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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MICHELLE DUHON, Plaintiff/Respondent, vs. JARED OLBRICHT, Defendant/Appellant.	)	Docket No.: 40572-2012 Case No. CV 10-8855 ***APPELLANT'S BRIEF***

FILED - COPY
APR - 1 2013
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

* *

APPELLANT'S BRIEF

* *

APPEALED FROM THE MAGISTRATE COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR KOOTENAI COUNTY

HONORABLE ROBERT CALDWELL
Magistrate

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I

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This matter was tried before the court on November 1, 2011, for the division of assets and entry of the divorce. The court rendered its decision in writing on November 29, 2011, which also included the court's Findings of Fact and Conclusions of Law. The decree in this matter was entered on December 12, 2011.

Defendant moved for reconsideration on December 19, 2011. The hearing on that motion was held on February 6, 2012. The order denying the motion for reconsideration was entered on February 8, 2012.

The Defendant/Appellant herein timely filed his notice of appeal on March 5, 2012.

The District Court entered a Memorandum Opinion and Order on Appeal on October 17, 2012. The District Court upheld the Magistrate's ruling.

The Appellant filed this appeal on November 26, 2012.

B. STATEMENT OF FACTS

The facts in this matter are generally stipulated by the parties. There is very little disagreement as to substantive factual issues.

The parties began living together in 2001.

The parties bought a house together in 2005. The parties stipulated that the house is community property. Tr. p. 5, ll. 8-9. In fact, the parties were not married until 2007, so the house could not be characterized as community property, but the parties acknowledged the house was in both names, they considered it a joint asset and stipulated that it was subject to the jurisdiction of the court in the divorce.

The parties married on September 2, 2007.

Jared (Appellant) suffered an ankle injury on December 16, 2007, while skiing. The injury occurred after the marriage of the parties. The court found that Jared suffered an injury to his ankle and that his surgery for that injury was unsuccessful, causing him a severe disability. Jared, separately and not joined by Michelle, instituted a claim against the physician. The claim was subsequently mediated. Both parties were required to sign the mediated settlement agreement. In his testimony, Jared stated that it was essentially his understanding that his wife was present to supplement any information about the accident as part of the mediation, and that she needed to sign the agreement to waive any claims she might have against the doctor. Tr. p. 231, ll. 5-12.

The final check, however, was made payable to Jared only for $217,135.13. *Decision, November 29, 2010, pages 2 & 3. See Exhibit 10.*

Jared deposited the $217,135.13 check into the joint checking account of the parties on December 18, 2010. Both parties testified that the parties did not have any other open checking accounts with the exception of the account for the Blind Guy, a jointly owned business. Tr. p. 193, ll. 17-23, Tr. p. 223, ll. 6-10.

After deposit, the money is clearly traceable. Jared, in an effort to reduce the mortgage payment of the parties, paid down a line-of-credit mortgage with his separate personal injury funds. The parties testified that their mortgage was a line-of-credit that was "interest only" and the payment varied depending on the balance due on the loan. There is no indication that Jared's intent was to do anything other than benefit the parties regarding their monthly obligations. In his testimony, Jared

clearly believed that he had sole decision making and the control of that money. In his testimony, he always refers to himself in first person regarding ownership and use of that money. Tr. p. 223, ll. 15-25. Essentially, Jared held a separate lien against the home by virtue of using his separate funds to reduce community debt.

On May 10, 2011, $60,000 of these funds were transferred to Doc's Pharmacy. The parties do not disagree with this factual statement. The $60,000 was transferred for starting the new pharmacy and it is clear that the proceeds used to start the pharmacy were "from the ankle injury," as stated in direct examination and answer by Michelle (Respondent). Tr. p. 86, ll. 6-8, p. 87, ll. 6-10.

There is currently a loan payable to the shareholders from the community corporation, Doc's Pharmacy, Inc., in the amount of $62,753.00. Tr. p. 87, ll. 20-25, p. 88, ll. 1-6.

In the decision by the trial court, the court characterized the $217,135.13 as community property. The court did not specifically address or make a ruling on the $62,753.00 loan to shareholders that was an asset of this marriage.

II

ISSUES ON APPEAL

A. Did the Magistrate err in his characterization of the proceeds of the Defendant's personal injury settlement as community property?

B. Did the Magistrate err in failing to award the community the shareholder loan made by the community to Plaintiff's business, thus entitling Defendant to one-half of the shareholder loan showing on the books of the company.

III

ARGUMENT

1. Did the Magistrate err in his characterization of the proceeds of the Defendant's personal injury settlement as community property?

As stated above, there is no factual dispute that Jared received $217,135.13 as a result of a personal injury he sustained in a skiing accident. Michelle does not state the reasons why she was present in the mediation agreement and she does not rebut Jared's assessment that she was there as support and to answer any questions which may arise. There was no testimony or evidence by any of the parties as to why Michelle signed or was required to sign the mediated settlement agreement. There was no allegation by Michelle that any of the settlement proceeds were for anything other than Jared's loss to his person, pain and suffering or general damages. She has made no claims for award of funds for community loss.

As cited by the court, the Idaho case which instructs the court is *Rogers v. Yellowstone Park Co.*, 97 Idaho 14 (Sup. Ct. 1975), which states that "damages for pain and suffering and emotional distress are the separate property of the spouse injured." The Supreme Court has also given us additional instruction in *Cook v. Cook*, 102 Idaho 651 (Sup. Ct. 1981). Where the right to receive property during the marriage arises as compensation for some right personal to one spouse alone, the property takes its character from the right violated.

It is the position of the Appellant that once it has been agreed that he received an injury and that he alone received a check payable to himself as a result of his claim, and further that he alone, signed the settlement agreement with the

attorneys, he has directly traced the proceeds of his personal injury to the receipt of $217,135.13. The settlement agreement, **Exhibit 10**, further indicates repayment for all medical costs incurred which would have been community obligations. It would therefore follow, by logic, that any portion of the funds that were owed to the community were, in fact, repaid to the community, with the remaining balance payable to Jared Obricht as his sole and separate property.

The Appellant argues that he has shown, by prima facie evidence, that funds were paid to him. The court analyzed that there was no breakdown of what was community and what was separate, then defaults to the position that the whole settlement is community. Clearly that is not true. Certainly, some of that payment was for pain and suffering, and loss of the use of his person. There is no case law to support the court's conclusion that if there is no breakdown, we have to infer that all of the settlement was a community settlement. In fact, Appellant would argue just the opposite. After he has shown the payment solely to him of funds which were called "ankle money" by Plaintiff and her counsel throughout this case, it should be inferred, that in the absence of any evidence to the contrary, the entire balance was payable to Jared as his sole and separate property. It was his ankle. The court did not find that the funds were commingled or were not traceable. The court simply made the initial characterization that the property was community based upon a presumption, which is not supported in case law or statute.

There was no argument that the settlement was gifted to the community nor was there any testimony to that effect. In fact, Michelle would have the burden to prove that the separate funds were gifted. *Ustick v. Ustick* 104 Idaho 215 (Ct. App.

1983). Therefore, in the absence of any evidence which would disrupt Appellant's clear evidence that he received a check as a result of his personal injury, the characterization of the property is not transmuted by gift. At no point did Michelle testify that she believed the proceeds to be community. There is a void of evidence at trial that Michelle, at any time, made a claim for lost wages to the community. The testimony solely surrounds the damage done by Dr. Greendyke to Jared.

Further, Jared clearly believed that he had sole decision making and the control of that money. In his testimony, he always refers to himself in first person regarding ownership and use of that money. Tr. p. 223, ll. 15-25. This does not evidence any intent to gift.

In the Arizona case of *Jurek v. Jurek*, 124 Arizona 596, the court reversed its long standing rule that personal injury proceeds were community and, in fact, instructed the court to determine the amount of lost wages and medical expenses, and to then award the balance to the injured spouse as his sole and separate property. In this case, the medical expenses and costs have already been deducted. As stated above, there was no claim for lost wages. The remaining proceeds that were paid to Jared Olbricht should be deemed his sole and separate property and he should be reimbursed those sums from the community estate.

2. Did the Magistrate err in failing to award the community the shareholder loan made by the community to Respondent's business, thus entitling Appellant to one-half of the shareholder loan showing on the books of the company?

The Appellate court may approach this question several different ways. The trial court did not address it at all and, therefore, was in error.

A. Jared loaned $60,000 of separate funds to start the community business, free of other debt. The debt owed to the community is a community asset. It is subject to division by the court.

The Court of Appeals, in *Jensen v. Jensen*, 124 Idaho 162 (Ct. App. 1993), included a discussion of fact which were very similar to the facts in this case. There had been loans from separate property to a community business and the Court of Appeals determined that the magistrate was in error in failing to make a finding on the disputed factual issue of the business loans. In *Jensen*, there was insufficient evidence regarding whether the contributions of capital were intended to be loans. This is not the case in the current matter since the funds are clearly identified by Michelle as shareholder loans. The point in *Jensen*, however, as it relates to the instant case, is the magistrate's failure to properly address and support his findings on this specific issue.

Michelle did not present any evidence of the value of her business. She did not have expert testimony indicating how much her business would be worth if it could continue to pay her wages in the amount of $14,400 per month as she testified. Tr. p. 202, ll. 16-19, p. 187, l. 5.

Both parties testified regarding $60,000 loaned to the community company from the personal injury proceeds. On direct exam, Michelle was asked if the parties had discussed using "proceeds from the ankle injury for the pharmacy purchase." She answered in the affirmative. Tr. p. 86, l. 6. Michelle continued in her direct

testimony regarding "the $60,000." Tr. p. 87, l. 6. At no time was the $60,000 characterized as anything other than the money from the ankle injury. Michelle acknowledges that $60,000 still exists on the corporate books of Doc's Pharmacy, Inc., as a corporate loan to shareholders. The balance owing to the shareholders at this time is actually $62,753.90. Tr. p. 87, l. 24, p. 88, l. 6.

There is a rebuttal presumption that all properties (and the character thereof) acquired during the marriage is community property. *Winn v. Winn*, 105 Idaho 811 (Sup. Ct. 1983). During the marriage Jared made a loan to the community of $60,000 of his separate funds (the presumption that those funds were community having been rebutted). That debt is acknowledged on the federal tax return of the corporation which has been prepared at the behest of Michelle. She does not dispute that the community owes $60,000 borrowed to finance the community business.

In Michelle's books, she began tracking, during the process of this divorce, what income she should actually be taking. This is based partly upon what she is paying a second pharmacist. When she tracked her actual projected income, her profits became negative. Michelle stated in response to a question as follows:

Question: "So when you were giving us figures about the retained earnings that you have as being a large negative figure, does that come from your P&L that you prepared?"

Response: "Um-hmm" Tr. p. 186, ll. 15-19.

Creating hypothetical figures, Michelle was able to create a loss, thus giving the appearance that her business had very little value. In fact, there was no valuation of the business.

In fact, Michelle has drug inventory of $42,000 which is paid for. Tr. p. 192, ll. 10-11.

The $62,753 shareholder loan is clearly a community asset, separate from the corporation. Michelle was awarded the business known as Doc's Pharmacy, Inc., along with its liabilities. She will presumably continue to operate that business and also continue to have sales which have been increasing. This debt will continue to be an obligation that she owes to Jared Olbricht and Michelle Duhon. The debt to her company was apparently generally calculated by the court in arriving at a $-0- value for her business (although the court was not clear). If Michelle is credited for the debt, as an offset to value, then it is a valid debt that must be paid by the corporation. Michelle was not, nor should she be awarded that account as her own asset. To do so would unequally divide the assets by giving her a $62,753 asset owed by a separate entity. The debt should be either divided between the parties, or reimbursed to Jared as his separate property as set forth above.

A review of the court's decision, at page 5 (referencing faxed numbers at the top of the page) shows error. The court assumed that Michelle was going to borrow $136,800 per year to meet payroll. In fact, Michelle has been operating the business for two years without having to do so. She further testified she did not intend to pay herself the unpaid salary. Tr. p. 187, ll. 23-25, p. 188, ll. 1-4. The property lease was not valued. The inventory of the business, as stated, was $42,000. The court stated "any value from the inventory is offset by the liabilities of pharmacy." This finding is not supported by the evidence. The court did not have sufficient evidence to value the business at a "net zero value." The only fixed liability of the corporation

is the liability to the shareholders, and Jared Olbricht was one of those shareholders at the time of trial of this matter. Jared Olbricht should be awarded a judgment for his share of that shareholder debt.

The appellate court in Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974), found:

> Debts which were not evidenced by written instrument but were accounts on the books of the corporation to which they were owed and which had no due dates or interest charge were properly classified as community property and assigned to respondent in the division of the property where it was shown that such debts would be satisfied without expense to the respondent and there was no evidence that such accounts were not debts.

B. There is another approach to this issue:

The Court could order reimbursement to Jared of his separate funds. In *Estate of Freeburn*, 97 Idaho 845 (Sup. Ct. 1976), the court found "where separate funds of one spouse are used to benefit the community, such as payment of a debt arising from acquisition of community property, the separate estate is entitled to reimbursement." In this case, Jared clearly invested $60,000 of his separate funds directly into the pharmacy business to pay the debt for acquisition of inventory and equipment, thus benefitting the community, by creation of a business which is continuing to grow. The trial court should have found that the debt owed by Doc's Pharmacy, Inc. to its creditors (Jared and Michelle) is a liability, just as she owes her lease, and it is assumed that she will pay those liabilities. Jared should be reimbursed, at a minimum, $60,000 from the business. Again, she received a credit for this debt against value of the corporation. The debt must be paid. If she is not obligated to pay the debt, Michelle received a $62,753 windfall and an unequal

distribution. If Michelle does pay the debt to herself only, she also receives a windfall.

In its Decision, the trial court made no finding that there should be an unequal distribution of assets and debts. The court, on the contrary, found that the division of property made was a substantially equal division of property. It can be inferred, therefore, that the court intended to find that this case warranted a substantially equal division of property. Idaho law requires such a division. Idaho Code §32-712.

Whichever approach the district court finds appropriate, the trial court erred in not addressing the $62,753 shareholder loan as a community asset. Clearly, it is Jared's position that the $60,000 was loaned to the corporation from his sole and separate assets in order to benefit the corporation and such asset should be returned to him fully, under *Freeburn*, prior to awarding the community assets and debts.

IV.

CONCLUSION

The Trial Court in this matter exceeded its authority and the matter should be remanded to the Trial Court for further determination.

The court's decision that Jared's personal injury settlement was community was not supported by the law and the facts of the case. The findings should be reversed and the character of the proceeds of the personal injury settlement should be awarded to Jared as his sole and separate property, with the necessary recalculation of the distribution of assets and debts.

The court did not address the asset of the shareholder loan of the corporation which is owed to Jared Olbricht and Michelle Duhon. This matter should be remanded to the Magistrate to divide this asset which was omitted from the court's decision.

Appellant requests attorneys fees and costs incurred herein.

DATED this 27th day of March, 2013.

Respectfully submitted,

LIESCHE & REAGAN, P.A.

RAMONA R. LIESCHE
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of March, 2013, a true and correct copy of the within and foregoing document was served upon:

X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile	Suzanna L. Graham, P.C. 302 E. Linden Avenue, Ste. 103 Coeur d'Alene, ID 83814 Fax: 665-7079
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