INJURY SETTLEMENTS ARE USUALLY COMMUNITY PROPERTY - 2024

by Greg Enos

A spouse's recovery for an injury claim is usually community property because most settlements mix all of the damage elements together into a single payment. All property is presumed to be community property in a divorce and when an injury settlement is paid in a lump sum, it is almost always impossible to prove how much is attributable to claims that are separate property.

A spouse that receives a settlement arising out of a personal injury has a burden to show that none of the funds constitute payment for medical expenses, lost wages or lost earnings capacity during marriage. In the absence of such evidence, the entire settlement proceeds are properly characterized as community property. *Kyles v. Kyles*, 832 S.W.2d 194, 198 (Tex. App.—Beaumont 1992, no pet.).

The evidence usually relied on to determine if the settlement is for separate property claims are the lawsuit and the damages it claims (or the lawyer's settlement demand letter if the case is settled before litigation), the settlement release agreement, and the settlement check itself. The testimony of the injured spouse is seldom enough to prove the settlement was exclusively for separate property damages. See e.g. *Vanderbol v. Vanderbol*, 02-23-00230 (Tex. App. – Fort Worth 5/2/24, no pet.)(mem. op.)

General Principles

Recoveries in injury claims are treated like other property in a divorce and the usual presumptions and burdens of proof apply. When a spouse receives a settlement from a lawsuit during the marriage – some of which could be separate property and some of which could be community property – the burden of proof is on the spouse claiming the funds as separate property. *Kyles v. Kyles*, 832 S.W.2d 194,198 (Tex. App.—Beaumont 1992, no pet). All property is presumed to be community property and "clear and convincing evidence" must be presented to establish that property is separate property. Tex Fam. Code §3.003.

The Texas Family Code provides in its definition of separate property:

> *Sec. 3.001. SEPARATE PROPERTY. A spouse's separate property consists of: ....*
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> *(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.*

The following elements of personal injury damages have been found to be community property:

- Loss of earning capacity during marriage, *Perez v. Perez,* 587 S.W.2d 671,673 (Tex. 1979)

- Medical expenses incurred during the marriage, *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, no pet).

- Damage to credit reputation, *Douglas v. Delp,* 987 S.W.2d 879, 883 (Tex. 1999).

- "Other expenses associated with the injury to the community estate," Osborn v. Osborn, 961 S.W.2d 408, 414 (Tex. App.—Houston [1st Dist.] 1997, writ denied). Presumably, this would include damages to community property such as the family automobile.

- Disability insurance payments and workers' compensation benefits are community property, "…to the extent it is intended to replace earnings lost while the disabled or injured person is married." Texas Family Code §3.008(b).

The following elements of damages have been held to be separate property:

- Mental pain and anguish, *Moreno v. Alejandro*, 775 S.W.2d, 735,737 (Tex. App.—San Antonio 1989, writ denied).

- Physical pain and suffering, *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).

- Disfigurement, *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972).

- Loss of a spouse's love and companionship, *Osborn v. Osborn,* 961 S.W.2d 408, 414 (Tex. App.— Houston [1st Dist.] 1997, writ denied).

An old Texas case says punitive or exemplary damages are community property and a new case from 2011 says punitive damages are separate property. See the detailed discussion below on this topic.

Lump Sum Settlements are Community Property

The basic rule in Texas is that a lump sum injury recovery is all community property if a party cannot prove what part of the lump sum settlement is separate property. See, e.g. *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont 1992, no pet); *Patt v.Patt*, 689 S.W.2d 505 (Tex. App.—Houston [1st Dist.] 1985, no writ); and *York v. York*, 579 S.W.2d 24 (Tex. Civ. App.—Beaumont 1979, no writ).

As one court has said, “Without clear and convincing evidence showing the recovery is solely for the personal injury of a particular spouse, the spouse does not overcome the presumption that all recovery received during marriage is community property.” *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, pet denied).

Vanderbol v. Vanderbol, 02-23-00230 (Tex. App. – Fort Worth 5/2/24, no pet.)(mem. op.) is a recent example of this principle involving a lawsuit settlement arising from a house fire. The husband and his girlfriend received a total of $876.685.59 in a settlement where the husband sued for economic damages based on, “loss of value, loss of opportunity, and loss of business momentum” and “loss of ability to conduct business.” The divorce trial court awarded the wife 50% of the husband’s half share of this recovery and the court of appeals affirmed. The appellate court states:

> *To the extent that the settlement proceeds cover these losses pertaining to Husband's lost earning capacity, they belong to the community estate. Because some or all of the settlement proceeds could be community property, it was Husband's burden to prove by clear and convincing evidence which portion of the settlement does not belong to the community estate.*
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> *Although Husband contends that the settlement proceeds were to cover damage to the house – which he claims was solely owned by his girlfriend – and his separate personal property, the only evidence in the record to support this contention is Husband's own testimony. The settlement checks from State Farm do not explicitly state what losses they are intended to cover, and they list both Husband and his girlfriend as payees. Thus, the evidence regarding which losses the settlement proceeds were intended to cover is far from conclusive.*
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> *Further, even if we were to assume that Husband had successfully shown that the settlement proceeds were for damage to the house and Husband's personal property, the trial court still could have reasonably concluded that Husband failed to present clear and convincing evidence rebutting the community presumption. The only evidence that the house was solely owned by Husband's girlfriend is Husband's own testimony; he offered no certificate of title, deed records, or other documentary evidence showing that he lacked an ownership interest in the house. Similarly, Husband's own testimony is the only evidence supporting his claim that the personal property damaged in the fire was his separate property. But mere testimony of property's separate character that is unsupported by documentary evidence is generally insufficient to satisfy the clear-and-convincing standard.*

In sum, given this record, the trial court reasonably could have concluded that Husband failed to rebut the presumption that the settlement proceeds were community property.

Vanderbol (citations omitted)

In *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.—Beaumont 1992, no pet), the husband was injured in a car wreck and filed a lawsuit seeking various damages, including lost wages and lost earnings capacity. An unsigned copy of the release was introduced which had signature lines for both spouses and which stated the release was for, "all sums of any kind or character, including by way of illustration, but not by way of limitation, actual damages sustained by claimant; exemplary damages; medical hospital, drug or nursing bills; prosthetic devices; property damages; loss of wages or profits..." The trial court found that the entire recovery was the husband's separate property and that it did not include any recovery for loss of earning capacity, medical expenses or property damage. The court of appeals reversed and ruled that the husband failed to rebut the presumption that the recovery was community property, stating:

All property possessed during marriage or on dissolution of marriage is presumed to be community property, and the party claiming that such property is separate, must prove so by clear and convincing evidence. Thus appellee has the burden of proving that the original settlement was his separate property....

We are hard put from the record to find clear and convincing evidence proffered by appellee to rebut the presumption that the settlement proceeds were community property. Without evidence to the contrary, it must be presumed that at least some of the settlement proceeds were attributable to lost wages or lost earning capacity which are community property. The only evidence we can find from the record which comes close to addressing the issue, comes from appellee's testimony that it was his understanding that the entire settlement was for personal injuries and nothing else. However, in earlier testimony, appellee testified as follows:

Q: How much of that settlement was due to your lost wages in income?

A: I don't know.

Q: Some of it was, was it not?

A: It would have to be, it wasn't spelled out how much.

....

Q: You couldn't say one way or the other? You couldn't deny it, part of it was for lost wages?

A: I still don't know.

Since appellee did not prove what amount, if any, of the settlement proceeds were separate or community property, it must be conclusively presumed that the entire proceeds are community property. When a spouse receives a settlement from a lawsuit during a marriage, some of which may be separate property and some of which may be community property, it is the spouse's burden to demonstrate what portion of the settlement is his separate property. *Moreno v. Alejandro, 775 S.W.2d 735, 738 (Tex. App.— San Antonio 1989, writ denied).* ***This Court has previously held that a spouse that receives a settlement arising out of a personal injury has a burden to show that none of the funds constitute payment for lost wages or lost earnings capacity during marriage. In the absence of such evidence, the entire settlement proceeds are properly characterized as community property.*** *York v. York, 579 S.W.2d 24, 25-26 (Tex. Civ. App.—Beaumont 1979, no writ), see also, Patt v. Patt, 689 S.W. 2d 505, 509-510.*

Kyles, 832 S.W.2d at 198 (emphasis added).

In *Franklin v. Franklin,*[1] a 2006 unpublished opinion from the Amarillo Court of Appeals, the husband settled a Fen-Phen lawsuit in which he sought past and future physical pain and mental anguish, disfigurement and medical expenses. The trial court and then the court of appeals held that annuity payments to the husband that were part of the injury settlement were community property. The Amarillo Court of Appeals stated:

...we deal here with an asset acquired during marriage from the settlement of a lawsuit in which both Robert's separate property claims and community property claims were asserted and settled. The trial court here properly placed on Robert the burden to show that the annuity he claimed as separate property was obtained as a result of his personal injuries and was not compensation for lost earning capacity during marriage or medical expenses.

The trial court's ruling that the annuity was community property was upheld in the *Franklin* case because the husband was not able to prove how much of the settlement was for each item of damages. His argument that all of his medical expenses incurred during

[1] June 19, 2006, No. 07-04-0515CV. Opinion is at court's website at http://www.7thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=11338.

the marriage did not help the husband because, as the court of appeals said, "...that evidence says little or nothing about the amount, or the proportion of the total settlement, for which the medical expense claim was settled."

How To Prove A Settlement Is Separate Property?

There have only been two situations in Texas in which a lump sum injury settlement was held to be separate property. In *Slaton v. Slaton*, 987 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the total net recovery was $450,000 and parties stipulated that $34,060 was for lost wages and medical expenses which were agreed to be community property. The parties then litigated over whether the rest of the recovery was either the wife's separate property or the husband's separate property based on what they claim they had suffered. They in effect agreed that the rest was separate property and so overcame the community property presumption.

In *Licata v. Licata*, 11 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), the two releases that settled the injury claims specifically said that the money being paid was for physical pain, mental anguish and disfigurement only. That stipulation was enough to overcome the community property presumption.

In *Sykes v. Sykes,* No. 14-177-00049-Cv (Tex. App. – Houston [14th Dist.] 12/27/2018)(mem. op.), the settlement agreement said the payment was not for lost wages but only for claims of "mental anguish, pain and suffering, emotional distress, loss of enjoyment of life, [and] physical injuries." That wording might have been enough to overcome the community property presumption per *Licata*, except the settlement agreement had a confidentiality clause that prevented its terms from being disclosed. The court of appeals ruled:

> *The trial court concluded that the settlement agreement was no evidence at all because the agreement stated that it could not be used as evidence in any other proceeding other than one between the parties to the agreement. ..., There is no ambiguity in the settlement agreement regarding the confidentiality of the terms of the agreement, and we agree that it is not evidence that the settlement funds are Carlton's separate property.*

A case decided by the Austin Court of Appeals in 2011 also involved a stipulation that a recovery was separate property. *Harrell v. Hochderffer*, S.W.3d (Tex. App.— Austin 2011)(03-09-00007- CV) was a probate case in which a trust agreement signed by both spouses essentially stipulated that the amounts contributed by each spouse (which resulted from the proceeds of a settlement of a medical negligence suit against a nursing home) were their own separate property. The settlement agreement in the nursing home lawsuit also awarded each spouse his and her own separate recoveries and the lawsuit did not seek any element of damages that is considered community property. This was held to

be sufficient evidence that each spouse's respective recoveries were their own separate property.

Sheehan v. Sheehan, No. 11-22-00085-CV (Tex. App. – Eastland, 8/24/2023)(mem. op.) involved the settlement of an uninsured motorist claim and two releases. The first agreement, signed at mediation, settled the husband's claim for a total of $1,250,000 "in exchange for a complete release of all claims." A second settlement agreement was signed months after the settlement funds were paid out and deposited in the couple's joint account and after the parties had separated. The second agreement said that the payment for was mental anguish and "for personal injury damages and only personal injury damages." The court of appeals decided that characterization of the settlement should be based on the agreement signed at the time the settlement was paid and before the funds were distributed. The court of appeals held:

> *As we previously noted, the first settlement agreement did not allocate the settlement to any specific damage elements. Instead, it provided that George would receive $1,250,000 "in exchange for a complete release of all claims." At the time that George executed the first settlement agreement, his live pleading in the UIM case was his third amended petition wherein he asserted claims for "under-insured motorist damages" consisting of "reasonable and necessary medical expenses, physical pain and mental anguish, disfigurement, impairment, loss of earnings, loss of earning capacity" both in the past and in the future. George also asserted a claim for enforcement of an agreement reached in the worker's compensation claim, claims for bad faith and unfair settlement practices, claims for insurance code violations, and claims for violation of the Texas Deceptive Trade Practices Act.*
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> *Under the terms of the first settlement agreement, George released all claims in exchange for the settlement proceeds. By doing so, he released a broad range of claims, including community claims for lost earnings and medical expenses. Because the settlement included compensation for both community property claims and separate property claims, it was George's burden to establish by clear and convincing evidence which portion of the settlement proceeds was his separate property.*
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> *Here, the trial court did not abuse its discretion by determining that George did not demonstrate by clear and convincing evidence which portions of the settlement proceeds for his UIM claim were his separate property. A proper construction of the settlement agreement does not establish that the settlement proceeds were George's separate property because the first settlement agreement, which is the operative agreement, is broad in the claims that George released, and it does not allocate the settlement amount to any specific damage elements. Additionally, the oral testimony did not overcome the community property presumption applicable*

to the settlement proceeds.

Sheehan v. Sheehan, (Citations omitted).

Thornhill v. Thornhill, 666 S.W.3d 823 (Tex. App. – Houston [14th Dist.] 2023, no pet.) is another example of a settlement agreement that failed to prove the payment was exclusively for separate property damages. There, the settlement payment consisted of a cash portion and monthly payment funded by an annuity. The court of appeal reversed the trial court and found that there was not clear and convincing evidence that the monthly annuity payments were the husband's separate property. The court said:

> *…there is no language in the settlement agreement or the final judgment in the tort suit suggesting that the monthly annuity payments were not, at least in part, compensation for Scott's lost wages, which would, of course, be community property damages. As Scott himself testified, he was determined to be incapacitated at the time the settlement agreement was reached and remained so for approximately ten years. At the time of trial in the divorce case, he stated that he was still 60 to 70 percent disabled. There is no indication in the record that the worker's compensation lien covered all of Scott's expected lost wages; in fact, the nature and extent of the lien is scarcely addressed in the record before us.*
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> *Second, Scott points to the following language in the settlement agreement that appears to reference the federal income tax consequences of the settlement: "[a]ll sums set forth herein constitute damages on account of personal physical injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code and physical injuries or physical sickness within the meaning of Section 130(c) of the Internal Revenue Code." According to Scott, the use of the terms "personal physical injuries" and "physical injuries" in the passage reflects that the settlement proceeds were intended to compensate Scott specifically for his physical injuries and not for any element of damages that would constitute community property. We first note that this position cuts against Scott's argument that the Thornhill's were obligated to use the cash payments to satisfy certain community obligations such as medical expenses and liens. But more to the point, the United States Supreme Court has interpreted the "damages ... on account of" language in 26 U.S.C. section 104(a)(2) as including medical expenses and lost wages awarded in ordinary tort actions, among other things*
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Thornhill v. Thornhill, 666 S.W.3d at 829 (citations omitted).

The court in *Osborne v. Osborne*, 961 S.W.2d 408, 415 (Tex. App.—Houston [1st Dist.] 1997, no pet.) suggested that if a case were tried to a jury then the jury's awards of specific damages amounts would be another way to overcome the community

presumption. In *Osborne*, the personal injury lawsuit had not yet been tried or settled. The court of appeals observed that until the case was tried or settled, the parties' estimates of the dollar amounts or percentages of recovery attributable to the various claims would be entirely speculative. *Id.* at 415.

Punitive Damages

In dicta, an old case from the Amarillo Court of Appeals case states that an exemplary damages award was not community property. *In re DeVine*, 869 S.W.2d 415, 429 (Tex. App.—Amarillo, 1993, writ denied). However, *DeVine* involved a $3,000 exemplary damage award in the divorce trial awarded to the husband against the wife for fraud she committed on the community estate – it did not involve a punitive damage award paid by some third party.

A new case decided by the Austin Court of Appeals in June 2011 basically says the *In re De Vine* case is limited to its facts and does not apply to a lawsuit against a third party in tort. *Harrell v. Hochderffer*, S.W.3d (Tex. App.—Austin 2011)(03-09-00007-CV). In the *Harrell* case, the majority said:

> *A recovery for personal injuries, such as the one at issue here, is expressly characterized as separate property under the family code, with a statutory exception for any recovery for loss of earning capacity during the marriage. See Tex. Fam. Code Ann. § 3.001(3). The only additional exceptions acknowledged by Texas courts are funds recovered for "medical expenses incurred during marriage, and . . . other expenses associated with injury to the community estate." Licata, 11 S.W.3d at 273. Unlike lost earning capacity and medical expenses, however, exemplary damages do not represent income to which the community is entitled or an expense for which the community is liable. An exemplary damages recovery is merely "a private windfall," levied for the public purpose of punishment and deterrence, and is not associated with an injury to the community estate. See Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994). Because an exemplary-damages award does not fall under any exception to the general rule that the recovery for personal injuries is separate property, such damages must be characterized as separate property under family code section 3.001(3). See Tex. Fam. Code Ann. § 3.001(3).*

A case from Louisiana (a community property state with case law and statutes similar to Texas') holds that punitive damages are community property. *Morris v. Morris*, 685 So.2d 673 (La. App. 3 Cir. 1996). The court cited a Louisiana Supreme Court case that stated, "punitive damages are sums awarded apart from any compensatory or nominal damages…" Because punitive damages do not derive from the spouses personal injury, the Court reasoned that punitive damages did not fall under the Louisiana code that stipulates that damages due to personal injuries sustained during the existence of the

community by a spouse are separate property, but are governed by the " 'omnibus clause' which clearly states that 'community property comprises: all other property not classified by law as separate property.' " The Court rejected the defendant's argument that the exemplary damage should be pro rated between separate and community property in the same manner as the compensatory damages.

The Alaskan Supreme Court in 2000 reaffirmed an earlier decision that, "an award of punitive damages should be apportioned in the same manner as the underlying compensatory damage award." *Edelman v. Edelman*, 3 P3d 348, 354-55 (Alaska 2000).