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Borley v. Smith Appellant's Reply Brief 2 Dckt. 35751

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IN THE SUPREME COURT OF THE STATE OF IDAHO,

DEBRA A. BORLEY,

Plaintiff/Respondent/
Cross-Appellant,

Docket No. 35751-2008

v.

KEVIN D. SMITH,

Defendant/Appellant/
Cross-Respondent.

CROSS-APPELLANT'S REPLY BRIEF

**Appeal/Cross-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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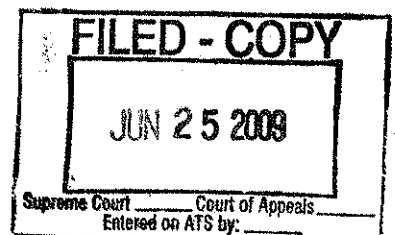


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STATEMENT OF CASE

A. **Nature of the Case:** Respondent/Cross-Appellant, Debra A. Borley (hereinafter “Debra”) previously set forth the Nature of the Case in Respondent/Cross-Appellant’s Brief filed on May 5, 2009.

B. **Course of Proceedings:** Debra previously set forth the Course of Proceedings in Respondent/Cross-Appellant’s Brief filed on May 5, 2009.

C. **Stipulated Facts:** Debra previously set forth the Stipulated Facts in Respondent/Cross-Appellant’s Brief filed on May 5, 2009.

D. **Additional Facts Available to the Magistrate Court:** Debra previously set forth the Additional Facts Available to the Magistrate Court in Respondent/Cross-Appellant’s Brief filed on May 5, 2009.

STANDARD OF REVIEW

Debra previously set forth the Standard of Review in Respondent/Cross-Appellant’s Brief filed on May 5, 2009.

ARGUMENT

A. **The Magistrate Court and the District Court Erred When They Failed to Award Debra Her Attorney Fees Pursuant to Paragraph 15.03 of the Property Settlement Agreement.**

Appellant/Cross-Respondent, Kevin D. Smith (hereinafter “Kevin”), asserts that Debra, even if she prevailed, is not entitled to an award of attorney fees and costs “because her Motion to Divide Omitted Assets does not seek to enforce the Property Settlement Agreement.” (Appellant/Cross-Respondent’s Reply Brief, p. 7.) Kevin’s position is shortsighted and ignores the undisputed facts.

Debra's March 24, 2006 Motion to Divide Omitted Assets specifically requests that attorney fees be awarded to her pursuant to paragraph 15.03 of the Property Settlement Agreement. (Augmented Record ["A.R."] No. 1.) Debra believed that the convertible notes and stock allocations represented a mere substitute for the loss of Kevin's pension plan. The magistrate court reached the same conclusion:

It is clear to this court that in fact the convertible notes are in fact compensation to the pilot for the termination of their "A Plan" (Defined Benefit Pension Plan) and therefore is a substitute for that defined benefit plan which would qualify it under paragraph four of the property settlement agreement as a division of retirement benefit received by Kevin from United Airlines.

(R. 00038) (emphasis added)

As previously set forth in Respondent's/Cross-Appellant's Brief, paragraph four of the Property Settlement Agreement mandated that Kevin's retirement benefits be divided equally. (R. 00022). The magistrate court ultimately held that the convertible notes did not constitute "an omitted asset, but rather [were] controlled by paragraph four [of the Property Settlement Agreement] under the division of retirement benefit and specifically under amounts to be received from United Airlines." (R. 00039.) Since the magistrate court found that paragraph four controlled the convertible notes issue, paragraph 15.03 of the Property Settlement Agreement should equally apply.

To reiterate, Kevin asserts that Debra is not entitled to attorney fees because she did not specifically seek enforcement of the parties' Judgment and Decree of Divorce. As set forth above, Debra, from the outset, sought enforcement of the parties' Judgment and Decree of Divorce. Further, this case represents an action in equity. *See McHugh v. McHugh*, 115 Idaho

198, 200, 766 P.2d 133, 135 (1988) (citing *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983).) “Further, equity having obtained jurisdiction of the subject matter of a dispute, will retain it for the settlement of all controversies between the parties with respect thereto **and will grant all proper relief whether prayed for or not.**” *Id.* (citing *Boesiger v. Freer*, 85 Idaho 551, 563, 381 P.2d 802, 809 (1963)) (emphasis added)

CONCLUSION

Based on the above, the magistrate court and the district court improperly concluded that Debra was not entitled to her attorney fees pursuant to paragraph 15.03 of the Property Settlement Agreement. Since the magistrate court agreed that the convertible notes should be divided pursuant to paragraph four of the Property Settlement Agreement, there is absolutely no justification for the failure to apply the terms and conditions set forth in paragraph 15.03. Debra was the prevailing party and should be awarded her attorney fees pursuant to paragraph 15.03 of the Property Settlement Agreement.

DATED this 26th day of June, 2009.

COSHO/HUMPHREY, LLP



MATTHEW R. BOHN

Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25th day of June, 2009, a true and correct copy of the within and foregoing instrument was served upon:

DEREK A. PICA
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Served by: U. S. Mail



MATTHEW R. BOHN