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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000647-MR

ROBERT EUGENE LITTERAL

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 08-CI-00746

LISHA DAWN LITTERAL

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

DIXON, JUDGE: Robert Eugene Litteral appeals from the findings of fact, conclusions of law, and decree of dissolution rendered by the Greenup Circuit Court. After careful review, we conclude the court erred in its designation of marital and non-marital property; consequently, we affirm in part, reverse in part, and remand this action for further proceedings.

In September 2002, prior to the parties' marriage, Robert suffered a disabling work injury in Ohio. After the accident, Robert filed a claim for workers' compensation. In April 2003, Robert married Lisha Dawn Litteral, in Greenup, Kentucky. Unable to work, Robert received temporary disability benefits during the pendency of his workers' compensation claim. In November 2007, Robert received a lump-sum settlement of \$213,334.00, after legal fees. Shortly thereafter, Robert used a large portion of the settlement funds to purchase a house and land for \$176,000.00.

In October 2008, Robert initiated divorce proceedings in Greenup Circuit Court. Following a hearing, the trial court rendered its findings of fact, conclusions of law, and decree of dissolution on February 24, 2009. The court concluded that the workers' compensation settlement was marital property, citing *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002). The court noted the parties' house was purchased with settlement funds, and the court assigned each party a one-half marital interest in the house.¹ Robert filed a motion to alter, amend, or vacate the judgment, contending the court erred in its analysis of the workers' compensation settlement. The court denied Robert's motion, and this appeal followed.

¹ Aside from the house, the marital estate consisted of home furnishings and two automobiles. At the hearing, Robert testified that after purchasing the house, the remaining settlement funds (approximately \$37,000.00) were spent on items such as a van, motorcycle, furniture, and horses.

A trial court's determination of whether property is marital or non-marital is a question of law; accordingly, our review on appeal is *de novo*. *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008).

Robert contends the trial court erred by concluding the workers' compensation settlement was marital property and subsequently awarding Lisha one-half of the value of the house as her marital interest.² Robert asserts the court erroneously relied on *Holman*, and he contends the proper authority for this issue is *Jessee v. Jessee*, 883 S.W.2d 507 (Ky. App. 1994).

After careful review, we agree that *Holman, supra*, offers little guidance here, as that case specifically addressed the classification of disability retirement benefits, rather than a lump-sum workers' compensation award. *See Holman*, 84 S.W.3d at 910.

In *Quiggins v. Quiggins*, 637 S.W.2d 666 (Ky. App. 1982), a panel of this Court held that a lump-sum workers' compensation settlement was marital property, reasoning that such settlements were not excluded by the statute defining marital property, KRS 403.190(2). *Id.* at 668-69.

In *Weakley v. Weakley*, 731 S.W.2d 243 (Ky. 1987), the Kentucky Supreme Court addressed the classification of a personal injury settlement during dissolution proceedings and compared such settlements to workers' compensation benefits. *Id.* at 244. In its analysis, the Court emphasized that a primary factor in determining if a tort award was marital or non-marital depended upon whether the

² Robert also argues that Lisha failed to claim a marital interest in the property during the proceedings below. This argument is clearly refuted by the record and without merit.

injury occurred prior to, or during, the marriage. *Id.* at 244-45. The Court concluded:

When a personal injury occurs before the marriage, we hold that the entire compensation received therefor is nonmarital, and this is true 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. In either situation the recovery is a compensation for a loss which existed before the marriage, one in which a future spouse is not entitled to share. The future spouse takes the injured person in the condition which obtains on the date of the marriage. A person and his spouse can reasonably anticipate that his earning capacity will continue during his marriage, absent an injury, but there is no such reasonable expectation on the part of a person who is injured before his marriage. This court is of the opinion that one who marries a person already disabled by injury is not entitled to share in any recovery received as damages resulting from the injury under the theory that the compensation received is marital property.

Id. at 245. Thereafter, in *Jessee v. Jessee*, 883 S.W.2d 507 (Ky. App. 1994), this Court cited the reasoning of *Weakley, supra*, and designated a lump-sum workers' compensation settlement for a pre-marital injury as both marital and non-marital. *Id.* at 508-09.

In *Jessee*, Chris Jessee filed a workers' compensation claim for black lung benefits ten years prior to his marriage to Barbara Jessee. *Id.* at 507. Two years after their marriage, Chris received a lump-sum settlement awarding back pay from the date he filed his claim. *Id.* The trial court concluded Chris's settlement was non-marital because it accrued prior to the marriage, and Barbara appealed to this Court. *Id.* at 508.

At the outset of its analysis, the *Jessee* Court distinguished *Quiggins*, *supra*, because, in that case, both the injury and settlement had occurred during the marriage. *Id.* In contrast, the Court emphasized that Chris had entered the marriage with a pending workers' compensation claim, and like the spouses in *Weakley*, Barbara "took Chris in the condition he was in on the date they married." *Id.* at 509. The Court concluded:

Because we find this situation to be similar to that in *Weakley*, we are of the opinion that the portion of money which represents the years that Chris was not married to Barbara is nonmarital However, we are unwilling to find that the entire \$74,633.50 was nonmarital. Because this is a workers' compensation settlement and not a personal injury settlement we are of the opinion that the portion of the award which represents those years that the parties were married is marital.

Id.

Robert argues, in light of the reasoning articulated in *Jessee*, he is entitled to the lion's share of the settlement as his non-marital property. After thorough consideration, we conclude *Jessee* guides the resolution of the issue before us.

Robert was injured seven months before the marriage; accordingly, Lisha took Robert "in the condition he was in on the date they married." *Id.* Five years after his injury, Robert received a lump-sum settlement, ostensibly meant to compensate him for "diminished future earnings due to a work-caused injury or disease." *Mosley v. Mosley*, 682 S.W.2d 462, 463 (Ky. App. 1985). It is well settled, "[w]orkers' compensation benefits are based on something that happened

while one was employed and . . . the compensation is awarded to replace the injured or diseased employee's loss of ability to work in the future.” *Id.*

Under the circumstances presented here, we believe “that the portion of the award which represents those years that the parties were married is marital[,]” *Jessee*, 883 S.W.2d at 509, and “[t]o the extent that the award can be prorated to the remaining years of life expectancy following the dissolution of the marriage, it is nonmarital.”³ *Weakley*, 731 S.W.2d at 244. Accordingly, we reverse the portion of the trial court’s judgment relating to the classification of the workers’ compensation settlement.

In light of our decision, we must remand this case for additional findings consistent with this opinion, including whether Robert adequately traced the purchase of the parties’ home to the proceeds of the settlement for determining Robert’s non-marital interest in the home. *Jessee*, 883 S.W.2d at 509; *See also Kleet v. Kleet*, 264 S.W.3d 610, 614 (Ky. App. 2007). Furthermore, after classifying the property as marital or non-marital, the court is obligated to divide the marital property “in just proportions” pursuant to KRS 403.190(1)(a)-(d), rather than “prorat[ing] the settlement based upon the years that the parties were married.” *Id.*; *see Reeves v. Reeves*, 753 S.W.2d 301 (Ky. App. 1988).

³ The *Weakley* Court applied this formula in the classification of a tort award for an injury that occurred during the marriage. *Weakley*, 731 S.W.2d at 244. Similar to our decision here, however, the *Weakley* Court concluded the portion of the settlement covering the years of marriage was marital while the remainder of the settlement constituted the injured spouse’s non-marital property due to the loss of the ability to earn money post-dissolution. *Id.* We conclude it is sensible to apply this formula to determine Robert’s non-marital, post-dissolution interest in the settlement.

The judgment of the Greenup Circuit Court is affirmed in part,
reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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