

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000412-MR

KIMBERLY S. SPARKS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
ACTION NO. 08-CI-00616

DOUGLAS E. SPARKS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Kimberly S. Sparks appeals from a Boyd Circuit Court order which found that the funds received by Douglas E. Sparks in a FELA (Federal Employers' Liability Act, 45 U.S.C. § 51, et seq.) settlement were nonmarital.

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kimberly filed a petition for dissolution of marriage on May 6, 2008. The property issues were tried before a Domestic Relations Commissioner (DRC) whose final report and recommendation were adopted in full by the circuit court. On February 19, 2010, the circuit court denied Kimberly's exceptions to the report, and this appeal followed.

The sole issue on appeal is whether the circuit court erred in characterizing as nonmarital approximately \$135,000 which Douglas Sparks received as net proceeds from the settlement of a FELA claim involving his former employer, CSX.

When disposing of property in a dissolution of marriage action, the trial court is required by KRS 403.190 to follow a three-step process: (1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties. *See Travis v. Travis*, 59 S.W.3d 904, 908-09 (Ky.2001) (citations and footnotes omitted). "KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital. This presumption must be rebutted by clear and convincing evidence." *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky.App. 1998).

On appeal, we review the trial court's findings of fact only to determine if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414

(Ky. 1998). The classification of an asset as marital or nonmarital property, however, “involves an application of the statutory framework for equitable distribution of property upon divorce and therefore constitutes a question of law subject to this Court’s independent determination.” *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky. 2002).

Under Kentucky law, funds received to compensate exclusively for pain and suffering are deemed to be nonmarital property.

To the extent that a personal injury award for loss of earnings and permanent impairment of ability to earn money is applicable to the years while the marriage existed, it is marital property. ...

However, any portion of the recovery which constitutes damages for pain and suffering must stand on a different footing because it is in no sense the replacement of earnings that otherwise would have accrued during the marriage.

*Weakley v. Weakley*, 731 S.W.2d 243, 244 -245 (Ky. 1987).

The DRC found that Douglas received a gross settlement of \$275,000 from CSX as a result of injuries he had suffered in 2002 and 2004. Approximately \$55,000 was withheld from the total amount to reimburse the Railroad Retirement Board and the SSB (Special Separation Benefit program) for sickness benefits Douglas had received while he was unable to work. According to Douglas, the benefits he received from these agencies amounted to approximately \$2,200 per month. After the payment of his attorney’s fees and other expenses, Douglas received approximately \$135,000 in net proceeds from the settlement. It was

Douglas's uncontradicted testimony that the net proceeds were intended as compensation solely for his pain and suffering. The Settlement and Final Release of All Claims does not specify what portion of the award is intended to compensate for pain and suffering, stating only that it is a settlement "for any and all injuries to person and/or damage to property."

The DRC concluded that the net funds Douglas received were compensation exclusively for pain and suffering and not for lost wages. The remainder of the settlement was awarded to him.

Kimberly argues that Douglas's testimony was insufficient to prove by clear and convincing evidence that the "sickness benefits" of \$55,000 that were deducted from the award represented the total compensation for lost wages or that the remainder of the award was intended to compensate solely for pain and suffering. Kimberly argues that because the \$2,200 per month in sickness benefits was well below the monthly income of \$4,160 Douglas earned when he returned to work, the \$55,000 deducted from the award could not have represented the full compensation for lost earnings.

We are confronted in this case with a situation anticipated but not resolved in *Weakley*, where the Court stated:

We do not attempt to decide here the proper procedure for the allocation between marital and nonmarital property of a personal injury award for an injury sustained during the marriage where the settlement or judgment does not indicate what portion of the award applies to earning capacity and what portion is allocated to pain and suffering.

*Id.* at 245.

Kimberly has relied on *Reeves v. Reeves*, 753 S.W.2d 301 (Ky.App. 1988), to argue that in a situation where there is no definite evidence as to the allocation of damages in a settlement award, the entire property should be characterized as being marital. But the *Reeves* court also considered the equity of the parties' circumstances, ruling that because the marriage was one of short duration and the appellee was totally disabled, the appellant was only entitled to a small fraction of the award.

In the case before us, the award was received shortly before Kimberly filed the petition for dissolution. The trial court found that a substantial portion of the settlement, almost \$74,000, was used by the couple to repay various debts, including a loan against Douglas's retirement account which was used to buy a car for the couple's son, and a \$24,169.34 credit card debt in Kimberly's name. Twenty-thousand dollars was used as a down payment for a Corvette, which the trial court awarded to Douglas along with the remaining \$20,000 of debt remaining on that vehicle. Only \$24,000 or approximately one-sixth of the total settlement remains and this was the amount awarded to Douglas. In light of the fact that such a large portion of the award was used to settle marital debts and Kimberly's own debt, the trial court did not abuse its discretion in awarding the remainder to Douglas.

The order of the Boyd Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gordon J. Dill  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Rhonda M. Copley  
Ashland, Kentucky