

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MILLER V. MILLER

PEGGY MILLER,

Petitioner below,

VS.

YUEL MILLER,

Respondent below,

TO: THE HONORABLE JUSTICES OF THE SUPREME
COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN SUPPORT OF PETITION FOR APPEAL

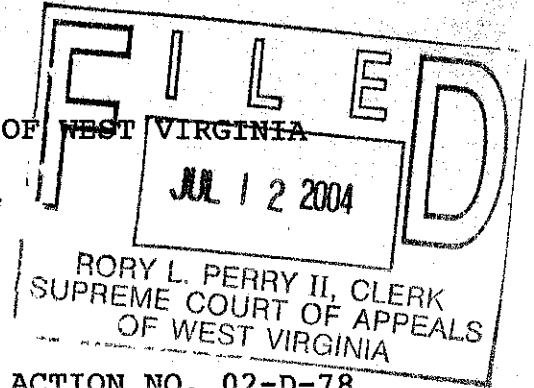
The issue pending before this court is as follows:

1. *When parties, during their marriage, are victims of a tort ("contractual fraud") and receive damages as a result of said tortious conduct, are the damages marital or non-marital property?*

STATEMENT OF UNDISPUTED FACTS

The facts in this matter are undisputed. These parties were married on October 10, 1958, and separated in June of 2001. In August of 1996, they purchased a new automobile from White Chrysler Plymouth Dodge of Ripley, West Virginia. Incident to that purchase, the respondent/husband executed a promissory note payable to Bank One. The vehicle was the family automobile.

It was later discovered that a fraudulent "balloon payment" had been inserted into the promissory note subsequent to the same being executed by the husband. [emphasis added]. Civil litigation followed and the respondent received the net amount of \$15,363.85



CIVIL ACTION NO. 02-D-78
JUDGE DAVID W. NIBERT
CIRCUIT COURT OF JACKSON COUNTY

in compensation for this tort. The monies were received after the divorce was filed and are still being held in escrow by the husband's counsel, pending the outcome of this dispute.

This issue before the Court was whether or not the tort proceeds of \$15,363.85 are marital or separate property. The Family Court Judge found that the tort was committed during the marriage and the resulting funds should be treated as marital property. Accordingly, she ordered the respondent to pay to the petitioner one-half of that amount as part of the equitable distribution of marital property. The final order, in part, read as follows:

"17. The Court FINDS that the marital property of the parties consists of the following:

... D. The parties were awarded \$15,363.85 from White Chrysler Dodge, as a result of a case against Mountaineer Federal Credit Union for fraud. Mr. Miller was a named plaintiff in the case, but Mrs. Miller was not. The court finds that this was a tort that occurred during the marriage and should be treated as marital property."

The respondent appealed to the Circuit Court. The Circuit Court found that these settlement proceeds were the separate property of the respondent, and therefore not subject to equitable distribution. It is from this ruling that the petitioner appealed.

ARGUMENT / BRIEF IN SUPPORT OF PETITION FOR APPEAL

In the case at bar, the facts are undisputed. When attempting to review the ruling of the courts below, namely the Family Court ruling made by Judge Deloris J. Nibert and the Circuit Court ruling made by Judge David Nibert, the court must look to distribution of the proceeds from the tort litigation and determine whether it is

a marital or non-marital asset.

Equitable distribution under the West Virginia Code is a three step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in the W. Va. Code.

The property's value is obvious on it's face, since it is a cash award, which is easily divisible. Therefore, our review of the instant proceeding requires only that we analyze the first step, that is, classification of property. In classifying property as separate or marital, the legislature has indicated a preference for classifying property as marital. In syllabus point 2 of *Kapfer v. Kapfer*, 187 W. Va. 396, (1992), quoted in *Huber v. Huber*, 200 W. Va. 446 (2000), the Supreme Court said that "The W. Va. Code, defining all property acquired during the marriage as marital property except for certain limited categories of property which are considered separate or nonmarital, expresses a marked preference for characterizing the property of the parties to a divorce action as marital property." The issue boils down to this: Are proceeds from a "contractual fraud" tort case part of the limited categories of property which are considered separate or nonmarital?

Is an award in a case for "contract fraud" to be treated the same as an award for "personal injury"?

In spite of this express preference for classifying property as marital, the Supreme Court has found some exceptions to this preference. One such exception is personal injury awards. The *Hardy v. Hardy* case, on which the respondent relies, is a personal injury case. The *Huber v. Huber* case, supra, was another personal injury case. The *Huber* case involved a noninjured spouse who was claiming money from a tort settlement or verdict award as loss of consortium. It held, "The injured spouse who claims money for noneconomic loss and post-divorce economic loss must prove the same by a preponderance of evidence. If either or both parties carry their burdens of proof, the money proven under such burdens shall be deemed separate property. To the extent that the parties do not provide sufficient evidence to make a reasonable allocation of all the tort settlement or verdict award under their respective burdens, such balance shall be classified as marital property and divided accordingly." Syllabus point 4, attached hereto. There was no loss of consortium claim in the case at bar, and it is easily distinguished because it is not a personal injury case at all. None of the money was for pain and suffering or other damages to the person of Mr. Miller.

In the case before the court today, it is the position of the petitioner that a tort award is not a personal injury award, therefore it is not one of the narrowly defined exceptions to the highly favored classification of property as marital.

However, if "contract fraud" and "personal injury" are treated the same under the law, what did the husband have to prove to maintain the status of the award as non-marital?

In the event this Court believes that a fraud action should be treated in the same manner as a personal injury, then there are dual burdens of proof. In other words, both parties would have a burden of proof when seeking to designate settlement proceeds as nonmarital or marital property.

Using the analysis outlined in the *Huber* case, Mrs. Miller would have the burden of proving that any loss of consortium claim would cause part of her proceeds to be separate. She made no such claim. The only remaining burden was that of Mr. Miller, who would have to prove noneconomic losses and post-divorce economic losses by a preponderance of evidence. In *Hardy*, supra, the court held that "the burden of proving the purpose of part or all of a personal injury recovery is on the party seeking a nonmarital classification." No evidence was tendered which would support Mr. Miller's position that the proceeds should be non-marital. He merely states that he was the only person defrauded because he alone signed the fraudulent promissory note, even though he was married when the transaction took place. It is true that the fraudulent note was "forgiven" by the settlement before any payment was made on the balloon payment. "Economic losses, such as past wages and medical expenses, which diminish the marital estate are distributable as marital property when received in a personal injury award or settlement." *Hardy*, supra. *Hardy* also stands for

the proposition that "To the extent that it's purpose is to compensate an individual for pain and suffering, disability, disfigurement, or other debilitation of the mind or body, a personal injury award constitutes the separate, non-marital property of an injured spouse." Mr. Miller made no such claim here.

Mr. Miller suffered no injuries to the mind or body which would clearly make this settlement non-marital. Additionally, an argument can be made that the parties did not suffer economic damage as a result of the fraud, ^{until later,} since it was settled prior to the loss of funds due to the fraudulent balloon payment. Clearly, if they had not discovered the fraud, the settlement would have been due to an economic impact on the marriage. The evidence presented by both parties was slight on this issue, and in that event, the law clearly prefers classification as marital property.

Analysis of situation had tort remained undetected:

It is helpful to analyze what effect, if any, the tort would have had on the marriage and/or divorce settlement if the tort had gone unrecognized. For purposes of argument, let us assume that the tort was not recognized. At the time of separation, the parties owned a marital vehicle titled to the husband. There were payments due, in addition to a balloon payment. If this case had gone to final hearing on these facts and the husband kept the vehicle, the court would have equally divided the asset OR the deficiency, had one existed. Mrs. Miller would not have had the

option of arguing that the title and note were solely in the name of her husband and therefor not marital debt. She clearly would have been responsible for her half of this debt.

Secondly, if the parties had remained married and the tort had gone undetected, the debt would most certainly have been paid with marital funds. Again, it would make no difference whose name appeared on the vehicle title or note and marital funds would have paid the payments. Clearly, Mrs. Miller again would have paid her half of the debt.

Is it important that the fraud was committed in procuring items of marital property for marital use?

It is also an interesting to analyze the source of the fraud. Mr. Miller procured the family vehicle and signed the note (which note included the fraudulent balloon payment, which was inserted post signing). As a result, he procured a family automobile. The automobile is, without dispute, marital property. Would the court make a distinction if he had obtained a non-marital article of property and paid for it from separate funds? Perhaps if he was purchasing a vehicle with funds from a non-marital source (such as an inheritance) and maintaining the vehicle as non-marital or separate property by titling it to himself only, or if the funds used to purchase the vehicle were protected by a prenuptial agreement, his argument to retain 100% of the proceeds might make sense. None of these facts appear here. In the process of obtaining marital property, which was paid for with marital funds,

he became the victim of a tort. Any proceeds obtained as a result should also be considered marital property.

PRAYER FOR RELIEF

Therefore, the petitioner below moves this court to reverse the ruling of the Circuit Court and affirm the ruling of the Family Judge below, and direct the husband to equally distribute the proceeds of the tort award with his ex-wife.

Peggy Miller

Respectfully submitted:

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