6-3-2009

Borley v. Smith Appellant's Reply Brief 1 Dckt. 35751

IN THE SUPREME COURT OF THE STATE OF IDAHO

DEBRA A. BORLEY,

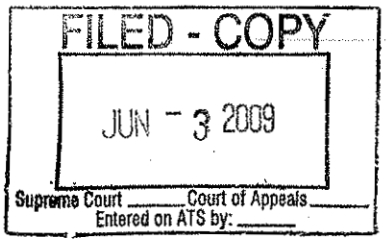
Plaintiff / Respondent,

vs.

KEVIN D. SMITH,

Defendant / Appellant.

Supreme Court No. 35751



APPELLANT / CROSS-RESPONDENT'S REPLY BRIEF

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

The Honorable Cheri C. Copsey, District Judge, Presiding

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A.

NATURE OF THE CASE

Defendant / Appellant / Cross-Respondent, Kevin D. Smith, hereinafter "Kevin," previously set forth his Nature of the Case in his Appellant's Brief and need not restate the same here.

B.

COURSE OF PROCEEDINGS IN THE MAGISTRATE COURT

Kevin previously set forth his Course of Proceedings in the Magistrate Court in his Appellant's Brief and need not restate the same here.

C.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Kevin previously set forth his Course of Proceedings in the District Court in his Appellant's Brief and need not restate the same here.

D.

STATEMENT OF FACTS

Kevin's Statement of Facts was previously set forth in his Appellant's Brief and need not restate the same here.

REPLY ARGUMENT

I.

PURSUANT TO THE "DOCTRINE OF MERGER," THE PROPERTY SETTLEMENT AGREEMENT ENTERED INTO BY THE PARTIES DID NOT MERGE INTO THE DECREE OF DIVORCE FILED ON SEPTEMBER 22, 2005.

In this action, Kevin and Plaintiff / Respondent / Cross-Appellant, Debra A. Borley, hereinafter "Debra," entered into two (2) agreements. The first agreement was the Property Settlement Agreement entered into on September 16, 2005. (R. pp. 19 – 29). Paragraph 10 of the Property Settlement Agreement states:

> 10. AGREEMENT TO BE MERGED: The parties hereto agree that in the event a divorce is entered, the original of this Agreement will be submitted to the court for approval and the parties hereto will request that this Agreement will be merged and incorporated and made a part of the Judgment and Decree of Divorce.

R. p. 24. The second agreement entered into by Kevin and Debra was the Stipulation that the Judgment and Decree of Divorce filed on September 22, 2005 be entered by the Court. (R. pp. 19 – 20). The specific language regarding merger in the Judgment and Decree of Divorce states:

> 2. PROPERTY SETTLEMENT AGREEMENT: The Property Settlement Agreement dated September 15, 2005 is approved by this court. The Property Settlement Agreement is approved by this Court, but it is not merged nor incorporated into this Judgment and Decree of Divorce. A copy of that Agreement is attached hereto. The parties have provided all of the terms of the said Agreement. (Emphasis added).

(R. pp. 19 – 20).

In Toyama v. Toyama, 1129 Idaho 142, 922 P.2d 1068 (1996), the Idaho Supreme Court held:

> As this Court has previously held, the rules of construction of contracts apply equally to the interpretation of divorce decrees. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). If the

> language in the decree is clear an unambiguous, determination of the its meaning and legal effect is a question of law upon which this Court exercises free review. *Id.*

129 Idaho at 144. The Judgment and Decree of Divorce filed in this action on September 22, 2005 is clear and unambiguous that the Property Settlement Agreement is not merged into the Judgment and Decree of Divorce.

The magistrate court and the district court erred in this action in ruling the Property Settlement Agreement did merge into the Judgment and Decree of Divorce. Both the magistrate court and the district court incorrectly attempted to read both agreements together, thereby creating an ambiguity. Pursuant to the doctrine of merger, it is the last agreement that controls. In Stuart v. D'Ascenz, 22 P.3d 540 (Col.App.2000), the Colorado Court of Appeals, citing a holding by the Tennessee Court of Appeals, held:

> Moreover, the parties' execution of the purchase agreement preceded the execution of the lease by five weeks. As such, the purchase agreement provisions merged into the unambiguous clause in the lease dealing with the same subject matter. *See Batterman v. Wells Fargo Ag Credit Corp.*, 802 P.2d 1112, 1115 (Colo.App.1990) ("[U]nder law of merger, prior agreements, covenants, and conversations are merged into the final, formal, written contracts executed by the parties."); *Davidson v. Davidson*, 916 S.W.2d 918, 922 (TennApp.1995) ("[T]he last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement.") (quoting *Magnolia Group v. Metropolitan Development & Housing Agency*, 783 S.W.2d 563, 566 (Tenn.App. 1989)).

22 P.3d at 542-543. In Davidson v. Davidson, 916 S.W.2d 918 (Tennessee App. 1995), the Tennessee Court of Appeals held:

> Wife further asserts that since the QDRO and the MDA are agreements respecting the same subject matter, the doctrine of merger applies. She correctly cites *Magnolia Group v. Metropolitan Dev. And Hous. Agency*, 783 S.W.2d 563, 566 (Tenn.App. 1989), for the

> proposition that "the last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement." (Emphasis added).

916 S.W.2d at 922.

In this action, the last agreement between Kevin and Debra was for the entry of a Judgment and Decree of Divorce that specifically stated the Property Settlement Agreement did not merge into the Judgment and Decree of Divorce. Because the Property Settlement Agreement did not merge into the Judgment and Decree of Divorce, the magistrate court had no jurisdiction over Debra's Motion to Divide Omitted Asset filed March 24, 2006. (Augmented Record, Exhibit "A.").

II.

THE MAGISTRATE COURT AND THE DISTRICT COURT HAD NO JURISDICTION TO MODIFY THE JUDGMENT AND DECREE OF DIVORCE PURSUANT TO THE DOCTRINE OF RES JUDICATA.

Even if the Property Settlement Agreement entered into by Kevin and Debra is merged into the Judgment and Decree of Divorce, the magistrate court and the district court had no jurisdiction to modify the Judgment and Decree of Divorce. McBride v. McBride, 112 Idaho 959, 961, 739 P.2d 258 (1987). Debra argues that the magistrate court had jurisdiction to grant Debra's Motion to Divide Omitted Asset. Debra's argument is correct, but only if there is an omitted asset. The magistrate court determined the convertible notes were not an omitted asset as the convertible notes were covered by paragraph 4 of the Property Settlement Agreement. Once this determination was made, the Court had no jurisdiction to further divide the convertible notes. Pursuant to paragraph 4 of the Property Settlement Agreement, Debra is entitled to 50% of the convertible notes that were accumulated during the parties' marriage.

None of the convertible notes were acquired until after Kevin and Debra divorced and therefore, the convertible notes are Kevin's separate property.

The district court ruled that the magistrate court had jurisdiction to enforce the Judgment and Decree of Divorce and divide the convertible notes. Debra did not bring a motion to enforce the Judgment and Decree of Divorce. As such, the enforcement of the Judgment and Decree of Divorce was not raised before the magistrate court and therefore, is not an issue on appeal.

In Borah v. McCandless, 147 Idaho 73, 205 P.3d 1209 (2009), the Idaho Supreme Court held:

> Generally, appellate review is limited to those issues raised in the lower court and this Court will not decide issues presented for the first time on appeal. *Barbee v. WMA Securities, Inc.*, 143 Idaho 391, 397, 146 P.3d 657, 663 (2006) (citing *Balser v. Kootenai County Bd. Of Comrs.*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986)). (Emphasis added).

205 P.3d at 1214. The district court erred in raising this issue *sua sponte* on appeal. Debra made no attempt in her Motion to Divide Omitted Asset to raise an issue as to enforcement of the Judgment and Decree of Divorce. Clearly, both the magistrate court and the district court concluded the convertible notes were controlled by paragraph 4 of the Property Settlement Agreement. Therefore, the convertible notes were not an omitted asset and the magistrate court had no jurisdiction to re-divide them.

III.

DEBRA'S ARGUMENT THAT THE CONVERTIBLE NOTES AND THE STOCK ALLOCATION ARE COMMUNITY PROPERTY HAS NO MERIT.

Debra argues that the convertible notes and stock allocation received by Kevin are community property. Debra further argues:

> These undivided assets need to be divided pursuant to paragraph 4 of the Property Settlement Agreement, or divided as "omitted assets" pursuant to Debra's earlier motion.

Respondent's / Cross-Appellant's Brief, p. 26. Both the magistrate court and the district court ruled the convertible notes were controlled by paragraph 4 of the Property Settlement Agreement which divided the marital portion, if any, on a 50 – 50 basis. As such, the convertible notes were not an omitted asset. Further, the convertible notes were accumulated and acquired after the parties' divorce was filed on September 22, 2005. The parties stipulated to the following facts regarding the convertible notes:

> 16. In order for a pilot to receive convertible note distributions / allocations, said pilot must have been employed on February 1, 2006, and have been a qualified member of the A plan as of December 30, 2004.
> 17. In determining a pilot's share of the convertible note allocations / distributions, United took into account each pilot's age, years left to retirement (which is reached at age 50) and seniority. United projected that the more seniority a pilot had, the greater the projection as to the aircraft that he/she would be flying at retirement. A pilot projected to be flying a 777 at the time of retirement versus a pilot that would be flying an A320 would be entitled to a greater allocation of convertible notes assuming that the pilots were of the same age. The one with greater seniority would be projected to be flying a more advanced aircraft with higher pay.

(Augmented Record, Exhibit J, pp. 6 – 7). Clearly, the convertible notes did not accrue until February 1, 2006. Black's Law dictionary 10 (5th ed. 1983) defines "accrue" in part as follows:

> **Accrue** /əkrúw/. To increase or accumulate; due and payable; vested.

Debra agreed in the Property Settlement Agreement to divide Kevin's United Airlines Retirement on an accrued benefit basis, not a time rule basis. As such, any retirement benefits that accrue after the parties' divorce are Kevin's separate property. Debra

seeks to keep her 50% share of Kevin's United Airlines retirement accrued during the marriage and also receive a portion of Kevin's retirement that accrued after marriage. This would clearly be inequitable and contrary to Idaho law. Hypothetically, if the "time rule" method had been used as the method to divide Kevin's United Airlines retirement, then Debra would be entitled to a portion of the convertible notes, however, her share of the United Airlines retirement that is now with the Pension Benefit Guarantee Association would be far less than 50%. Debra does not get the best of both retirement division methods used in the state of Idaho. It is also important to note that Kevin's share of the convertible notes were based on Kevin's age on February 1, 2006 until his retirement at age 60. The convertible notes were to compensate Kevin for a portion of the A-Plan he was losing from February 1, 2006 until retirement if the A-Plan had stayed in place.

With regard to the stock allocation, the magistrate court correctly ruled that the stock allocation was Kevin's separate property. First, in order to receive the stock allocation, Kevin had to be employed by United Airlines on February 1, 2006. Second, as the magistrate court correctly noted, that the stock allocation was divided pursuant to paragraph 13 of the Property Settlement Agreement. (R. pp. 39 – 41).

IV.

THE DISTRICT COURT ERRED WHEN IT RULED THE STOCK ALLOCATION WAS AN OMITTED ASSET.

Even if a portion of the stock allocation was earned during the parties' marriage, it was awarded to Kevin in paragraph 13 of the Property Settlement Agreement (R. pp. 24 – 25) as his share of the assets. The stock allocation is clearly property or income acquired by Kevin after the date the Property Settlement Agreement was entered into

by Kevin and is therefore, his separate property. The district court's holding that any portion of the stock allocation that related to the period of May 1, 2003 to the date of divorce is clearly community property is irrelevant as paragraph 13 of the Property Settlement Agreement awarded that share of the community property to Kevin as his separate property. (R. pp. 64 – 65, pp. 24 – 25). The district court's citation of Batra v. Batra, 135 Idaho 388, 17 P.3d 889 (2001) is misplaced. First, Batra is specific to stock options. The stock allocation Kevin received was not a stock option. Second, paragraph 13 of the Property Settlement Agreement clearly awarded the stock allocations to Kevin.

V.

DEBRA IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

Debra cites paragraph 15.03 of the Property Settlement Agreement in support of her claim that she is entitled to attorney's fees and costs she has incurred in bringing this action. Debra's argument is misplaced. Paragraph 15.03 of the Property Settlement Agreement provides:

> 15.03 If an action is instituted to enforce any of the terms of this Agreement, then the losing party agrees to pay to the prevailing party all costs and attorneys' fees incurred in that action. (Emphasis added).

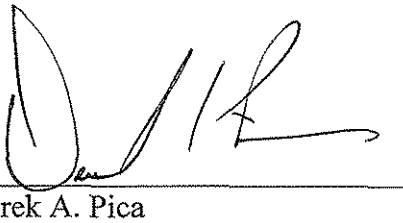
(R. p. 25). Even if Debra prevailed, she is not entitled to attorney's fees and costs because her Motion to Divide Omitted Assets does not seek to enforce the Property Settlement Agreement. In fact, Debra seeks to change the terms of the Property Settlement Agreement by arguing the convertible notes and the stock allocation were not included in the Property Settlement Agreement.

CONCLUSION

The Supreme Court should reverse both the magistrate court and the district court on the merger issue pursuant to the doctrine of merger as the Property Settlement Agreement did not merge into the Judgment and Decree of Divorce. Therefore, the magistrate court had no jurisdiction over Debra's Motion to Divide Omitted Assets. Further, the Supreme Court should reverse the magistrate court's decision awarding a portion of the convertible notes to Debra as those convertible notes are Kevin's separate property. With regard to the stock allocation, the Supreme Court should affirm the magistrate court's ruling that the stock allocation is Kevin's separate property and reverse the district court's ruling that a portion of the stock allocation is community property.

Finally, Kevin should be awarded attorney's fees and costs on appeal and below.

DATED this 3rd day of June, 2009.



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Attorney for Defendant / Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3rd day of June, 2009, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s)

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