

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-002347-MR

DEBRA LYNN FITZGERALD

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NO. 06-CI-01250

JAMES CHARLES HAMMOCK

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: LAMBERT, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Debra Lynn Fitzgerald appeals from an order denying her post-dissolution motion to divide as marital property certain money her ex-husband, James Charles Hammock, received in settlement of a work-related lawsuit filed during the marriage. For the following reasons, we affirm.

James and Debra married in September 1992 and their son was born in June 1993. The Simpson Circuit Court entered a decree of dissolution in September 1999. In relevant part, the decree discussed as follows a lawsuit James initiated in October 1997 against his employer because of his alleged exposure to asbestos:

[Debra] asserts a marital interest in the proceeds, if any, of the petitioner's pending asbestos litigation against his employer, the Medical Center. The Court finds that a "wait and see" approach to the division of this asset is appropriate and defers any disposition of that asset at this time.

In February 2006, Debra learned that the asbestos matters had been "resolved to all parties' satisfaction." Thus, she moved the Simpson Circuit Court to divide James's settlement between the parties as marital property. The Domestic Relations Commissioner (DRC) recommended that Debra's motion be denied since James and the Medical Center settled James's claim when his only remaining cause of action was for the tort of outrage and "pain and suffering" damages. The DRC opined that under *Weakley v. Weakley*, 731 S.W.2d 243 (Ky. 1987), these damages were nonmarital property. The circuit court approved the DRC's recommendations after reviewing the complaint, summary judgment order, and confidential settlement agreement in James's claim, as well as Debra's exceptions to the DRC's report and James's response thereto. This appeal followed.<sup>1</sup>

Debra argues that the circuit court erred by failing to find that James's settlement was divisible as marital property. We disagree.

---

<sup>1</sup> This appeal is from the Warren Circuit Court, because on the same day that the Simpson Circuit Court denied Debra's motion to divide James's settlement, it also ordered that the matter be transferred to Warren Circuit Court for further litigation on Debra's motion to hold James in contempt of court for failure to pay child support. The child support issue is not before us on appeal.

Pursuant to KRS<sup>2</sup> 403.190(2), “all property acquired by either spouse subsequent to the marriage” is “marital property,” other than the types of property specifically excepted therein. A party claiming that property acquired during the marriage is nonmarital property bears the burden of proof. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002) (citing KRS 403.190(3), *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998)). On appeal, “[w]hether certain property is part of the marital estate subject to division presents a question of law that we decide without deference to the trial court's decision.” *Overstreet v. Overstreet*, 144 S.W.3d 834, 837 (Ky.App. 2003).

In *Weakley*, 731 S.W.2d at 245, the Kentucky Supreme Court held that when a spouse suffers a personal injury before his marriage, “the entire compensation received therefor is nonmarital . . . regardless of when the judgment or settlement is obtained or whether the recovery is for the loss of wages, replacement of earning capacity, or pain and suffering.” On the other hand, if a spouse suffers a personal injury during the marriage, the portion of his recovery for loss of earnings and permanent impairment of his ability to earn money representing the years the parties were married is marital property. *Id.* at 244. By contrast, the portion of his recovery for the same damages representing the remaining years of his life expectancy following the dissolution of the marriage is nonmarital. *Id.* Also nonmarital is any portion of the award representing damages for pain and suffering. *Id.* at 245.

Here, James filed suit against his employer in October 1997 for alleged exposure to asbestos. The circuit court subsequently granted a summary judgment in favor of the employer on James’s claims of negligence, negligence per se, and strict liability, leaving only James’s claim for outrage/intentional infliction of emotional

---

<sup>2</sup> Kentucky Revised Statutes.

distress. James argues that since he did not lose any income as a result of his asbestos exposure, the entire settlement amount was for pain and suffering and therefore constitutes his nonmarital property under *Weakley*.

Debra argues, however, that *Reeves v. Reeves*, 753 S.W.2d 301 (Ky.App. 1988), rather than *Weakley*, is dispositive of the matter now before us. In *Reeves*, the husband was injured at work during the marriage. He settled his claim under the Jones Act for \$175,000. After payment of medical and legal expenses, \$107,500 remained. Although the husband voluntarily paid the wife \$7,500, the trial court awarded the wife 25% of the \$107,500. On appeal, this court held that *Weakley* was inapplicable to the matter because it was unknown “what portion of [the husband’s] award was to be considered as payment for pain and suffering.” *Reeves*, 753 S.W.2d at 301. This court therefore held that the husband’s award was marital property under KRS 403.190.<sup>3</sup>

Here, while we have not been able to discern from the record when James began working for the Medical Center, he admitted in response to Debra’s motion to divide his settlement that he was married to her “from September 23, 1992 to August 31, 1999 while he was an employee at the Medical Center at Bowling Green.” Further, James does not dispute Debra’s assertion on appeal that he was exposed to asbestos at work for at least two years while the parties were married. Finally, James filed suit against his employer in October 1997. Thus, whether James’s injury occurred on the dates of his exposure to the asbestos or the date when he became aware of the exposure,

---

<sup>3</sup> Ultimately, this court held that the trial court abused its discretion by awarding the wife more than the \$7,500 which the husband had voluntarily paid her, since the wife did not contribute to the acquisition of the award, the parties had little property to divide other than the award, the marriage lasted only nineteen months (the last six of which the parties were separated), and the husband was totally disabled. 753 S.W.2d at 302.

the injury clearly occurred during the parties' marriage. As such, whether James's settlement is marital property turns on the type of damages the settlement represented.

Again, James filed suit against his employer alleging damages for asbestos exposure arising out of the following causes of action: negligence, negligence per se, strict liability, and outrage. The trial court granted summary judgment in favor of James's employer on all of the issues except outrage, leaving that as James's only remaining claim. Pursuant to the *Restatement (Second) of Torts*, § 46(1) (1965), one who recovers on an outrage claim may receive damages for "emotional distress, and if bodily harm . . . results from it, for such bodily harm."

James sought punitive damages in his complaint against his employer, as well as "[c]ompensatory damages for mental distress, increased risk of future disease, diminished enjoyment of life, medical monitoring for onset of future disease or management of current disease, future health insurance coverage, and costs of decontamination[.]" Clearly, this claim sought damages other than the loss of earnings, permanent impairment of one's ability to earn money, and pain and suffering discussed in *Weakley* and *Reeves*.

The guiding principle underlying the *Weakley* decision is what the Missouri Court of Appeals described in *Mistler v. Mistler*, 816 S.W.2d 241, 246-47 (Mo.Ct.App. 1991), as the "analytic" approach of characterizing a personal injury award as marital or nonmarital property. That is, whether a personal injury award is marital property depends on what the award was intended to replace. *Id.* at 247. The portion that compensates for losses to the marital estate is marital property; the portion that compensates for losses to a spouse's separate estate is nonmarital property. *Id.*

Here, James maintains on appeal that he “did not lose any earnings or income as a result of his asbestos exposure during his employment. His only damages in the sole remaining claim of outrage would have been for pain and suffering.”<sup>4</sup> Debra neither disputes these claims nor provides any evidence that marital funds were spent on medical monitoring, decontamination, or the like. Accordingly, the trial court did not err by finding that James met his burden of proving that his settlement was for pain and suffering and therefore constituted nonmarital property which was not subject to division.

Finally, Debra cites cases from other jurisdictions in support of her argument that James’s settlement should be divided between them as marital property. However, these cases simply are not controlling and do not alter our analysis as set forth above.

The circuit court’s order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nancy Oliver Roberts  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

John David Cole, Jr.  
Bowling Green, Kentucky

---

<sup>4</sup> Without unduly discussing the contents of the confidential settlement agreement, which is part of the record but under seal, we note that the agreement supports James’s assertion.