IN THE COURT OF APPEALS OF MARYLAND

No. 14

September Term, 1995

LUVENILDE MARGOTT BLAKE

v.

CLIFTON AVON BLAKE

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
JJ.

Concurring opinion by Chasanow, J.
in which Bell, J. joins

Filed: January 25, 1996

I concur in the result which affirms the trial judge, but disagree with the way the Court reaches that result. This Court granted certiorari on its own motion prior to consideration of this case by the Court of Special Appeals because of the importance of the single issue raised in the brief of appellant, Luvenilde Blake (Ms. Blake). That issue is:

> "Whether the trial court erred in finding that the husband's personal injury settlement proceeds obtained during the parties' marriage did not constitute marital property?"

Instead of deciding the case on the issue briefed and argued by the parties, the Court uses this appeal to sua sponte raise and then reject a contention not previously decided by this Court. Neither party suggested to this Court that there was an unresolved counsel fee issue nor was there any suggestion that the counsel fee claim might arguably prevent the judgment from being final. The argument that an unresolved counsel fee claim might prevent a judgment from being final was raised by, and rejected by, the Court sua sponte without benefit of briefs and arguments.

I. MOTION TO DISMISS

Appellee, Clifton Blake (Mr. Blake), filed an appellee's brief dealing with the issue raised by Ms. Blake, as well as a terse, conclusory motion to dismiss. The entire text of Mr. Blake's motion to dismiss is as follows:

> "The appellee, in accordance with Rule 8-603 of the Maryland Rules of Procedure, moves this honorable court to dismiss the appeal

> filed herein as improvidently granted, and in support thereof, says:
>
> 1. The appeal was untimely filed, and should be dismissed.
>
> The JUDGMENT OF DIVORCE in this matter was entered on August 4, 1993. The ruling on the MOTION FOR RECONSIDERATION was entered on February 14, 1994, and the appeal was not noted until May 11, 1994. (E14 - E15).
>
> **Rule 8-202. NOTICE OF APPEAL-TIMES FOR FILING** states `(a) Generally. -- Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.' Even if the MOTION FOR RECONSIDERATION filed by the appellant is considered to be a motion under Rule 2-534, the notice of appeal still was not filed within 30 days as required by the Rule.
>
> 2. The appeal is from an opinion of the trial court and not from the judgment and should be dismissed.
>
> The appellant in the STATEMENT OF THE CASE on page 3 of her brief indicates that she is appealing from the opinion of the court in ruling that the personal injury settlement proceeds were not marital property rather than appealing from the JUDGMENT OF DIVORCE.
>
> It has been decided by this court on more than one occasion that `appeal from the opinion of the trial court and not from the judgment cannot be allowed, since the opinion is no part of the judgment.' Fast Bearing Co. v. Precision Dev. Co., 185 Md. 288, 44 A.2d 735 (1945)."

Neither of the two grounds for dismissal stated in the motion justify dismissing the appeal, and the appeal cannot be dismissed "as improvidently granted." Mr. Blake first contends that the

appeal was untimely because it was noted on May 11, 1994, which was more than 30 days beyond the February 14, 1994 date that the trial judge denied the motion to revise the judgment. Mr. Blake fails to mention that the notice of the judge's ruling was not mailed by the Clerk of the Court until April 12, 1994. It was from that latter date, when the parties were made aware of the judge's ruling, that the 30 days for filing the appeal began to run. Hence, the appeal of the decision on the motion to revise was not untimely.

The second basis for appellee's motion to dismiss is that Ms. Blake is "appealing from the opinion of the court in ruling that the personal injury settlement proceeds were not marital property rather than appealing from the JUDGMENT OF DIVORCE." This apparently refers to the appeal from the decision denying the 30-day motion to revise. But, as the majority opinion acknowledges, that appeal was timely and should not be dismissed. The fact that there are only limited bases to review a trial judge's rulings on a motion to revise does not mean that an appeal of the ruling should not be permitted. There is a big difference between contending that there is no right to appeal and contending that there is no merit in an appeal. The only two grounds stated in appellee's motion to dismiss do not justify dismissing this appeal.

Even though the only two grounds set forth in Mr. Blake's motion to dismiss do not seem to justify dismissal, the majority undertakes its own search for other reasons to dismiss at least part of this appeal. Putting aside the substantive issue briefed

and argued by the parties, the Court scrutinizes the docket entries, the pleadings, and the decisions of the trial judge. Sua sponte, the majority undertakes an analysis of the law concerning final judgments, the difference between a 10-day motion under Rules 2-532 through 2-534 and a 30-day motion under Rule 2-535, the nature of a claim for attorney's fees in a divorce action, and the limited review of a motion to revise a judgment. A considerable portion of that analysis was not necessitated by anything filed by the parties to this appeal. Neither party in brief or argument mentioned that the trial judge failed to decide the claim for counsel fees and neither party suggested that the failure to decide a claim for counsel fees was at all relevant to the finality of any judgment. Merely because an appellee files a terse, conclusory, and groundless motion to dismiss should not require or even justify this Court scrutinizing the entire record in order to uncover, discuss, and then reject contentions not raised by the parties.

I believe we should have decided the case on the issue briefed and argued by the parties. The instant case is one of those rare cases where we should exercise our discretion to review the law relied on by a trial judge in deciding to deny a motion to revise a judgment. Even if the Court was going to dismiss the appeal, we still could have, and should have discussed the substantive issue raised by the parties. That substantive issue was of such importance that this Court granted certiorari on its own motion prior to the consideration of the issue by the Court of Special

Appeals.

This Court has also stated that ordinarily it will not review a trial judge's Rule 2-535 decision not to reopen a legal issue raised at trial. In *Hardy v. Metts*, 282 Md. 1, 381 A.2d 683 (1978), this Court stated:

> "[W]hen the trial court denies a Rule [2-535] preenrollment request to revise a final judgment rendered on the merits, if that judgment was based solely on a question of law an appellate court will not *ordinarily* disturb the trial court's discretionary decision not to reopen the matter; an appeal from the primary judgment itself is the proper method for testing in an appellate court the correctness of such a legal ruling." (Emphasis added).

282 Md. at 6, 381 A.2d at 686. This case, however, is not an ordinary case. The substantive issue raised in the instant case is an important issue, and rather than resolve the case on an issue not briefed or argued by the parties, we should exercise our discretion to decide the issue that was briefed and argued by the parties.

Even where this Court has dismissed an appeal, we have on occasion, where the issue was of sufficient importance, nevertheless set forth our views on the issue. As Judge Eldridge once wrote:

> "[I]f the issue on the merits is deemed to be sufficiently important, we could set forth our views even while directing that the appeal be dismissed. Although the portion of the opinion setting forth such views would not technically constitute the holding in the case, it would advise trial judges, lawyers,

> and others as to the law and would likely accomplish the same purpose as a holding. This course of action has occasionally been taken by this Court in the past. For example, in *Judefind v. State, supra*, 78 Md. 510, 28 A. 405 [1894], the issue on the merits concerned the constitutionality of the laws prohibiting certain work on Sundays. While required to dismiss the appeal because of the lack of appellate jurisdiction in this Court, our predecessors went on to express the opinion that the statutes were constitutional, 78 Md. at 513-516, 28 A. at 406-407. *See also, e.g., Roth and Boyle v. House of Refuge*, 31 Md. 329, 334-335 (1869)."

Cardinell v. State, 335 Md. 381, 426-27, 644 A.2d 11, 33 (1994)(Eldridge, J., dissenting). See also *Thanos v. State*, 332 Md. 511, 632 A.2d 768 (1993), where we stated:

> "Although ordinarily we do not express our views on questions raised by a dismissed appeal, on occasion we do so to resolve a matter of substantial importance. *Montgomery County v. McNeece*, 311 Md. 194, 200, 533 A.2d 671[, 674] (1987)."

332 Md. at 521, 632 A.2d at 772.

After being critical of the Court for not reaching the substantive issue upon which we granted certiorari, and in order to explain why I concur in this Court's judgment affirming the trial judge, I feel compelled to explain my reasons for agreeing with the rulings made by the trial judge.

II. PERSONAL INJURY PROCEEDS ARE PART MARITAL PROPERTY

On February 9, 1984, Mr. Blake was injured while working as a seaman on board the S.S. Santa Elena in Ecuador. As a result of

the accident, his left leg was amputated below the knee. Mr. Blake now receives accidental disability benefits from the Seafarers' International Union.

Mr. Blake also sued Delta Steamship Lines, Inc. and Crowley Maritime Corporation alleging damages for personal injury, wage loss, loss of consortium, and compensation for present and future economic loss. The case settled on November 4, 1985 for one million dollars in return for releases signed by both Clifton and Luvenilde Blake. Mr. Blake's release was signed in consideration for the one million dollar settlement, while Ms. Blake released the steamship company from liability "for consideration of One Dollar and No Cents ($1.00) and other good and valuable consideration (including a settlement made by Delta Steamship Lines, Inc. with my husband, Clifton Blake for injuries sustained by him ...)." Clifton Blake received $637,483.09 of the one million dollar settlement after attorney fees and court costs. Of that sum, approximately $115,000.00 remained in Mr. Blake's possession at the time of the divorce.

At the divorce hearing, the trial judge considered, *inter alia*, whether any portion of Mr. Blake's settlement proceeds from his injury constituted marital property and if so, whether a monetary award should be entered based on those proceeds. Judgment for absolute divorce was granted to the parties on August 9, 1993. The trial judge ordered alimony and a monetary award to Ms. Blake

based on Mr. Blake's disability pension benefits. Judge Hennegan stated, however, that he was

> "unable to determine what, if any, of the [personal injury] proceeds represented [marital property]. It is the obligation of the party asserting a marital property interest in specific property to produce evidence as to the identity and value of that property. As a result, this court finds that the settlement proceeds flowed from a personal injury sustained by Clifton Blake and, therefore, [are] not a marital asset."

Ms. Blake moved to revise the judgment of August 9 regarding, *inter alia*, the court's refusal to consider the personal injury proceeds as marital property. The trial judge denied the motion to revise. Ms. Blake then filed her notice of appeal. The issue Ms. Blake presented on appeal was whether personal injury settlement proceeds, acquired during the marriage, constitute marital property pursuant to Maryland Code (1984, 1991 Repl. Vol., 1995 Supp.), Family Law Article (FL), § 8-201(e).

The trial judge properly concluded that the remaining portion of Mr. Blake's settlement proceeds was not marital property. I reach this conclusion because Ms. Blake failed to prove what, if any, portion of the personal injury settlement proceeds at issue constituted marital property. A substantial portion of Mr. Blake's settlement compensated him for the loss of his leg, pain and suffering incident thereto, and loss of wages for the period after the divorce. That portion was properly considered his separate property. If Ms. Blake had proven that a portion of the personal

injury proceeds compensated for loss to the marital entity, the trial judge could have found that portion of the proceeds to be marital property. Ms. Blake, however, failed to meet that burden of proof. *See Odunukwe v. Odunukwe*, 98 Md. App. 273, 282, 633 A.2d 418, 422 (1993)(party asserting a marital interest in specific property bears the burden of proving that the property is "marital"); *Noffsinger v. Noffsinger*, 95 Md. App. 265, 281, 620 A.2d 415, 422 (party asserting marital property interest must produce evidence as to its identity and value), *cert. denied*, 331 Md. 197, 627 A.2d 539 (1993).

In holding that Ms. Blake failed to prove what, if any, portion of the personal injury proceeds was marital property, the trial judge found our opinion in *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1986), to be dispositive. In *Unkle*, we held that an unliquidated personal injury claim was not marital property within the definition intended by the legislature under FL § 8-201(e). Commenting on the nature of the inchoate claim, we noted that it was "uniquely personal to the holder" and that, "while it may have some attributes of personal property, the claim was not ... `acquired' during the marriage by one or both spouses. It arose from purely fortuitous circumstances and not from any on-going marital initiative to acquire marital assets." *Unkle*, 305 Md. at 596, 505 A.2d at 854. But we also recognized that "<u>in part</u> ... payment of the claim would produce monies which would replenish

marital assets previously diminished through payment of medical expenses and the loss of wages." *Id.* (emphasis added).

At the time of the husband's accident in *Unkle*, the couple was separated. The husband had not filed suit on his personal injury claim prior to the decree of absolute divorce. This claim, therefore, was inchoate and conjectural at the time the marriage was terminated. In the case *sub judice*, however, the husband's proceeds amounted to more than a mere expectancy. The personal injury settlement was received (as well as substantially spent) well before the Blakes separated and then divorced. Based upon the date Mr. Blake's proceeds were received and the liquidated nature of the award, Ms. Blake argues that *Unkle* is distinguishable and that all of her former husband's personal injury proceeds are marital property.

In arguing that liquidated personal injury proceeds fall within the definition of marital property under the statute, Ms. Blake relies in part on *Alston v. Alston*, 331 Md. 496, 629 A.2d 70 (1993). *Alston* held, *inter alia*, that a husband's lottery winnings, although acquired without any contribution from the wife, constitute marital property. Her reliance, however, is misplaced. *Alston* primarily dealt with granting a monetary award after the property was determined to be marital. *Alston* also held that a monetary award dividing the property in half would not be "equitable" when one party gains property "wholly through his or

her own efforts." 331 Md. at 507-08, 629 A.2d at 76. The instant case focuses not on calculating a monetary award from property that is wholly marital, but instead on determining what, if any, percentage of the property is marital at all. Unlike *Alston*, the entire amount of Mr. Blake's proceeds did not constitute marital property.

Section 8-201(e)(1) of the Family Law Article defines marital property as "the property, however titled, acquired by 1 or both parties during the marriage." The statute further provides that

> "marital property does not include property:
>
> (i) acquired before the marriage;
>
> (ii) acquired by inheritance or gift from a third party;
>
> (iii) excluded by valid agreement; or
>
> (iv) directly traceable to any of these sources." (Emphasis added).

FL § 8-201(e)(3).

The settlement proceeds are unquestionably property, but I do not believe that the legislature intended for the entire settlement to be considered marital property. Although we noted in *Unkle*, *supra*, that the inchoate right to personal injury proceeds had "some attributes of personal property," we held that the claim was Mr. Unkle's "separate property," and not marital property. 305 Md. at 596, 505 A.2d at 854. Likewise, when that right is reduced to an actual liquidated amount as in the instant case, it is not

primarily marital property. In *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985), we defined "property" quite broadly as including "`every interest or estate which the law regards of sufficient value for judicial recognition.'" 303 Md. at 356, 493 A.2d at 1079 (quoting *Deering v. Deering*, 292 Md. 115, 125, 437 A.2d 883, 889 (1981)(citation omitted)). A spouse's body, although generally not considered property, is analogous to property and is "of sufficient value for judicial recognition" when compensation is paid for loss or injury to a part of the body. When so considered, compensation for injury to the body is closely analogous to compensation for injury to property "acquired before the marriage." Clearly, the latter is not marital property within the statute. I believe that the legislature intended that compensation received for loss of, or injury to, the body should be treated the same as property "directly traceable" to property "acquired before the marriage." The compensation is reparation for the damage to Mr. Blake's body, and since Ms. Blake cannot share or assume any part of Mr. Blake's bodily pain, suffering, and loss, it would be inequitable for her to share in the compensation "directly traceable" to Mr. Blake's "uniquely personal" bodily pain, suffering, and loss. *See Unkle*, *supra*. A significant portion of Mr. Blake's personal injury settlement proceeds, therefore, does not constitute marital property.

It is conceivable, however, that Mr. Blake's personal injury

settlement was part marital and part non-marital. *See Harper v. Harper*, 294 Md. 54, 80-81, 448 A.2d 916, 929 (1982). We held in *Harper* that there are occasions when property can flow from both marital and non-marital sources. We use the source of funds theory to make the determination under those circumstances.

> "[W]hen property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital. Thus, a spouse contributing nonmarital property is entitled to an interest in the property in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property. The remaining property is characterized as marital property and its value is subject to equitable distribution. Thus, the spouse who contributed nonmarital funds, and the marital unit that contributed marital funds each receive a proportionate and fair return on their investment."

Harper, 294 Md. at 80, 448 A.2d at 929. We concluded that property directly attributable to non-marital contributions is characterized as non-marital property, and conversely, property directly attributable to marital contributions is characterized as marital property. *Harper*, 294 Md. at 80-81, 448 A.2d at 929.

The Washington Supreme Court applied similar reasoning in finding that recovery for a personal injury occurring during the marriage is at least in part a loss to the marriage. *Brown v. Brown*, 675 P.2d 1207 (Wash. 1984). The *Brown* court held that
d at 1212 (applying community property standards).

Applying these principles to the instant case, the settlement proceeds contained both marital and non-marital elements. Examples

of non-marital contributions which flowed from Mr. Blake's inchoate personal injury claim include the loss of his leg, the pain and suffering attendant thereto, and the loss of earnings for the period after dissolution of the marriage. *See Queen v. Queen*, 308 Md. 574, 587, 521 A.2d 320, 327 (1987)(The uninjured spouse cannot "share in the compensation for the injured spouse's loss of future earning capacity representing a time period beyond the dissolution of the marriage."). On the other hand, loss of consortium, medical expenses directly or indirectly paid by the marital entity, and lost wages prior to the break-up of the marriage could constitute marital property.

Ms. Blake would not be entitled to the portion of the settlement that was "uniquely personal" to Mr. Blake and traceable to loss or injury to his body. Unquestionably, a significant portion of Mr. Blake's settlement compensated him for the loss of his leg, his bodily pain and suffering, and his loss of future earning capacity. It is also possible, however, that a portion of the proceeds were intended as payment for loss to the marital unit, such as paid medical expenses, loss of wages during the marriage, and loss of consortium. Ms. Blake offered no evidence of medical expenses, loss of wages prior to the break-up of the marriage, or any claim for loss of consortium. Thus, the trial judge was unable to say what, if any, portion of the award may have constituted marital property as compensation for these items. The fact that

Ms. Blake signed a general release waiving liability in consideration of one dollar and Mr. Blake signed a general release in consideration of the full one million dollars, may have lent further support to the trial judge's ruling.

The trial judge did not err in ruling that Ms. Blake failed to meet her burden of proving what, if any, portion of the personal injury award was marital property.

Judge Bell has authorized me to state that he joins the views expressed in this concurring opinion.