

RENDERED: JULY 9, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2003-CA-001727-MR

JAMES LEE HOLMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 95-CI-02775

SUE RODES HOLMAN

APPELLEE

OPINION

REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: James Lee Holman appeals from an order of the Fayette Circuit Court denying his motion to require Sue Rodes Holman to make restitution to him for amounts paid to her as a result of an erroneous determination by the circuit court that a portion of James' disability retirement income constituted marital property. The trial court's determination was later overturned by the Kentucky Supreme Court, and James

seeks to recover amounts paid to Sue during the pendency of his appeal of the circuit court's order. The trial court off-set any restitution owed by Sue to James by allocating additional marital property to Sue. For the reasons stated below we reverse and remand.

On March 11, 1974, James began employment as a firefighter with the Lexington-Fayette Urban County Government (LFUCG). The parties were married on May 8, 1981. On February 11, 1987, James was forced to retire from his firefighter employment as a result of a total and permanent occupational disability. On August 29, 1995, Sue filed a petition for dissolution of marriage in Fayette Circuit Court.

The parties' divorce was made final on August 26, 1996. James was thus employed as a firefighter for thirteen years, with six of those years taking place during the parties' marriage.

Prior to the finalization of their divorce the parties entered into a separation agreement which resolved all issues relating to child custody, property distribution, maintenance, and child support with the exception of whether Holman's disability pension was marital or nonmarital. With regard to this issue the agreement stated "The issue of the marital or nonmarital character of the Husband's pension is reserved for further decision by the Court."

Holman retired from the fire department with a total and permanent disability in February 1987. Had he retired on that date absent the disability, he would have been entitled only to reimbursement for his contributions into the retirement system. Those contributions amounted to \$18,065.40 as of his retirement, of which \$11,206.40 was contributed during his marriage to the appellee. James agreed that the \$11,206.40 contributed to the retirement system during the marriage was marital property; however, he maintained that the ongoing monthly disability retirement payments were nonmarital. During this time James was receiving approximately \$1,700.00 per month in disability retirement payments.

On February 25, 1997, the trial court entered an opinion holding that the disability retirement payments were marital property. On March 24, 1997, the trial court entered an order holding that an amount equal to 6/13 of the disability retirement benefits was to be deemed as marital property and that the appellee was entitled to one-half of that amount, retroactive to September 1, 1996. Pursuant to the order James was required to pay Sue \$3,236.15 representing the payments which had accrued from September 1, 1996, through March 1997, and to make monthly payments thereafter of \$468.87, which amount represented one-half of 6/13 of the then total monthly disability retirement payment of \$2,031.79.

James subsequently appealed the trial court's determination to this Court. On December 4, 1998, this Court entered an opinion affirming the trial court's holding that the disability payments were marital property. See Case No. 97-CA-000736-MR.

The Supreme Court subsequently accepted discretionary review. On June 13, 2002, the Supreme Court rendered an opinion holding that Holman's disability retirement benefits were not marital property. See Holman v. Holman, Ky., 84 S.W.3d 903 (2002). The Supreme Court remanded the case to the trial court for it to assign James' disability retirement benefits to him as his nonmarital property and to reconsider the previous marital property distribution.

During the appeals process James complied with the trial court's order to share his disability payments with the appellee. However, after the Supreme Court reversed the trial court's decision, on February 20, 2003, James filed a motion for the relief provided under the Supreme Court's opinion, and also moved for restitution of the principal sum of \$31,414.29 paid to the appellee during the appeals process. James also requested prejudgment and postjudgment interest thereon.

On August 14, 2003, the trial court entered an order denying James' motion for restitution. This appeal followed.

Holman contends that the trial court erred when it denied his motion to require the appellee to pay him restitution for the portion of his disability retirement benefits he paid to Sue while he appealed the trial court's determination that those amounts were marital property.

"[T]he law is well settled that, if an appellate court reverses a judgment, the party against whom the judgment originally was entered, and who thereafter satisfied it, is entitled to restitution[.]" Fitch v. Kentucky-Tennessee Light & Power Co., 308 Ky. 652, 215 S.W.2d 91, 92 (1948). It is an accepted principle that money paid in obedience to a judgment that is later set aside must be repaid. Alexander Hamilton Life Ins. Co. of America v. Lewis, Ky., 550 S.W.2d 558, 559 (1977) (citing Fitch v. Kentucky-Tennessee Light & Power Co., 308 Ky. 652, 215 S.W.2d 91, 92 (1948); Turner v. Ewald, 295 Ky. 764, 174 S.W.2d 431, 438 (1943); Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 972, 88 A.L.R. 917 (1933); and Morgan v. Hart, 48 Ky. (9 B.Mon.) 79, 80 (1848)). "A person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable. . . ." Id. (quoting Restatement, Restitution, § 74). The obvious justification for restitution is that one should not be unjustly enriched at the expense of another. Id. (citing Restatement, Restitution, § 1).

"The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution." Alexander Hamilton Life Ins. Co., 558 S.W.2d at 559. However, when the party who received the money by authority of the judgment has spent some or all of it at her own volition and for her own ends, equity does not diminish her accountability to make restitution. Id.

To summarize the foregoing, James was entitled to restitution for the sums he paid to Sue during the pendency of the first appeal unless circumstances had so changed since James began making the payments that it would be inequitable to require Sue to make restitution.

The trial court did not make a finding that circumstances had so changed that it would be inequitable to require Sue to make restitution. Rather, the trial court determined that it would be unfair to require Sue to make restitution because it had originally determined that the payments were marital property "based upon a sense of equitable distribution." Specifically the trial court's August 14, 2003, order the trial court stated as follows:

The Court has reviewed the decision of the Supreme Court and has considered the arguments presented by the parties. The

Court thus notes that per the ruling of the higher court the Respondent's disability benefits are his nonmarital property. In theory the Respondent is entitled to restitution. However, when this Court ruled that Petitioner was entitled to a portion of the disability benefits it believed it was making an equitable distribution given the years of the marriage and the circumstances of the parties, including the terms agreed to by the parties. This Court does not feel that Petitioner should be ordered to actually make restitution to the tune of \$34,650.44. To require that of Petitioner would not be fair given this Court was driven in its original decision by a sense of equitable distribution. It logically follows that the Respondent's request for interest on amounts paid is denied.

The Court believes Petitioner was entitled to marital property in an amount equal to \$34,650.44. Obviously the sum cannot be deemed to have come from the disability payments, but the Court does reallocate the same amount from Respondent's marital property.

Inequity justifying excusing a party from making restitution must be based upon a change in circumstances to the extent that it would be inequitable to require the party from making restitution. Alexander Hamilton Life Ins. Co., supra. In excusing Sue from making restitution the trial court instead relied upon the motivation behind its original decision, i.e., its "sense of equitable distribution," notwithstanding that this which was later determined by the Supreme Court to be erroneous. The trial court's denial of restitution was not based upon a change of circumstances at all. We are not persuaded that the

trial court's reliance upon the motivations behind its original order - an order which was later overturned - satisfies the test for changed circumstances so as to make restitution inequitable.

Sue contends that it would be inequitable to require her to make restitution because she relied upon established law and the trial court's order holding that the disability payments were marital property, and that the existing law was significantly changed by the Supreme Court's decision in Holman v. Holman, supra. Sue alleges that she had no reasonable expectation that the Supreme Court would create new law applicable to firefighters disability retirement benefits.

We disagree that the Supreme Court's decision in this case amounted to a change in circumstances so as to make restitution inequitable. We interpret the change in circumstances rule identified in Alexander Hamilton Life Ins. Co., supra., as principally referring to changes in a parties' personal circumstances. In addition, the decision in Holman addressed an issue of first impression and did not, as characterized by the appellee, overturn "established law." Further, the parties' settlement agreement specifically deferred the determination of the status of the disability payments to the courts, and thus an adverse decision by the courts could have been reasonably anticipated. As such, we do not believe that the Supreme Court's decision in this case qualifies as a



change in circumstances which would excuse Sue from her obligation to make restitution.

Sue also argues that restitution would be inequitable because the amounts she received from James were used to assist in paying her monthly living expenses, as well as the continuing legal fees incurred as a result of James' appeals. The appellee contends that she relied on the judgment of the trial court to determine the nature of the disability retirement benefits and therefore presumed she could appropriately utilize the funds awarded to her to support herself and her children in the manner similar to what was enjoyed in the marriage. As previously noted, when the party who received the money by authority of the judgment has spent some or all of it at her own volition and for her own ends, equity does not diminish her accountability to make restitution. Alexander Hamilton Life Ins. Co., 558 S.W.2d at 559. Pursuant to this rule, we do not believe the fact that Sue spent the money for living expense and legal fees excuses her from her obligation to make restitution.

Sue also appears to argue that James' failure to post a superceded bond somehow extinguishes his entitlement to restitution; however, we believe this argument is without merit.

There is an additional reason that the trial court's order erroneously failed to award James restitution. The order, in effect, "awarded" James restitution, but at the same time

reconsidered the original property award and offset James' restitution award by an equivalent additional award of marital property to Sue. From this perspective the real issue is not whether James is entitled to restitution - under the trial court's order he "received" that - but, rather, whether it was proper for the trial court to reopen the original marital property distribution award and award additional sums to Sue.

The Supreme Court's June 13, 2002, opinion concludes as follows: "For the reasons mentioned, we reverse the decision of the Court of Appeals and remand to the trial court for it to assign Appellant's LFUCG disability benefits to him as his nonmarital property and to reconsider its marital property distribution." (Emphasis added). Hence, the trial court, upon remand, was under a mandate by the Supreme Court to, in conjunction with assigning James his disability retirement benefits as nonmarital property, specifically reconsider the previous marital property distribution.

The original marital property distribution was pursuant to a separation agreement. While the trial court was under an obligation to reconsider the marital property distribution upon remand, we believe the Supreme Court intended the trial court to carry out that obligation within the normal constraints imposed by a separation agreement.

KRS 403.180(2) provides that the terms of a separation agreement, "except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, ... that the separation agreement is unconscionable."

"Unconscionable" has been defined as "manifestly unfair or inequitable." Wilhoit v. Wilhoit, Ky., 506 S.W.2d 511, 513 (1974). A separation agreement which was originally determined not to be unconscionable may later be modified if due a change in circumstances the agreement has become unconscionable. Peterson v. Peterson, Ky. App., 583 S.W.2d 707 (1979). However, the party challenging the agreement as unconscionable has the burden of proof. Peterson, at 711..

The Separation Agreement executed by the parties dated August 23, 1996, was a comprehensive instrument addressing in detail all issues concerned in the dissolution proceeding. The agreement consists of 29 numbered paragraphs, along with numerous subparagraphs, which address in great detail issues relating to child custody and support; marital property; nonmarital property; debts; and maintenance.

The paragraphs relevant to this proceeding are as follows:

15. The issue of the marital or nonmarital character of the Husband's pension is reserved for further decision by the Court.

. . . .

26. The foregoing constitutes a full, complete, and final settlement of all property rights, both present and future, and the same shall be fixed and irrevocable upon approval by the Court. This Agreement shall be incorporated into and made a part of any Decree entered herein, and each party will assume his or her existing and future obligations, except as may be otherwise provided herein, and, except as provided herein, shall hold the other party free from any hereinafter incurred obligations.

. . . .

27. This Agreement shall be incorporated by reference in any Decree which may be entered in an action between the parties, and shall be enforceable by any and all means legally available to said Court, including contempt proceedings.

The final decree was entered on August 26, 1996.

Paragraph four of the decree stated as follows:

The Settlement Agreement entered into by and between the parties on August 23, 1996 is found not to be unconscionable and is hereby approved and incorporated into this Decree of Dissolution as if set out in full length herein. Each party is hereby ordered to comply with the terms and conditions set out therein. (Emphasis added).

Hence, the original separation agreement, which specifically deferred to the courts on the issue of the marital/nonmarital status of James' disability retirement

income, was originally found by the trial court not to be unconscionable.

In its reconsideration of the original marital property distribution as provided in the separation agreement, the trial court did not purport to make a finding that due to a change in circumstances the agreement had become unconscionable. Absent such a finding, the trial court was bound by the parties' separation agreement. KRS 403.180(2). As such the trial court erroneously reallocated marital property to Sue to offset the restitution she owed to James.

Further, a review of the separation agreement demonstrates that it was not so manifestly unfair, inequitable, and lopsided as to be unconscionable.

As his division of the marital property James received his sole-proprietor heating, air conditioning and plumbing business, from which he derives approximately \$75,000.00 per year in income; a 1995 Cadillac; three real estate properties owned by the parties; the life insurance and life insurance cash surrender values on insurance insuring the life of James; personal property in his possession; bank accounts in James' sole name; and a "street rod" and motorcycle.

As her division of the marital property Sue received the marital residence; a 1995 Cadillac; the proceeds from the sale of Florida real estate owned by the parties; Sue and James'

individual retirement accounts; the items of personal property in her possession; and all bank accounts in the wife's sole name; the sum of \$269,221.00 paid in equal monthly payments over a period of ten years; and the parties' membership in the Greenbriar Country Club.

Further, pursuant to the separation agreement James agreed to pay Sue maintenance consisting of four payments of \$1,300.00; 12 payments of \$1,500.00; 12 payments of \$1,400.00; 12 payments of \$1,200.00; 12 payments of \$1,100.00; 12 payments of \$950.00; 12 payments of \$800.00; 12 payments of \$600.00; 12 payments of \$400.00; 12 payments of \$300.00; and 8 payments of \$100.00.

The foregoing terms were originally determined not to be unconscionable and the Supreme Court's resolution of the disability payment issue (which the agreement specifically deferred to the courts) adversely to Sue was not a change in circumstances which would render the agreement unconscionable. No other changes in circumstances relevant to this issue have been identified by the appellee.

In summary, while the trial court was required under the Supreme Court's mandate to reconsider the marital property distribution, because the separation agreement is not unconscionable the trial court was bound by the agreement, and it was error to reopen the settlement agreement and reallocate

the original marital property distribution for the purpose of off-setting the restitution owed by the appellee to the appellant. We accordingly reverse and remand the case for entry of an order granting the appellant restitution for amounts paid to Sue during the pendency of the first appeal.

James also alleges that he is entitled to prejudgment and postjudgment interest on the restitution owed to him by the appellee.

"The determination as to whether or not to award prejudgment interest is based upon the foundation of equity and justice. It is a determination to be made by the trial court and to be disturbed by an appellate court only upon a showing of abuse of discretion." Church and Mullins Corp. v. Bethlehem Minerals Company, Ky., 887 S.W.2d 321, 325 (1994). Kentucky Revised Statute (KRS) 360.040 provides that a judgment shall bear twelve percent (12%) interest compounded annually from its date. Thus the awarding of prejudgment interest is discretionary with the trial court whereas postjudgment interest is required under KRS 360.040.

Because of the trial court's disposition of the case it did not address the appellant's request for interest on the merits. On remand the trial court should also address and rule on the appellant's request for prejudgment and postjudgment interest.

For the foregoing reasons the judgment of the Fayette Circuit Court is reversed and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Catesby Woodford  
Susan Y.W. Chun  
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BRIEF FOR APPELLEE:

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