4-25-2012

Baruch v. Clark Appellant's Reply Brief Dckt. 39224

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMY BARUCH, Plaintiff/Respondent, v. WILLIAM CLARK, Defendant/Appellant.	Supreme Court Docket No. 39224-2011

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County. The Honorable Kathryn Sticklen affirming the Honorable Michael J. Reardon, Magistrate Judge, Presiding.

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I. Response to Dr. Baruch's Statement of Course of Proceedings.

The Plaintiff/Respondent (hereinafter referred to as "Dr. Baruch") incorrectly states that the Defendant/Appellant (hereinafter referred to as "Bill") requested "two pre-trial rulings" from the magistrate court.[1] Bill never requested any pretrial rulings nor did he file any pretrial motions with the court and Dr. Baruch's claims in this regard are contradicted by the record in this case.

Dr. Baruch alleges that Bill sought two pretrial rulings, the first of which she claims that Bill requested a ruling that because his real estate development projects were under water he "wanted essentially all of the community assets."[2] She further alleges that Bill requested the trial court to "rule as a matter of law ... that since the balance in his retirement account on the day of trial was less than it was on the day of marriage, that automatically it was all Appellant's separate property."[3] The record reflects in this case that Bill never file a single pretrial motion and certainly did not request any ruling "as a matter of law" on any issue. Notably, Dr. Baruch fails to cite to anywhere in the record where such claims are supported.

What actually transpired was that the magistrate court requested both parties to submit pretrial briefing on two specific issues that were likely to arise at trial: Bill's retirement account and the valuation of Bill's development entities that were financially challenged. (R., p. 155.) The court ordered the parties to submit the pretrial briefs no later than December 18, 2009. (R., p. 155.)

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[1] Respondent's Brief, p. 2.
[2] *Id.* at 2-3.
[3] *Id.* at 2-3.

Dr. Baruch argued that although Bill's development companies were underwater, that they should be awarded to him at a zero value. Bill argued that the entities should be awarded to him at their actual value. She further claims that with regard to Bill's argument that the Court "denied that obvious inequitable claim." The court issued no ruling on the pretrial briefs and the record will reflect that the court did not enter a single pretrial order. (R., p. 4-6.) Notably, Dr. Baruch fails to cite to any alleged motion or any order.

The trial was originally scheduled to occur on October 1, 2009, but was later rescheduled for October 30, 2009. (R., p. 4.) The parties stipulated to vacate the October 30th trial date and it was rescheduled for March 31, 2010. (R., p. 5.) The court requested the parties to submit pretrial briefing on the issues related to the valuation of Bill's business entities and Bill's retirement account and those briefs were due on December 18, 2009. (R., p. 155.) Both parties submitted the briefing to the court. Dr. Baruch alleges that Bill requested pretrial rulings on these issues and the court denied his requests; those statements are simply not true. The court requested briefing on the issue of the valuation of the business and the retirement account. It was Bill's position that because the entities had negative values, that they should be awarded to him at a negative value. (R., p. 155.) Dr. Baruch argued that they should be awarded to Bill at no value, despite the fact that the parties had executed personal guarantees on the debt in the hundreds of thousands of dollars. The Court made no rulings in the affirmative or negative based upon the parties' pretrial briefs and issued no pretrial orders. Furthermore, Dr. Baruch's incorrect statement that certain claims of Bill's were "denied" by the court makes no sense in light of the fact that the court permitted Bill to present evidence and argue the issues at trial.

After the magistrate received the briefing status conferences were held on December 22, 2009 and January 27, 2010. There are no transcripts from the status conferences, there are no motions in the court file, and there are no oral or written orders.

Contrary to Dr. Baruch's claims about Bill changing his position at trial, it was Dr. Baruch who abandoned her argument that Bill should be awarded the businesses at zero values at the time of trial. Dr. Baruch has disregarded the court record and misstates the procedural history of this case.

II. Response to Dr. Baruch's Statement of the Facts and Corrections to Appellant's Statement of Facts.

Bill will respond to Dr. Baruch's corrections to Bill's statement of facts in the order addressed in her brief.

A. Dr. Baruch directs this Court to page 8 of Appellant's Brief that states, "after Bill and Dr. Baruch were married, no funds were put into the Veltex Building, LLC" and notes that the citation is incorrect. The citation in the brief directed the Court to Tr. Vol. I, p. 418, L. 15-19. This citation does contain a typographical error; the correct citation is to page 412, not page 418, and the transcript provides:

Q. After the time you and Amy, did you put any money into Veltex Building, LLC?

A. No.

Mr. Bevis: After what?

Mr. Welsh: After their marriage.

(Tr., Vol. 1, p. 412, L. 15-19.) The factual statement contained in Bill's brief that no funds were put into Veltex Building, LLC after marriage is correct and is supported by the record; the brief simply contained the incorrect page number.

B. Bill Clark did testify that he received a capital gains distribution from Veltex Building, LLC in the amount of $342,149 which was deposited directly into his Charles Schwab account and then used towards the acquisition of the Ketchum Condominium. Bill cited to Tr., Vol 1, P. 421, L. 4-16, p. 422, L 4-9, Defendant's Exhibit 596, Bate Stamp 1283, and Plaintiff's Exhibit 232. Dr. Baruch correctly notes that this testimony was objected to at trial and the objection was overruled. The testimony is supported by the transcript.

C. Dr. Baruch claims that Exhibit 517A was not admitted at trial despite the fact that Exhibit 517A is clearly marked as "admitted" in the Clerk's Record. There was no objection filed by Dr. Baruch to the Clerk's Record. Nonetheless, Bill does agree that the transcript does not appear to reflect that Exhibit 517A was one of the exhibits that was admitted. Bill does not rely "heavily" on this exhibit as asserted by Dr. Baruch and if this Court so chooses not to consider it as being admitted it does not alter or subtract from Bill's argument.

D. Dr. Baruch characterizes Bill's statement that he did not withdraw to himself the IRA funds as being a clever, but misleading choice of words. Bill did refer to the transfer of funds as "rollovers" because that is what they were—they were rolled over into other retirement accounts. This is the crux of Bill's argument and the basic foundation that supports his position; there is a key difference between transferring funds between retirement accounts and transferring or withdrawing funds out of a retirement account into a non-retirement account. Dr. Baruch's claim that the funds were "spent on his investments" is not correct. The funds were rolled over

into two other retirement accounts: Pensco Trust and Sterling Trust. Both of these retirement accounts are self-directed plans that do provide the individual with the ability to direct how their retirement dollars are invested. Dr. Baruch blames Bill for the fact that some of the investments did not turn out to be profitable, nonetheless, the funds were not "spent."

Bill is compelled to respond to Dr. Baruch's statement of the facts and briefly addresses some inaccuracies below.

Schwab Retirement Accounts

With regard to the Schwab Retirement Accounts, Dr. Baruch incorrectly claims that "Bill and his attorney conceded at trial that said amount was her separate property."[4] Notably, again, Dr. Baruch fails to cite to any place in the transcript where any such concession was made. Rather she cites to Bill's Proposed Findings of Fact and Conclusions of Law. (R., p. 441, item 32.) As set forth in detail in Appellant's Brief, it is Bill's position—and it has always been Bill's position—that *both* he and Dr. Baruch's retirement accounts should be treated in the *same* manner. Bill's position has remained the same, which is that if Dr. Baruch were to be awarded the balance in her account on the date of marriage as her separate property, so too should Bill. This position is reflected in Bill's discussion of the treatment of his retirement account in the same Proposed Findings of Fact and Conclusions of Law and as reflected on Exhibit A attached to his brief. (R., p. 439-40, 458 item 30.)

[4] Respondent's Brief, pp. 6-7.

Dr. Baruch discusses Bill's "withdrawals" from his Schwab 3713 IRA; however the evidence at trial established that Bill did not withdraw any substantial funds from his account.[5] Rather, Bill rolled over some of his retirement funds from the Schwab 3713 IRA into two other retirement accounts, but did not take distributions from his IRA. (Tr., Vol. 1, p. 434, L. 5-9.) All funds were rolled over and transferred between two other retirement accounts Pensco Trust and Sterling Trust. Bill testified at trial that all three of the accounts, Schwab 3713 IRA, Pensco Trust and Sterling Trust are all IRAs in his name. (Tr., Vol. 1, p. 483, L. 9-18.)

Dr. Baruch points to Plaintiff's Exhibit 235 and claims that the community contributed funds to the account during marriage. However, the community also contributed significant funds to her account during marriage so there is no distinction between the two. She also argues that Bill's account fluctuated during marriage and it was unclear what percentage of the decrease in value was a result of market conditions and of that percentage was community and separate funds. Again, there is no way to determine which portion of *her* accounts were community or separate either, but this did not prevent the court from determining that the balance in her account on the date of marriage was separate property.

Ketchum Condominium Trace

It was undisputed at trial that Bill acquired his ownership interest in Veltex Building, LLC prior to marriage. (Tr., Vol. 1, p. 412, L. 1-5; p. 232, L. 4-8; Defendant's Exhibit 517.) It was undisputed at trial that after the parties were married, no funds were put into Veltex

[5] As the magistrate court noted, Bill received one *de minimus* distribution in the amount of $1,495.24 in 2007. (R., p. 570.)

Building, LLC. (Tr., Vol. 1, p. 418, L. 15-19.) Therefore, all capital contributions made by Bill were contributed before the parties were married. Bill testified that the $342,149 he received on February 7, 2007 were capital gains. (Tr., Vol. 1, p. 420, 6-15.) Dr. Baruch presented no evidence or testimony to rebut or even contradict this evidence.

Rather, Dr. Baruch argues that the distribution is presumed to be income because it was received during the marriage. As addressed in more detail below, this analysis is flawed because the character of property attaches on the date of acquisition—Bill's interest in Veltex Building, LLC was acquired *prior* to marriage. Dr. Baruch further argues that the $342,149 was "generated" as a result of Bill's "labor" and "sweat equity." (R., p. 588.) However, Bill was already being compensated for his labor through Clark Development, LLC. Bill testified that none of the equity in Veltex Building, LLC was due to any sweat equity because Clark Development, LLC was paid a fee for developing the project. (Tr., Vol. 1, p. 626, L. 11-28.) Bill historically has received a draw from Clark Development, LLC after expenses are paid, which is his primary source of income. (Tr., Vol. 1, p. 238.) In 2009, he was receiving income of $15,000 per month until April of 2009. (*Id.*) As of January 2010, Clark Development, LLC was receiving income of $15,000, which after expenses were paid Bill received approximately $8,500 per month. (Tr., Vol. 1, p. 244.) Therefore, to the extent that the community contributed any sweat equity or labor towards the project after marriage, Bill was compensated for that labor through his income from Clark Development, LLC. Dr. Baruch failed to establish or even present any evidence to support a claim that the community was not adequately compensated.

Finally, Dr. Baruch's claim that Bill avoided the question regarding when construction was begun or completed is not supported by the transcript. Bill's testimony was as follows:

Mr. Bevis: And do you recognize that publication?

Bill: Not specifically. I certainly know what it's about.

Q. It does say that the Veltex Building was completed in 2004; is that correct?

A. Correct.

Q. Is that accurate?

A. Yes.

(Tr., Vol. 1, p. 511, L. 19-25.) From this testimony, it is hard to see how this testimony could be characterized as anything but direct. There is no testimony in the transcript where Bill was asked about when construction commenced and did not respond or attempted to avoid the question.

III. Response to Dr. Baruch's Request for Attorney Fees.

Dr. Baruch requests attorney fees on appeal pursuant to Idaho Code Section 12-121 claiming that this Appeal is pursued frivolously. Dr. Baruch requested attorney fees from the district court on the same grounds. The district court denied the request and her subsequent motion to reconsider. (R., p. 841.) Dr. Baruch did not appeal those orders to this Court.

Bill has not pursued this appeal frivolously and there is no basis for fees under Idaho Code Section 12-121.

This Court set forth the requirements for an award of attorney fees pursuant to Idaho Code § 12-121:

> An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Nampa & Meridian Irrigation Dist. V. Washington Fed. Savings,* 135 Idaho 518, 20 P.3d 702 (2001).

> When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the **entire course** of the litigation must be taken into account. *Id.* Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. Section 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Id.* Although an award of attorney fees under the statue is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record. *Wait v. Leavell Cattle, Inc.,* 136 Idaho 792, 41 P.3d 220 (2002).

McGrew v. McGrew, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003) (emphasis added).

"Fees under I.C. § 12-121 are not awarded to a prevailing party as a matter of right but, rather, are subject to the district court's discretion." *Coward v. Hadley*, 150 Idaho 282, 290, 246 P.3d 391, 399 (2010). "A district court should only award fees 'when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.'" C&G, Inc. v. Rule, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001). "However, 'when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation.'" *Id.* "A claim is not necessarily frivolous simply because the district court concludes that it fails as a matter of law." *Gulf Chem. Employees Fed. Credit Union v. Williams,* 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Ct.App.1984). "Furthermore, '[a] misperception of the law, or of one's interest under the law is not, by itself, unreasonable. Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation.'" *Snipes v. Schalo*, 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct.App.1997).

Bill's appeal was not brought frivolously, unreasonably or without foundation. Dr. Baruch fails to present any argument or analysis explaining how or why she believes Bill's

appeal was frivolous. Rather, she just makes the sweeping statement that Bill simply invited this Court to second guess the trial court on conflicting evidence. Bill did not invite this Court to second guess the trial court on conflicting evidence. Bill submitted extensive briefing to this Court on appeal, not second-guessing conflicting evidence, but disputing the legal analysis and the application of the law to the facts.

It is Bill's position that this appeal was not brought frivolously or unreasonably since the magistrate court's decision to deny Bill's separate property claims was an abuse of discretion in that insufficient evidence to support those findings was presented to the magistrate court. The district court erred in affirming the magistrate's holding.

IV. Response to Dr. Baruch's Standards of Review.

Dr. Baruch infers on page 18, at footnote 7, that Bill incorrectly stated as fact that the magistrate found that the distribution Bill received was a capital gain. Bill made no such incorrect statement. Bill stated in the procedural history portion of his brief that "The magistrate further held that the capital gains distribution Bill received on one of his separate business entities was community and therefore he was not entitled to any reimbursement..." (Appellant's Brief, p. 5.) The magistrate stated in his Memorandum Decision and Order,

> Bill's argument rests on the undisputed fact that he received a distribution from Veltex Building LLC shortly before making the down payment on the Ketchum condominium, and relies on the presumption that the entire amount he received was his separately. This presumption appears to be based on his belief that capital gains from a separate asset received during marriage are separate property, a proposition that the Court can find no support.

(R., p. 582.) The Court found that a capital gain earned on separate property is not separate property.

The Court later corrected this statement of the law after Bill filed his Motion to Alter or Amend Findings of Fact and Conclusions of Law. In the Order Re: Motion to Alter or Amend Findings of Fact, Conclusions of Law and Judgment the magistrate stated, "The Court corrects the statement found on page 22, lines 12-15, in the Conclusions of Law that '...capital gains from a separate asset received during marriage are separate property...' because the court meant to say that capital gains from separate assets are not always separate property." (R., p. 680.)

V. The District Court Did Err in Affirming the Magistrate's Finding That the Entirety of Bill's Charles Schwab SEP/IRA #...3713 was Community Property.

Dr. Baruch argues that the holdings in *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991) and *McCoy v. McCoy*, 125 Idaho 199, 868 P.2d 527 (Ct.App.1994) should only apply where an account increases in value and not where an account decreases in value, but provides no rationale for why such a distinction should be drawn. Under this analysis, the community would reap all of the benefit, but not share in any of the risks associated with investing.

Dr. Baruch incorrectly states that Bill Clark "withdrew" funds from his account and relies upon Plaintiff's Exhibit 235 which was a document she prepared. The actual supporting account statements from Charles Schwab reflect that Bill did not take distributions.[6] (Defendant's Exhibits 642-648.) All funds were rolled over and transferred between two other retirement accounts Pensco Trust and Sterling Trust. Bill testified at trial that all three of the accounts, Schwab 3713 IRA, Pensco Trust and Sterling Trust are all IRAs in his name. (Tr., Vol. 1, p.

[6] As the magistrate court noted, Bill received one *de minimus* distribution in the amount of $1,495.24 in 2007. (R., p. 570.)

483, L. 9-18.) All of which are essentially one, big IRA held in three different entities. (*Id.*) There were transfers and investments made within each of them during the marriage. (*Id.*) Bill never made any withdrawals to himself from any of the three accounts. (Tr., Vol. 1, p. 483, L. 19-22.)

It has always been Bill's position that the analysis under *McCoy* and *Maslen* control, but that the analysis is equally applicable to both his and Dr. Baruch's accounts. The magistrate court provided no rationale or explanation as to how it arrived at its conclusion to award Dr. Baruch the balance of her 401(k) on the date of marriage. At the conclusion of the trial the magistrate found that Bill's account was distinguishable from the *Maslen* and *McCoy* cases because (1) he "withdrew" funds and (2) because the community contributed to the account after marriage and therefore the account was commingled and could not be traced. (R., p. 585.)

The community made significant contributions to Dr. Baruch's account and the account increased in value by nearly $400,000 during marriage. On the date of marriage, Bill's account was valued at $386,636. The magistrate court found that the community made contributions towards Bill's account and that the account was community because it was comingled with community funds. However, community funds were contributed to both accounts and therefore both accounts have been comingled. There is no way to determine on *either* of the accounts whether it was the separate portion or community portion of the accounts that increased or decreased in value. The magistrate court's finding that Bill withdrew funds was not supported by the evidence as there was no evidence that any funds were withdrawn from the Schwab 3713 IRA.

Dr. Baruch argues that there was a stipulation that her account funds were separate. There was no such stipulation. Mr. Welsh stated at the hearing on the Motion for Leave to Alter or Amend:

> **Mr. Welsh:** And I want to make it clear, Your Honor, I think the court knows we never conceded. We took the same argument with her account as we did to my client's account. I think the court knows that. When you say counsel tried to suggest to you that we conceded the separate property, I don't think the court hopefully believes that. We argued as to both accounts, they were separate based upon Maslen and McCoy.
>
> **Court:** They were separate at the time of marriage.
>
> **Mr. Welsh:** Yes, Your Honor. Exactly. And stayed separate at the time of divorce, that portion under our analysis from Maslen and McCoy.

(Tr., Vol. 1, p. 666, L. 10-23.) It has always been Bill's position that *Maslen* and *McCoy* apply equally to both his retirement and Dr. Baruch's retirement account. Dr. Baruch's claim that Bill did not raise this argument until the appeal is simply incorrect and contradicted by the record. Either *Maslen* and *McCoy* apply to both or they apply to neither; his position on appeal is entirely consistent. He has argued, among other things, that the magistrate erred by applying the cases to Dr. Baruch's account and not to his.

Finally, Dr. Baruch suggests that the district court's conclusion that Bill stipulated to the treatment of Dr. Baruch's retirement account as being her separate property when the district court relied upon a portion of the transcript where Bill made a concession related to an *entirely different account* is simply harmless error; this mistake is far from harmless error.[7] It is hard to fathom how the district court's conclusion that a stipulation was made by Bill and in support of

[7] As set forth in detail in Appellant's Brief, the district court found that Bill conceded that Dr. Baruch's 401(k) was her separate property and relied on the following testimony, "Are you claiming any interest in that IRA?" "No, I

that conclusion relies on a portion of the transcript where Bill stipulated to an entirely different account can amount to harmless error. To the contrary, this constitutes error because the conclusion is not supported by the evidence in the record.

Dr. Baruch label's Bill as "greedy" and "litigious" simply because it is his position that the balance of his retirement account on the date of their marriage is his separate property, just as the balance of her retirement account on the date of their marriage was deemed her separate property.

The magistrate court abused its discretion because it failed to act within the outer boundaries of its discretion and consistently with the applicable rules and its decision was not made with an exercise of reason. *Hentges v. Hentges*, 115 Idaho 192, 195, 765 P.2d 1094, 1097 (Ct.App.1988). The district court erred in affirming the magistrate's decision.

VI. The District Court Did Err in Affirming the Magistrate's Finding that the Capital Gains Distribution was Community Property.

Dr. Baruch's entire argument regarding Bill's Veltex distribution is based upon the magistrate court's incorrect application of the law. She argues that the $342,149 capital distribution that was made during the marriage was properly deemed income by the court because the court found that significant labor and efforts were contributed to the project during marriage.

It was undisputed at trial that Bill acquired his ownership interest in Veltex Building, LLC prior to marriage. (Tr., Vol. 1, p. 412, L. 1-5; p. 232, L. 4-8; Defendant's Exhibit 517.) It

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don't claim any interest in it." "We will agree to treat it as separate property." (R., p. 834) Bill was referring to Exhibit 234 which was a small IRA with a value of approximately $3,361. He was not testifying about the 401(k).

was undisputed at trial that after the parties were married, no funds were put into Veltex Building, LLC. (Tr., Vol. 1, p. 418, L. 15-19.) Therefore, all capital contributions made by Bill were contributed before the parties were married. Bill's interest in the entity was acquired *prior* to marriage, not *during* marriage. Dr. Baruch presumes that because the funds were disbursed during marriage that the date of the disbursement is the date the asset is characterized. However, under Idaho law, the character of property vests at the time the property is acquired. *Winn v. Winn*, 105 Idaho 811, 815, 673 P.2d 411, 415 (1983). Bill testified that the $342,194 was a capital gains distribution. Dr. Baruch presented no evidence or testimony to rebut or even contradict this evidence.

Significantly, Dr. Baruch completely ignored and did not even address Bill's legal analysis discussing the *Speer, Swope,* and *Wolford* line of cases. It appears that she does not disagree with Bill's legal analysis.

Bill agrees and does not dispute that he must trace the funds applied to the Ketchum Condominium to his separate property to a reasonable degree of certainty. Bill has met that burden. The magistrate court erred in its conclusion that the capital gains distribution was income and that it was income because the community had contributed efforts towards Bill's separate property. Under Idaho law, the party seeking reimbursement as a result of alleged community contribution with respect to separate property has the burden of proving that community expenditures have enhanced the value of the separate property and the amount of the enhancement. *Bliss v. Bliss*, 127 Idaho 170, 173, 898 P.2d 1081, 1084 (1995); *Josephson v. Josephson*, 115 Idaho 1142, 772 P.2d 1236 (Ct. App. 1989); *Suter v. Suter*, 97 Idaho 461, 546 P.2d 1169, (1976); *Hooker v. Hooker*, 95 Idaho 518, 511 P.2d, 800 (1972); and *Swope v. Swope*,

122 Idaho 296, 834 P.2d 298 (1992) (emphasis added) (hereinafter referred to as *Swope II*). With regard to the burden of proof, the Supreme Court has ruled that, not only must the party claiming a community reimbursement from a separate property business demonstrate that the value of the business increased during the years of the marriage, the party must also demonstrate why the value of the separate property business increased. *Swope, supra.*

Furthermore, there was no evidence presented at trial as to any community efforts or labor were expended towards Veltex Building, LLC. Rather, the magistrate simply assumed such labor based purely upon the fact that construction of the building occurred during the marriage and stated, "... my finding was based upon my determination that it was more probable than not that Mr. Clark put a significant amount of effort into this project in the planning, building, and selling of the units after they were married." (Tr., Vol. 1, p. 678-679.) As addressed in Appellant's Brief, even if the court's finding that labor was expended were supported by the evidence, the community was compensated by Bill's monthly paycheck from Clark Development, LLC. Clark Development, LLC was paid a fee for developing the project. (Tr., Vol.1, p. 626, L. 11-28.) Bill has fully addressed this legal analysis in his appeal brief and Dr. Baruch has not responded at all to the legal arguments set forth therein, so Bill will not reiterate that argument here.

With regard to Dr. Baruch's claim that Bill's accounting in tracing the actual funds contained errors. First she argues that Bill did not account for the $1,631.60 in community dividends and interest added to the Schwab account in February and the $1,943.23 in community and dividends added to the account in March. With regard to the $1,943.23 in dividends, of that amount $1,904.50 of those dividends were added on March 30, 2007, which is after the $176,000

was withdrawn on March 27th and is therefore after the relevant time period. (Defendant's Exhibit 596, bates stamp 1294.) If the Court deems that it is appropriate, Bill has no objection to reducing the $107,146.07 by $1,670.33 ($38.73 for March dividends + $1,631.60 for the February dividends).

Most significantly, Dr. Baruch incorrectly states that the $10,000 check was withdrawn on March 28, 2007 after the $176,000 check cleared."[8] However, Defendant's Exhibit 596, bates stamp 1293 reflects that the $176,000 check and the $10,000 check both cleared on the *same day*; March 28, 2007. It does not show that the $10,000 check cleared *before* the $176,000 check. Significantly, and in support of Bill's argument, the $10,000 check was written on March 26, 2007, one day before the $176,000 check written on March 27th. (Defendant's Exhibit 596, bates stamps 1306-07.)

The Veltex capital gains distribution was Bill's separate property and Bill traced those funds to a reasonable degree of certainty to the acquisition of the Ketchum condominium and is entitled to be reimbursed for those funds.

VII. Conclusion

Bill respectfully requests this Court to grant his appeal and reverse the district court and conclude that the balance of Bill's IRA on the date of marriage is his separate property and therefore the account, since it is less than that balance, is Bill's separate property. In the alternative, if this Court characterizes Bill's account as community, then Bill respectfully requests the Court to hold that Dr. Baruch's account should also be characterized as community property. Bill further respectfully requests this Court to conclude that he is entitled to

reimbursement in the amount of $107,146.07 for his separate property contributions towards the acquisition of the Ketchum Condominium.

DATED: April 25, 2012

COSHO HUMPHREY, LLP

By: _____
MACKENZIE WHATCOTT
Attorneys for Defendant/Appellant

[8] Respondent's Brief, p. 36 (emphasis original).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25th day of April, 2012, a true and correct copy of the within and foregoing instrument was served upon:

James A. Bevis
BEVIS JOHNSON & THIRY, PA
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Boise, Idaho 83706

☒ Hand Delivery
☐ U.S. Mail
☐ Overnight Courier
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MACKENZIE WHATCOTT
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