

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. CA12-59

CAROLYN PALMER

APPELLANT

V.

LEROY PALMER

APPELLEE

**OPINION DELIVERED** OCTOBER 31, 2012APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
FOURTEENTH DIVISION  
[NO. DR-2009-0393]

HONORABLE VANN SMITH, JUDGE

AFFIRMED

**ROBERT J. GLADWIN, Judge**

On September 28, 2011, appellant Carolyn Palmer was granted a divorce in Pulaski County Circuit Court. In its decree, the trial court awarded appellee Leroy Palmer all of the proceeds from his personal-injury claim against Union Pacific Railroad (“UPRR”). The sole issue on appeal is whether the trial court erred in determining that appellee’s \$1.6 million settlement was nonmarital property. We affirm.

*I. Statement of Facts*

The parties were married in 1983 and separated in May 2002. During the marriage, appellee was an employee of UPRR, where he began working in 1998. He was injured on the job in 2005 and consequently brought a personal-injury lawsuit under the Federal Employers’ Liability Act (“FELA”). The case against UPRR was filed in the District Court of St. Louis, Missouri, where UPRR is headquartered. The Missouri court’s procedural rules

require juries to render only general verdicts in personal-injury cases.<sup>1</sup> A jury trial occurred, and a general verdict in favor of appellee for \$1.6 million was awarded. Pending appeal in Missouri, appellee and UPRR reached a settlement for the same amount of the jury award.

During the time he was awaiting payment of the settlement, appellee borrowed money for living expenses at high rates of interest from out-of-state lenders. Ultimately, appellee received \$816,402.64 of the \$1.6 million settlement. He purchased a trucking business, a house in Helena, Arkansas, a pick-up truck, and other miscellaneous property.

Appellant filed for divorce on January 26, 2009. She claimed entitlement to half of the total amount of the settlement appellee had received as a result of his FELA claim. Pending the final divorce hearing, the trial court sequestered \$286,000 of the settlement into an interest-bearing, federally-insured account to determine later how much, if any, was marital property.

In the final decree, the trial court summarized the parties' arguments and acknowledged *Collins v. Collins*, 347 Ark. 240, 61 S.W.3d 818 (2001), and the joint exhibit of the FELA-trial testimony as instructive in the case. The trial court concluded that appellee was permanently disabled based on the "ample medical evidence" set forth in the FELA trial, as well as the undisputed testimony that appellee had been unable to maintain gainful employment since his injury. Thus, the trial court awarded the full amount of the settlement to appellee as nonmarital property, finding that *Collins* was controlling and that the entire settlement award was for a degree of permanent disability and future medical expenses.

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<sup>1</sup>Missouri Supreme Court Rule 71.02 (2012).

Appellant filed a timely notice of appeal, and this appeal followed. She contends that the circuit court erroneously refused to equitably divide the proceeds from appellee's personal-injury claim.

## II. *Standard of Review*

On appeal, divorce cases are reviewed de novo. *Roberts v. Yang*, 2010 Ark. 55, 370 S.W.3d 170. With respect to the division of property, we review the trial court's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed and the same standard applies. *Id.* A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* In order to demonstrate that the trial court's ruling was erroneous, the appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Id.* We give due deference to the trial court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.* With this in mind, we now turn to the present case.

## III. *Division of FELA Proceeds*

In arguing that the trial court erred in failing to divide the settlement, appellant asserts that it is the public policy of Arkansas that, upon divorce, an equitable division of property should be made. Arkansas Code Annotated section 9-12-315(b)(6) (Repl. 2009) provides:

b) for the purposes of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:

...

6) benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those are [sic] benefits are for any degree of permanent disability or future medical expenses.

Appellant makes varying arguments in her attempt to reverse the trial court's decision. For instance, appellant maintains that the trial court did not consider the length of the marriage, the age, health and station in life of the parties, but only looked to the "settlement." However, before the trial court considers these factors in determining a division of property, the trial court must first determine whether the property at issue is marital. Therefore, appellant's argument misses the mark.

Appellant also contends that the settlement, of which she is seeking half, was not supported by valid consideration, as UPRR had a preexisting legal duty to make good on the jury verdict. We reject this argument because UPRR gained interest they would have owed had the award been affirmed on appeal. Further, UPRR made no admission of liability, and appellee gained no further appeals by UPRR.

Appellant further argues that she should have been included during the settlement negotiations between appellee and UPRR. However, this argument is not preserved because appellant did not present it before the trial court. *See Neal v. Sparks Reg'l Med. Ctr.*, 2012 Ark. 328, \_\_\_ S.W.3d \_\_\_.

Appellant also claims that the trial court had no direction from the Missouri jury and refused to divide the proceeds as required under Arkansas law. She alleges that the FELA claim could have been filed in Arkansas and argues that, by filing in Missouri, appellee forum shopped, successfully avoiding a claim by appellant against his award because of the general

verdict required in Missouri that did not distinguish monies awarded for permanent disability or future medical expenses. Appellant failed to make this argument below, however, and we are precluded from considering it on appeal. *See Neal, supra*.

In addressing the trial court's order, appellant contends that the trial court's reliance on *Collins, supra*, is misplaced because it is distinguishable. We disagree. In *Collins*, as in the instant case, during the parties' separation, the defendant husband was injured while working for UPRR and ultimately entered into a settlement with the railroad. *Collins*, 347 Ark. at 243, 61 S.W.3d at 820. The chancellor ordered the defendant to deposit half of the settlement amount he received into a savings account. *Id.* at 244, 61 S.W.3d at 820–21. Plaintiff wife argued that she was entitled to one-half of the settlement proceeds, as they constituted marital property not exempted by Arkansas Code Annotated section 9-12-315(b)(6) (Repl. 1999). *Id.* at 244, 61 S.W.3d at 821.

Defendant countered that plaintiff was not entitled to any portion of the proceeds, as they were proceeds awarded for permanent disability, and thus were excepted from the definition of marital property. *Collins*, 347 Ark. at 244, 61 S.W.3d at 821. Defendant's evidence proving that he had a degree of permanent disability consisted of medical records, including records from defendant's three surgeries and extensive physical therapy; depositions of Dr. Shoedinger (the same doctor who testified in appellee's FELA case) opining that defendant's injuries were attributable to his work-related accident and that defendant was totally disabled from doing the job of an engineer; a deposition from Dr. Calvin Benton that defendant was unable to return to work for the railroad; and two functional-capacity

evaluations revealing that defendant had limited ability in sitting, standing, and walking, that defendant's endurance showed a marked reduction, and that he would be unable to do full-time sedentary work. *Id.* at 247, 61 S.W.3d at 823.

The trial court in *Collins* also considered evidence of defendant's wage losses, past and future, as well as evidence of the settlement. *Id.* at 248–49, 61 S.W.3d at 824. The *Collins* court held that the trial court had overwhelming evidence that defendant suffered a permanent disability that ended his career with the railroad and prevented him from maintaining gainful employment. *Id.* at 249, 61 S.W.3d at 824. Thus, the trial court's decision that the FELA proceeds were not subject to division as marital property was upheld. *Id.* at 251, 61 S.W.3d at 251.

Appellant herein contends that the mere labeling of a claim as “personal injury” does not satisfy the requirements for alleging everything in a verdict should go to appellee, *Mason v. Mason*, 319 Ark. 722, 895 S.W.2d 513 (1995), and claims that labeling is not the same as analysis. Appellant also argues that the trial court's decision is inconsistent in that appellee's compromised ability to lift, bend, push, pull, and twist is not proof of medical disability. Appellant asserts that, no matter Dr. Shoedinger's opinion that appellee is disabled from any and all gainful work, appellee must believe that he can work at some level because he bought a truck in order to start a trucking business. Appellant maintains that running the business is work, even though appellee may not drive the truck. Finally, appellant points to her own testimony that appellee told her he would pour gasoline on the money and burn it before he would let her have a dime. She contends that her testimony regarding appellee's

infidelity, inability to keep employment and pay child support, and appellee's gambling habits should be analyzed.

Despite appellant's arguments, we affirm the trial court's order. The trial court correctly determined that the FELA proceeds were not marital property as defined under section 9-12-315, and in accordance with *Collins, supra*. The trial court considered the same evidence that the jury considered in the personal-injury trial by way of the exhibited transcript from that trial. The trial court also considered appellant's argument that the jury in the FELA case was presented with requests for specific damages for past and future lost wages, past and future pain and suffering, and past medical bills. As recited above, the trial court listed the evidence and testimony, concluded that there was ample evidence to find that appellee was permanently disabled, then found that the entire settlement was for a degree of permanent disability and future medical expenses, and was not marital property. The record before this court demonstrates the depth of the approach and consideration that the trial court employed in reaching its assessment and does not suggest that any mistake has been committed. Accordingly, we affirm.

Affirmed.

GRUBER and GLOVER, JJ., agree.

*Ralph Washington and David O. Bowden*, for appellant.

*W. Michael Powell*, for appellee.