5-5-2009

Borley v. Smith Respondent's Brief Dckt. 35751

IN THE SUPREME COURT OF THE STATE OF IDAHO,

DEBRA A. BORLEY,

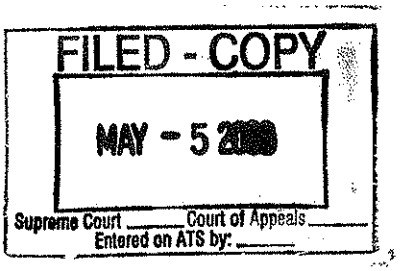
Plaintiff/Respondent/
Cross-Appellant,

v.

KEVIN D. SMITH,

Defendant/Appellant/
Cross-Respondent.

Docket No. 35751-2008



RESPONDENT'S/CROSS-APPELLANT'S 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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I.

STATEMENT OF THE CASE

A. Nature of the Case:

This appeal concerns the Conclusions of Law reached by the magistrate court in its November 20, 2007 Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset, and subsequently thereto, the district court's September 10, 2008 Decision on Appeal. (R., 00030-00042, and 00052-00066.)

B. Course of Proceedings:

The course of proceedings began with the Judgment and Decree of Divorce entered on September 22, 2005. (R., 00019-00029.)

On March 24, 2006, Plaintiff, Debra A. Borley (hereinafter "Debra"), filed a Motion to Divide Omitted Asset. (Augmented Record ["A.R."], No. 1.)

On April 18, 2006, Defendant, Kevin D. Smith (hereinafter "Kevin"), filed an Answer to Debra's Motion to Divide Omitted Asset. (R., 00004.)

The Court set a final hearing on Debra's Motion to Divide Omitted Asset for August 28, 2006. (R., 00030.)

On August 28, 2006, Debra renewed her request to vacate the trial based on the fact that Kevin had failed to answer discovery that was pertinent to the conclusion of Debra's case. (R., 00030.) After considering Debra's renewed request for a continuance based on Kevin's failure to respond to discovery, the court vacated the trial and directed that Kevin respond to all outstanding discovery. (R., 00030.)

On September 8, 2006, Kevin filed a Motion to Dismiss, claiming that there had been no assets omitted and also that the court lacked jurisdiction to hear this case. (R., 00030)

On September 27, 2006, the court reset Debra's Motion to Divide Omitted Asset for trial on April 27, 2007. (R., 00030.)

On October 10, 2006, the date set for the hearing on Kevin's Motion to Dismiss, neither party appeared, and therefore Kevin's Motion was deemed withdrawn. (R., 00030-00031.)

On March 27, 2007 (30 days prior to the trial date), Kevin filed a Motion for Summary Judgment with a supporting brief and affidavit. (R., 00031.)

On April 16, 2007, Debra filed an objection and response to the Motion for Summary Judgment, claiming that pursuant to the Idaho Rules of Civil Procedure, Kevin's Motion for Summary Judgment could not be brought since it was less than 60 days prior to the trial date. (R., 00031.)

After convening a status conference with counsel for each party, the court determined that Debra's objection to the timeliness of the Motion for Summary Judgment was proper. (R., 00031.) Each party, however, informed the court that they would submit a set of stipulated facts from which the court could decide on the appropriateness of Debra's Motion to Divide Omitted Asset. (R., 00031.) Thereafter, the court decided that it would treat the case as one having been submitted on cross motions for summary judgment. (R., 00031.)

Based on counsel's representations, the court vacated the hearing on Debra's Motion to Divide Omitted Asset, which was set for April 27, 2007. (R., 00031.)

On July 19, 2007, the court entered a final briefing schedule which required the stipulated set of facts be filed no later than August 1, 2007. (R., 00031.) The court required each party to

file simultaneous briefs on August 13, 2007, setting forth their respective positions regarding Debra's Motion to Divide Omitted Asset, and required that any reply brief be submitted no later than August 29, 2007. (R., 00031.)

In addition to the stipulated set of facts, the court indicated that it would consider the affidavits of both parties, excerpts from depositions of both parties, and documents received through discovery which were provided to Kevin through his employment with United Airlines as a pilot, both during and after the marriage of the parties. (R., 00032.)

On August 1, 2007, Plaintiff's and Defendant's Stipulated Facts were filed. (R., 00031.)

On August 13, 2007, Debra filed Plaintiff's Memorandum in Support of Motion to Divide Omitted Asset. (A.R., No. 17.)

On August 13, 2007, Kevin filed a Supplemental Memorandum in Support of Motion for Summary Judgment. (A.R., No. 12.)

On August 29, 2007, Debra filed Plaintiff's Short Reply to Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment. (A.R., No. 18.)

On October 10, 2007, the magistrate court entered its Memorandum Decision. (R., 00030-00042.)

On November 20, 2007, the magistrate court entered its Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset. (R., 00043-00045.)

On or about November 28, 2007, Kevin filed a Notice of Appeal to the district court. (R., 00046-00048.)

On December 4, 2007, Kevin filed a Memorandum of Costs and Affidavit of Derek Pica in the magistrate court. (A.R., Nos. 20, 21.)

On December 4, 2007, Debra filed a Memorandum of Costs and Attorney Fees in the magistrate court. (A.R., No. 19.)

On December 7, 2007, Kevin filed an Objection to Plaintiff's Memorandum for Attorney Fees and Costs in the magistrate court. (A.R., No. 22.)

On December 13, 2007, Debra filed an Objection to Memorandum of Costs and Affidavit of Derek Pica in the magistrate court. (A.R., No. 23.)

On December 28, 2007, Debra filed a Notice of Cross Appeal to the district court. (R., 00049-00051.)

On January 29, 2008, the parties filed a Stipulation for Extension of Time to File Respondent's Brief in the district court. (R., 00007.)

On January 3, 2008, Kevin filed Appellant's Brief in the district court. (A.R., No. 25.)

On January 31, 2008, the district court entered an Order Granting Extension of Time to File Respondent's Brief. (R., 00007.)

On February 7, 2008, Debra filed Cross-Appellant's Brief in the district court. (A.R., No. 28.)

On February 28, 2008, the court entered its Order Denying Attorney Fees in the magistrate court. (A.R., No. 24.)

On February 28, 2008, Kevin filed Cross Respondent's Brief in the district court. (A.R., No. 29.)

On February 29, 2008, Debra filed Respondent's Brief in the district court. (A.R., No. 26.)

On March 21, 2008, Kevin filed Appellant's Reply Brief in the district court. (A.R., No. 27.)

On September 10, 2008, the district court filed its Decision on Appeal. (R., 00052-00066.)

On October 8, 2008, Kevin filed a Notice of Appeal to the Idaho Supreme Court. (R., 00067-00069.)

On October 29, 2008, Debra filed a Notice of Cross-Appeal to the Idaho Supreme Court. (R., 00070-00072.)

On or about February 3, 2009, Kevin filed a Motion for Extension of Time in which to file Appellant's Brief.

On February 4, 2009, the parties filed a joint Stipulation to Augment Record in the Supreme Court. (A.R., ¶ 1).

On February 4, 2009, the Supreme Court filed its Order Granting Extension of Time (CV).

On February 11, 2009, the Supreme Court filed its Order Granting Motion to Augment and to Suspend the Briefing Schedule. (A.R., ¶ 1.)

On March 10, 2009, Kevin filed Appellant's Brief.

On April 3, 2009, Debra filed a Motion for Extension of Time to File Respondent/Cross-Appellant's Brief, and Affidavit of Matthew R. Bohn in Support of Motion for Extension of Time to File Respondent/Cross-Appellant's Brief.

On April 7, 2009, this Court entered its Order Granting Extension of Time – Brief(s) on Cross-Appeals.

C. **Stipulated Facts:**

1. Kevin and Debra were common law married on August 1, 1988 and ceremonially married on or about June 4, 1994. (R., 00021, ¶ 1.01 and A.R., 10, p. 1, ¶ 2.)

2. Kevin began working as a pilot for United Airlines ("United") in October 1990. (A.R., No. 10, p. 2, ¶ 2.)

3. On or about December 9, 2002, United filed for bankruptcy protection. (A.R., No. 10, p. 2, ¶ 3.)

4. As a result of United seeking bankruptcy protections, "[The] pilots agreed to concessions including reduced pay, loss of work benefits, and loss of pensions in the 2003 restructured agreement." (A.R., No. 10, p. 2, ¶ 4.)

5. In May of 2001, United stated that if the pilots' "A Plan" (Defined Benefit Retirement Plan) was terminated, its pilots would be compensated as follows:

> 7. Convertible Notes. In the event that the A Plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination, the Revised 2003 Pilot Agreement and the Plan of Reorganization shall provide for the issuance of $550 Million of UAL convertible notes as described in Exhibit "D" to this letter of agreement to a trust or other entity designated by the Association. The terms of the UAL convertible notes described in Exhibit "D" shall be subject to mutually acceptable modifications to optimize implementation for all parties from an accounting, securities law and tax law perspective.

(A.R., No. 10, p. 2, ¶ 5.)

6. The pilots' A Plan was terminated by the Bankruptcy Court effective December 30, 2004. (A.R., No. 10, p. 2, ¶ 6.)

7. After termination of the A Plan on December 30, 2004, the Pension Benefit Guarantee Corporation Insurance System replaced, in limited part, the pension benefits the pilots had accrued under the A Plan through December 30, 2004. (A.R., No. 10, p. 3, ¶ 7.)

8. On September 22, 2005, Debra and Kevin were divorced pursuant to a Judgment and Decree of Divorce which, in pertinent part, set forth the following:

> 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.
>
> > 2. **TRANSFERS TO WIFE**: The Husband hereby agrees to, and by this Agreement he does hereby transfer, assign and convey unto the Wife as her sole and separate property, and does hereby forever waive any and all rights in and to, the items more particularly described as follows:
> >
> > > 2.01 Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Wife is awarded the items under the column entitled "To Wife" as indicated with a dollar amount or an "x".
> > >
> > > 2.02 Any other property in her possession or under her control except those items specifically being awarded to the Husband.
> >
> > 3. **TRANSFERS TO HUSBAND**: The Wife hereby agrees to, and by this Agreement she does hereby transfer, assign and convey unto the Husband as his sole and separate property, and does hereby forever waive any and all rights in and to, the items of property more particularly described as follows:

3.01 Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Husband is awarded the items under the column entitled "To Husband" as indicated with a dollar amount or an "x".

3.02 Any other property in his possession or under his control except those items specifically being awarded to the Wife.

4. **DIVISION OF RETIREMENT BENEFITS.** Husband has been employed by United Airlines and has a pension, either with United Airlines, or now with Pension Benefit Guarantee Association. Wife shall receive fifty percent (50%) of the benefit accumulated by Husband during the marriage to be set over to her pursuant to a In order for a pilot to receive stock distributions/allocations, said pilot must have been employed on May 1, 2003. Qualified Domestic Relations Order.

. . .

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 be merged and incorporated and made a part of the Judgment and Decree of Divorce.

13. **SEPARATE PROPERTY/INCOME AFTER SIGNING OF AGREEMENT**: The parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any and all property or income acquired or earned by either party hereto shall be the separate property of the party who has acquired or earned it and the other party shall have no claim thereon. The parties agree that any income earned by either party after the date of signing this Agreement shall be the separate property of the party earning the income, and any income on separate property shall be separate property from and after the date of signing this agreement.

15. **MISCELLANEOUS PROVISIONS**:

* * *

15.04 Each of the parties hereto represents to the other that they have made full disclosure of all community assets and community liabilities of which they are aware.

(A.R., No. 10, p. 3-5, ¶ 8.)

9. Pursuant to the Revised 2003 Pilot Agreement, on or about February 9, 2006, Kevin received 1,616 shares of United stock (known as the stock allocations/distributions referenced in paragraph 16 herein (hereafter "stock allocations"), valued at approximately $27 per share. (A.R., No. 10, p. 5, ¶ 9.)

10. In addition to the stock allocations, Kevin also received convertible notes (known as the convertible note allocations/distributions (hereafter "convertible notes") in February of 2006 valued at $30,707.36 directly deposited into a Schwab IRA account and received an additional $25,229.84 in convertible notes in March of 2007. These convertible notes represented United's attempt to compensate the pilots for the loss of their A plan. (A.R., No. 10, p. 5, ¶ 10.)

11. Kevin received an additional 406 shares of stock as part of the stock allocations, valued at approximately $27 per share. (A.R., No. 10, p. 5, ¶ 11.)

12. Kevin received additional stock distributions as part of the stock allocations, but is unsure as to the number of shares, value, etc. (A.R., No. 10, p. 5, ¶ 12.)

13. On June 23, 2006, United represented that the convertible notes received by their pilots represented consideration for the loss of their "A Plan." Pursuant to a "question and answer" outline, United stated the following:

> **Question 1**: I understand that eligible pilots will receive cash proceeds from the ALPA convertible note sometime in August 2006. Why am I receiving these proceeds?
>
> > **Answer 1**: As part of the Bankruptcy Exit Agreement, [the pilots] negotiated the right to receive $550M, face amount, in Senior Subordinated Convertible Notes to be issued by UAL not later than 100 days after exit from bankruptcy. The MEC . . . adopted an allocation methodology under which the Notes [would] be sold as soon as possible after issuance and the net proceeds of the sale . . . applied as a partial offset to the losses suffered by the pilots as a result of termination of [their] A plan.

(A.R., No. 10, p. 5-6, ¶ 13.)

14. In order for a pilot to be eligible to receive the stock allocations, said pilot must have been employed on May 1, 2003. For the pilot to actually receive any of the stock allocations, the pilot must have been employed by United Airlines on February 1, 2006. (A.R., No. 10, p. 6, ¶ 14.)

15. The stock allocations that each eligible pilot received attempted to compensate the pilots for the work rules, compensation, and work benefits that each pilot lost as a result of restructuring their collective bargaining agreement, which is to run from May 1, 2003 through December 31, 2009. (A.R., No. 10, p. 6, ¶ 15.)

16. In order for a pilot to receive the convertible notes, 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. (A.R., No. 10, p. 6, ¶ 16.)

17. In determining a pilot's share of the convertible notes, United took into account each pilot's age, years left to retirement (which is reached at age 60) 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 his 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. (A.R., No. 10, pp. 6-7, ¶ 17.)

18. Once a pilot received either the convertible notes, and/or the stock allocations, he could immediately cease his employment without any obligation to return any of the originating funds from the convertible notes and/or stock allocations. (A.R., No. 10, p. 7, ¶ 18.)

19. Kevin remains employed by United as a pilot. (A.R., No. 10, p. 7, ¶ 19.)

D. <u>Additional Facts Available to the Magistrate Court:</u>

The convertible notes and stock allocations were not included in the Property Settlement Agreement by Debra because she forgot about them as she was "emotionally distraught" due to Kevin's infidelity. (A.R., No. 10, p. 7, ¶ 21, and A.R., No. 16, Exh. 5 (Deposition of Debra A. Borley, taken February 9, 2007, p. 19, Ll. 13-25, p. 20, Ll. 1-2).) Kevin did not volunteer the information concerning the convertible notes and stock allocations at the time the Property Settlement Agreement was prepared, and Debra had forgotten about the information. (A.R., No. 10, p. 7, ¶ 21, and A.R., No. 16, Exh. 5 (Deposition of Debra A. Borley, taken February 9, 2007, p. 19, Ll. 13-25, p. 20, Ll. 1-2).)

II.

ADDITIONAL ISSUES ON APPEAL

A. Is Debra entitled to an award of attorney fees and costs on appeal pursuant to Idaho Appellate Rules 35(a)(5), 40, 41 and paragraph 15.03 of the Property Settlement Agreement?

Yes, Debra should be awarded her attorney fees and costs pursuant to Idaho Appellate Rules 35(a)(5), 40 and 41, and paragraph 15.03 of the Property Settlement Agreement, attached to the September 22, 2005 Judgment and Decree of Divorce, which states the following:

> 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.

(September 22, 2005, Judgment and Decree of Divorce, Property Settlement Agreement, ¶ 15.03.) (emphasis added).

In the instant matter, it is beyond question that Debra should be considered the prevailing party and be awarded her attorney fees on this appeal. On November 20, 2007, the magistrate court entered an order granting in part and denying in part Plaintiff's Motion to Divide an Omitted Asset. In other words, Debra went from having no interest in the United settlement to being awarded a significant interest therein. Clearly, she should be considered the prevailing party pursuant to paragraph 15.03, cited above, as the prevailing party. Consequently, Debra should be awarded all costs and attorney fees incurred in this appeal.

III.

STANDARD OF REVIEW

"In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002), citing *Eagle Water Co., Inc. v. Roundy Pole Fence Co., Inc.*, 134 Idaho 626, 7 P.3d 1103 (2000).

As this Court is well aware, under Rule 56, I.R.C.P., summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *McColm-Traska v. Baker, 88 P.3d 767* (Idaho 2004), *Gardner v. Evans,* 110 Idaho 925, 929, 719 P.2d 1185, 1188 (1986), *Sewell v. Nielsen, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985); *Arnold v. Diet Center, Inc.*, 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987).

"The motion for summary judgment provides a more expeditious and effective procedure for quickly terminating an action that does not appear to entitle the plaintiff to relief on its substantive merits." *Harper v. Harper,* 122 Idaho 535, 538, 835 P.2d 1346, 1349 (Ct.App 1992

Pertinent to this case, if an action will be tried before the Court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. (*See, Riverside Development Co. v. Ritchie,* 103 Idaho 515, 650 P.2d 657 (1982); *see also, Anderson v. Farm Bureau Mutual Ins. Co.,* 112 Idaho 461, 732 P.2d 699 (Ct.App. 1987).

Further, the Idaho Supreme Court has "repeatedly stated that when reviewing a decision of the district court acting in its appellate capacity, this Court will review the record and the magistrate court's decision independently of, but with due regard for, the district court's decision." *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). Succinctly stated:

> [t]he Supreme Court reviews the trial court's (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate court's findings of fact, and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom, and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Id. at 672, 183 P.3d at 760.

In this case, the magistrate court and the district court considered and reviewed the Stipulated Facts dated August 1, 2007; considered the affidavits of both parties, excerpts from depositions of both parties, and documents received through discovery which were provided to Kevin through his employment with United as a pilot, both during and after the parties' marriage. (R., 00030-00042, and R., 00052-00058.) After reviewing this information, the lower courts held as follows:

1. Magistrate Court: Determined that Debra's Motion to Divide an Omitted Asset, as it pertained to the convertible notes, should be granted, and determined that Debra's Motion to Divided an Omitted Asset, as it pertained to the stock allocations, should be denied. (R., 00043-00045.)

2. District Court: Affirmed the magistrate court's opinion with respect to the convertible notes, but ordered that the "accrued benefit method" be utilized as opposed to the lower court's utilization of a modified "time rule method." (R., 00063-00064.) The district court also held that the stock allocations constituted an omitted asset, and ordered that the magistrate court should "determine what portion of the stock allocations were 'earned' before September 22, 2005, the date of divorce, and then divide that portion between the parties as equity requires." (R., 00064-00065.)

III.

ARGUMENT

1. Neither the Magistrate Court nor the District Court Erred When It Determined that the Property Settlement Agreement Was Merged into the Judgment and Decree of Divorce.

Contrary to Kevin's assertion, there is no clear and convincing evidence supporting the non-merger of the Property Settlement Agreement. Paragraph 10 of the Property Settlement Agreement specifically states that it is to be merged into the Judgment and Decree of Divorce. (R., 00024, ¶ 10.) Each party executed this document before a notary public. (R., 00026-00027.) By its terms, the Property Settlement Agreement reveals that the parties intended it to be merged into the Judgment and Decree of Divorce.

In *Phillips v. Phillips,* 93 Idaho 384, 462 P.2d 49 (1969), this Court noted that

> When parties enter into an agreement of separation in contemplation of divorce and thereafter the agreement is presented to a District Court in which a divorce action is pending and the court is requested to approve, ratify or confirm the agreement, certain presumptions arise. In the absence of clear and convincing evidence to the contrary, it will be presumed that each provision of such an agreement is independent of all other provisions and that

> such agreement is not integrated; it will be further presumed that the agreement is merged into the decree of divorce, is enforceable as a part thereof and if necessary may be modified by the court in the future.

Phillips, at 387, 462 P.2d at 52.

Neither the magistrate court nor the district court was faced with clear and convincing evidence overcoming the presumption of merger as set forth in *Phillips.* Again, the Property Settlement Agreement executed by the parties before a notary public on September 15, 2005 and September 16, 2005 respectively, confirms that it was to be "merged and incorporated and made a part of the Judgment and Decree of Divorce." (R., 00024, ¶ 10.)

Inexplicably, however, the September 22, 2005 Judgment and Decree of Divorce states that although the Property Settlement Agreement "is approved by this Court, ... it is not merged nor incorporated into this Judgment and Decree of Divorce." (R., 00019-00020.) Faced with this contradiction of terms, the magistrate court and the district court reached the same conclusion: there was no clear and convincing evidence to support the non-merger of the Property Settlement Agreement.

Consequently, the magistrate court, along with the district court, correctly characterized the ambiguity contained within the Judgment and Decree of Divorce and the Property Settlement Agreement:

> Smith argues that because the language in the Judgment and Divorce Decree is unambiguous, the Court must exercise free review over the magistrate court's decision. This argument is misplaced. It is true that the language of the divorce decree when taken alone is unambiguous, but in making his determination the magistrate court considered both the agreement and the decree. When these two documents are read together they are ambiguous as to the parties' intent. Consequently, their interpretation is a

> question of fact and the Court must review the magistrate court's findings only to determine whether they were based on substantial and competent evidence. The Court finds his findings are based on substantial competent evidence and, therefore, the Court upholds his determination.

(R., 00060-00061.)

The presumption set forth in *Phillips* controls. The lack of clear and convincing evidence mandates that the Property Settlement Agreement was merged into the parties September 22, 2005 Judgment and Decree of Divorce. Based on the above, the lower courts did not err in reaching the conclusion that the Property Settlement Agreement was merged in the September 22, 2005 Judgment and Decree of Divorce.

2. Neither the Magistrate Court nor the District Court Modified the Judgment and Decree of Divorce.

At the outset, it should be noted that contrary to Kevin's assertion, whether the Property Settlement Agreement was merged into the September 22, 2005 Judgment and Decree of Divorce is a non-issue in light of the relief originally sought by Debra. Again, Debra filed a Motion To Divide Omitted Asset; she did not seek "modification" of the Judgment and Decree of Divorce. (A.R., p. 1, No. 1.) The magistrate court clearly had the authority and jurisdiction to grant Debra's Motion to Divide Omitted Asset. After all, an action for divorce is 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).) Citing *Barnard & Son, Inc., v. Atkins*, 109 Idaho 466, 469, 708 P.2d 871, 874 (1985), this Court stated, "General maxims of equity dictate that once the equitable jurisdiction of the court has attached, the court should retain jurisdiction to resolve all portions of the dispute between the parties and render equity to all parties." *McHugh, supra*, at 200, 766 P.2d at 135. This Court, citing with approval to several California cases, noted that "[t]he courts accord special treatment in equity actions, and that an action to divide an omitted asset in the context of a divorce proceeding is an action in equity, and that such does not seek to modify or reopen the previous final judgment of dissolution." *Id.*

Debra merely requested that the magistrate court divide an omitted asset; she did not, nor is she currently, asking any court to modify the September 22, 2005 Judgment and Decree of Divorce. Debra's Motion to Divide Omitted Asset, by its terms, sought division of assets (convertible notes and stock allocations) that were not included in the September 22, 2005 Judgment and Decree of Divorce, nor considered by the parties prior to executing the Property Settlement Agreement attached thereto. Even if this Court finds that the Property Settlement Agreement was not merged and incorporated into the parties' September 22, 2005 Judgment and Decree of Divorce, that fact alone did not eliminate the magistrate court's jurisdiction to divide the same as omitted assets.

By definition, "omitted" means that it was not included. Importantly, the magistrate court stated the following:

> This court believes that in fact this is not an omitted asset but rather controlled by paragraph four under the division of retirement benefit and specifically under amounts to be received from United Airlines.

> **If however, this matter is appealed and it is determined that in fact this is not to be considered under paragraph four then this court would rule that in fact this was an omitted asset and require the division as set forth above.**

(R., 00039, ¶¶ 4-5.) (Emphasis added.) Thus, the magistrate court concluded that the convertible notes fell under paragraph four of the Property Settlement agreement and should be divided as set forth therein, or, at the very least, constituted an "omitted asset." Either way, the magistrate court determined that this asset needed to be divided.

The underlying principle of Idaho law is that property acquired during the course of marriage should be divided equitably between the parties pursuant to I.C. § 32-712. Both the magistrate court and the district court attempted to do just that. Therefore, the lower courts' decisions concerning the division of the convertible notes should be upheld and said notes should be divided pursuant to the "time rule" formula: number of months that Kevin and Debra were married while Kevin was employed by United divided by the number of months that Kevin was employed by United, multiplied by convertible notes received multiplied by one-half equals Debra's share.

3. The Convertible Notes and the Stock Allocations Represent Community Property Assets Pursuant to Paragraph 4 of the Property Settlement Agreement or Omitted Assets Which Should Be Divided.

Contrary to Kevin's position, neither the convertible notes nor the stock allocations represent Kevin's separate property. The stipulated facts make it very clear that the convertible notes and the stock allocations received by Kevin represented undivided community assets.

Again, the convertible notes were provided to United pilots, including Kevin, as a partial offset to the losses suffered as a result of termination of their A Plan. (A.R., No. 10, p. 5 ¶ 10.)

Moreover, in order to qualify for these convertible notes, Kevin had to have been a qualified member of the A Plan as of December 30, 2004. (A.R., No. 10, p. 6, ¶ 16.) Kevin began working for United as a pilot in October of 1990. (A.R., No. 10, p. 2, ¶ 2.) Kevin was a qualified member of the United "A Plan" as of December 30, 2004. (A.R., No. 10, p. 5, ¶¶ 10 and 11, and p. 6, ¶ 16.) To be perfectly clear, the convertible notes represented an attempt by United to appease their pilots as a result of the loss of their "A Plan." (A.R., No. 10, p. 5, ¶¶ 10, 11 and 13.) This fact is further borne out by the following:

> 7. Convertible Notes. In the event that the A plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination, the revised 2003 Pilot Agreement and the Plan of Reorganization shall provide for the issuance of $550 Million of UAL convertible notes as described in Exhibit "D" to this letter of agreement to a trust or other entity designated by the Association. The terms of the UAL convertible notes described in Exhibit "D" shall be subject to mutually acceptable modifications to optimize implementation for all parties from an accounting, securities law and tax law perspective.

(A. R., No. 10, p. 2, ¶ 5.)

Like the convertible notes, the stock allocations also represented an attempt by United to compensate their pilots for losses suffered as a result of restructuring. (A.R., No. 10, p. 6, ¶ 15.) In order for a pilot, like Kevin, to receive the stock allocations, he must have been employed on May 1, 2003. (A.R., No. 10, p. 6, ¶ 14.) Kevin easily qualified for these stock allocations as his continuing employment with United began in October of 1990. (A.R., No. 10, p. 2, ¶ 2.) Consequently, Kevin received multiple stock allocations following United's emergence from bankruptcy in February of 2006. (A.R., No. 10, p. 5 at ¶¶ 9, 10, 11 and 12.) These allocations represented compensation that Kevin lost as a result of the restructuring of his collective

bargaining agreement, which runs from May 1, 2003 through December 31, 2009. (A.R., No. 10, p. 6, ¶ 15.)

Neither the 2003 Restructured Agreement, nor any subsequent letters, required United pilots to maintain their employment after receipt of the convertible notes and/or stock allocations in question. (A.R., No. 10, p. 7, ¶ 18.) In fact, pilots could immediately terminate their employment following receipt of the convertible notes and/or stock allocations, without being required to return any of the funds. (A.R., No. 10, p. 7, ¶ 18.) Although based in part on projections of one kind or another, it is undisputed that these community assets were received by Kevin, did not need to be returned by Kevin, were earned during the parties' marriage, and would represent a windfall to Kevin if he is permitted to retain an undivided interest in the same. 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.

The funds generated by the convertible notes, as well as the stock allocations, do not represent post-divorce income. The undisputed facts in this case make it impossible for Kevin to assert otherwise. Kevin and Debra were married while United was in bankruptcy, and while these benefits and protections were being negotiated on Kevin's behalf as a United pilot. (A.R., No. 10.) As set forth in the Judgment and Decree of Divorce, the parties were not divorced until September 22, 2005. (R., 00019.) Therefore, the convertible notes and stock allocations represent community assets, which should have been divided via the September 22, 2005 Judgment and Decree of Divorce but were not.

Notwithstanding the above, however, Kevin asserts that the "stock allocation [he] received is clearly income he acquired after the filing of the Judgment and Decree of Divorce on

September 22, 2005, ..." because he "did not become the owner of the stock allocation until February 1, 2006." (Appellant's Brief, p. 11, ¶ 5.) Kevin's reliance on mere receipt is misplaced. As the facts demonstrate, Kevin and Debra acquired the right to the convertible notes and stock allocations on May 1, 2003 and December 30, 2004 respectively. (A.R., No. 10, p. 6, ¶¶ 14, 15 and 16.) In other words, Kevin and Debra "acquired" the rights to the convertible notes and the stock allocations many months prior to their September 22, 2005 divorce.

In *Batra v. Batra*, 135 Idaho 388, 17 P.3d 889 (2001), the Idaho Supreme Court rejected an argument similar to Kevin's "because it ignores a basic proposition of community property law [that] 'income derived from a husband's or wife's efforts, labor and industry' during the marriage is community property." *Id.*, at 393, 17 P.3d at 894; citing *Hiatt v. Hiatt*, 94 Idaho 367, 368, 487 P.2d 1121, 1121 (1971); *Wood v. Wood*, 124 Idaho 12, 15 855 P.2d 473, 476 (Ct. App. 1993). The stock allocations as well as the convertible notes, represented compensation earned during the marriage:

> 7. Convertible Notes. In the event that the A plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination, the revised 2003 Pilot Agreement and the Plan of Reorganization shall provide for the issuance of $550 Million of UAL convertible notes as described in Exhibit "D" to this letter of agreement to a trust or other entity designated by the Association. The terms of the UAL convertible notes described in Exhibit "D" shall be subject to mutually acceptable modifications to optimize implementation for all parties from an accounting, securities law and tax law perspective.
>
> * * *
>
> 15. The stock distributions/stock allocations that each eligible pilot received attempted to compensate the pilots for the work rules, compensation, and work benefits that they lost as a result of

> restructuring their collective bargaining agreement, which is to run from May 1, 2003 through December 31, 2009.
>
> 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 60) 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 his 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.

(A.R., No. 10, p. 2, ¶ 5; p. 4, ¶ 15, and p. 6 ¶ 17.)

To reiterate, the parties were divorced on September 22, 2005. Kevin began to receive the stock allocations in February of 2006, a mere five months later. The stock allocations represented compensation for "the pilots for work rules, compensation and work benefits that they lost as a result of restructuring their collective bargaining agreement" between May 1, 2003 and December 31, 2009. For all but five months of Kevin's employment, he was married to Debra. Clearly, these allocations constituted community income and therefore, pursuant to *Batra, supra.,* the community interest in the same should be divided pursuant to the *Batra* formula.

4. The District Court Did Not Err When it Reversed the Magistrate Court on the Issue of Whether the Stock Allocations Constitutes an Omitted Asset.

In pertinent part, the magistrate court's October 10, 2007 Memorandum Decision, states the following:

> With regards to the stock allocation, it is clear to this court pursuant to the February 9, 2006 letter marked Exhibit "3" to

> Matthew Bohn's Affidavit of April 16, 2007, the income received from the sale of United stock was paid to the pilots because they gave up significant compensation pursuant to work rules, work benefits and regular compensation to allow for United airlines to go through and exit bankruptcy.
>
> ...
>
> Regardless of the above, it is clear from Debra's deposition taken on February 9, 2007 that she was well aware of United Airlines offers to compensate the pilots during the bankruptcy in order to resolve the restructuring issues facing United Airlines.
>
> Debra specifically testified that she understood that sometime in the future the pilots of United Airlines including Kevin could possibly be compensated for them having their retirement taken away and agreeing to pay cuts during the restructuring.
>
> Debra also testified that she was specifically aware of this possibility when she and Kevin entered into the settlement agreement that is the subject of this litigation.
>
> Therefore, based on the Stipulated Facts and the deposition of Debra and United Airlines documents reviewed by this court, it is clear that the stock allocation would fall under paragraph 13 of the Property Settlement Agreement and would be Kevin's sole and separate property.

(R., 00039-00040.) Incorrectly, the magistrate court failed to recognize Debra's undisputed/uncontroverted testimony that the stock allocations were not included in the Property Settlement Agreement because Debra was "emotionally distraught" due to Kevin's unfaithfulness. (A.R., No. 10, p. 7, ¶ 21, and A.R., No. 16, Exh. 5 (Deposition of Debra A. Borley, taken February 9, 2007, p. 19, Ll. 13-25, p. 20, Ll. 1-2).)

Further, it is also uncontroverted that Kevin did not raise any issues or volunteer any information about the convertible notes and/or stock allocations that he would be receiving in the near future at the time the parties executed the Property Settlement Agreement. (A.R., No. 10, p.

7, ¶ 21, and A.R., No. 16, Exh. 5 (Deposition of Debra A. Borley, taken February 9, 2007, p. 19, Ll. 13-25, p. 20, Ll. 1-2).)

The mere fact that Debra knew at one point in time that Kevin would be receiving "stock allocations" at some point in the future, does not prevent the magistrate court from dividing the same as an omitted asset at a later date.

As the district court correctly pointed out:

> An examination of the stipulated facts reveals that the stock allocations were meant to compensate United Airlines' pilots for "the work rules, compensation, and work benefits that they lost as a result of restructuring their collective bargaining agreement, which is to run from May 1, 2003 through December 31, 2009." Presumably, a portion of the stock allocations received by Smith represented the loss of work rules, compensation, and work benefits suffered between May 1, 2003 and the date of the divorce. This portion is clearly community property not covered by the terms of the settlement agreement. As such, it is an omitted asset and must be divided equitably between the parties.
>
> Furthermore, Idaho courts have rejected Smith's argument that since vesting of the stock allocations was contingent upon his continued employment through February 1, 2006, the allocations constituted separate property. *Batra*, 135 Idaho at 393 17 P.3d at 894 (finding that stock options which vested after date of divorce were partially earned from the plaintiff-appellant's labor during marriage and, thus, the community had a fractional interest in the stock options vesting in the months following the divorce).

(R., 00064-00065.) At the very least, the district court recognized that the stock allocations represented a loss resulting from a change in work rules, compensation and benefits suffered by United pilots, including Kevin, between May 1, 2003 and the date of the parties' divorce, September 22, 2005. (R., 00064-00065.)

In 1994, the Idaho Court of Appeals noted that "Most jurisdictions hold that if a final decree of divorce fails to dispose of community property, the former spouses own the omitted property equally as tenants in common." *Clark v. Clark*, 125 Idaho 173, 175, 868 P.2d 501, 503 (Ct.App. 1994). The Court of Appeals further noted that "It is not strictly accurate to define this ownership after divorce by common-law terms, such as tenancy in common, ... it is rather a form of joint ownership, peculiar to the civil law community property system." *Id.* (*citing DeFUNIAK*, Principles of Community Property § 229 (2d ed. 1971)).

This Court has held that "It is well established that without an appeal from an original decree of divorce the property division portions of that decree are final, *res judicata*, and no jurisdiction exists to modify property provisions of a divorce decree." *Ratkowski v. Ratkowski*, 115 Idaho 692, 693, 769 P.2d 569, 570 (1989). However, this Court further explained that it is not a modification of a divorce decree when the court is enforcing the terms of its own decree. *See Id.* at 694, 769 P.2d at 571. In support of its finding that a court has continuing jurisdiction to enforce its orders, this Court stated:

> This general principle is codified in Idaho Code § 1-1622, which provides:
>
> > Incidental Means to Exercise Jurisdiction. – When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in exercise of the jurisdiction if the course of proceedings be not specifically pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.
>
> The nature of continuing jurisdiction was outlined in *McDonald v. McDonald*, 55 Idaho 102, 114, 39 P.2d 293, 298 (1934):

> The court having jurisdiction of both the subject matter and person of the defendants, has the right and authority to hear and determine all questions that occur in the case and are essential to a decision of the merits of the issues, and it likewise has authority and jurisdiction to make such orders and issues such writs as may be necessary and essential to carry the decree into effect and render it binding and operative.

Ratkowski, supra at 694, 769, P.2d at 571.

As the above-cited case law sets forth, and most particularly *Ratkowski, supra*, holds, the magistrate court has continuing jurisdiction to enforce the September 22, 2005 Decree to carry out the Decree's division of the property in question. The mere fact that Debra forgot to include the convertible notes and/or the stock allocations in the Property Settlement Agreement should not prevent the lower court from dividing the omitted asset. Kevin should not receive a windfall as a result of his intentional failure to raise the stock allocations issue, at worst, or receive a windfall because he forgot, like Debra, to include the stock allocation in the Property Settlement Agreement, at best. Again, by definition, "omitted" means that the asset was not included. The district court properly reversed the magistrate court with respect to the stock allocations.

5. <u>Issue on Cross-Appeal –Attorney Fees</u>

On November 20, 2007, the magistrate court entered an order granting in part and denying in part Plaintiff's Motion to Divide an Omitted Asset, and on September 10, 2008, the district court entered its Decision on Appeal. Both the magistrate court and the district court concluded that Debra owned an interest in the convertible notes and/or stock allocations. Prior to

the lower courts' respective rulings, Debra did not have a recognized interest in either. For this reason, Debra should be considered the prevailing party.

Paragraph 15.03 of the Property Settlement Agreement, cited above, states that the prevailing party is entitled to all costs and attorney fees incurred in bringing an action:

> 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.

(R., 00025.) (emphasis added).

It is clear that Debra had to file the Motion to Divide Omitted Asset and/or seek enforcement of the Property Settlement Agreement, since Kevin refused to agree to a division of the convertible notes and/or stock allocations. In the event this Court affirms the district court and/or the magistrate court, Debra should be the prevailing party as defined by paragraph 15.03 of the parties' Property Settlement Agreement.

A settlement agreement that is merged and incorporated into a decree of divorce that provides for the award of attorney fees "is valid and enforceable as such." *Noble v. Fisher,* 126 Idaho 885, 891, 894 P.2d 118, 124 (1995). As this Court held in that case, "the clear and unambiguous import of [the attorney fee] provision is that if the parties subsequently dispute the terms of the settlement agreement--their applicability, modifiability, enforceability, or meaning--then the party who prevails in the dispute is entitled to have his or her attorney fees paid by the losing party." *Id,* at 892, 894 P.2d at 125.

As with the Property Settlement Agreement executed by the parties in this instant matter, the attorney fee provision in the *Noble* case provided that "if any action is instituted under the terms of this agreement, then the losing party agrees to pay the prevailing party his or her costs

and reasonable attorney fees...." *Id.* at 891, 894 P.2d at 124. This Court affirmed the magistrate court's award of attorney fees to the wife pursuant to the parties' settlement agreement, even though it had not granted her requests for an award of attorney fees pursuant to either Idaho Code § 12-121 or Idaho Code § 32-704. Similarly, this Court should award Debra her attorney fees pursuant to the parties' stipulated enforceable agreement that attorney fees be awarded to the prevailing party set forth in Paragraph 15.03 of the Property Settlement Agreement.

V.

CONCLUSION

The magistrate court and the district court properly concluded that the convertible notes represented community property that should be divided by Paragraph 4 of the Property Settlement Agreement, or, in the alternative, represented an omitted asset that should be divided pursuant to the time rule method. The district court also properly reversed the magistrate court by finding that the stock allocations represented omitted assets that should have been divided. Based on the above, Debra respectfully requests that this Court affirm the decision of the district court with respect to the convertible notes and the stock allocations.

Debra also respectfully requests that this Court reverse both the magistrate court and the district court with respect to her request for attorney fees and costs pursuant to paragraph 15.03 of the Property Settlement Agreement.

Finally, Debra requests that she be awarded all of her attorney fees on appeal pursuant to Idaho Appellate Rules 35(a)(5), 40, 41 and paragraph 15.03 of the Property Settlement Agreement.

RESPECTFULLY SUBMITTED this 5th day of May, 2009.

COSHO HUMPHREY, LLP

MATTHEW R. BOHN
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 5th day of May, 2009, a true and correct copy of the within and foregoing instrument was served upon:

DEREK A. PICA
Attorney at Law
199 N. Capitol Blvd., Ste. 302
Boise, Idaho 83702
Phone: 336-4144
Served by: U. S. Mail

MATTHEW R. BOHN