

NO. 33043

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

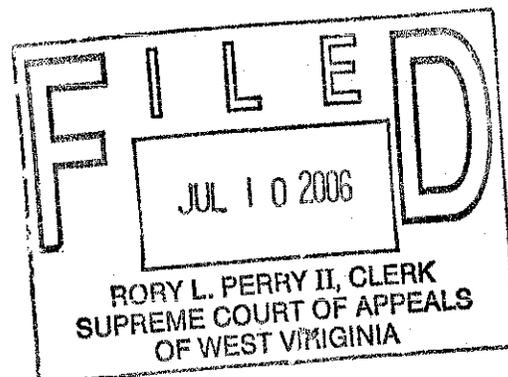
In re the Marriage of:
PATRICIA FITZGERALD,

Appellee/Petitioner Below,

And

EARL FITZGERALD,

Appellant/Respondent Below.



APPELLANT'S REPLY TO
APPELLEE'S BRIEF

Submitted by:

Shawn Bayliss, WV Bar No. 6863
Bayliss & Phalen, PLLC
112 Roane Street
Charleston, WV 25302
(304) 342-3850

APPELLANT'S REPLY TO APPELLEE'S BRIEF

Appellee argues two main assignments of error in her brief: 1) The circuit court erred by finding that 25% of the Worker's Compensation award was for pain and suffering as no authority exists for such an arbitrary decision, and the whole compensation award is a marital asset; and 2) The circuit court erred requiring the Appellee to reimburse Appellant for 25% of the money received from the award during the marriage.

Appellant agrees that the circuit court erred by arbitrarily awarding 25% of the Worker's Compensation award as pain and suffering, and, therefore, ruling that only the 25% of the award was Appellant's separate property not subject to division of the marital estate. The whole award should be separate property and not subject to division.

As for the second assignment of error, the circuit court never ordered Appellee to reimburse Appellant for the 25% of the award given during the marriage. In her own brief, Appellee quotes the circuit order as follows:

QUESTION NO. 4: Is the injured spouse entitled to any reimbursement of part of a lump sum Worker's Compensation permanent total disability award that was received prior to the parties' separation?

COURT'S RESPONSE: The Court FINDS that the injured spouse **is not entitled to any reimbursement** unless there is a showing that this lump sum payment has been kept in some segregated account and was not consumed during the marriage. The Court FINDS that the portion of a Workers' Compensation

permanent total disability award that was received prior to the parties' separation would have been consumed by the parties during the marriage and the injured spouse **is not entitled to be reimbursed his 25%** by the non-injured spouse.

(emphasis added). The Court plainly ordered that Appellant was not entitled to reimbursement from Appellee for the portion of the award the court categorized as pain and suffering that was awarded during the marriage. Therefore, there is only essentially one issue before this court. . . whether the Worker's Compensation award is subject to division as a marital asset or whether it is the separate and sole property of the injured spouse.

In Appellant's initial brief to this court, Appellant gave numerous states' case law on similar issues and the complete argument on how the award should be classified. Appellant now incorporates those arguments into this reply. However, Appellant will only reply to Appellee's response and not re-iterate the original arguments.

Appellee first argues that the Worker's Compensation statute, *W.Va. Code Chapter 23*, was written to replace an injured worker's wages. In reality, the statute makes it clear that the compensation program is to compensate an employee for personal injury.¹ The compensation statute bases the award to an injured employee on that employee's wages. The

¹ "Where compensation is due an employee under the provisions of this chapter for personal injury, the compensation shall be as provided in the following schedule:" *W.Va. Code §23-4-6 (replacement vol. 2006)*.

award is based on wages, not to replace only wages. The intent behind basing the award on the employee's wages is to ensure a fair award to all injured employees. It keeps lower paid employees from being awarded the same compensation amount as higher paid employees since the compensation fund is based on the employees' wages and the employers' taxable contribution.

Appellee argues that since the statute does not mention pain and suffering, the Legislature must have intended that the award is solely for wages. That just simply is not true. This Court has made it clear that a worker's compensation award replaces the personal injury tort claim, and, therefore, benefits the employer as much as the employee.

This Court has previously held in *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 425 S.E.2d 551 (1992), that injured people who had been compensated for their injuries by workers' compensation were barred by *W.Va.Code*, 29-12A-5(a)(11) [1986] from maintaining a civil suit against a political subdivision for damages from those injuries--even though the damages available in a civil suit were broader or different than those available under the workers' compensation system. The Court went further to state that it rejected the argument that the failure of the workers' compensation system to provide compensation for "elements of damages,

such as pain and suffering, total lost wages, and mental anguish" meant that a claim was not "covered" by workers' compensation. *Id.* at 188 W.Va. at 610, 425 S.E.2d at 565.

This Court also stated the following in *State ex rel. Beirne v. Smith*, 214 W.Va. 771, 591 S.E.2d 329 (2003):

The Act is designed to compensate injured workers as speedily and expeditiously as possible in order that injured workers and those who depend upon them for support shall not be left destitute during a period of disability. The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits.

It has also held that "None should lose sight of the fact that this system benefits the employers as well as the injured employees." *Meadows v.*

Lewis, 172 W.Va. 457, 469, 307 S.E.2d 625, 638 (1983); *Repass v.*

Workers' Compensation Division, 212 W.Va. 86, 92-93, 569 S.E.2d 162,

168-69 (2002). More importantly, this court has stated the following

concerning a permanent total disability award:

Permanent total disability awarded under workers' compensation is part of a comprehensive plan designed to rectify the results of an injury in the workplace. The payments to the claimants and other benefits are in lieu of such elements of damage in the common law tort system as lost wages, lost earning capacity, reimbursement of past and future medical expenses, **past and present pain and suffering**, emotional distress, and other factors.

(emphasis added). *Boan v. Richardson*, 198 W.Va. 545, 548, 482 S.E.2d 162, 165 (1996) (as modified). Therefore, it is plain to see that this Court views Worker's Compensation claims as the sole remedy of an injured worker to recover lost wages plus all remedies available under tort law. Since the Worker's Compensation statute was created, the injured worker no longer has the option to recover from the employer under tort law, so it is plain to see that this Court agrees that the award is not only for wages, but also for pain and suffering, emotional distress, medical expenses, future lost wages, and all other remedies that were available under the tort system. See also *Makarenko v. Scott*, 132 W.Va. 430, 55 S.E.2d 88 (1949); *McVey v. Chesapeake & Potomac Telephone, Co.*, 103 W.Va. 519, 138 S.E.97 (1927).

Given that this Court has clearly stated that the Worker's Compensation award replaces the tort claim for pain and suffering and non-wage compensation, it only makes sense that the award be divided as personal injury awards. Thus, this Court has previously stated that "To the extent that its purpose is to compensate and individual for pain, suffering, disability, disfigurement, or other debilitation of the mind or body, a personal injury award constitutes the separate nonmarital property of an injured spouse." *Syl. Pt. 1, Hardy v. Hardy*, 186 W.Va. 496, 413 S.E.2d 151 (1991). Therefore, the only issue for this Court to decide is what portion of

the Worker's Compensation award is for pain and suffering and all remaining non-wage compensation that should be classified as the sole and separate property of the Appellant and not subject to division of the marital estate.

The Appellee attempts to compare this case to past decision on disability pensions and other plans that were purchased by the parties during marriage. That is simply not the facts of this case. The worker's compensation award is not purchased, nor contributed into from the employee, therefore, it is not analogous to the cases where a purchased plan was categorized a marital asset and divided accordingly.

Appellee agrees that she is not entitled to an of the award that is for future earnings awarded for the period after separation, so the only issue concerning future wages is the amount of the lump-sum award for future earnings.

As stated earlier, Appellee argues that the circuit court erred in requiring Appellee to reimburse Appellant for the 25% pain and suffering portion of the award. Appellant has shown that the court made no such award and will, therefore, not reply to those arguments.

WHEREFORE, Appellant respectfully requests that this Honorable Court adopt the positions he has argued in both briefs and allow the award to be classified as sole and separate property and not subject to division with the marital estate. In the alternative, should the Court not allow the whole award as separate property, Appellant respectfully requests this Court to remand this case, with directions, to the Putnam County Circuit Court for proper classification and division of the award.

Respectfully Submitted,

EARL L. FITZGERALD

By Counsel



Shawn D. Bayliss, WVSB #6863

Bayliss & Phalen, PLLC

112 Roane Street

Charleston, WV 25302

(304) 342-3850

Counsel for Appellant Earl Fitzgerald

NO. 33043

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In re the Marriage of:
PATRICIA FITZGERALD,

Appellee/Petitioner Below,

And

EARL FITZGERALD,

Appellant/Respondent Below.

CERTIFICATE OF SERVICE

I, Shawn D. Bayliss, hereby certify that I have served a true and exact copy of the foregoing "Appellant's Reply to Appellee's Brief" on the Appellee by United States mail, prepaid, to the following address, on this the 10th day of July 2006:

Beverly Selbe, Esq.
Boulevard Tower, Suite 1200
1018 Kanawha Boulevard, East
Charleston, WV 25301


SHAWN D. BAYLISS