court which rendered the judgment, the Chancery Court for DeSoto County, Mississippi. The fact that the debtor may not wish to reappear before that court in this regard because he is subject to incarceration for contempt does not provide a basis for attempting to collaterally attack the money judgment in this court.

IV.

Based on the foregoing, the court will grant plaintiff's motion for summary judgment on the issue of nondischargeability of the money judgment of $48,320.77 contained in the agreed order entered January 30, 1991, there being no factual dispute that the original divorce judgment, as intended by the parties and the trial court, created and designated a support obligation on the part of debtor to be responsible for all medical bills of the parties' minor children, that debtor failed to comply with this support obligation which in turn gave rise to the January 30, 1991 agreed order, and that the money judgment contained in that agreed order is actually in the nature of support for plaintiff and the parties' minor children. Debtor's motion for summary judgment will be denied. An order will be entered

contemporaneously with the filing of this memorandum opinion.

FILED: February 27, 1996

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE