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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001228-MR

STEVEN WILDT — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 13-CI-500306

PATRICIA WILDT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Steven Wildt appeals the Jefferson Family Court's July 25, 2016 order finding none of the personal injury settlement proceeds Wildt received during his marriage to appellee Patricia Wildt compensated him for the loss of his ability to earn money post-dissolution. We affirm.

This dissolution action returns to this Court after remand. *Wildt v. Wildt*, 2014-CA-000673-MR, 2015 WL 2152906, at *1 (Ky. App. May 8, 2015)

(*Wildt I*). *Wildt I* provides more detail to the parties' case. Suffice it to say now that Steven and Patricia married on July 7, 1990. During the marriage, Steven was injured in an automobile accident. He received short-term and long-term disability benefits and, when those benefits terminated, Steven filed an action against the disability insurer resulting in a settlement for $30,000.00.

Steven also was awarded Social Security disability benefits as a consequence of the accident. He received a lump-sum payment of $16,523.25 to compensate him retroactively for the disability along with basic reparation benefits, half of which, "maybe $6,000.00 or so went towards lost wages and the rest towards his medical bills." *Wildt I*, 2015 WL 2152906, at *1.

Steven filed a personal injury action against the tortfeasor. While still married, he settled that claim for $185,459.93. The settlement was for "all recoverable out-of-pocket expenses, attorney fees, all medical liens, all rights of recovery, all medical subrogation claims except PIP from State Farm, all Worker Compensation subrogation claims, known and unknown, and claims for general damages." Steven's attorney testified at trial that the phrase "claims for general damages" referred to "pain and suffering." Steven used $80,226.54 of the settlement proceeds to pay off the mortgage on the marital residence.

Steven's attorney indicated that the value of Steven's claim for pain and suffering exceeded $800,000.00. Accordingly, Steven filed an underinsured claim against his own insurer. Steven settled that claim for an additional $50,000.00.

Steven was involved in another motor vehicle accident in April 2012. He settled his claim against that tortfeasor for $42,294.50. The $35,000.00 net recovery was deposited into a joint savings account. Steven later withdrew the $25,000.00 that remained in that account at the time.

Patricia petitioned for dissolution of the marriage in 2013. The family court held a bench trial to determine the character of several items of personal property, including the personal injury settlements. Steven argued the settlements were solely to compensate him for nonmarital pain and suffering. He asserted his disability insurer compensated him for lost income and his inability to earn wages. Steven's personal injury attorney testified that damages from the first personal injury settlement were "overwhelmingly" to compensate Steven for pain and suffering, and *none* of the award was to replace income as his income had already been replaced by disability insurance and Social Security benefits.

Steven requested the family court deem nonmarital the value of the mortgage payoff ($80,226.54), the $25,000.00 he withdrew from the joint savings account, and $4,920 in cash on hand. In the alternative, Steven argued that the settlements were intended to compensate him, in part, for loss of earnings and impairment of his ability to earn money for a period following the parties' divorce.

The family court was not convinced. It found that Steven failed to prove the value of the settlement proceeds he sought could be characterized as his nonmartial property. Instead, the Court found that Steven's "contribution was in lieu of money he would have earned over the course of years and brought into the

marriage had he not been injured – money that would have been applied to the mortgage as well as other family expenses." It designated the proceeds from the various settlements marital property and equitably divided it, along with other personal property, between the parties.

Steven appealed to this Court. Citing *Weakley v. Weakley*, 731 S.W.3d 243 (Ky. 1987) extensively, we noted that "a personal injury award for loss of earnings and permanent impairment of ability of earn money" during the marriage constitutes marital property, but any portion of the award which constitutes damages for pain and suffering is nonmarital. *Id.* at 244-45. We also explained that "[t]o the extent that the award [for loss of earnings and the inability to earn money] can be prorated to the remaining years of life expectancy following the dissolution of the marriage," it is also nonmarital. *Id.* at 244.

Applying *Weakley*, we held the family court did not err by finding the settlement funds were meant to compensate the marital estate for lost wages and unpaid medical expenses not covered by Steven's disability insurance payments. We also held the family court did not err by finding Steven failed to meet his burden of proving that the settlement proceeds were intended to compensate him solely for his pain and suffering. "Instead, the value of the personal injury settlements that Steven sought to have characterized as his nonmarital property was used to compensate the marital estate for losses caused by his accidents. Therefore, it is properly characterized as marital property subject to division." *Wildt I*, 2015 WL 2152906, at *4.

However, we were "persuaded that the family court omitted to determine which part, if any, of the settlement proceeds compensated Steven for the loss of his ability to earn money *post-dissolution*." *Id.* Explaining further:

> "To the extent that the award can be prorated to the remaining years of life expectancy following the dissolution of the marriage, it is nonmarital." *Weakley,* 731 S.W.2d at 244. Therefore, we must vacate and remand on that issue. After prorating the settlement funds as directed, the family court may also need to reevaluate the terms of its maintenance order on remand.

Id. Accordingly, we affirmed the family court's order "in part, vacated in part, and remanded for further proceedings as directed by this opinion." *Id.*

On remand, the family court set the matter for an evidentiary hearing. Patricia filed a motion to prevent the introduction of new evidence at the hearing. She argued the matter had already been tried, and the task for the family court on remand was simply to make the omitted finding based on the evidence presented at trial.

Patricia's motion came before the family court on May 6, 2016. At motion hour, Steven's attorney admitted Steven had no new evidence to offer the court. Counsel for the parties agreed that an evidentiary hearing was not necessary. They asked to submit briefs with citations to the original trial evidence. Steven's attorney, upon further reflection, asked the family court to pass the motion to allow counsel an "opportunity to look at the issues."

The following week, on May 23, 2016, the case was called again. Steven's counsel agreed the evidentiary hearing could be taken "off the docket."

The parties asked that simultaneous briefs be submitted, citing to the original trial record, after which the matter would stand submitted for the family court's consideration. At no point, either in writing or during either hearing, did Steven object to the circuit court's failure to hold an evidentiary hearing.

By order entered July 25, 2016, the family court considered, as directed by this Court, "what portion of the settlement proceeds, if any, were for lost wages after the dissolution." It found the answer to be zero. It noted that Steven's argument that traceable settlement proceeds were to compensate him solely for post-dissolution lost wages was directly at odds with his earlier trial position that settlement proceeds were solely to compensate him for nonmarital pain and suffering. It also pointed out that Steven and his personal injury attorney testified at trial that lost earnings were recovered through disability insurance and Social Security benefits, not the personal injury settlements. Having concluded that none of the settlement proceeds were for post-dissolution lost wages, the family court found no reason to reconsider or alter its original decision. Steven again appealed.

In this second appeal, Steven takes issue with the *manner* in which the family court handled the matter on remand. His sole argument is that the family court's July 25, 2016 order is erroneous because the family court did not conduct the evidentiary hearing required by *Wildt I*. To fulfill this Court's mandate, Steven claims the family court needed three pieces of information: (1) the amount of each settlement; (2) the portion of each settlement attributable to lost future income; and

(3) Steven's life expectancy. This evidence, Steven asserts, was not contained in the original trial court record. Accordingly, Steven argues the family court's refusal to hold an evidentiary hearing reveals it failed to adequately consider the issue on remand and, in turn, failed to comply with this Court's clear directive in *Wildt I.* We are not persuaded.

This Court did not mandate in *Wildt I* that the family court hold an evidentiary hearing on remand. Instead, we found the family court "omitted to determine" what portion of the settlement was for Steven's post-dissolution lost wages and then "remanded for further proceedings as directed by this opinion." *Wildt I*, 2015 WL 2152906, at *4. We admit the latter language is a mere vague rather than specific mandate. But it is clear enough that we did not grant Steven a new trial or explicitly direct the family court to hold an evidentiary hearing. Furthermore, this Court's use of the word "omitted" insinuates the family court simply failed to make the requisite finding from the evidence. Absent any more explicit mandate from this Court, it was reasonable for the family court to interpret this Court's directive as it did.

In any event, Steven invited the error, if any such error occurred. Invited errors are those that reflect a party's knowing relinquishment of a right. *See Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011). Generally, invited errors are not subject to appellate review. *Gray v. Commonwealth,* 203 S.W.3d 679 (Ky. 2006); *Miles v. Southeastern Motor Truck Lines,* 173 S.W.2d 990, 998 (Ky. 1943) ("It is the rule that one cannot complain of an invited error.").

The rationale behind the notion is that a party will not be heard to complain of an error which he himself has induced the trial court to commit. *See Miles,* 173 S.W.2d at 998. To allow otherwise would permit a party "to take advantage of an error produced by his own act." *Wright v. Jackson,* 329 S.W.2d 560 (Ky. 1959); *United States v. Myers*, 854 F.3d 341, 355 (6th Cir. 2017) ("Challenges to such invited errors are forfeited.").

Steven cannot complain on appeal of an alleged error invited or induced by him. He ***agreed*** to dispense with an evidentiary hearing. Steven twice informed the family court at motion hour, through counsel, that there was no need for an evidentiary hearing, that he had no new evidence to submit, and that the issue could be adequately addressed through simultaneous briefs with citations to the original trial record. He cannot now be heard to complain that the family court failed to conduct an evidentiary hearing. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court." *Owens v. Commonwealth*, 512 S.W.3d 1, 15, 15 n.14 (Ky. App. 2017). Steven has forfeited his right to challenge the family court's decision not to hold an evidentiary hearing.

In sum, we are not convinced the family court committed error when it declined to hold an evidentiary hearing on remand. This Court did not direct it to do so. In any event, any such "error" was invited by Steven when he agreed, through counsel, to dispense with the scheduled evidentiary hearing. We affirm the Jefferson Family Court's July 25, 2016 order.

D. LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
William D. Tingley Louisville, Kentucky	Melanie Straw-Boone Louisville, Kentucky