UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

DAVID ALLEN LIEBERMAN and
TRACEY ANN GIBBONS,

ORDER FOR AMENDED JUDGMENT

Debtors.

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DAVID ALLEN LIEBERMAN,

Plaintiff,

BKY 00-50978

v.

ADV 02-5018

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Defendant.

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At Duluth, Minnesota, this 4th day of March, 2004.

This adversary proceeding came on before the Court on the Plaintiff's motion for relief from the judgment entered herein. The Plaintiff ("Debtor") appeared by his attorney, David G. Keller. The Defendant ("ECMC") appeared by its attorney, Christopher M. McCullough. Upon the moving and responsive documents and the relevant prior records and proceedings in this matter, the Court makes this order.

This is an adversary proceeding under 11 U.S.C. § 523(a)(8) for determination of the dischargeability of educational-loan debt. The parties tried the matter to the Court. The Court held for ECMC, in a memorandum decision that is now disseminated electronically at 2003 WL 21397713 (Bankr. D. Minn. 2003). Judgment was duly entered on that decision.

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 3/04/04
Patrick G. De Wane, Clerk, By jrb

The Debtor timely filed a motion for relief from that judgment, seeking an amended judgment or a new trial.[1]

In seeking this relief the Debtor argues that the Court made "manifest errors" in certain findings of fact, the ones on his ability to make payment on his educational-loan debt to ECMC.[2] In specific, he maintains that the finding on his monthly household budget entirely omitted three categories of necessary and reasonable expense that his family actually incurs and pays. As the Debtor would have it, once these line-entries are factored in the prior finding of a substantial income surplus is no longer supported by the evidence. He also takes issue with several other, less central findings, similarly arguing that they are not supported by the trial record and hence are manifestly wrong.

ECMC, of course, maintains that the findings have ample evidentiary support. It also argues (or reargues) that the evidence would bolster an alternative basis for judgment in its favor even if the Debtor's current argument is credited in whole or in part.

The memorandum decision, at 2003 WL 21397713, *5, did indeed omit three classes of household expenditure. The evidence received at trial would support findings that every month the Debtor and his family have to meet the expenses in those classes, as follows:

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[1] The Debtor's counsel cited Fed. R. Civ. P. 59(e) as the basis for his client's motion. For this forum the correct source of empowerment is Fed. R. Bankr. P. 9023. That rule provides that: "Rule 59 F.R.Civ.P. applies in cases under the [Bankruptcy] Code. . ." In turn, Fed. R. Civ. P. 59(e) does countenance a "motion to amend or alter a judgment," which the courts have construed to encompass "any motion which seeks a substantive change in a judgment," made after trial but on the basis of the record made at trial. *In re Barger*, 219 B.R. 238, 244 (B.A.P. 8th Cir. 1998). Fed. R. Civ. P. 59(a) authorizes a "motion for a new trial in an action tried without a jury."

[2] Under Eighth Circuit precedent, this is the beachhead issue under § 523(a)(8). It will be dispositive, if the debtor-plaintiff proves an actual inability to make payment at present and for the relevant future. *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003); *In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981).

Food	$320.00[3]
Electricity	$140.00[4]
Transportation Expense (gas, oil, vehicle upkeep)	$220.00[5]
TOTAL:	$680.00

The nature and amount of these expenditures are reasonable.

Beyond this, the Debtor testified in much broader and more qualitative fashion to other expenses that he and his wife expected to reincur on a regular basis to maintain the well-being of their family: replacement eye glasses; supplies for the intensive monitoring and maintenance of his wife's diabetes regimen; and the possibility of greater deductibles, co-pays, and exclusions from insurance coverage attributable to ongoing healthcare needs. Because the Debtor did not testify to a specific amount of expenditure for any of these items, even via conjecture or speculation, it is not possible to make findings of fact as to them.

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[3] This figure was the one to which the Debtor testified at trial, and in some detail. Tr. at 68 and 94 [docket no. 31]. It is what the Debtor and his wife spend out of pocket. The amount seems a bit short, given a household of four people. The Debtor testified with some chagrin that he simply does not have more cash to spend, and from time to time he and his family have to resort to a local food shelf.

[4] Again, the Debtor testified to this figure at trial. Tr. at 65. Though in closing argument, ECMC's counsel criticized the amount as "expensive," he did not cross-examine the Debtor to challenge him on the household's level of electricity usage.

[5] At trial, the Debtor testified that his commute to work, five days per week, was 100 miles in distance and one hour, 45 minutes in duration, one way. Tr. at 44. The Debtor also opined that his commute "ha[d] been probably the biggest drain on monthly finances . . . that [was] potentially remediable." Tr. at 48. He had addressed it by locating a small, inexpensive vehicle with high gas mileage performance. Tr. at 70. This was all that was brought out on direct or cross-examination. There certainly was no testimony to a specific figure. However, between the two sides, two documentary exhibits were produced, one being an enumeration of expenses made by the Debtor as a discovery response and the other the original Schedule J for the Debtor's bankruptcy case. Of the two, the former is worthy of more weight, produced as it was in direct focus on the central issue in this litigation. The current finding mirrors its content, as to the Debtor's transportation expense above the cost of financing to acquire the family vehicles. The evidentiary support is thin and unelaborated, but it is sufficient.

The application of Rule 59 should be limited to "extraordinary circumstances." *In re Crystalin, L.L.C.*, 293 B.R. 455, 465 (B.A.P. 8th Cir. 2003). However, the rule permits a trial court to correct its own errors, to obviate "the burden of unnecessary appellate proceedings." *Id.* (citing *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986); interior quotes omitted). The grant or denial of such relief "is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). *See also Perkins v. U.S. West Communications,* 138 F.3d 336, 340 (8th Cir. 1998).

Unlike other means to vacate an order or judgment, Rule 60(b) for instance, Rule 59 does not make a grant of relief contingent on a finding of failure or dereliction on the part of a party or its counsel. As noted in *Charles v. Daley*, it truly is a call to the trial court to do the right thing, to forego pride of authorship. If the trial court has made a mistake, it should 'fess up, recognize uncontroverted evidence as it was constituted, amend its prior findings as necessary, and adjust its ruling as the corrected findings may compel. Where a trial record is clear enough, it is not a time for judicial obduracy.

And this is such a case. Under the full evidentiary record, the original enumeration of the Debtor's reasonable household expenses, 2003 WL 21397713, *5, was incomplete, and in a fashion that was manifestly wrong.[6] The Debtor is entitled to an

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[6] The memorialization of that error was the Court's doing; hence, the present acknowledgment and action. The underlying cause is not laid solely to the Court, however; the Debtor's counsel played a large role, by ineptitude if nothing else. As parties to these matters are encouraged to do, the Debtor and ECMC stipulated to the amount of a large number of the Debtor's household expenditures. That agreement was presented as Term 17 of a written pretrial stipulation of fact. In that document, the recited line entries were prefaced by the phrase, "Lieberman's partial monthly expenses are as follows . . ." This language bore a meaning that was not immediately apparent, and that did not emerge until this motion was made. As was revealed then, ECMC had not agreed to the

amendment of the findings, to incorporate the three line-entries identified previously. When they are added in, the total of the reasonable household expenditures is $3,826.00 per month.

This is a handful of dollars greater than the Debtor's total monthly household income, $3,810.00.[7] The Debtor has proved that he and his household have no income surplus whatsoever, from which to make payment on account of his substantial educational-loan debt to ECMC.[8]

Debtor's position on the actuality and reasonableness of the three categories of expense identified earlier in this order. It reserved the right to dispute the Debtor's evidence on them at trial. However, the Debtor's counsel *nowhere* disclosed in express terms that this dispute would be presented to the Court--neither in trial brief, nor in opening or closing argument, nor in the form of his questioning of his client, nor in the answers he elicited from his client. In counsel's direct examination of the Debtor, he reviewed a number of the stipulated budget's line-entries, even though this was not strictly necessary. Interspersed in that inquiry, he elicited very brief references to the amounts expended for two (but not all three) of the categories that were in controversy. The Debtor's counsel never identified these classes of expenditure as salient, at any point before the matter was submitted for decision. He certainly did not identify them as critical to his client's position that he had no surplus of household income. To all outward indications, but for the single word "partial," the budget presented in the stipulation was complete, and was to be relied on as such in analysis. When the time came for fact-finding, the Court treated it as such. There was no indication that certain subsidiary issues had to be decided on the evidence. One could debate until doomsday whether a trial judge has a burden to run the full breadth of an evidentiary presentation against a checklist of subsidiary facts, when presented with a routine and formulaic issue like this one, or whether that is the duty of an advocate. Perhaps that issue would be relevant under rules like Fed. R. Civ. P. 60(b) or Fed. R. Bankr. P. 9006, which make a demonstration of "excusable neglect" or "inadvertence" the prerequisite to relief from a procedural or adjudicatory consequence. Under Rule 59, however, an assignment of blame and a grant of absolution are not to be made. The Court is just to take a deep breath, and then spare the parties and the higher courts the brunt of an unwarranted appellate inquiry into the sufficiency of the evidence and the accuracy of the findings. That is being done now. However, fairness compels the disclosure of the sloppy input that flawed the initial decision, and that necessitated the present exercise.

[7] As found at 2003 WL 21397713, *5.

[8] This now-accurate finding answers the conundrum recognized at n. 13 of the original decision, 2003 WL 21397713, *9. Such items as major vehicle and home repairs, or major uncovered medical, dental, or ophthamalogical expenses are not evidenced by line-entries in the monthly budget presented by the Debtor;

This gets the Debtor halfway there. Under the governing precedent, however, "the prospect of future changes--positive or adverse--in the Debtor's financial position" is also to be considered, engaging the central factor of ability to pay. *In re Long*, 322 F.3d at 555. This issue did not receive a pointed, conclusive treatment in the original decision, because the flawed finding on present ability to pay terminated the analysis. Now, however, it must be addressed.

When one looks at all of the evidence in a hard-headed light, the ultimate finding is fully supported: it simply will not get any better for the Debtor and his family. More to the point, the record could not support a finding that he and his wife could generate income at a level sufficient to fund monthly payments of more than $600.00 for 30 years, to begin at any point in the near to mid-range future and to be sustained for several decades.

This is a function of several characteristics of the relevant vocational profiles, as well as manifest deficiencies and concomitant needs within the family. All of these circumstances are undeniable; none of them is reasonably subject to material remediation. The consideration of these circumstances is not just warranted under the governing precedent, it is mandated. *In re Long*, 322 F.3d at 553-554 (emphasizing that standard under § 523(a)(8) is a "totality-of-the-circumstances test," to be applied in a "less restrictive approach"). *See also In re Andresen*, 232 B.R. 127, 135 (recognizing "judicial discretion within the confines of defining and determining undue hardship") and 141 (noting how Eighth

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neither is payment on account of the Debtor's wife's own educational-loan debt. All of these expenses have cropped up and they will continue to do so. (The Debtor testified that his wife makes payment on her own educational loans out of the family fisc. He did not include a line-entry for this expenditure in the budget, or rely on it for his showing of undue hardship.) This explains the semblance of a longer-term pattern of deferring the less pressing and more general expenses of home and family upkeep, in order to meet immediate specific needs.

Circuit's test "allow[s] a broader consideration of the case and any factors specific to a given debtor's particular situation"); *In re Reynolds*, 303 B.R. 823, 836-837 (Bankr. D. Minn. 2004).

First, as to the Debtor himself: as noted in the original decision, 2003 WL 21397713, *10, the record could not support a finding that the Debtor's actual in-hand income will increase materially for the foreseeable future. The Debtor did not see any prospect for a substantial promotion or a significant increase in income at West Group, as glad as he was to have the job and as well as he had used his more abstract legal-research skills in performing its very specialized duties. ECMC had full opportunity to challenge this point by cross-examination or by developing its own evidence, but it did neither. The Debtor's law degree is approaching a decade in age. 2003 WL 21397713, *2. He had virtually no experience in the actual practice of law between getting the degree and the date of trial. *Id.* The job market for new attorneys is extremely competitive at present; hiring practices put a high premium on the recency of both education and work experience. As observed in the earlier decision, 2003 WL 21397713, *10, there is no evidence that the Debtor's present work is preparing him for a more lucrative position in a client-centered practice of law, or that it is giving him any sort of credential more attractive to employers in that sector. ECMC insinuates that a substantially enhanced employability must be attributed to the Debtor just because he is a lawyer. However, this argument points only to the irrelevant. *In re Andresen*, 232 B.R. at 138.

The Debtor, of course, has two professional credentials, in law and in medicine. The second is even more problematic in the way of predicting a future. As found in the earlier decision, 2003 WL 21397713, *2-3, the Debtor had a long and varied work experience as a physician assistant in four different states. Ordinarily, this should translate into a high

probability of reemployment, particularly given the medical field's increasing reliance on paraprofessionals for direct patient care. However, the Debtor was terminated from his last two positions as a physician assistant, because of his behavior in the workplace and his actions toward his co-workers. As of the date of trial, he had been unable to get further than the first-interview stage in an "intense" two-year effort to become reemployed as a physician assistant. 2003 WL 21397713, *3. The record does not permit fact-finding as to the reasons, but the most compelling inferences are not at all sanguine for the Debtor's chances--at least in central Minnesota, near the situs of his most recent such employment.[9] The one certain thing is that there is no evidence that the Debtor has any material prospect of reemployment as a physician assistant at present, at a rate of pay higher than what he is and will be making as a research attorney with West Group. The only evidence of record would support an inference to the contrary.

The Debtor's employment is by far the main source of income in his household. His wife has not taken permanent or regularly-scheduled employment, having worked on an on-call basis as a school classroom assistant and on a seasonal basis in a greenhouse. 2003 WL 21397713, *4. She does not have especially strong formal credentials for employment, lacking a bachelor's degree and having maintained only sporadic employment in occupations that are not highly skilled. Neither side developed evidence as to whether her present credentials would enable her to find other employment at higher income. On this record, the only possible finding is that she could not.

The Debtor identified the very substantial needs of their daughter Maura as the reason why his wife had not reinjected herself into the workplace, as a majority of American

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[9] The medical community is small, particularly in rural areas; word gets around.

women do by the time their children approach school age. ECMC's counsel did not probe the bona fides of this statement on cross-examination. Against the Debtor's other relevant testimony, it has every bit of legitimacy. Maura is afflicted with severe mental, emotional, and developmental impairments as a result of a severe genetic abnormality. They include moderate mental retardation and attention-deficit disorder; they are manifested by an inability to control impulses and to understand and observe personal boundaries. *See* findings made at 2003 WL 21397713, *4 and n. 3. The Debtor and his wife clearly and correctly see their daughter as massively vulnerable to exploitation and abuse by third parties.[10] They are following through on professionals' recommendations that Maura cannot be left alone, and must receive a round-the-clock monitoring.

Early in Maura's life, the Debtor and his wife had decided that they would be the ones to afford her that care, rather than a residential care facility. In the present context, neither ECMC nor the Court has the right to gainsay that commitment. With the Debtor working full-time out of the home, the brunt of that decision for most of the time necessarily falls on his wife. Over the years of Maura's placement in a school program in Sauk Rapids, there has been some respite of some regularity--but one limited by the hours of Maura's absence from the home and in turn circumscribed by her actual school schedule. With the variations of the Debtor's income from employment over time, it is no wonder that his wife has not pushed herself into regular participation in the workforce; there was not enough income to fund a regular and lengthy daycare arrangement of a sort to meet Maura's very special needs. On-call work during regular school hours, and some more intensely-scheduled nursery

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[10] A finding was not made on this point in the original decision. However, it is an inescapable inference, in light of the Debtor's testimony that oral contraceptives had been prescribed for their daughter out of just this concern.

employment of limited duration in spring and summer, clearly fit within these confines. Adhering to a regular work schedule, even part-time, seems not to have done so.

For the future, Maura would no longer be able to attend high school after age 20. This was to come a year or so after the trial. The Debtor and his wife did not want to place her in an adult residential facility; they hoped to see her in some sort of sheltered workshop during the day and still residing in their home.[11] The specifics of such an arrangement, of course, were conjectural as of the date of trial. ECMC's counsel did not inquire on cross-examination or develop any independent evidence to support a finding that this would free up the Debtor's wife's attentions, to enable her to take more regular and more highly-compensated employment. The most reasonable inference from the sparse record is that it would not; a sheltered-workshop schedule would most likely parallel a high school attendance schedule, requiring an adult parent's presence to send Maura off in the morning and to receive her in mid-afternoon. If Maura's school arrangement did not permit more sustained income-generation by the Debtor's wife, a daytime sheltered workshop placement would not either.

And, for the sake of certainty, it must be found: on the record presented at trial, this is a situation to persist for life, like any connection between parent and child. Absent a fundamental and wrenching change of heart and alteration of life plan, Maura's impairments will continue to limit the latitude with which her parents can address the many choices of their own lives, including options for employment and career by the parent(s) bearing primary caregiving responsibility for her.

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[11] Again, it would be entirely beyond the pale to second-guess a decision by the parents of a disabled and greatly dependent adult child to keep her in their home, for the protection and nurturing they could continue to give.

Perforce, the result: the Debtor will not have the income resources in his household to generate a surplus from which to make payment on his debt to ECMC, at any point in the near to the far future. In particular, he will never be able to service payments of more than $600.00 per month under the Ford Program's extended payment plan--which was the only option that ECMC relied on factually and legally.[12]

The other prong of ECMC's argument on this motion focuses on the balance of funds from the refinancing of the Debtor's home mortgage, of which about $12,600.00 was left as of the date of trial. ECMC paired this point with its insistence that the Debtor now had, would have, or could have an income surplus. The point was that the liquid funds could be used to pay down the total, leaving a balance susceptible of a more moderate monthly amortization over the period of the extended-payment option.

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[12] In argument on this post-trial motion, ECMC's counsel invoked the Bankruptcy Appellate Panel's opinion on remand in *Long*, 292 B.R. at 638, to insist that the Debtor be bound to enroll in the Ford Program's income-contingent repayment program. Under this option, a borrower's payment obligation is keyed to a determination of payment ability at specific income levels, according to preset formulas that do not take an individual's actual expenses into account. Since the Debtor has no income surplus at all, now or in the future, the suggestion must be rejected out of hand. *See In re Korhonen*, 296 B.R. 492, 496-497 (Bankr. D. Minn. 2003) and *In re Strand*, 298 B.R. 367, 376-377 (Bankr. D. Minn. 2003). (Both of these cases involved an argument by ECMC that undue hardship was not shown by debtors who admittedly had no income surplus at present, because the Ford Program's income-contingent option would accept them and assign a current payment obligation of zero, subject to adjustment on future review of income. The authors of both decisions decisively and properly rejected the argument, not the least because its *per se* approach went contrary to the broad-based "totality of the circumstances" test endorsed by the Eighth Circuit. *In re Korhonen*, 296 B.R. at 496; *In re Strand*, 298 B.R. at 376.) In any event, ECMC introduced no evidence on the amount of a payment obligation for the Debtor under this option, even one of zero. In passing on a motion for amended findings under Rule 59, the Court is not to consider evidence that was not placed into the original trial record, where that evidence could have been developed by discovery or investigation. *Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998); *In re Crystalin, Inc.*, 293 B.R. at 465.

Given the findings just amended, this argument crumbles from the end going backwards. Even if the total were reduced, there would be no surplus income with which to pay down an unsatisfied and non-discharged balance over time. To the extent that ECMC argued that § 523(a)(8) obligates the Debtor to pay over the liquid funds now regardless of future ability to pay, it fails on a more abstract precept of the governing law: § 523(a)(8) does not authorize a "partial discharge" or other revision of a debtor's individual educational loan obligations, in the sense of "a single student loan . . . divided into discharged and excepted portions." *See In re Andresen*, 232 B.R. at 135-136.[13]

The clear import of the Eighth Circuit precedent is that a debtor will prevail under § 523(a)(8) upon a showing of a lack of actual ability to make payment on account of the subject debt, at present and for the relevant future. The Debtor made that showing, as to the resource of his household income. As to the remainder of the mortgage-refinancing proceeds, the resource was not sufficient in amount to satisfy the debt, absent a future income

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[13] In *Andresen*, the Bankruptcy Appellate Panel gave every last bit of substantive analysis to support this construction of § 523(a)(8); then it declined to actually announce a holding to that effect. It found that the dispute before it had actually been resolved on the trial level by applying § 523(a)(8) to each of the several discrete, unconsolidated educational loan debts owing by the debtor before it. In an exercise of judicial restraint, it then opted to agree with that approach rather than rule on the lender's "partial discharge" argument. 232 B.R. at 136. Here, though, the parties have stipulated that the Debtor has a single, consolidated obligation to ECMC. The *Andresen* panel did not have to reach the issue, but here the facts require it. To accede to ECMC's argument as to the liquid funds alone would countenance splitting the debt into excepted and discharged portions, and § 523(a)(8) just does not authorize that. From a deeper horizon, one supposes, this outcome looks untoward; the Debtor keeps thousands of dollars of value pulled out of his homestead equity, in liquid form, in the face of an initial presumption of nondischargeability. There is no way to get around that, given the cogency of *Andresen's* discussion on "partial discharge." And, from another light, the result is no more anomalous than if the Debtor's budget had showed a surplus of $100.00 or $200.00 per month--far from enough to meet the only repayment option that ECMC put into the record, on an unsplittable and massive single debt.

surplus, so the Debtor's possession of it does not stymie his case for undue hardship. The Court's findings did not accurately reflect the Debtor's showing, which made the original holding for ECMC erroneous.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The Plaintiff's motion for relief from the judgment entered herein on June 3, 2003 is granted, and that judgment is vacated.

2. On the findings of fact and conclusions of law as amended in this order, excepting the Plaintiff's debt to the Defendant from discharge in BKY 00-50978 would impose an undue hardship on the Plaintiff and his dependents.

3. Accordingly, the Plaintiff's debt to the Defendant was discharged in the due course of BKY 00-50978.

LET AN AMENDED JUDGMENT BE ENTERED IN ACCORDANCE WITH TERMS 2 AND 3.

BY THE COURT:

/E/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE