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2017 IL App (5th) 150422-U

NO. 5-15-0422

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

JENNIFER TOENISKOETTER,	)	Appeal from the
n/k/a Jennifer Hamilton,	)	Circuit Court of
	)	Madison County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 01-D-1085
	)	
CHAD TOENISKOETTER,	)	Honorable
	)	Philip B. Alfeld,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in awarding 20% of the respondent's finalized and pending worker's compensation awards to the petitioner as child support nor in awarding 15% of the respondent's EEOC award to the petitioner as child support; and the trial court's award of \$3,000 in attorney fees to the petitioner's counsel by the respondent did not constitute an abuse of discretion.

¶ 2 The respondent appeals the trial court's award of a portion of his worker's compensation and Equal Employment Opportunity Commission (EEOC) awards to the petitioner as child support, as well as the trial court's award of attorney fees. We affirm.

¶ 3

## BACKGROUND

¶ 4 Only relevant facts shall be discussed. The parties were married on May 4, 1996. As a result of the marriage, one child, D.T., was born on July 10, 1998. On September 30, 2002, judgment of dissolution of marriage was entered whereby, *inter alia*, the parties were awarded joint custody, with the petitioner having primary physical care of the minor child and the respondent responsible for monthly child support. On September 24, 2008, a stipulated order was entered that the respondent would continue to pay \$666 per month in child support to the petitioner.

¶ 5 On October 5, 2011, the petitioner filed a motion to modify child support and for other relief, seeking to increase child support and asking for her attorney fees to be paid by the respondent.

¶ 6 On May 8, 2012, the respondent filed a motion to reduce child support, stating he had lost his job and could not pay child support. On June 29, 2012, the respondent was ordered to pay \$93 per week to the petitioner for temporary child support. Further, the court enjoined the respondent from spending \$14,000 of his \$70,000 worker's compensation settlement, representing 20% of the net proceeds, and reserved its ruling on the amount of child support to be awarded from these monies. The court also reserved ruling on the petitioner's October 5, 2011, petition to modify.

¶ 7 On September 11, 2012, the court entered an order that provided the terms of the June 29, 2012, temporary order remained in full force and effect and that the parties were to update and provide all outstanding discovery requests which included, but were not limited to, most recent year-to-date paystubs, 2011 federal and state tax returns and

attachments, and current income information. Compliance was expected to be completed 30 days prior to hearing.

¶ 8 On January 22, 2013, the respondent settled his EEOC claim for \$60,000. On February 14, 2013, the petitioner filed a motion for temporary restraining order regarding the EEOC settlement and the trial court ordered 20% of the net proceeds of that claim to be held in the respondent's attorney's trust account until further order of the court. On February 20, 2013, the court enjoined respondent from spending any of the proceeds he might receive from a pending worker's compensation claim.

¶ 9 On April 19, 2013, the petitioner filed a motion to compel and, on April 23, 2013, the court entered an order requiring the respondent to comply with the discovery request. The court reserved the issue of attorney fees at that time. On May 15, 2013, the petitioner filed a motion for sanctions for the respondent's failure to comply with the discovery order. On July 22, 2013, the respondent was ordered to produce various documents within 14 days. The next day, the respondent produced three paycheck stubs, but none of the other documentation required by the court's order.

¶ 10 On August 14, 2013, the petitioner filed a second motion for sanctions because of the respondent's failure to comply with discovery. On August 14, 2013, the respondent produced an updated affidavit of assets and liabilities and several bank statements, but nothing further. On September 11, 2013, the respondent failed to appear or produce any additional discovery, and the court ordered him to appear on September 25, 2013. The respondent appeared, but again failed to produce any additional documents. Respondent was ordered to produce all documents within seven days. On October 3, 2013, the

petitioner's counsel filed an affidavit regarding attorney fees as a result of the respondent's failure to comply with discovery, and on October 4, 2013, the petitioner filed a fourth motion for sanctions. On October 30, 2013, the petitioner's counsel was awarded \$1,150 in attorney fees from the respondent as a result of his willful failure to comply with discovery.

¶ 11 On December 31, 2013, the respondent filed a petition to modify and decrease child support, stating that he was no longer eligible to receive unemployment benefits, that he was working an average of 38 hours per week for minimum wage at Starbucks, and that his wages at Starbucks were less than his unemployment compensation. The matter was set for trial on March 4, 2014, and the parties were ordered to update all discovery. On February 28, 2014, the respondent was ordered to supplement outstanding discovery by April 9, 2014. The respondent provided some, but not all, of the required documents.

¶ 12 A case management conference was set for April 30, 2014, to determine the respondent's compliance with discovery. At that conference, a hearing was set for all pending matters for July 17, 2014, but it was subsequently continued to September 30, 2014.

¶ 13 On September 30, 2014, the court ordered the respondent to pay \$224.88 biweekly to the petitioner for temporary child support; to place 20% of the net proceeds of any worker's compensation settlement in his attorney's trust account for child support; to provide an accounting to petitioner's counsel of all monies held in trust or enjoined within

21 days; and both parties were ordered to supplement their discovery 14 days prior to trial. The issue of child support retroactivity or overpayment was reserved.

¶ 14 On February 18, 2015, the respondent was ordered to supplement his discovery by producing documents listed within 30 days. On February 19, 2015, the petitioner filed a motion to compel, and on February 20, 2015, an order to compel was entered reserving payment by the respondent of the petitioner's attorney fees.

¶ 15 On April 8, 2015, an order was entered setting the matter for trial on all pending issues. On May 13, 2015, the petitioner served a notice to supplement discovery upon the respondent.

¶ 16 On June 29, 2015, a stipulated final order was entered providing, among other things, that the respondent owed to the petitioner the following in child support: (1) \$742 per month for 2011; (2) \$743 per month for 2012; (3) \$854 per month for 2013; (4) \$482 per month for 2014; and (5) \$488 per month for 2015 onward. Further the order provided that the respondent was to pay the outstanding arrearage of \$8,000 calculated as of June 22, 2015, at a rate of \$25 per week. Judgment was entered accordingly. The order specifically stated that it did not take into account the pending worker's compensation settlement agreement with the City of Granite City, the settlement proceeds being held in the respondent's attorney's trust account, or any other settlement, as these matters were reserved. On September 18, 2015, the court issued its order on the issues of the worker's compensation awards, the EEOC settlement, and the attorney fees issue. The court ordered the respondent to pay to the petitioner the sum of \$14,000 (previously determined to be approximately 20%) for the benefit and needs of the minor child from his 2010

worker's compensation settlement, 15% of the proceeds from the respondent's EEOC settlement, and 20% of the net proceeds of the pending 2012 worker's compensation claim upon settlement for the benefit and needs of the minor child.

¶ 17 Lastly, the court, finding a history of noncompliance by the respondent, awarded an additional \$3,000 in attorney fees to the petitioner's attorney to be paid by the respondent. "This is in addition to the attorney's fees which were awarded on October [30], 2013, and which remain due and owing \*\*\*."

¶ 18 Notice of appeal was timely filed *pro se* by the respondent on October 6, 2015.

¶ 19 ANALYSIS

¶ 20 On appeal, the respondent argues that (1) monies awarded pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2014)) constitute net income only to the extent they represent lost wages and only for the time the respondent would be obligated to pay support; (2) in a common law personal injury action, sums awarded as compensatory damages for pain and suffering and/or any other damages intended as a recoupment of capital, versus damages for lost income, are not considered as "income" for the purposes of calculating child support under section 505 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505 (West 2014)); and (3) the attorney fee award was an abuse of discretion.

¶ 21 We first begin by noting our standard of review. "Generally speaking, the modification of child support payments lies within the sound discretion of the trial court, and a trial court's modification order will not be disturbed on appeal, absent an abuse of discretion." *In re Marriage of Rogers*, 213 Ill. 2d 129, 135, 820 N.E.2d 386, 389 (2004)

(citing *In re Marriage of Bussey*, 108 Ill. 2d 286, 296, 483 N.E.2d 1229, 1223 (1985)). In the present case, however, we must determine whether the proceeds from the respondent's worker's compensation and wrongful termination settlements meet the statutory definition of "net income." "How a statute is interpreted is not a matter left to the trial court's discretion. It presents a question of law, which we review *de novo*." *Rogers*, 213 Ill. 2d at 135, 820 N.E.2d at 389 (citing *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 43, 802 N.E.2d 774, 777 (2003)). See also *In re Marriage of Fortner*, 2016 IL App (5th) 150246, ¶ 16, 52 N.E.3d 682. Regarding the award of attorney fees, "a trial court's decision to award or deny [attorney] fees will be reversed only if the trial court abused its discretion." *In re Marriage of Schneider*, 214 Ill. 2d 152, 174, 824 N.E.2d 177, 190 (2005) (citing *In re Marriage of Snow*, 277 Ill. App. 3d 642, 653, 660 N.E.2d 1347, 1354 (1996)). "A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court. [Citation.] Moreover, the burden is on the party seeking reversal \*\*\* to show an abuse of discretion." *Schneider*, 214 Ill. 2d at 173, 824 N.E.2d at 189 (citing *In re Marriage of Puls*, 268 Ill. App. 3d 882, 888, 645 N.E.2d 525, 529 (1994)).

¶ 22 The respondent's initial argument is twofold. First, he argues that only those portions of his worker's compensation settlements designated as lost wages are "net income" for child support purposes and, second, that the amount of lost wages/income should be prorated and awarded only for the period of time he would be responsible for paying support for the child. Therefore, he contends that the award of 20% of the whole

amount of the worker's compensation awards is an unwarranted deviation from the statutory guideline and a windfall to the petitioner. We disagree.

¶ 23 First, respondent errs in construing "net income" to simply mean "lost wages." Section 505(a)(3) of the Act defines net income for child support as "the total of all income from all sources" minus various enumerated deductions. 750 ILCS 5/505(a)(3) (West 2014). In *Fortner*, the respondent argued that the proceeds from a wrongful death settlement were not income for purposes of calculating child support because they represented compensatory damages for "grief and suffering" rather than economic gain or an increase in wealth. We rejected that argument, finding it at odds with the principle that the broad and expansive statutory definition of net income includes all benefits and gains received unless excluded by statute. We emphasized "that the \*\*\* Act creates a rebuttable presumption that any such gain or benefit is income for child support unless specifically excluded by the statute." *Fortner*, 2016 IL App (5th) 150246, ¶ 20, 52 N.E.3d 682 (citing *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280, 860 N.E.2d 539, 548 (2006), and *Department of Public Aid ex rel. Jennings v. White*, 286 Ill. App. 3d 213, 218, 675 N.E.2d 985, 988 (1997)). We further noted that "Illinois courts have [specifically] found all of the following types of payments received by noncustodial parents to fall within the statutory definition of income: *lump-sum worker's compensation awards*, individual retirement account distributions, military allowances, and pensions." (Emphasis added.) *Fortner*, 2016 IL App (5th) 150246, ¶ 18, 52 N.E.3d 682 (citing *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 54, 890 N.E.2d 1256, 1270 (2008)). Additionally, our colleagues in the Second District have held that "a lump-sum worker's



compensation award is contained within the broad definition of income set forth in section 505." *In re Marriage of Dodds*, 222 Ill. App. 3d 99, 103, 583 N.E.2d 608, 611 (1991) (a case our supreme court found to be "correctly decided" (*In re Marriage of Mayfield*, 2013 IL 114655, ¶ 18, 989 N.E.2d 601)). Based upon the foregoing, we find that lump-sum worker's compensation disbursements, in their entirety, are net income for purposes of calculating child support.

¶ 24 Our supreme court addressed the proration issue in *Mayfield*. In that case, the respondent argued that the circuit court's award of 20% of the entirety of a lump-sum worker's compensation settlement constituted child support beyond the minor's age of majority because the settlement was intended to replace lost wages over the respondent's life expectancy. Relying on *In re Marriage of Wolfe*, 298 Ill. App. 3d 510, 699 N.E.2d 190 (1998), the respondent argued for a "creative and equitable solution" to balance the competing interests of custodial parents in receiving child support and noncustodial parents who suffered the work-related injury in receiving compensation for that injury which could be resolved by a "prorated monthly amount of the lump-sum settlement, and not of the entire settlement." *Mayfield*, 2013 IL 144655, ¶ 20, 989 N.E.2d 601. In *Wolfe*, the cause was remanded as the personal injury award at issue in *Wolfe* was intended to compensate the husband for wages he would have earned during approximately 25 years of his expected work life, and the order essentially awarded the child, who was only 12 years from majority, child support for 25 years of future net income. However, the *Mayfield* court disagreed on the apportionment issue, stating:

"Under section 505(a)(2), the trial court must apply the guidelines, unless it finds that a deviation is appropriate based on the evidence presented by the parties on various factors; if it does, it must explain why. Seemingly, the trial court in *Wolfe* applied the guidelines and did not find a deviation was appropriate. But the appellate court still discerned a deviation based solely on the discrepancy between the years remaining on the husband's child support obligation and the years covered by his settlement. That holding, in effect, turns the statute on its head, requiring the trial court to justify an adherence to the guidelines, rather than a departure from them, when allocating a lump sum. *Wolfe* was wrongly decided and is, therefore, overruled." *Mayfield*, 2013 IL 114655, ¶ 23, 989 N.E.2d 601.

¶ 25 Therefore, in the case at bar, the trial court was required to order 20% for the child support award on the lump-sum worker's compensation awards unless it determined that the evidence warranted a deviation from the guidelines. Here, the trial court specifically stated, "it is far from persuaded that the Supreme Court made a blanket endorsement of Respondent's proposed allocation method, i.e., pro rate for the years of minority remaining to the child." The trial court found no reason to deviate from the statutory guideline and did not abuse its discretion in awarding 20% of the lump-sum worker's compensation awards as child support, as required by statute.

¶ 26 Analogizing his EEOC settlement to a personal injury settlement, the respondent next argues that "in common law personal injury action, sums awarded as compensatory damages for pain and suffering and/or any other damages intended as a recoupment of capital, versus damages for lost income, are not considered as 'income' for the purposes

of calculating child support under 750[ ]ILCS[ ]5/505." Relying on *Villanueva v. O'Gara*, 282 Ill. App. 3d 147, 668 N.E.2d 589 (1996), he argues that his EEOC settlement is not subject to the child support guidelines because the agreement between the parties states it "shall be recognized by the parties not as back pay, but as an [*sic*] a negotiated settlement of the employee's asserted claim for emotional distress."

¶ 27 In *Villanueva*, the mother sought a one-time 20% child support payment from the father's personal injury settlement. The trial court agreed, finding the personal injury settlement "income." On appeal, the Second District found that the entire amount was not "income," as personal injury awards serve to make the injured party whole. Therefore, the appellate court remanded the case with instructions to the trial court to determine the portion that represented lost earnings and to then find the correct child support award.

¶ 28 The respondent in *Fortner* also relied on *Villanueva*. In *Fortner*, the husband had received \$170,000 from a wrongful death settlement. The trial court found that the wrongful death settlement was not "income" for the purposes of child support, but it found that the settlement increased the husband's financial resources and, therefore, the child support award to the wife deserved a one-time upward deviation from the statutory guideline amount for a lump sum of \$15,000. On appeal, the husband argued the wrongful death settlement was analogous to the personal injury settlement in *Villanueva*. *Fortner*, 2016 IL App (5th) 150246, ¶ 9, 52 N.E.3d 682.

¶ 29 We reversed, stating that, "We believe *Villanueva* was wrongly decided, and we decline to follow it." *Fortner*, 2016 IL App (5th) 150246, ¶ 24, 52 N.E.3d 682. While

we upheld the \$15,000 award, we classified the wrongful death settlement as "income" in accordance with the broad and expansive statutory definition which "includes all benefits and gains received by a supporting parent unless such gains are excluded by statute." *Fortner*, 2016 IL App (5th) 150246, ¶ 26, 52 N.E.3d 682 (citing *Rogers*, 213 Ill. 2d at 136, 820 N.E.2d at 390). Further, "[b]ased on our foregoing discussion [on the broad statutory definition of 'income']", we believe this [wrongful death settlement] amount is more properly characterized as nonrecurring income in the year it was received." *Fortner*, 2016 IL App (5th) 150246, ¶ 34, 52 N.E.3d 682.

¶ 30 Thus, even if we accept that EEOC awards are analogous to personal injury awards, under *Fortner*, they are still "income" for child support purposes.

¶ 31 Finally, the respondent argues that the trial court's award of attorney fees was improper. He avers that he did not provide documents because of the fear of identity theft on the part of the petitioner; that he was in substantial compliance; that a majority of the discovery was "not necessary as the Petitioner is entitled to no monies from the personal Injury Settlement or the Workers Compensation Settlement with the City of Granite City"; and that he "had no paperwork on said case making much of the litigation and discovery requests unnecessary." The record reveals there were at least four orders to comply with discovery and an additional three orders to supplement discovery against the respondent, all with incomplete and/or partial responses. In awarding attorney fees, the trial court stated, "The Court has reviewed the pleadings and it finds that there is a history of non-compliance with discovery requests on the part of the Respondent. It also disagrees with him that much of this litigation and the ensuing discovery were

'unnecessary.' " We agree. Further, as the nature of the case was specifically regarding the worker's compensation awards and the EEOC monies, discovery regarding these cases would be deemed clearly relevant, if not imperative, to these proceedings. In fact, the trial court's order states that the petitioner had to go so far as to serve the respondent's EEOC attorney with a subpoena *duces tecum* to receive minimal documents regarding that case which were used by the petitioner at trial. Under the circumstances, the award of attorney fees against the respondent for his continuous failure to comply with discovery was not an abuse of discretion.

¶ 32

#### CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 34 Affirmed.