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Duhon v. Olbricht Respondent's Brief Dckt. 40572

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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. CV10-8855

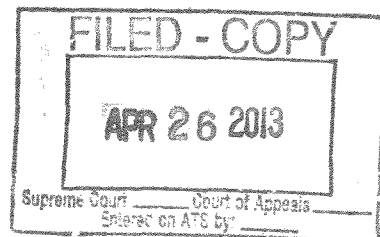
**RESPONDENT'S REPLY TO
APPELLANT'S BRIEF**

RESPONDENT'S BRIEF

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

HONORABLE ROBERT CALDWELL

Magistrate Presiding



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COMES NOW, the Plaintiff/Respondent, MICHELLE DUHON, (hereinafter Respondent DUHON), by and through SUZANNA L. GRAHAM, her Attorney of Record, and hereby submits the following RESPONDENT'S REPLY TO APPELLANT'S BRIEF (Defendant/Appellant JARED OLBRICHT is hereinafter referred to as Appellant OLBRICHT):

I.

STATEMENT OF CASE

A. PROCEDURAL HISTORY:

The trial in this matter was held on November 1, 2011 related to the divorce and property distribution which were the only issues. The Trial Court rendered its written Decision on November 29, 2011 after the parties were allowed to submit their post-trial briefing. The Decree of Divorce in this matter was entered on December 12, 2011.

Appellant OLBRICHT moved the Trial Court to reconsider its Decision in a sparsely written Motion without grounds. On February 6, 2012 a hearing was held. The Court summarily DENIED the Reconsideration Motion, and an Order was entered on February 8, 2012.

Appellant OLBRICHT filed an Appeal on March 5, 2012 and later obtained the trial transcript, but he has failed to obtain the transcript from the Reconsideration Hearing held on February 6, 2012. The Magistrate Court ruled on Appellate Issue 2 at the hearing on the Motion to Reconsider for which this Appellate Court does not have the transcript.

B. STATEMENT OF FACTS:

That the Parties jointly purchased a home in 2005, in joint name and joint deed. TRIAL TRANSCRIPT, Page 26, Lines 7-12, *hereinafter cited* as TR p. 26, L 7-12.

That Respondent DUHON resided in said home while the divorce was pending. TR p. 27, L 1-12.

That the Court entered a Joint Preliminary Injunction at the time of the divorce filing. TR p. 27, L 13-15.

That the Community Debt on the Real Property located at 11168 North Patty Drive, Hayden, Idaho went from \$160,000 on the date of the divorce filing to \$360,000. TR p. 27, L 16-23.

The Real Property was secured by an accelerated Home Mortgage Loan. TR p. 28, L 3-7. When you put money on the house, it's like a line of credit and you can get the money back out of it. TR p. 28, L7-9.

When Appellant OLBRICHT discovered that the divorce was going to happen, he pulled all the money off (the Line of Credit). TR p. 28, L 9-11. Appellant OLBRICHT pulled \$100,000 on November 9, 2010 and \$25,000 on November 12, 2010. TR p. 29, L 15-16.

The Joint Preliminary Injunction in the above-captioned matter, which precluded both parties from "Transferring, encumbering, concealing, selling or otherwise disposing

of the joint, common or community property” was issued on October 14, 2010. TR p. 29-30, L 15-30; 1-19.

The removal of money was in violation of the Joint Preliminary Hearing entered herein.

The parties were married on September 2, 2007. TR p. 95. L18-20.

The Parties owned the Blind Guy and paid \$50,000 for said business. TR p. 45, L 1-7. The parties sold the Blind Guy back to the Corporation for \$110,000. TR p. 46, 15-17. The Appellant OLBRICHT retained the sales proceeds of approximately \$38,000. TR p. 47-48, L 12-25, 1-23.

Appellant OLBRICHT was hurt in a skiing accident at Schweitzer Mountain Resort on December 16, 2007. TR p 95, L13-25. The parties thereafter filed a Malpractice claim. The parties mediated a settlement of the malpractice claim. See Exhibit 9, TR p. 101-102, L 9-24, 1-11. Upon receipt of the settlement proceeds, Appellant OLBRICHT deposited the \$217,135.13 into the parties’ joint account on December 18, 2010. TR p. 121, L 2-6. The parties put \$200,000 towards the debt owed against the house by agreement. TR p. 121-122, L 20-25, 1-25. Exhibit 4, page 7.

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

First Issue on Appeal - Did the Magistrate err in his characterization of the proceeds of the Defendant's personal injury settlement as community property?

Item 36: Appellant OLBRICHT'S Personal Injury Settlement: It is a basic concept of community property law that all property acquired during marriage is presumed to be community property. Guy v. Guy, 98 Idaho 205 (S.C. 1977). *Citations omitted.*

It is clear that the party asserting the separate character of comingled assets must prove that the property is separate "with reasonable certainty and particularity" Speer v. Quinlan, 96 Idaho 119 (1974). The party asserting that the property is separate bears the burden of proving to a reasonable certainty that property is separate. Worzala v. Worzala, 128 Idaho 408 (S.C. 1996).

The Personal Injury settlement necessarily includes five measures of damage: (1) Lost earnings (CP=Community Property), (2) pain and suffering (SP=Separate Property), (3) loss of enjoyment of life (CP=Community Property), (4) future medical (CP=Community Property), and (5) loss of consortium (SP=Separate Property). Appellant OLBRICHT had the burden of proving with certainty and particularity his separate property claim and if so, how much was separate. Appellant OLBRICHT failed to meet his burden of proving any separate property claim. Appellant OLBRICHT failed to provide any proof as to the separate property nature of the claim or the value thereof. The Magistrate Court had no facts from which to make a determination as to the separate character.

General damages for pain and suffering and emotional distress are the separate property of the injured spouse. Rogers v. Yellowstone Park Co., 97 Idaho 14 (S.C. 1975); Evans v. Twin Falls County, 118 Idaho 210 (S.C. 1990).

Where the right to receive property during marriage arises as compensation for some right personal to one spouse alone, the property takes its character from the right violated. Cook v. Cook, 102 Idaho 651 (S.C. 1981).

Damage to earning capacity is community property. Cook v. Cook, 102 Idaho 651 (S.C. 1981).

The Court is without the ability to determine what amount, if any, is subject to separate property interest, the Appellant OLBRICHT having brought no facts before the Trial Court herein relative to his separate property claim. In other words, Appellant OLBRICHT failed in his burden of establishing the separate nature of the settlement.

Appellant OLBRICHT provided no evidence to rebut the presumption that the Medical Malpractice settlement proceeds, having been acquired during the parties' marriage, was community property.

Alternatively, TRACING.

Appellant OLBRICHT'S reliance on tracing is flawed as it is first incumbent upon the Appellant OLBRICHT to prove that the asset was separate when placed into the parties' joint account, which he has failed to do. If Appellant OLBRICHT fails to prove the separate nature of the asset, then Tracing cannot be had, as there is nothing to be traced.

Appellant OLBRICHT, having failed in his burden to prove the separate nature of the Medical Malpractice settlement proceeds, then tracing is not necessary as the settlement shall be presumed community property. The Appellant OLBRICHT'S reliance on tracing is misplaced as

the Appellant OLBRICHT failed to meet his burden of proving any portion of the settlement was separate property.

With that argued, Appellant OLBRICHT put the proceeds of the Medical Malpractice settlement proceeds into the parties' joint bank account, which cannot be considered comingled as the presumption is that the proceeds were community. The parties paid off their joint Mortgage Line of Credit and left the remainder of the settlement proceeds on said account for eleven (11) months.

Where parties comingle, blend and confuse separate funds with community property, and treat and handle their separate and community funds in one bank account as one fund, all such funds become community property. Gapsch v. Gapsch, 76 Idaho 44 (S.C. 1954).

Alternatively, GIFT:

The essential elements of a gift inter vivos are: (1) A donor competent to contract; (2) freedom of will of donor (3) the gift must be complete and nothing left undone; (4) the property must be delivered by the donor and accepted by the donor; (5) the gift must go into immediate and absolute effect. Wilson v. Fackrell, 54 Idaho 515; Blake v. Blake, 69 Idaho 214.

Respondent DUHON asserts that Appellant OLBRICHT failed to meet his burden of proving the separate nature of the Medical Malpractice settlement; alternatively, Appellant OLBRICHT effectuated a gift to the community. Appellant OLBRICHT transferred the settlement proceeds/money into a joint account, Appellant OLBRICHT and/or Respondent DUHON transferred a portion of those monies over to pay a community debt, i.e., the Home Loan. The remainder of the settlement proceeds remained in said joint account for in excess of ten (10) months until the altercation occurred and divorce was sought. All elements of a gift were proven by the parties' conduct and actions herein.

The manner and method of acquisition of property, as well as the parties' treatment of that property, are questions of fact. We defer to the Magistrate's findings on these issues when supported by substantial evidence. Krebs v. Krebs, 114 Idaho 571 (C.A. 1988).

The parties treated the property as community placing the same into joint account, and paying a Mortgage Debt of a jointly owned home.

FACTS SURROUNDING THE MEDICAL MALPRACTICE CLAIM:

Respondent DUHON and Appellant OLBRICHT paid substantial medical bills from the community funds on behalf of the Appellant OLBRICHT and his ankle injury. TR p. 80, 13-18. In 2008 - \$15,761 and in 2009 - \$2,157. TR p. 80-81, L 12-25; L 1-9, Trial Exhibit 7

The parties jointly agreed to the medical treatment and Operation/Surgery. TR p. 96-97, L 11-25, 1-12. Respondent DUHON was Appellant OLBRICHT'S caregiver when he was laid up and convalescing from the accident. TR p. 97, L 13-21; TR p. 105, L 6-10. The community had to hire a helper at the BLIND GUY as Appellant OLBRICHT was not able to work as he had been prior to the accident. TR p. 98, L 1-17. Respondent DUHON went to Medical Appointments with Appellant OLBRICHT and encouraged him to return to his Physician, when his pain was too great. TR p. 99, L 1-19. The parties discovered that the ankle was displaced or did not heal properly, the Doctor having not let the ankle heal long enough. TR p. 99-100, L 1-20-22, 1-1-4. Both parties went to the Medical Malpractice Claim Attorney's appointments. TR p. 100, L 1-9-18.

The parties also went to mediation together and both signed the mediated agreement, agreeing to the \$217,000 settlement. TR p. 101-102, L 9-25, L 1-, Trial Exhibit 9, Trial Exhibit 10. Appellant OLBRICHT obtained the check for \$217,000 and put it into the joint bank account. TR p. 102, L 9-18. The parties discussed and agreed that they would put the money towards the Home Mortgage Loan. TR p. 102-103, L 19-25, L 1-22.

Respondent DUHON worked from the time Appellant OLBRICHT sustained the injury until the settlement was received. TR p. 104, L 9-14. Respondent DUHON paid all the community bills and worked six (6) days per week to pay the community debts. TR p. 104-105, L 12-25, 1-5.

The characterization of property is within the discretion of the court and will not be disturbed unless the record demonstrates an abuse of discretion. Hunt v. Hunt, 137 Idaho 18 (S.C. 2002). Appellant OLBRICHT failed to provide any substantially competent evidence that the personal injury monies were separate property. Further, the parties' conduct and actions prove that the monies were community property.

Second issue on appeal - Did the Magistrate err in failing to award 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?

Unless shown to the contrary, expenditures made and indebtedness incurred during the marriage is presumed to be for the benefit of the community. Campbell v. Campbell, 120 Idaho 394 (C.A. 1991). There is a rebuttable presumption that a debt incurred during marriage is a community debt. McAfee v. McAfee, 132 Idaho 281 (C.A. 1999).

Community debts generally are to be paid by community property. Vail v. Vail, 117 Idaho 520 (C.A.1990); Donndlinger v. Donndlinger, 107 Idaho 431 (C.A. 1984).

The Magistrate Court in its written Decision, recognized the community shareholder's loan and awarded the same unto the Plaintiff with the Business and the debt owing thereupon. "The parties acquired a business in June, 2010 known as 'Doc's Pharmacy'". **The community invested \$60,000.00 into the new business as working capital. The business corporation was originally owned by the parties, each as shareholders.** During the divorce, Respondent DUHON transferred the corporation share to herself divesting the Appellant OLBRICHT of his shares. **The \$60,000.00 originally invested into the company is booked as a debt owing to the shareholders.** The evidence adduced at trial indicates clearly that the pharmacy is not making money. Respondent DUHON, a licensed pharmacist, has been working for free. The records demonstrate that she has foregone approximately \$267,000.00 of salary in an effort to allow the pharmacy to continue to operate. The records demonstrate that if she drew a salary or if the business paid a pharmacist to work, then the business would have a negative value. Respondent DUHON historically earned approximately \$48.00 per hour. Respondent DUHON works as much as 50 hours a week. In order to the business to operate and pay a pharmacist, the company would have to borrow as much as \$136,800.00 per year to meet payroll. The business has one significant obligation which is a real property lease agreement ten (10) years in length. The inventory of the business is worth \$42,000. Any value from the inventory is offset by the liabilities of the pharmacy. **Respondent DUHON should be awarded the business together with its encumbrances/liabilities which the Court finds to be a "net zero value" award to the Plaintiff.**

The division of property is a factual question left to the sound discretion of the trial court. Barrett v. Barrett, 149 Idaho 21 (2010).

FACTS:

The parties purchased Doc's Pharmacy in June, 2010. TR p. 81-82, L 24-25, L 1. The parties invested \$62,753.90 of community capital. TR p. 87, L 23-24. The initial investment was for the startup costs and operating capital, computers, and monthly bills. TR p. 87, L 6-7. The investment capital has been consumed. The Loan is carried on the Books as payable to Shareholder, the Respondent DUHON. Respondent DUHON has utilized the \$100,000 removed from the community residence to sustain the business, having a balance remaining of \$35,000.

The Pharmacy has a Lease Agreement which is for ten (10) years at the rate of \$1,100 per month. TR p. 92, L 21-24. The Pharmacy has monthly fixed bills of \$6,533.11. TR p. 89, L 5-7.

If the community had to pay a pharmacist plus all the bills, it would take \$20,900 per month to operate the pharmacy. TR p. 89, L 13-18. The Pharmacy is in the red if the community had to pay a pharmacist \$11,400 every month. TR p. 89, L 18-19. If Respondent DUHON had to pay herself a salary she would need a loan of \$136,800 just to make the payroll for one year. TR p. 90, L 1-4. The Pharmacy is not marketable and Respondent DUHON would not be able to sell the Pharmacy. TR p. 92, L 15-17.

A Pharmacist for the extra 40 hours per month of regular time (not overtime so a second Pharmacist) would cost \$2,400 per month.

The Pharmacy hours are Monday through Friday 9:00 a.m. to 6:00 p.m. and Saturday 10 a.m. to 2:00 p.m. The Pharmacy is operated by the Respondent DUHON in excess of fifty (50)

hours per week. TR p. 95, L 10-17. It would cost \$20,900 per month to pay a Pharmacist (operating costs) in lieu of the Respondent DUHON. TR p. 95, L 7-9. Respondent DUHON has not taken a paycheck since June, 2010 as there has been no earnings from which to pay her a salary. TR p. 95, L 10-16.

A Pharmacy Technician at 80 hours per month would cost \$1,200.

The total operating cost for the Pharmacy is \$20,900 per month to have someone else run the Pharmacy. TR p. 95, L 7-9. The Pharmacy had its best month in October, 2011 earning \$9,500.00 which resulted in an \$11,400.00 deficit each month. The Pharmacy would need a loan of \$136,800.00 to meet the payroll obligation for one (1) year. TR p. 90, L 1-4..

Respondent DUHON has worked at the Pharmacy fifty (50) hours per week for the past one (1) year without payment of a salary, attempting to build a clientele and improve her prescription base.

The Pharmacy is not marketable at present due to the outstanding Ten Year Lease (\$2,000 per month) and contract due and payable to Medicine Man Pharmacy (either 1% of the sales OR \$1,100 whichever is greater).

The current Inventory of Medication is \$42,000. There is no market wherein said drugs could be sold to another Pharmacy.

The Profit and Loss statement for 2010 showed negative earnings of \$24,796,04. TR p. 184, L 1-2.

The record clearly shows substantial and competent evidence that the current value of the Pharmacy is nothing.

The Magistrate Court clearly relied on competent and substantial evidence in finding the value of the Pharmacy to have a net zero value as announced in Judge Caldwell's written

opinion. The claim of entitlement to the Shareholder Loan and Appellant OLBRICHT'S failure to argue this issue on Appeal proves the frivolous and unreasonable nature of this issue on Appeal.

The Magistrate Court very specifically identified a debt owing to the shareholders and then awarded the same unto the Respondent DUHON. The Magistrate Court awarded the business together with its encumbrances/liabilities which the Court found to be a "net zero value". The shareholder loan was necessarily included in the debt and value.

Appellant erroneously argues on Appeal that "the Loan of \$60,000 was separate funds", there is no proof that the money was Appellant OLBRICHT'S separate funds. In fact, the record is clear, the Magistrate found and the District Court affirmed that the funds were community. Appellant OLBRICHT failed to meet his burden of proving that the funds were his separate property. Appellant OLBRICHT'S Counsel has violated Idaho Appellate Rule 11.2 by stating a fact that is clearly not grounded in fact. Sanctions should be imposed against Appellant OLBRICHT'S Counsel for misleading the Court, and for stating claims that are clearly for improper purpose, to harass or cause a needless increase in the cost of litigation.

IV.

ATTORNEY'S FEES

Pursuant to I.C. 12-121, even a pro se litigant can be liable for attorney's fees when the appeal is frivolous, unreasonable and particularly when the custody litigation appeared to be an unabated vendetta. Nelson v. Nelson, 144 Idaho 710 (2007).

Where an Appellant fails to present any significant issue of law on appeal regarding a question of law, where no findings of fact made by the trial court are clearly or arguably unsupported by substantial evidence, and where the Appellate Court is not asked to establish any new legal standards or modify existing ones, and where the focus

of the case is on the application of settled law to the facts, the appeal is deemed to be without foundation. Such is the case here and accordingly Respondent DUHON is entitled to attorney's fees incurred on this appeal. Huerta v. Huerta, 127 Idaho 77 (1995); Reed v. Reed, 137 Idaho 53 (2002).

Appellant OLBRICHT has not presented any issues to this Appellate Court which are not supported by substantial and competent evidence. The law is settled on the issues presented in this Appeal. Appellant OLBRICHT simply seeks to substitute his view for that of the Magistrate. The appeal is both frivolous and fallacious, having been appealed on incorrect grounds. Simply because Appellant OLBRICHT disagrees with the Written Opinion of the Magistrate does not entitle him to an Appeal.

Related to the Issue of personal injury settlement proceeds Appellant OLBRICHT did NOT present evidence or any proof at trial that the Malpractice claim settlement proceeds were separate unto him; he had the burden of proof. Clearly, the presumption is therefore that the personal injury settlement proceeds were community. Appellant OLBRICHT should be precluded from bringing an action when he failed to present any evidence that his cause of action was correct.

Related to the Issue of the shareholder debt, the Court clearly ruled upon said debt and asset (Pharmacy). Appellant OLBRICHT provides no legal basis for challenge other than he seeks to substitute his analysis for that of the Magistrate Court. Again Appellant OLBRICHT did not even include the shareholder loan on Trial Exhibit 1, the Property List or Trial Exhibit 2, the Debt List but argues on appeal that the same is a separate

asset. The record is clear that the Magistrate Judge relied upon substantial and competent evidence when he awarded the shareholder debt and the Pharmacy considering them together as the parties had done in trial.

Respondent DUHON seeks an award of attorney's fees and costs for defense of this frivolous appeal.

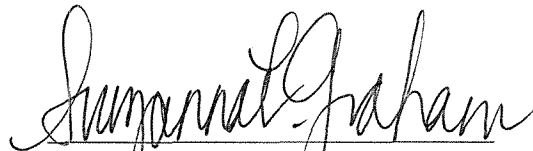
V.

CONCLUSION

The Court relied upon substantial and competent evidence as presented at trial in this matter, Appellant OLBRICHT having supplied no evidence of claimed separate property at trial in this matter. The Shareholder debt was considered with the asset of Doc's Pharmacy as was presented and considered by the Magistrate Judge at trial.

Appellant OLBRICHT should be assessed costs and Attorney's fees for presentment of this frivolous Appeal in light of the District Court and Magistrate Court ruling that Appellant OLBRICHT failed in his burden of proving any separate property interest.

DATED this 24 day of April, 2013.


SUZANNA L. GRAHAM
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of April, 2013, I served the within and foregoing document, by causing a true and correct copy thereof to be sent addressed to:

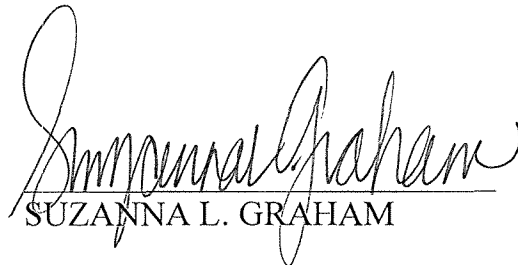
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SUZANNA L. GRAHAM