9-7-2012

Bald, Fat, & Ugly, LLC Appellant's Reply Brief Dckt. 39451

IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD A. KEANE and LISA C. KEANE, and KEANE AND CO. CONSTRUCTION, INC., and R & L DEVELOPMENTS, L.L.C.,

Claimants/Respondents-Appellants,

and

KEANE & TAYLOR LLC and KEANE LAND CO., LLC,

Claimants,

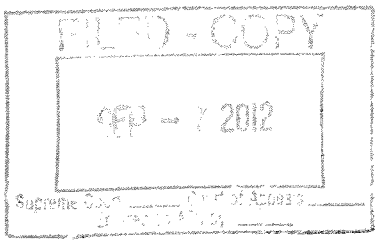
v.

BALD, FAT & UGLY, LLC,

Respondent/Claimant-Respondent on appeal.

Docket No. 39451

APPELLANTS' REPLY BRIEF



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, Honorable Jeff M. Brudie, District Judge, Presiding

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I. INTRODUCTION

Appellants ("Keane") did not disobey or fail to comply with any lawful judgment, order or process as required by the rules governing contempt proceedings. There was no judgment entered. The Order Confirming Arbitration Awards did not order Keane to pay the arbitration awards. It merely granted to Bald, Fat & Ugly ("BFU") the right to obtain a money judgment, which BFU failed to obtain. Keane did not disobey the confirmation process because the process did not require Keane to pay off the arbitration award.

Even if the Order Confirming Arbitration Awards was deemed an order to pay the arbitration award, it was not be a lawful order. Idaho rules and statutes require the completion of three steps in order enforce payment of a sum certain. First, there must be a decision to pay. There was a decision in the form of the Order Confirming. There then must be entry of judgment. This was never completed. Only upon entry of judgment can a party, with the aid of the court, seek enforcement of the obligation to pay. However, the enforcement proceedings do not include Contempt Orders.

There is no substantial or competent evidence that Keane had the then present ability to comply with the Contempt Order. The Contempt Order required payment in full of the arbitration award of more than $159,000.00 within thirty (30) days. The evidence, in the form of the contempt trial transcript, shows that Keane put most of his assets up for sale, sold sufficient assets to pay off the other arbitration award in an amount in excess of $282,000.00, did not have liquid assets to pay the arbitration award at issue and did not have the ability to pay the arbitration award within thirty (30) days absent the sale of additional property. There is no

evidence that Keane was able to sell any additional property within the thirty (30) days and he explained at the trial the reasons why this might not happen – a weak market and a lack of qualified buyers. Keane had no ability to comply with the Contempt Order's command to pay the arbitration award in full in thirty (30) days. The Contempt Order should be reversed.

II. ARGUMENT

A. Reply to Big, Fat & Ugly's Summary of Argument.

BFU variously contends that the Appellants ("Keane") were in contempt because they refused to honor a mediated settlement agreement, an arbitration award, the district court's Order Confirming Arbitration Awards ("Ordering Confirming"), and a "judgment." (Respondent's Brief, pp. 3-4.) As BFU itself recognizes, contempt can only be based on a disobedience of a court order, process or judgment. Idaho Code § 7-601(5). Neither the settlement agreement nor arbitration award involved the court and therefore cannot form the basis for or lead to a finding of contempt.

The Order Confirming is unquestionably a court "order" but there must be disobedience of this order. Here, the Order confirmed the arbitration awards but no one claims Keane disobeyed confirmation of the awards. (R., p. 44.) Instead, Keane was found in contempt of the Order Confirming because he failed to pay off one of the arbitration awards. (R., p. 185.) This was not a disobedience of the Order Confirming, however, because that order never ordered Keane to pay the arbitration award. It granted to BFU right to obtain a money judgment against Keane but does not order Keane to pay anything. The statute cited by the district court in the Order Confirming specifically requires that simultaneously with or after confirmation of the

award, "judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree." Idaho Code § 7-914. Therefore, the Order Confirming and the applicable statute contemplate entry of judgment after confirmation. There was no entry of judgment.

An Order granting the right to obtain a money judgment is not an order requiring payment of the judgment but, as indicated above, is an order requiring a further step in the process. Read carefully, the Order Confirming does not require Keane to do anything. Instead, the Order and Idaho Code § 7-914 grants the right to, and therefore requires, BFU to obtain a money judgment against Keane before anything is required of Keane. (R., pp. 43-45.) It is BFU that failed to comply with the Order Confirming.

BFU argues that the Order Confirming is also a "judgment" and Keane disobeyed this judgment by not paying off the arbitration award. (Respondent's Brief, pp. 3-4.) The Order Confirming does not say judgment (or decree) in its title, is not a separate document and has attached to it and refers to twenty-six (26) pages of exhibits. (R., pp. 43-45.) As discussed in more detail below, the Order Confirming is not a judgment and Keane cannot be held in contempt for disobeying a non-existent judgment.

BFU further summarizes that because Keane is "a very wealthy man" and had "conceded he had the ability to pay" and "clearly had the ability to pay" the district court properly found Keane in contempt for failing to comply with the Order Confirming. (Respondent's Brief, p. 4.) There is no substantial or competent evidence that Keane had the ability to pay the arbitration award at all, let alone within the thirty (30) days given by the district court. The evidence shows to the contrary. Any wealth Keane had was, and is, tied up in non-liquid assets like real estate,

an airplane and an airplane hanger. (Tr., pp. 165-178.) Keane put various of his assets on the market for the specific purpose of paying off the arbitration awards. *Id.* He was partially successful and in fact sold enough of his assets to pay $282,734.16 toward one of the arbitration awards. *Id.*[1] Keane was not able, however, despite concerted efforts, to sell any more of his assets and was therefore unable to pay toward the other arbitration award. *Id.* Keane never conceded he had the present ability to pay the other arbitration award. *Id.* Keane consistently testified that any ability to pay was tied to his ability to sell his assets, which was in turn tied to a poor market and finding qualified and willing buyers. *Id.* There is not a shred of evidence that Keane had any available (liquid) assets to pay off the arbitration award. *Id.* There is no substantial or competent evidence that Keane had the then present ability to pay.

Keane has never been in disobedience of any court judgment, order or process. Without disobedience and without the then present ability to pay, Keane was erroneously found to be in contempt and the contempt order should be overturned.

B. <u>Response to BFU's Claim That the District Court Entered a Money Judgment Against Keane</u>.

Disingenuously, especially given recent case law and rule changes, BFU argues that the Order Confirming is a judgment because it resolved the core matter at issue and because the word "judgment" can be found <u>in</u> the Order. (Respondent's Brief, p. 6.) This argument is based

[1]BFU's attempt to paint Keane as a person who refused to live up to his obligations rings hollow in light of the efforts Mr. Keane made to sell his assets to pay off one of the arbitration awards and doing so before a judgment was entered.

on a selective quotation from *Spokane Structure, dicta*, and a case (*Storey*) that has been overturned by recent case law and by amendments to the Idaho Rules of Civil Procedure.[2]

A judgment is a "separate document" entitled "judgment or decree." I.R.C.P., Rule 54(a). The Order Confirming is not entitled, nor does it even have the word, "judgment" or "decree" in the title. (R., p. 43.) Nor is it a "separate document." It attaches and refers to twenty-six (26) pages of exhibits. (*Id.* at pp. 43-68.) The Order Confirming is not a judgment. There is no judgment with respect to the arbitration awards.

Aside from the non-existence of a judgment, a judgment must be entered before it can be enforced. I.R.C.P., Rule 58(a) states that "upon a decision by the court that a party shall recover only a sum certain . . . the court shall sign the judgment and the judgment shall be entered by the judge or clerk." *Id.* (Emphasis added.) This rule also requires that a judgment shall be set forth on a separate document as required by Rule 54(a). *Id.* Entry of a judgment is accomplished by placing a filing stamp on this separate document. *Id.* A judgment cannot be enforced until after it has been entered. I.R.C.P., Rule 62(a).

These rules contemplate a three step process for collecting money: (1) a decision by the court that a party recover money; (2) the signing and entering of a separate document entitled judgment; and (3) enforcement of the judgment. Here, the first step of the process was completed. The Order Confirming was a decision by the court that BFU recover money. However, the second step has not been completed. There has never been a separate document

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[2]The rules were amended on July 1, 2010 after both *Spokane Structures* and *Storey* were decided.

entitled judgment entered in this action with respect to the arbitration awards. As a consequence, the third step (enforcement of the judgment) could not proceed. Without entry of a money judgment there is no legal process for enforcing an award of money. Neither an Order Confirming nor Contempt Order can be used to do so.

Interestingly, BFU's application (motion) for the Order Confirming Arbitration Awards requested the first two steps in the process: (1) that the court enter an order confirming the arbitration awards; and (2) [a]fter confirmation of the arbitration awards, judgment be entered in favor of BFU in the following amounts . . . . (R., p. 15 (emphasis added by BFU – *see* Respondent's Brief, p. 1).) Also of note, the Order Confirming is based on, and refers to, Idaho Code § 7-914. (R., p. 44.) This statute also contemplates a two step process: (1) granting an order confirming; and (2) entering judgment. Idaho Code § 7-914. It was up to BFU to see that this requested second step be completed. It failed to do so. Keane should not be held in contempt for BFU's failure to complete the very process for which Keane was held in contempt for not complying.

BFU's reliance on *Spokane Structures* is misplaced. (Respondent's Brief, p. 5.) Although BFU accurately quotes from that case, BFU fails to note preceding and applicable language that the "decision of the court" resolving the underlying lawsuit and the "judgment" must be two different documents. *Spokane Structures, Inc. v. Equitable Investments*, 148 Idaho 616, 621, 226 P.3d 1263, 1268 (2010). The Order Confirming was not.

BFU also relies on *Storey Construction, Inc. v. Hanks*, 148 Idaho 401, 224 P.3d 468 (2009), for the proposition that this Court in that case confirmed that the title or specific

formatting of a document does not control the judgment analysis. (Respondent's Brief, p. 5.) BFU argues that it can rely on *Storey* because it was not specifically mentioned, disavowed or criticized by *Spokane Structures* and therefore had not been overruled. (Respondent's Brief, p. 5.) *Spokane Structures* overruled any prior case that held that a document combining the decision of the court with the relief granted was a judgment. *Spokane Structures*, 148 Idaho at 620; 621, 226 P.3d at 1267. BFU relies on *Storey* for that exact proposition. To the extent that *Spokane Structures* did not overrule *Storey*, later amendments to the Idaho Rules of Civil Procedure did. (*See* July 1, 2010 amendments to I.R.C.P., Rules 54(a), et al.)

Regardless of whether *Storey* has been overruled by case law or statute, this Court's analysis in that case merely assumed, without ruling, that the Order Confirming was also a judgment. *Storey*, 148 Idaho at 410, 224 P.3d at 475. *Storey* therefore has no precedential value. In addition, the analysis in *Storey* was done in the context of res judicata and is *dicta*, at best, to the issues presented in this case.

Contrary to BFU's position, the district court did not enter a money judgment against Keane. Contempt therefore cannot properly be based on disobedience of this non-existent judgment. Moreover, because the Order Confirming is not an order to pay and cannot be enforced as a judgment, Keane was not in disobedience of this order.

C. Reply to BFU's Argument that No Judgment was Required; Keane was in Contempt for Disobeying the Order Confirming and the Confirmation Process.

BFU contends that whether or not there is a judgment is irrelevant because Keane failed to comply with the Order Confirming Arbitration Awards and/or the process "for infusing an

arbitration award with judicial authority." (Respondent's Brief, pp. 6-7.) This argument assumes that Keane failed to comply with the Order Confirming or the confirmation process. There is no evidence that he failed to comply with either.

Neither the Order Confirming nor the process of confirmation required compliance or obedience by Keane. Neither required Keane to pay the awards. If any action was ordered or required, it was action by BFU to seek and the court to enter judgment. (R., p. 44.) BFU's motion, the arbitration statutes and the Ordering Confirming all contemplate a two step process before an order to pay can be enforced. Unless and until that second step (entry of judgment) is taken, Keane is not required to obey or comply with the Order Confirming or the confirmation process simply because Keane was not ordered to take any affirmative action.

Nevertheless, BFU argues that the Order Confirming commanded Keane to pay the arbitration award and he was found in contempt for violating that order/command. The Order confirmed the arbitration awards and granted to BFU the right to recover a money judgment from Keane but in no manner ordered Keane to pay the award. That the district court knew how to affirmatively and directly order payment, the Contempt Order commands Keane to "pay Award #2 in full . . within 30 days." (R., p. 186.) There is no such command in the Order Confirming.

Nor was the confirmation process disobeyed by Keane. The process requires entry of judgment. *See* Idaho Code § 7-914 (a judgment shall be entered and enforced as any other judgment). Keane was not ordered to enter judgment and therefore has not failed to comply with the process of confirmation.

BFU correctly points out that the disobedience upon which contempt is based must be from a "lawful" judgment, order or process. (Respondent's Brief, p. 6.) The lawful process for enforcing payment of a sum certain requires entry of judgment. It cannot lawfully be accomplished with an Order Confirming Arbitration Awards or a contempt order based on failing to pay the sum certain.

First, the granting of an order confirming an arbitration award requires a judgment in conformity therewith and that the judgment be enforced as any other judgment. Idaho Code § 7-914. The statute does not infuse an Order Confirming with judgment like qualities and in fact divests it of any such power by requiring a separate document entitled judgment. No such judgment was entered.

Second, Rule 62(a) allows for enforcement of a judgment only upon the entry of judgment. I.R.C.P. 62(a). Enforcement proceedings cannot proceed without a judgment and by parity of reasoning cannot proceed on an Order Confirming.

Third, execution of or any proceedings to enforce a judgment can be stayed pending the disposition of a motion for a new trial or to alter or amend a judgment, or a motion for relief from a judgment due to clerical mistakes, or a motion for judgment in accordance with a motion for a directed verdict or a motion for amendment to the findings or for additional findings. I.R.C.P. 62(b). A party has the right to file these motions up to fourteen (14) days after entry of judgment. I.R.C.P. 59(b). Nor can any Rule 60(b) relief be granted for mistake, inadvertence, excusable neglect, newly discovered evidence, fraud or other grounds for relief from judgment until after there is a final judgment. I.R.C.P. 60(b). None of these motions or relief are available

to challenge or attempt to correct an Order Confirming Arbitration Awards. Using the Order Confirming and subsequent contempt order to enforce payment of a debt precludes from seeking any such relief or stay of enforcement because there has been no judgment entered.

Fourth, the Legislature knows how to expressly give a document other than a judgment the force and effect of a judgment. I.R.C.P. 74(d) (although entry of judgment is still required, a Writ of Mandamus and Writ of Prohibition ordering the party to perform an act or refrain from performing an act "shall have the same force and effect as a judgment"). The Legislature has not given an Order Confirming Arbitration Awards or an Order on Contempt the same force and effect as a judgment and its failure to do so speaks volumes as to the ability of a court to find someone in contempt for failing to do that which first requires a judgment or judgment like document.[3]

Fifth, the enforcement mechanisms for payment of a judgment are manifold. They include execution, attachment, garnishment, and liens. But the enforcement of an obligation to pay can only come after entry of judgment. I.R.C.P. 62(a). There can be no enforcement of an obligation to pay, whether by execution or contempt powers, without first entering judgment. It

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[3]BFU argues that the Order Confirming has the same force and effect as a document entitled "judgment" for purposes of contempt because Idaho Code § 7-919 makes it an appealable order. (Respondent's Brief, p. 8.) It is plain on its face that Idaho Code § 7-919 only allows Orders Confirming to be treated like a judgment for purposes of establishing jurisdiction for filing an appeal. Idaho Code § 7-919(b). This statute in no manner converts the Order Confirming into a judgment or allows the Order to be enforced like a judgment through contempt proceedings or create an exception to all of the rules and statutes requiring entry of judgment before enforcing or defending against an obligation to pay.

is error to allow the parties and the court to bypass these Legislative based enforcement proceedings through the contempt process.

Sixth, there are numerous other remedies available to a person who owes money against the enforcement of that obligation. These include not only the stay on enforcement pending the disposition of the motions described above, but also a stay upon filing of bankruptcy (11 U.S.C. § 362(a)(2)) and injunctive relief from enforcement under I.R.C.P. 62(f). These remedies against enforcement of payment are not available until after entry of judgment (except for bankruptcy) and therefore were not available to Keane.

BFU also claims that the court has inherent powers to enforce orders without the presence of a judgment. (Respondent's Brief, pp. 9-10.) Keane agrees. There are innumerable orders that are not judgments but can be enforced through contempt proceedings based on the court's inherent powers. But, that does not resolve the issue here whether a court has the power to force someone to pay money through an Order Confirming without entry of a money judgment. The Legislature has created a very specific process for the enforcement of money judgments. Neither the parties nor the court should be allowed to circumvent that process under the guise of the inherent contempt powers of the court.

BFU accuses Keane of raising a "red herring" argument by focusing on the lack of a judgment. Nevertheless, BFU raises a "straw dog" argument in response to prove that requiring a judgment here would lead to the breakdown of the entire judicial process. (Respondent's Brief, pp. 9-10.) BFU's straw dog is bred from the so-called "logical extension" of Keane's argument that a party has no duty to comply with a court order until it is reduced to a judgment. *Id.* at p. 9.

BFU then feeds its straw dog with holdings from two cases upholding contempt orders, neither of which were based on an order to pay without a judgment.[4] *Id.* at pp. 10-11. BFU then asks the straw dog to hunt based on the conclusion that not all contempt orders need to be based on a judgment, therefore the non-judgment Order Confirming is lawful and a proper basis for contempt. *Id.*

In typical straw dog fashion, BFU attempts to create an issue that does not exist, direct attention to the non-existent issue, show how ludicrous the other party's non-existent position is on the non-existent issue, then claim victory on the actual extant issue. Keane is in no manner advocating or even arguing that a party can only be in contempt of a judgment. Keane is not taking the position that the court's inherent powers of contempt do not include orders, verbal or written and other non-judgment documents and actions. Keane agrees that the so-called "logical extension" is ludicrous but notes that it is not a logical extension of the actual issues in this case. A judgment is required in this case because that is the lawful process for enforcing an obligation to pay, not an Order Confirming.

Incongruously, BFU then argues that the contempt was not based on failing to pay a money. (Respondent's Brief, p. 11.) BFU now appears to argue that the obligation at issue would not be reduced to a money judgment but was instead more of a directive to pay funds to a trust account as a type of performance bond to ensure certain work was completed. *Id.* What

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[4]These cases upheld contempt orders based on a failure to comply with an order to execute a settlement agreement and a failure to comply with a TRO. Absent from Respondent's Brief is a citation to any case upholding a contempt order based on an alleged order to pay without entry of a judgment.

BFU describes is simply to whom the money is to be paid and the purpose for which the money would be used, neither of which would change the nature of the judgment should it ever be entered. BFU was awarded the right to recover a sum certain, the result of which would be a money judgment.

The incongruity of the argument is best showcased in the very Order of which the court found Keane to be in contempt. The Order Confirming expressly gave BFU the right to recover a "money judgment". (R., p. 44.) Indeed, the arbitrator clarified that the arbitration award is in the nature of a monetary award and did not order Keane to do anything but pay. (R., p. 68.) The district court acknowledged this when he quoted the arbitrator as follows: "I did not order or direct that Keane perform (or even be allowed to perform) the work in question . . . ." (R., p. 184.) BFU cannot now reasonably argue that the obligation to pay would be reduced to something other than a money judgment.

No judgment has been entered in this matter. Neither the Order Confirming nor the process for confirming the arbitration awards required payment of those awards. Even if they did, it would not be a lawful order or process to pay. One can only be forced to pay money after entry of judgment and only through the enforcement mechanisms afforded by the rules and statutes (of which contempt is not one). To allow contempt proceedings to be used as a debt collection tool without first requiring a judgment would deprive Keane of numerous remedies and defenses that cannot be invoked until after entry of judgment. Whether this would rise to the level of a deprivation of due process rights need not be determined at this stage. It merely shows

that an order to pay money without a judgment is not a lawful order upon which contempt can be based.

Keane did not ignore, fail to comply with or disobey the Order Confirming. The order did not require him to do anything. It needed further action by others before any action could be taken – the required entry of judgment. That never came. There is nothing contemptuous about waiting for the obligation to pay to ripen into a valid judgment.

Interestingly, even if the judgment had been entered and Keane still did not pay there would be no grounds for contempt. Instead, BFU, with the aid of the court, could seek writs of execution, garnishment, attachment or file liens on the very property BFU claims made Keane a "very wealthy man." Upon execution, for instance, the sheriff could seize Keane's assets and force the sale of any non-exempt property. Again, interestingly, if the sheriff was no more able to sell the property than Keane was there would still be no grounds for contempt. The mere failure to pay a debt is not grounds for contempt.

If the proper collection process were followed, then Keane would have had the opportunity to file motions to challenge the judgment or get automatic stays that would extend the mere thirty (30) days allowed by the contempt order or seek a stay of execution or contemplate bankruptcy or simply allow the enforcement of the judgment process to be completed. Taking any one of these actions would not be grounds for contempt. How then could Keane be found in contempt for violating an order that does not require actual payment or, even if it did, required him to pay before judgment had been entered?

D. Reply to BFU's Argument That Keane was in Contempt Based on Substantial and Competent Evidence.

For the Contempt Order to stand there must be, at a minimum, substantial and competent evidence: (1) that Keane was ordered to make payment; or (2) there was a money judgment; and (3) that Keane had the then present ability to pay the entire arbitration award ($159,000.00 + prejudgment interest) within thirty (30) days. There is no such order to pay, no judgment and the only substantial and competent evidence regarding Keane's ability to pay is that he did not have the present ability to pay.

1. Reply to BFU's Claims That Keane Disobeyed the Order Confirming Arbitration Awards.

BFU describes Keane's disobedience to the Order Confirming as follows:

1. Keane failed to undertake serious efforts to liquidate his sizeable assets;
2. Keane failed to make the required payments;
3. Keane sought to circumvent the Order Confirming by performing the work himself; and
4. Keane failed to take more urgent efforts to sell his property and pay within thirty (30) days as he promised.

(Respondent's Brief, pp. 14-15.)

Keane was not found to be in contempt for the alleged disobedience numbers 1, 3 and 4 above. Nor could the court have found Keane to be in contempt for disobedience numbers 1, 3 and 4. The Order Confirming in no manner ordered, adjudged or decreed that Keane liquidate his "sizeable" assets, or to sell his property within thirty (30) days. (R., pp. 43-45.) Nor did the Order Confirming order Keane to refrain from performing certain work. *Id.* He was found to be in contempt for not having paid an arbitration award. (R., p. 185.) Regardless, whether there

was substantial or competent evidence that Keane disobeyed the Order Confirming as described in 1, 3 or 4, is irrelevant.[5]

The only relevant alleged "disobedience" is Keane's alleged failure to pay off the arbitration award. There is no "clear personal directive to pay funds" in the Order Confirming as claimed by BFU. It confirms the arbitration awards. These awards are not directives to pay. Even if they were they are not court directives.

Nor did the district court order payment of the awards by confirming them. It is true the Order Confirming uses boiler plate language "IT IS HEREBY ORDERED, ADJUDGED AND DECREED" but it did not order, adjudge or decree that Keane pay off the arbitration awards. (R., p. 44.) It ordered, adjudged and decreed that BFU "have and recover from" Keane "a money judgment." *Id.* This is not a clear personal directive to Keane to pay the arbitration awards. It is, at best, a clear personal directive to BFU to obtain a money judgment and have it entered. BFU never did. In no manner can BFU's failure be deemed a disobedience by Keane.

There is no substantial (or any) evidence that Keane disobeyed any lawful judgment, order or process of the court requiring him to pay the arbitration awards.

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[5]It should be noted, however, that there is no such evidence. The evidence shows Keane made serious efforts to liquidate his assets and with some success. (Tr., Contempt Trial, pp. 165-178.) The evidence shows he put many of his assets on the market and by doing so was able to pay over $282,000.00 toward one of the arbitration awards. *Id.*

2. Reply to BFU's Claims Regarding Keane's Knowledge of the Confirmation Order.

There is no dispute that Keane knew of the arbitration, the arbitration awards, the clarification of the arbitration awards and the Order Confirming Arbitration Awards. That is not the relevant issue. A contemnor must have more than knowledge of an order, the order must clearly state what he has been ordered to do. Here, there is no substantial or competent evidence that Keane knew from the Order Confirming that he had been ordered to pay the arbitration awards. The evidence is to the contrary. The Order Confirming does not clearly (or at all) order Keane to pay the arbitration awards. His knowledge of his duty to pay cannot have come from this order. Moreover, the rules and statutes do not allow for the enforcement of an obligation to pay without entry of a judgment. Keane's lack of notice and therefore lack of knowledge of any court commandment to pay the arbitration award is fatal to the Contempt Order.

3. Reply to BFU's Contention That There is Substantial and Competent Evidence that Keane had the Present Ability to Comply With Portions of the Order Confirming.

The substantial and competent evidence relied upon by BFU to show that Keane had the present ability to comply is the transcript from the proceedings on contempt dated September 9, 2011. Specifically, BFU cites to pages 166-174 of the transcript. This evidence, however, does not support BFU's claims that Keane failed to undertake serious efforts to liquidate his assets or that he conceded that he had the present ability to pay. Instead, this evidence supports his serious efforts to sell real property, an airplane and an airplane hanger with values of nearly $2,000,000.00. (Tr., Contempt Trial, pp. 166-172.) The evidence also describes the reasons why

more of these items had not sold, including a weak market and various buyers' inability to secure financing. *Id.*

Moreover, the allegation that Keane has failed to liquidate his assets is contradicted by his payment of over $282,000.00 toward the arbitration awards received from the sale of assets. (Tr., Contempt Trial, pp. 165-178.) The alleged substantial and competent evidence that Keane conceded his ability to pay reads as follows:

> Q: If the Court were to order you today to come up with that $159,000, how long would it take you to make that money?
> A: Depends on the sale of one of these properties.
> Q: You can do it though, couldn't you?
> A: With cash today, no. Depends on the sale of the property.
> Q: Would you be willing if the Judge told you to do it in 30 days, would you be willing to list all your properties for sale to raise that money?
> A: I would be willing to do what it takes to get solitude.
> Q: Would you do what it takes to obey the Court's order to pay the money?
> A: Yes.
> Q: You have the ability to do that, don't you, if you choose to?
> A: If a property sold.

(Tr., pp. 175-176.) Rather than conceding that he had the ability to pay, Keane clearly testified that he had no liquid assets with which to pay at that time and any ability to pay depended upon the sale of property. *Id.* There is no substantial or competent evidence that Keane had the then present ability to comply with any commandment to pay the arbitration award.

E. Reply to BFU's Contention that Requiring Payment Within Thirty (30) Days is an Appropriate Sanction.

The district court, in its contempt order, required payment of the arbitration award in full within thirty (30) days of the signing of the order. (R., p. 186.) BFU argues that this sanction was not an abuse of discretion because Keane admitted he could comply "if he wanted to badly

enough" and Keane failed to offer any explanation as to why he failed to list or sell property "at a low enough price to ensure prompt sale." (Respondent's Brief, pp. 16-17.) Keane did not admit that he could pay off the arbitration award within thirty (30) days. Rather, he testified that if the court were to order him to pay the entire $159,000.00, the length of time it would take him to pay that money would depend upon the length of time it took to sell one of the many listed properties. (Tr., p. 175, l. 25-p. 176, l. 7.) There is no evidence that he was able to do so within those thirty (30) days. When asked if the judge required him to make that payment within thirty (30) days, whether he was willing to list all his properties for sale to raise the money, (*Id.* at p. 176, ll. 8-18.) he responded he would be willing to do what it takes "to get solitude" and to obey the court's order to pay money but only if additional property was sold. *Id.*

As to Keane's alleged lack of explanation as to why he did not list or sell the property at a low enough price to insure prompt sale, the "evidence" cited in no manner stands for that proposition. BFU cites to the transcript on the contempt trial, p. 140, ll. 1-16. (Respondent's Brief, p. 17.) Keane's testimony was that he would be willing to reduce the price to fire sale status if somebody made him an offer. *Id.* His precise testimony, cited to by BFU, is:

Q: How much of that is up for sale?
A: For the right price I'll sell anything.
Q: You are trying to raise money though?
A: That's correct.
Q: So why not sell it at a fire sale where you can get it gone in 30 days, is there a reason you don't do that?
A: No.
Q: If you sold – if you reduced the price on lot 4 from seventy-four nine down to twenty-five, I bet you could sell it?
A: Yeah.
Q: So why not?

A: I don't know. I would probably if somebody came and made me an offer just to get my solitude. Would you like to buy it?

Id. In addition, Keane gave very detailed explanations why he was unable to sell more property – a weak market and lack of qualified buyers. *Id.*

In addition to there being no evidentiary basis for the sanction of full payment within thirty (30) days, it was an abuse of discretion to require full payment within thirty (30) days given his then present inability to comply as discussed above. When the evidence indicates that he could not comply at all, requiring him to comply within thirty (30) days was an abuse of discretion.

This sanction was a further abuse of discretion because it ordered payment of a debt without entry of judgment, without requiring BFU to exhaust other enforcement mechanisms (i.e., execution, attachment, garnishment or lien) and by depriving Keane of available remedies and defenses to payment that do not exist in response to a contempt order but would exist if a judgment had been entered. The sanction ordered was an abuse of discretion.

F. Reply to BFU's Claim that the Order Striking Keane's Affirmative Defenses Was Appropriate.

BFU argues that the district court did not abuse its discretion in striking Keane's affirmative defenses as untimely because the court did not grant an extension of time or mislead Keane regarding the timeline for filing. (Respondent's Brief, p. 17.) Keane does not argue that the court misled his counsel and agrees that he has the duty to know the rules. Therefore, the district court's intent is irrelevant. The district court abused its discretion in not taking into account or making a finding as to the reasonableness of Keane's counsel's understanding that

Keane had been granted an extension consistent with the fourteen (14) days discussed at the hearing.

The issue, one never decided by the district court, is whether it was reasonable for counsel to believe he had been granted fourteen (14) days to respond with affirmative defenses. Certainly, it was reasonable given the use of the word "yes" in response to the statement that affirmative defenses were due in fourteen (14) days. (Tr., pp. 8-9.) Additional evidence of reasonableness is the strict compliance with the fourteen (14) day deadline. In other words, Keane asserted his affirmative defenses within the fourteen (14) day period indicating his understanding of the due date. (R., pp. 152-156.) Also, because the rule expressly allows for extensions of time, it was reasonable for Keane's counsel to believe that the court had granted that extension. *See* I.R.C.P., Rule 75(g)(2).

BFU claims that even if the district court abused its discretion, any error was harmless. (Respondent's Brief, p. 18.) One of the affirmative defenses struck by the district court was Keane's inability to comply with the Order Confirming and that among the reasons he was unable to comply were the actions of counsel and BFU that specifically prevented Keane from complying. (R., p. 153.) It is clear from the district court's Findings of Fact and Conclusions of Law that it did not take this affirmative defense into account in determining Keane's ability to pay. (*Id.* at p. 185.) Had the district court considered this affirmative defense it had the direct bearing on Keane's ability to comply and if it had ruled based on that affirmative defense that there was no ability to comply, the contempt order would not have been issued. This cannot be said to be harmless error.

G. BFU's Additional Issues on Appeal.

1. Response to BFU's Claim that Lack of an Enforceable Judgment Cannot Be Considered.

BFU argues that, as an issue raised for the first time on appeal, whether there was entry of judgment should not be considered. The judge is tasked with the responsibility for ensuring that a proper judgment has been entered. *See Ward v. Lupinacci*, 111 Idaho 40, 720 P.2d 223, (Ct. App. 1986). BFU was granted the right to seek a judgment in the Order Confirming but did not. (R., p. 44.) It is the very failure of the district court and BFU to properly complete the process for enforcing payment of the arbitration award that makes the contempt order erroneous. BFU now, once again, seeks to use the lack of a properly entered judgment as a means for keeping the contempt order in effect. This is unquestionable. Besides, there are other reasons for overturning the contempt order, including, but not limited to, the lack of substantial or competent evidence that Keane had the then present ability to comply. Nevertheless, this Court should consider the impact that no entry of judgment has upon the validity of the contempt order.

The overarching "issue" presented to the district court, and now on appeal, is whether Keane was in contempt for failing to comply with the Order Confirming. Entry of judgment is not a new issue raised for the first time on appeal, but is rather a legal defense to the overarching issue. *State of Idaho v. Bower*, 135 Idaho 554, 557, 21 P.3d 491, 494 (Ct. App. 2001). An appellate court may exercise its discretion to consider a point for the first time on appeal where the point involves a pure question of law determinable from uncontroverted facts. *Ochoa v. State of Idaho, Industrial Special Indemnity Fund*, 118 Idaho 71, 78, 794 P.2d 1127, 1134 (1990).

Here, there are no disputed facts on this point. There was no entry of judgment. The issues raised by the lack of entry of judgment are purely questions of law. Therefore, to the extent it is found that these are points raised for the first time on appeal, this Court can still consider them. *See, Id.*

2. Reply to BFU's Request for Attorney Fees and Costs on Appeal.

Both parties agree that the award of attorney fees on appeal is governed by Idaho Code § 12-120(3). Consequently, the only issue to be decided is whether there is a prevailing party and, if so, which party prevailed. To the extent that Keane is determined to be the prevailing party, BFU is not entitled to attorney fees.

III. CONCLUSION

Keane respectfully requests that this Court vacate the district court's order and judgment finding him in contempt, reverse the award of attorney fees to BFU by the district court, and award attorney fees on appeal to Keane.

DATED this 7 day of September, 2012.

ELAM & BURKE, P.A.

By: _____
Jeffrey A. Thomson, of the firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of September, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

David R. Risley
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P.O. Box 1247
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✓ U.S. Mail
_____ Hand Delivery
_____ Federal Express
_____ Facsimile

Jeffrey A. Thomson