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Davidson v. Soelberg Appellant's Brief Dckt. 39595

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Case No. 39595

ANNETTE LLOYD DAVIDSON,
Plaintiff-RESPONDENT,

vs.

JOSEPH LLOYD SOELBERG,
Defentant-APPELLANT.

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Case No. CV OC 2011-07685

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ATTORNEYS FOR RESPONDENT

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Nature of the Case

Divorcing parties stipulated to a form of decree that would merge all provisions of a mediated property division, keeping them subject to modification for materially changed circumstances in the future. After pro-se husband (appellant here) had signed and handed back (to wife's attorney) the stipulation for entry of the "attached" form of decree, however, a different form of decree was substituted and attached to the stipulation for its actual presentation to and entry by the magistrate. The substituted form of decree deleted the language

> "2. **MEDIATION AGREEMENT:** The Mediation Agreement dated March 9, 2007 is hereby approved and made an integral and non-separable part of this decree of divorce and"

from the bottom of the first page, leaving only the following language – at the top of the second page, which of course lay covered by the first one:

> "2. **MEDIATION AGREEMENT:** The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, ***except for Paragraph L which is not merged and shall remain a separate contract between the parties***."

"Paragraph L" was a spousal support provision pursuant to which husband paid wife some $93,000 over a span of about 42 months, by which time his financial circumstances mirrored the rest of the economy and he could no longer afford to support his own family and his ex-wife. When he moved the magistrate to terminate the spousal support obligation for materially changed circumstances, however, wife's new attorneys successfully urged the second iteration of paragraph 2 as precluding modification. Wife then sued in District Court breach of the supposedly "not merged, separate contract" to pay her $2,200 per month for ten years, whereupon she was granted summary judgment.

Course of proceedings and disposition below.

Divorcing couple successfully submitted their property division and child custody issues to mediation, yielding an eleven-page Mediated Parenting Agreement and Property Settlement Agreement ("mediated agreement") that included a spousal support provision ("Paragraph L") benefitting wife. Thereupon, the office of wife's then-attorney presented appellant husband (who was pro se) with a stipulation for entry of judgment and decree of divorce

". . . in the form ***attached*** to this Stipulation."

Empnasis added. (C.R. 177) As reflected both in the wife's own affidavit in support of summary judgment (C.R. 105-128) and in husband's affidavit in opposition (C.R. 129-138), the "form attached" to the stipulation presented to, signed and handed back by the pro-se husband included the following at the very bottom of its first of two pages:

> "2. **MEDIATION AGREEMENT:** The Mediation Agreement dated March 9, 2007 is hereby approved and made an integral and non-separable part of this decree of divorce and"

(C.R. 108 and 136; Appendix A hereto for convenience.) The "form" submitted by wife's counsel to the magistrate for entry, however, was *not* the above form – to which husband had in fact stipulated – but a very *different* one (C.R. 175), attached as Appendix B. In this "form," the masthead of counsel has been moved down the page several lines, resulting in the total elimination of the "approved and made ***an integral and non-separable part*** of this decree of divorce" language, leaving in place – on the second page – only the paragraph that read:

> "2. **MEDIATION AGREEMENT:** The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, ***except for***

Paragraph L which is not merged and shall remain a separate contract between the parties."

C.R. 175-176, emphasis added.

It was this changed "form" – rather than the form that ***was*** attached to the stipulation when husband signed it – that wife's counsel submitted to the magistrate and the magistrate entered. C.R. 175-176; 129-138.

Husband had paid wife over $90,000 pursuant to the spousal support provision of the mediated agreement when competition and the economy rendered him unable to continue the $2,200 per month payments, and he quit making them. Wife (by then pro se as well) filed a "complaint" in the divorce case (CV DR 06-13448) for the arrearages and husband responded with a motion to terminate any further obligation for spousal support on the ground wife had remarried and he was financially unable to make further support payment in any event. Wife retained new (current) counsel, who voluntarily dismissed her pro se complaint. The magistrate denied husband's motion to terminate spousal support, concluding per the "stipulation," the support provision was *not* merged in the decree and that the court therefore no longer had jurisdiction to consider modification for changed circumstances. (C.R. 174, 181-183). Plaintiff wife then filed the instant suit in District Court as a separate action for breach of the putative "separate" contract.

Wife then moved for summary judgment on the ground the support provision was not merged in the divorce decree and thus was not susceptible to modification for changed circumstances. Husband opposed the motion on the ground the form of "judgment and decree of divorce" to which he had truly stipulated made the ***entire*** mediated agreement (including its spousal support provision) "an integral and non-separable" part of (i.e., was merged in) the

decree and thus there was no meeting of the minds as to any "agreement" to entry of a form of decree that would carve off the spousal support provision to render it impervious to modification for materially changed circumstances. Affidavit of Joseph L. Soelberg in Opposition to Plaintiff's Motion for Summary Judgment, C. R. 129-138.

Despite husband's affidavit and its inclusion (as Exhibit A and Exhibit B) of the two different "forms" of decree; and despite husband's explanation of the fact Exhibit A was what was attached to the stipulation when he signed it, whereas Exhibit B was what wife's counsel presented to the magistrate for entry (and which the magistrate did enter); and despite the fact even wife's *own* affidavit in support of summary judgment likewise adopted Appendix A and not Appendix B (C.R. 106, paragraph 4 and C.R. 108), the District Court nonetheless granted wife summary judgment, stating in its Memorandum Decision and Order at 3:

> Soelberg does not address in his affidavit the Stipulation he signed in 2007 with the attached form that reads exactly as the Divorce Decree entered in 2007.

C.R. 188. But Soelberg *does* address in his affidavit the Stipulation he signed in 2007 and he also addresses *why* the form attached to the stipulation *by the time it was filed by wife's attorneys* does indeed read "exactly as the divorce decree entered in 2007": It reads the same ***because the form filed with the stipulation and presented to the magistrate for entry wasn't the same form as was attached to the stipulation when husband signed it.*** And nowhere did the District Court address the fact that even wife's *own* affidavit in support of summary judgment ***also*** reflects the switch (C.R. 108).

Defendant husband elected to file his notice of appeal shortly thereafter (C.R. 200-203), which became effective upon the District Court's February 7, 2012 entry of judgment (C.R. 204-205).

Statement of Facts

Inasmuch as this is an appeal from summary judgment for plaintiff wife, husband here cannibalizes the facts from his affidavit in opposition to plaintiff's motion therefor (C.R. 129-138):

During the parties' marriage, they acquired, as community property, two residences in which they had, at the time of their mediated divorce, equity of $66,000 and $72,000, respectively – a difference of just $6,000. They also acquired, as community property, businesses that included an income-producing one known as The Litigation Document Group of Boise, LLC ("Litigation Document Group"), together with attendant business debt of approximately a million dollars and another business known as Las Vegas Legal Technologies, LLC, together with its attendant business debt of another roughly a half-million dollars.

As reflected in the "Property and Debt Schedule" that was part of the agreement (C.R. 119-120), the parties each received a distribution of one of the residences, with husband receiving the one with the greater equity – by a mere $6,000. In addition to the house with the $6,000 greater equity, husband also received the two businesses, but only with their attendant debt of fully $1,500,000. The parties were divorced in March of 2007. Husband's income for the last full year preceding the divorce, i.e., 2006, was $103,728. The provision for "spousal support" quoted by plaintiff in her complaint (i.e., $264,000 over a 10-year period) was intended by the parties to equalize her community property interest in what were, at the time of the agreement, seemingly solid, income-producing businesses. Those businesses were the sole sources of husband's income.

At all times throughout the parties' divorce proceedings, wife was represented by attorney Stanley W. Welsh, whereas husband, who has no legal training, was unrepresented. At

no time did plaintiff or her then attorney call to husband's attention the fact Welsh had inserted language into the proposed Judgment and Decree of Divorce that would differ from the mediated agreement by stating "The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, ***except for Paragraph L which is not merged and shall remain a separate contract between the parties.***" Emphasis added. Moreover, at no time did plaintiff or Welsh call to husband's attention any purpose they had to insert that language in order to prevent the divorce court from later reviewing the "spousal support" part of the parties' mediated agreement in light of future changed circumstances.

The Mediated Parenting and Property Settlement Agreement into which the parties entered purported, and was intended by them, to resolve all of the issues between them, including the division of their community property and the custody, visitation and support of their two then minor children. Husband understood, based on everything said by the plaintiff, by her attorney and by the mediator, that the entirety of the parties' Mediated Parenting and Property Settlement Agreement would be made effective by submittal to the divorce court for "adopting" in a judgment or decree. Review of the mediated agreement itself discloses it contains no provision whatsoever that would distinguish "Paragraph L" from the parties' intent for the entire agreement to be adopted by (i.e., merged in) the decree. (C.R. 110-120)

When Welsh's assistant presented husband with the stipulation for entry of the judgment and decree, she only said something about his addition in the form of the judgment and decree of some "minor" language to what was in the actual mediated agreement, which husband understood to mean some legal formality that would not affect in any way the substance or effect of what he had just agreed to in the mediation. Husband signed the proffered stipulation and gave it back to the assistant.

Husband believes the first page of the form of judgment and decree he was shown by Welsh's assistant when they sought his stipulation to its entry by the divorce court was the same one plaintiff herself attached as Exhibit 1 to her affidavit in support of summary judgment and it included, on its first page, the following:

> "2. **MEDIATION AGREEMENT**: The Mediation Agreement dated March 9, 2007 is hereby approved ***and made an integral and non-separable part of this decree of divorce and***"

(C.R. 108; 136; Appendix A) Husband does not recall whether the second page of the judgment form included the balance of the carry-over sentence at the bottom of its page one, but he distinctly remembers "knowing" that the entirety of the parties' Mediated Parenting and Property Settlement Agreement was to be approved by the divorce court and "made an integral and non-separable part of [the] decree of divorce," which was their whole purpose in submitting to mediation at all.

Nothing in what was said to husband by Welsh's assistant and nothing in the stipulation for entry of the judgment and decree called to his attention the fact that the form of judgment and decree Welsh had drawn and would present to the divorce court for entry carved off an exception to merger for the "spousal support" provision of the mediated agreement. Moreover, as set forth above, the first page of the judgment form with which husband was presented stated, specifically, that "the Mediation Agreement dated March 9, 2007 [i.e., ***all*** of it] is hereby approved and made ***an integral and non-separable part of this decree of divorce and,***" which conformed to what husband's understanding was all along.

In truth and in fact, however, the form of judgment and decree Welsh had drawn and would present *to the divorce court for entry, and which in fact the divorce court did enter*, is the one appended hereto as Appendix B. It differs materially from the form that was attached to the

proffered stipulation when husband signed it in that it deleted the language at the bottom of its first page (quoted above) and included at the top of its second page the following:

> "2. **MEDIATION AGREEMENT**: The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, *except for Paragraph L which is not merged and shall remain a separate contract between the parties.*"

Emphasis added. It must be noted that husband does not recall whether the provision just quoted was also in the form of judgment and decree Welsh's assistant presented to him (the first page of which is Appendix A hereto), but he does know he did not notice it or attach any significance to it if it was. Husband believes and urges this is reasonable and understandable in view of the language with which the first page concluded, i.e., " the Mediation Agreement dated March 9, 2007 [i.e., ***all*** of it] is hereby approved and made ***an integral and non-separable part of this decree of divorce and***".

Husband thought everything about plaintiff's and his divorce, including any necessary future modifications of it, would be handled in the divorce court, and that everything in the parties' Mediated Parenting and Property Settlement Agreement was to be confirmed and adopted by the divorce court's Judgment and Decree. Husband did not notice, understand the legal import of or attach any significance to the fact Welsh had, in the form of judgment and decree he submitted to the divorce court for entry, carved off an "exception" against merger of paragraph "L" – and only paragraph L – of the Mediated Parenting and Property Settlement Agreement which, although not identified or described in any way, was the subject provision for spousal support. The judgment and decree drawn by Welsh and submitted to the divorce court for its entry, and which was in fact entered, is Appendix B.

Since the parties' divorce in March 2007, both of the litigation-related businesses received by husband pursuant to the mediated agreement have failed and dissolved, and

Litigation Document Group received a Chapter 7 discharge of its debts in bankruptcy. Other than the discharge of Litigation Document Group's debts, husband received nothing of value for his ownership thereof. He continued to make payments on the business debt of the other business, although it, too, has closed its doors and is dissolved. At or about the time of the parties' divorce, husband started a third business, known as Data One, LLC in Boise, the primary product of which was to be the provision of records scanning and archival, along with copying. Since husband's post-divorce formation of Data One, LLC, five competitors have entered the Boise market for provision of the same services, nearly eliminating its profitability. It has downsized from a business employing five or six salaried employees to just one. It is husband's sole source of income.

Plaintiff was remarried on October 10, 2010, and husband has likewise remarried. As the result of the collapse of Litigation Document Group of Boise, LLC and Las Vegas Legal Technologies, LLC, coupled with the entry of so many competitors into the market for Data One's goods and services, husband is struggling to provide necessaries for his own family, whereas the businesses he received as the consideration for the subject spousal support provision have proved entirely worthless. Husband has already paid to plaintiff the sum of at least $93,100 pursuant to the subject "spousal support" provision – ***a sum that exceeds by some $87,000 what was distributed to him*** in what was understood and intended by both parties to be a roughly equal distribution of the community property. Husband's total income for 2011 through November was just $31,193 or less than one-third of what his annual income was when the parties entered into the "spousal support" agreement on which wife sues – in District Court, as a "separate contract".

Enforcement of the "spousal support" provision plaintiff sues on works an extreme hardship on husband and on his family due to the unforeseeable failure of the businesses it was the intent of the agreement to "equalize" by means of the payments to plaintiff wife. For that reason, he wants the opportunity to persuade the divorce court, if he can, to terminate the spousal support provision "Paragraph L" due to his materially changed circumstances and the prevailing equities. Because he never had any intent to treat the spousal support provision differently that any other provision of the mediated agreement as respects its merger in the decree (and thus its amenability to continuing review and modification as justice might require), the District Court erred in finding, as a matter of law, that he so agreed. Genuine issues of material fact preclude that finding. Because the intent of Idaho's community property scheme is to maintain a more-or-less equal balance between both spouses in the event of divorce; because the "spousal support" provision set forth in paragraph L of the Mediated Parenting and Property Settlement Agreement has already yielded an $87,000 bonus to plaintiff and because the true value of the businesses defendant received has turned out to be wholly illusory, the lower court's award of summary judgment to plaintiff wife should be reversed.

ISSUES ON APPEAL

1. Whether genuine issues of material fact precluded summary judgment for plaintiff wife.

2. Whether the parties' mediated agreement – in its entirety – was merged in the decree and is subject to the divorce court's review and modification for changed circumstances.

3. Whether the District Court lacked subject matter jurisdiction.

4. Whether the mediated agreement discloses any intent for internal integration and if not, whether the agreement evidences any contractual consideration for husband's spousal support obligation.

5. Whether husband's material change in his financial circumstances would support termination by the divorce court of any obligation for spousal support, given a void of any evidence that plaintiff isn't perfectly capable of earning a living to support herself.

6. Whether the District Court erred in its award of attorney fees to plaintiff wife.

ARGUMENT

1. Genuine issues of material fact preclude summary judgment for plaintiff.

It is axiomatic that a genuine issue of material fact is fatal to a motion for summary judgment:

> The requirements of Rule 56(e) are intended to provide the trial court with sworn factual statements based on personal knowledge that are intended to be put on as evidence at trial. The Idaho Court of Appeals has held that a verified complaint alone may meet the requirements of Rule 56(e). *Camp v. Jiminez,* 107 Idaho 878, 693 P.2d 1080 (Ct.App.1984). While this Court has never had the opportunity [to] address whether a verified complaint alone meets the requirements of Rule 56(e), we hold that the heirs met and satisfied the requirements of the rule when they relied on their depositions, in addition to, the sworn contents of the verified amended complaint and the numerous exhibits attached thereto. As long as the non-moving party relies on statements that are based on personal knowledge and which would be admissible as evidence at trial and does more than rest on mere allegations or denials in his pleading, it will be considered sufficient to comply with Rule 56(e). *See* I.R.C.P. 56(e).
>
> Even if the district court had been correct in concluding that Rule 56(e) required the heirs to submit affidavits or evidentiary matter other than those relied upon by the moving party, the requirements of Rule 56(e) would have been met for an even more fundamental reason. In *Central Idaho Agency, Inc. v. Turner,* 92 Idaho 306, 442 P.2d 442 (1968), the respondent sought to uphold the trial court's order by charging that the appellant had not complied with Rule 56(e) because of failure to submit affidavits in response to the motion. In *Turner,* we approved of

> the Federal Advisory Committee explanation of the identical Federal rule and quoted the Committee saying: "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." *Central Idaho Agency,* 92 Idaho at 310, 442 P.2d at 446.
>
> This explanation follows directly from I.R.C.P. 56(e) because even without an affidavit or other "opposing evidentiary matter" presented by the non-moving party, summary judgment will not be "appropriate," as that term should be understood in the last sentence of Rule 56(e), if the motion for summary judgment fails to eliminate all genuine issues of material fact. Thus, assuming that the original pleadings raise genuine issues of material fact, Rule 56(e) indicates that the non-moving party is only required to counter the assertions made by the movant, by tendering affidavits, depositions, or other sworn statements, if the motion puts at issue the question of whether material issues of genuine fact remain. If there are any genuine issues of material fact which remain to be determined by the trial court after receiving the motion for summary judgment then by definition summary judgment is not appropriate. I.R.C.P. 56(e).

McCoy v. Lyons, 120 Idaho 765, 770-771, 820 P.2d 360, 365 - 366 (1991).

Here, wife bases her campaign for conversion of a modifiable spousal support provision into a non-modifiable "separate contract" on her sworn assertion that defendant agreed to do so:

> "Joseph and I ***agreed*** that this provision should be treated ***like*** a contract. We ***agreed*** not to merge this provision with the divorce decree. See Exhibit 1 incorporated herewith by reference, a true and correct copy of the parties[']' Judgment and Decree of Divorce."

Affidavit [of plaintiff] in support of motion for summary judgment, paragraph 4 (C.R. 106), emphasis added; accord, Supplemental affidavit of plaintiff in support of motion for summary judgment (C.R. 170). She makes this claim despite the fact ***nothing*** in the Mediated Parenting Agreement and Property Settlement suggests any such thing. Moreover, Exhibit 1 to plaintiff's initial affidavit itself creates an issue of fact as to this assertion because it posits by its own terms at the bottom of page one the adoption of the agreement as an "integral" and "***non***-separable" part of the Judgment and Decree. Finally, defendant's affidavit makes plain the fact he did ***not*** so agree and was in fact "had" by Welsh's inclusion of the "integral" and "***non***-separable"

language at the bottom of the form of judgment and decree with which he was presented for approval but which Welsh then deleted from the form he would present to the magistrate for entry:

> 8. At all times throughout the plaintiff's and my divorce proceedings, she was represented by attorney Stanley W. Welsh, whereas I was unrepresented. I have no legal training.
>
> 9. At no time did plaintiff or her then attorney, Mr. Welsh, call to my attention the fact Welsh had inserted language into the proposed Judgment and Decree of Divorce that would differ from the mediated agreement by stating "The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, ***except for Paragraph L which is not*** merged and shall remain a separate contract between the parties." Emphasis added. Nor at any time did plaintiff or Mr. Welsh call to my attention any purpose they had to insert that language in order to prevent the divorce court from reviewing the "spousal support" part of our mediated agreement for modification or termination in the event fairness, equity and justice required it in light of future changed circumstances.
>
> 10. The Mediated Parenting and Property Settlement Agreement into which plaintiff and I entered purported, and was intended by us, to resolve all of the issues between us, including the division of our community property and the custody, visitation and support of our two minor children.
>
> 11. I understood, based on everything said by the plaintiff, by her attorney Stanley W. Welsh and by the mediator, that the entirety of our Mediated Parenting and Property Settlement Agreement would be made effective by submittal to the divorce court for "adopting" in a judgment or decree.
>
> 12. When attorney Welsh's assistant presented me with the stipulation for the entry of the judgment and decree, she said something about his addition in the form of the judgment and decree of some "minor" language to what was in the actual mediated agreement, which I understood to mean some legal formality that would not affect in any way the substance or effect of what I had just agreed to in the mediation.
>
> 13. I believe the first page of the form of judgment and decree I was shown by Welsh's assistant when they sought my stipulation to its entry by the divorce court was the same one plaintiff has attached as Exhibit 1 to her affidavit in support of summary judgment and it included, on its first page, the following:

"2. **MEDIATION AGREEMENT**: The Mediation Agreement dated March 9, 2007 is hereby approved ***and made an integral and non-separable part of this decree of divorce and***"

A true and correct copy is attached hereto for the convenience of the Court as Exhibit A. [Appendix A hereto.]

14. I do not now recall whether the second page of the judgment form included the balance of the carry-over sentence at the bottom of its page one, but I distinctly remember "knowing" that the entirety of our Mediated Parenting and Property Settlement Agreement was to be approved by the divorce court and "made an integral and non-separable part of [the] decree of divorce," which was our whole purpose in submitting to mediation at all.

15. Nothing in what was said to me by Welsh's assistant and nothing in the stipulation for entry of the judgment and decree called to my attention the fact that the form of judgment and decree Welsh had drawn and would present to the divorce court for entry carved off an exception to merger for the "spousal support" provision of the mediated property settlement agreement. Moreover, as set forth above, the first page of the judgment form with which I was presented stated, specifically, that "the Mediation Agreement dated March 9, 2007 [i.e., ***all*** of it] is hereby approved and made ***an integral and non-separable part of this decree of divorce and***," which conformed to what my understanding was all along.

16. In fact the form of judgment and decree Welsh had drawn and would present to the divorce court for entry, and which in fact the divorce court did enter, is attached hereto as Exhibit B. [Appendix B hereto.] It deleted the language quoted above in paragraph 13 hereof and included on its second page the following:

"2. **MEDIATION AGREEMENT**: The Mediation Agreement dated March 9, 2007 is hereby merged and incorporated into this decree of divorce, *except for Paragraph L which is not merged and shall remain a separate contract between the parties.*"

Emphasis added. I do not now recall whether the provision here quoted was also in the form of judgment and decree Welsh's assistant presented to me (the first page of which is Exhibit A hereto), but I know I did not notice it or attach any significance to it if it was. I believe this is reasonable and understandable in view of the language with which the first page concluded, i.e., " the Mediation Agreement dated March 9, 2007 [i.e., ***all*** of it] is hereby approved and made ***an integral and non-separable part of this decree of divorce and***".

17. I thought everything about plaintiff's and my divorce, including any necessary future modifications of it, would be handled in the divorce court, and that everything in our Mediated Parenting and Property Settlement

Agreement was to be confirmed and adopted by the divorce court's Judgment and Decree.

18. I did not notice, understand the legal import of or attach any significance to the fact Welsh had, in the form of judgment and decree he submitted to the divorce court for entry, carved off an "exception" against merger of paragraph "L" of the Mediated Parenting and Property Settlement Agreement which, although not otherwise identified or described, was the subject provision for spousal support. The judgment and decree drawn by Welsh and submitted to the divorce court for its entry, and which was in fact entered, is attached hereto as Exhibit B.

(C.R. 130-133) Accordingly, the major factual premise upon which plaintiff's motion was based – i.e., that the "spousal support" provision of the Mediated Parenting Agreement and Property Settlement Agreement should be treated ***"like"*** a contract because defendant "agreed" to do so – was directly controverted by husband's affidavit and at least indirectly by plaintiff's *own* affidavit, which likewise included Appendix A, ***not Appendix B***.

2. Idaho law presumes (rebuttably, but only by "clear and convincing evidence") that (a) the subject spousal support and property settlement agreement is merged in the decree and (b) the agreement itself is *not* an "integrated" agreement, such that (c) there is no longer a contract at all, only the divorce court's ever-modifiable decree.

This case is squarely controlled by *Keeler v. Keeler*, 131 Idaho 442, 958 P.2d 599 (1998). That case very clearly illuminates the somewhat technical but crucial distinction between making a spousal support and property settlement agreement an "integral" part of the decree, i.e., ***"merged,"*** as here, and the determination whether the agreement itself is "integrated" internally, which is ***not*** the case here. This is no mere matter of semantics, but a fundamental principle of divorce law. If the agreement is merged in the decree, as here, then the spousal support provision is subject to modification or termination by the divorce court – *unless* it is an "integrated" agreement, in which case it can't be modified even if merged in the decree. But if it

is merged and is *not* an integrated agreement (which is what we have here), then the divorce court retains continuing jurisdiction to modify or terminate the spousal support provision whenever changed circumstances warrant it. While somewhat involved, *Keeler* explains it very well:

> An agreement providing for spousal support payments cannot ordinarily be modified by the court *unless* the terms of the agreement were incorporated or "merged" into the divorce decree. *Sullivan v. Sullivan,* 102 Idaho 737, 739 n. 6, 639 P.2d 435 n. 6 (1981); *Roesbery v. Roesbery,* 88 Idaho 514, 521, 401 P.2d 805, 809 (1965); *Bainbridge v. Bainbridge,* 75 Idaho 13, 265 P.2d 662 (1954). When the settlement agreement has been merged into the decree, support provisions in the agreement may be modified without the mutual consent of the parties because the agreement has become part of the court's judgment; absent merger, the agreement stands independent of the decree, and "the obligations imposed under the agreement are not those imposed by decree but by contract." *Bainbridge,* 75 Idaho at 24, 265 P.2d at 669. In this case, the magistrate found that the agreement was merged into the decree of divorce, and that finding is not contested by either party.
>
> Even where the agreement has been merged into the decree, however, support terms cannot be judicially modified if the agreement is integrated. A property settlement and spousal support agreement is integrated "if the parties have agreed that the provisions relating to division of property and the provisions relating to support constitute reciprocal consideration [so that the] support provisions are ... necessarily part and parcel of a division of property." *Kimball v. Kimball,* 83 Idaho 12, 17, 356 P.2d 919, 922 (1960). *See also Phillips v. Phillips,* 93 Idaho 384, 385, 462 P.2d 49, 50 (1969); *Gortsema v. Gortsema,* 92 Idaho 684, 688, 448 P.2d 777, 781 (1968); *Turner v. Turner,* 90 Idaho 308, 314, 410 P.2d 648, 654 (1966); *Roesbery,* 88 Idaho at 519, 401 P.2d at 808.
>
> Thus, a court which has been called upon to modify provisions regarding support must determine whether the parties reached an agreement regarding integration. This has not proven to be an easy task. In a series of decisions, the Idaho Supreme Court determined whether property settlement and support agreements were integrated, focusing primarily upon the terminology used in the agreements at issue. *See, e.g., Gortsema, supra; Roesbery, supra; Kimball, supra.* However, in 1969, by its decision in *Phillips v. Phillips,* 93 Idaho 384, 462 P.2d 49 (1969), the Supreme Court significantly altered the manner in which the doctrines of integration and merger are to be applied in divorce cases. In abandoning its previous approach, the *Phillips* Court observed:
>
> It is our belief that in its attempts to determine the intent of the parties regarding integration or non-integration of the provisions of separations agreements, this

Court has been forced to indulge in technical hair splitting. In some cases the court has held agreements to be integrated ... while in other cases agreements which were substantially the same but for a word or two have been held to be non-integrated.

Phillips, 93 Idaho at 386, 462 P.2d at 51 (citations omitted). Taking a new direction, the Court held that when an agreement for division of property and support payments has been presented to the divorce court for approval, *it will be rebuttably presumed that the agreement was* ***not*** *integrated and* ***was*** *therefore subject to judicial modification.* The Court stated:

[W]hen parties enter into an agreement of separation in contemplation of divorce and thereafter the agreement is presented to a district court in which a divorce action is pending and the court is requested to approve, ratify or confirm the agreement, certain presumptions arise. *In the absence of clear and convincing evidence to the contrary, it will be presumed that each provision of such an agreement is independent of all other provisions and that such agreement is not integrated; it will be further presumed that the agreement* ***is*** *merged into the decree of divorce, is enforceable as a part thereof and if necessary may be modified by the court in the future.*

Id. at 387, 462 P.2d at 52. *See also Spencer-Steed v. Spencer,* 115 Idaho 338, 766 P.2d 1219 (1988) (applying the clear and convincing evidence test); *Sullivan v. Sullivan,* 102 Idaho 737, 743, 639 P.2d 435, 441 (1981) (Shepard, J., concurring) (acknowledging the presumption outlined in *Phillips*); *Phillips v. Dist. Court of Fifth Judicial Dist.,* 95 Idaho 404, 509 P.2d 1325 (1973) (same).

A rebuttable presumption imposes upon the party against whom it operates the burden of going forward with evidence to rebut the presumption. Idaho Rule of Evidence 301. According to the Supreme Court's pronouncement in *Phillips,* ***that rebuttal must be made by clear and convincing evidence.*** In this case, the magistrate found that the evidence of integration did not rise to the level of clear and convincing evidence and therefore did not rebut the non-integration presumption. This determination, like other findings of fact regarding the weight of evidence, must be given deference by this Court unless it is clearly erroneous. We find no error here, based upon the conflicting evidence presented to the magistrate.

In her appellate argument, Judith relies heavily upon asserted similarities between the language in the Keelers' agreement and the agreement involved in *Roesbery, supra,* which the Supreme Court found sufficient to establish that the agreement was integrated. We find this argument inapposite, however, in light of the Supreme Court's disavowal of the approach utilized in *Roesbery* and other pre-*Phillips* cases which relied heavily upon parsing the language of agreements and "technical hair splitting." *It is sufficient to say that the Keelers' property settlement and support agreement nowhere clearly and unambiguously expresses*

> *an intent of the parties regarding integration. We therefore decline to disturb the magistrate's finding that the Keelers' agreement was* ***not*** *integrated and* ***was*** *subject to judicial modification.*

Keeler v. Keeler, 131 Idaho 442, 444-446, 958 P.2d 599, 601 - 603 (Idaho App.,1998), emphasis added.

3. The District Court lacked subject matter jurisdiction over this case, because the divorce court by statute has "exclusive" jurisdiction over spousal support.

This issue is determined by application of statutory law:

> **7-1015. Continuing, exclusive jurisdiction to modify spousal support order**
> (1) A tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation.

Because plaintiff did not (and could not, on a duly controverted motion for summary judgment) overcome the presumption of (a) merger in the decree and (b) non-integration of the spousal support and property settlement provisions with "clear and convincing" evidence, I.C. § 7-1015 is directly applicable and the tribunal of this state that issued the spousal support order (i.e., the Judgment and Decree of divorce) had continuing, ***exclusive*** jurisdiction. The magistrate division is admittedly a part of the District Court, but the statute clearly operates to preclude what the plaintiff accomplished below: she obtained the divorce court's acceptance of a mediated resolution, only to attempt by a form of shell game to cut off that court's statutory power of continuing review, thus to preclude its continuing assessment of the controlling equities.

4. Even if Paragraph L ("Spousal Support") of the Mediated Parenting Agreement and Property Settlement Agreement were to be treated "like" a contract, plaintiff's claim fails because Paragraph L is, on its face, devoid of any requisite consideration.

In her effort to take further advantage of defendant, plaintiff successfully asked the lower court to treat the following "like" a contract:

> "L. Spousal Support:
> 1. JOSEPH agrees to pay ANNETTE spousal support in the amount of $2,200 per month for a period of ten (10) years."

(C.R. 106; 171; 116) Those tiny few words represent the entire universe of what it is plaintiff asks this Court to treat "like" a contract. And inasmuch as a plaintiff's choice of tactic in litigation is inherently self-serving, it can be taken it as gospel the plaintiff knows full well she would realize ***less*** money if the "Spousal Support" provision were treated ***as*** a "spousal support" provision and thus subject to review in the divorce court for any termination or modification that might be necessary in light of defendant's woefully changed circumstances. Idaho Code § 7-1015(1) provides:

> A tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation.

Having elected to invoke the power of the power of the District Court to treat the spousal support provision "like" a contract, plaintiff cannot be heard to complain if contract law defeats her claim.

It does. In order for a contract to exist, a distinct understanding common to both parties is necessary. *Brothers v. Arave*, 67 Idaho 171, 174 P.2d 202 (1946). *Mitchell v. Siqueiros,* 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978). Here, there is a stark issue of fact that defeats plaintiff's motion: She says, in paragraph 4 of her affidavit, that the parties "agreed" the spousal

support provision "should be" treated "like" a contract. Defendant, on the other hand, says he never agreed to any such thing and that he was in fact fooled by Welsh's presentation of the "dummy" judgment form (Exhibit 1 to plaintiff's affidavit (C.R. 108; Exhibit A to defendant's affidavit (C.R. 136); Appendix A hereto) that specifically stated the mediated spousal support/ property settlement agreement was to be "***made an integral and non-separable part of this decree.***" Defendant distinctly remembers "knowing" that "the entirety of our Mediated Parenting and Property Settlement Agreement was to be approved by the divorce court and 'made an integral and non-separable part of [the] decree of divorce,' which was our whole purpose in submitting to mediation at all." Affidavit of Joseph L. Soelberg, paragraph 14. (C.R. 132) Accordingly, the would-be "contract" on which plaintiff here sues fails because there was no "distinct understanding common to both parties" that the spousal support provision was to elevated to some eternal "gotcha" status unique among every other provision of their global resolution of the issues between them. In fact, plaintiff fails even to raise a genuine issue of material fact that would defeat summary judgment ***for defendant***, because ***there is a legal presumption in favor of merger into the decree*** and ***against integration***, which presumption can be rebutted only by "clear and convincing" evidence:

> In the absence of clear and convincing evidence to the contrary, it will be presumed that each provision of such an agreement is independent of all other provisions and that such agreement is not integrated; it will be further presumed that the agreement is merged into the decree of divorce, is enforceable as a part thereof and if necessary may be modified by the court in the future.

Phillips v. Phillips, 462 P.2d 49, 52 (Idaho 1969). *See also Spencer-Steed v. Spencer,* 115 Idaho 338, 766 P.2d 1219 (1988) (applying the clear and convincing evidence test). Nowhere in the entire Mediated Parenting Agreement and Property Settlement Agreement is there one single word to suggest integration or any intent to make its Paragraph L "spousal support" provision

immune to review by the divorce court for continuing fairness or legitimacy. Plaintiff's hopes for the success of her counsel's sleight-of-hand must go unrewarded.

Plaintiff's wish to treat Paragraph L "like" a contract fails for another reason, too: To be enforceable, a ***contract*** must be supported by mutual ***consideration***:

> The essential elements of a valid contract are: offer, acceptance, and bargained for consideration. *State ex rel. Career Aviation Sales, Inc. v. Cohen,* 952 S.W.2d 324, 326 (Mo.App. E.D.1997). The parties must have a mutuality of assent or a meeting of the minds on these essential terms of a contract. *Building Erection Services Co. v. Plastic Sales & Mfg. Co., Inc.,* 163 S.W.3d 472, 477 (Mo.App. W.D.2005). The forbearance to enforce a legal right such as filing a lawsuit can constitute bargained for consideration. *See Holt v. Jamieson,* 847 S.W.2d 194, 197 (Mo.App. E.D.1993); *and Missouri Farmers Ass'n, Inc. v. Barry,* 710 S.W.2d 923, 926 (Mo.App. W.D.1986). On the other hand, ***an expression to gratuitously do something, which is unsupported by consideration or unaccompanied by some bargaining, is normally an unenforceable promise***. *Cash v. Benward,* 873 S.W.2d 913, 916 (Mo.App. W.D.1994).

Drury v. Missouri Youth Soccer Ass'n, Inc., 259 S.W.3d 558, 574 -575 (Mo. App. 2008), emphasis added. Here, there is nothing whatsoever in Paragraph L – or anywhere else in the agreement, either, for that matter – that even purports to constitute "consideration" for defendant's otherwise gratuitous promise to pay plaintiff post-divorce support. Paragraph L, entilted "Spousal Support," remains just that: A spousal support provision in a Mediated Parenting Agreement and Property Settlement Agreement which, lacking either an integration clause, "clear and convincing evidence" of a mutual intent for integration, or consideration, did ***not*** magically morph into a binding, stand-alone contract as plaintiff contends. It was at all times simply part and parcel of a mediated divorce agreement that was merged in the decree.

5. Had plaintiff chosen to maintain her claim in the divorce court, where she initially brought it, it would have been subject to termination for the extreme hardship it would now work on defendant.

The parties were divorced over five years ago. Their community property was divided between them pursuant to a mediated property settlement, more or less equally as required by

I.C. § 32-712. They have both remarried. The children, including the son plaintiff transferred custody of to defendant to facilitate her move to Texas, are no longer minors.

Plaintiff would certainly prefer it if defendant would augment her own income by sending her $2,200 each month for another half-decade. Defendant should be relieved of any obligation it to do so. He's barely remaining financially afloat himself, and he has a family of his own to support. He was earning over $100,000 a year when as a pro se divorce litigant he entered into the subject Mediated Parenting Agreement and Property Settlement Agreement with plaintiff. Both of the businesses he received (along with their $1.5 million debt) in the property settlement have permanently tanked. They were his livelihood. The new business he started has been hamstrung by the post-2008 economy and a swarm of new competitors. He now makes just $31,000 per year.

The reason for plaintiff's conscious decision to abandon her claim in divorce court and to pursue it here is obvious: Any rational, fair-minded magistrate considering and applying the principles of Title 32, Chapter 7, and I.C. § 32-705 would necessarily conclude plaintiff cannot establish even the *threshold* for a maintenance award, i.e., that she "lacks sufficient property to provide for her reasonable needs and is unable to support herself through employment." See, *Tisdale v. Tisdale*, 127 Idaho 331, 900 P.2d 807 (Idaho App. 1995):

> The 1990 amendments to the statute, however, were meant to eliminate fault as a prerequisite, relegating it to one of many factors to be considered. The Statement of Purpose issued by the legislature with the amendment states:
>
> The purpose of this legislation is to remove fault as a requirement for the award of alimony.
>
> ***The need of one spouse and the ability of the other spouse to pay would become the primary basis for alimony awards.***

Tisdale v. Tisdale, 127 Idaho 331, 334, 900 P.2d 807, 810 (Idaho App.1995), emphasis added. This is consistent with the rule in other jurisdictions that provides for termination of spousal maintenance where necessary to avoid "extreme hardship" and the like to the host spouse. See *Robinson v. Robinson*, 674 N.Y.S.2d 921 (N.Y. Sup. 1998); *In re Marriage of Carpenter*, 677 N.E.2d 463 (Ill. App. 1997); *Weber v. Weber*, 589 N.W. 2d 358 (N.D. 1999); *Jones v. Jones*, 651 A. 2d 157 (Pa. Super. 1994); *In re Marriage of Maher*, 420 N.E. 2d 1144 (Ill. App. 1981), and cases cited therein; See *Compton v. Compton*, 612 P. 2d 1175 (Idaho 1980); *Harrigan v. Harrigan*, 373 A. 2d 550 (Vt. 1977); *Crosetto v. Crosetto*, 397 P. 2d 418 (Wash. 1964); *Crosby v.Crosby*, 29 S.E. 2d (Va. 1994).

CONCLUSION

The spousal support provision on which plaintiff sues represents one paragraph from a comprehensive, non-integrated, Mediated Parenting Agreement and Property Settlement Agreement. Idaho law presumes it was intended to be merged in the ensuing decree, such that it would always remain subject to review by the divorce court for continuing need and fairness. This presumption can only be overcome by "clear and convincing" evidence, which plaintiff hasn't shown, nor could she show as any matter of uncontested fact in the face of defendant's controverting affidavit.

Having made the conscious decision to abandon her chances in divorce court in the hope of having greater chances in the District Court on a counterfeit "separate contract" regardless of the merits or equities, plaintiff should be held to have no contract at all, since the universe of Paragraph L of the Mediated Parenting Agreement and Property Settlement Agreement is devoid of either consideration to support a separate contract or any clear indication of any intent to treat it as an integrated agreement.

Not only did genuine issues of material fact preclude the lower court's entry of summary judgment for plaintiff, the facts that are *not* in dispute defeat her claim. ***Plaintiff sues on an alleged "separate contract" and there simply is no such contract.***

Respectfully submitted this 5th day of June, 2012, by

Patrick D. Furey, Attorney at Law
Counsel for defendant-appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2012, I served two true and correct copies of the foregoing on the following by the means indicated:

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