2-19-2014

Baird-Sallaz v. Gugino Respondent's Brief 2 Dckt. 41301

IN THE SUPREME COURT OF THE STATE OF IDAHO

RENEE L. BAIRD-SALLAZ,

Plaintiff/Respondent,

vs.

DENNIS J. SALLAZ,

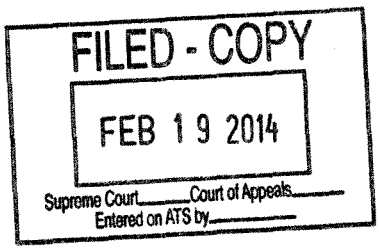
Defendant/Appellant,

JEREMY J. GUGINO, Chapter 7 Bankruptcy Trustee for the bankruptcy estate of Renee L. Baird,

Intervenor/Respondent.

SUPREME COURT NO. 41301

Fourth Dist. Case No. CV DR 04-01075D



INTERVENOR'S BRIEF ON APPEAL

Appeal from the District Court of the Fourth Judicial District
for the County of Ada

Honorable Kathryn A. Sticklen, District Judge, Presiding

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I.

STATEMENT OF THE CASE

A. Nature of the Case

This case stems from a divorce proceeding held at the magistrate court level over several months, concluding in 2006, which ultimately resulted in Amended Findings of Fact, Conclusions of Law and an Order entered by the Magistrate Judge. The Appellant's appeal is untimely, attempts to introduce new evidence on appeal that was not presented to the Magistrate Judge, either at the trial, or through a proper motion pursuant to the Idaho Rules of Civil Procedure, and includes arguments that are not proper for an appeal.

For ease of reference, throughout this brief Dennis J. Sallaz (the Appellant) will be referred to as "Dennis," Renee L. Baird (the Respondent) will be referred to as "Renee," and Jeremy J. Gugino (the Trustee/Intervenor) will be referred to as "Gugino."

B. Course of Proceedings Below

Renee commenced a divorce action on May 27, 2004, based on a previous marriage to Dennis. A decree granting the divorce was entered August 24, 2005 (*nunc pro tunc* to July 28, 2005). *Clerk's Record ("R")*, p. 23-24. That decree included a Rule 54(b) Certificate. The August 24, 2005 decree was never appealed. A subsequent trial ensued regarding the division of property and debts, which led to the entry of Findings of Fact, Conclusions of Law and Order, entered on October 30, 2007. That Order specifically found that Dennis and Renee had been married on July 4, 1996. *R*, p. 25-68. Several post-trial motions ensued, including motions to amend the Findings of Fact, Conclusions of Law and Order – none of which dealt with the court's finding that the parties were married.

Ultimately, the court entered Amended Findings of Fact, Conclusions of Law and an Order on or around January 4, 2012. *R*, p. 126-172. The Notice of Appeal was filed on or

around February 9, 2012. *R*, p. 193-196. Renee filed a Chapter 7 Bankruptcy petition on April 19, 2012. *R*, p. 197-201. The filing of the bankruptcy petition stayed the appeal, until Dennis received stay relief from the bankruptcy court to pursue the appeal. *R*, p. 202-204. Gugino successfully intervened in the appeal as the real party in interest regarding the judgments entered by the Magistrate Judge.[1] *R*, p. 205-208; 346-348.

The District Court denied Dennis's appeal on various grounds. *R*, p. 349-360. Most importantly for this Supreme Court appeal, the District Court found that Dennis had previously asserted and admitted that the parties were married, had failed to properly and timely appeal that issue from the magistrate court, and that his subject matter jurisdiction arguments were unavailing. *R*, p. 350-353.

C. Statement of Facts

In addition to the facts outlined in Dennis' brief on appeal (the accuracy of which Gugino does not concede), Gugino states the following additional facts: The parties were married on July 4, 1996, in Oregon. The Complaint in this matter included a specific allegation that the parties were married on July 4, 1996, and had been married ever since that date. *R*, p. 14. In his Answer to the Complaint, Sallaz admits those allegations of the Complaint. *R*, p. 17. As part of his testimony at the trial of this matter, Dennis testified that he married Renee on July 4, 1996.[2]

D. Standard of Review

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[1] Dennis now tries to avoid Gugino's involvement in this Supreme Court appeal by arguing that the sole issue on appeal is whether the parties (i.e., Dennis and Renee) were married – thus "mooting" any interest of the bankruptcy estate in the outcome of this appeal. However, this argument ignores the very arguments Dennis makes further in his appellate brief – that if no valid marriage existed the magistrate judge had no jurisdiction or ability to divide property. It is this division of property that Dennis is actually trying to avoid – even if not directly appealed. Accordingly, the bankruptcy estate (by and through its Trustee, Gugino) remains a real party in interest in this appeal.

[2] While it does not appear to have been in evidence at the trial court level, Dennis also testified at his deposition in this matter that he was married to Renee on July 4, 1996 in Portland, Oregon.

This Court is being asked to review the District Court's decision after the District Court sat in its appellate capacity over the magistrate judge's decision. Accordingly, the standard of review by this Court is as follows:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the Supreme Court] affirm the district court's decision as a matter of procedure. Thus, [the Supreme Court] does not review the decision of the magistrate court. Rather, [the Supreme Court is] procedurally bound to affirm or reverse the decisions of the district court.

Pelayo v. Pelayo, 154 Idaho 855, 858-59, 303 P.3d 214, 217-218 (2013).

An issue cannot be raised for the first time on appeal, if it was not previously presented to the trial judge. *See, e.g., McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003). "Appellate court review is limited to the evidence, theories and arguments that were presented [in the lower court]. In order to preserve an issue for appeal, the issue must be raised in the [lower court] ... Appellate courts follow this rule because it would be unfair to overrule the [lower court] on issues not presented to it on which it did not have an opportunity to rule." *Wattanbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 323-24, 246 P.3d 961, 967-77 (2010) (internal citations omitted).

> A motion to amend findings or conclusions or to make additional findings or conclusions shall be served not later than fourteen (14) days after entry of the judgment, and if granted the court may amend the judgment accordingly.

Idaho Rule of Civil Procedure 52(b).

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
> ...

> 4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
> ...
> A motion for new trial shall be served not later than fourteen (14) days after the entry of the judgment.
> ...
> A motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment.

Idaho Rules of Civil Procedure 59(a), (b) and (e).

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) *mistake*, inadvertence, surprise, or excusable neglect; (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)*; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken*. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court ...

Idaho Rule of Civil Procedure 60(b) (emphasis added).

> The doctrine of judicial estoppel prohibits a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding ... Generally when a litigant, through sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.

Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 748, 215 P.3d 457, 469 (2009) (internal citations omitted).

II.

ISSUES RAISED ON APPEAL

In addition to the issues on appeal listed by Dennis in his Appellant Brief (the accuracy and appealability of which Gugino does not concede, as outlined below), Gugino also asserts, as an additional issue on appeal, whether Gugino and/or Renee are entitled to an award of attorney fees on appeal against Dennis, pursuant to Idaho Code § 12-121.

III.
ARGUMENT

A. The Trial Court Had Sufficient Jurisdiction to Decide the Parties' Marriage and Divorce.

The district courts of Idaho have exclusive original jurisdiction over all domestic relations matter, including divorce actions. *See, e.g., Idaho Code § 32-715.* This jurisdiction has been delegated by the district courts to the magistrate division for trial purposes. *See IRCP 82(c)(2)(C).* In any divorce case, the magistrate court must make certain preliminary findings before awarding any property or debts to the parties. The threshold question made by every trial judge in a divorce proceeding is whether the parties to the divorce proceeding were actually married. If the trial court decides there was no valid marriage, the court still possesses jurisdiction to enter appropriate findings, but would decline to determine grounds for divorce or divide marital property, not on subject matter jurisdiction grounds, but on the basis of mootness. "A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Cowan v. Bd. of Comm'rs.*, 143 Idaho 501, 509 (2006) (internal citations omitted). However, the trial court obviously has subject matter jurisdiction to determine whether the parties were validly married.

Here, the trial court specifically found that the parties were married on July 4, 1996. *R*, p. 23-24 *(Partial Decree of Divorce, dated August 24, 2005);* p. 26 *(Findings of Fact, Conclusions of Law and Order, dated October 30, 2007).* The original finding was based, at least in part, on Dennis' admission that he and Renee had been married on that date, and remained married through the date of the Complaint and Dennis' oral request for a decree of divorce. The latter finding was further based on Dennis' testimony at trial regarding the marriage. Having specifically found that the parties were married (an issue that it *always* had jurisdiction to decide), the trial court then proceeded to determine a property and debt distribution between the parties.

Contrary to his assertions, the issues raised by Dennis regarding the validity of the marriage are not jurisdictional issues (subject matter, or otherwise). Properly construed, they are an attempt to attack the trial court's specific findings of fact (based on the parties' admissions) that they had been married. Because the trial court determined the parties were married (which it undisputedly had jurisdiction to decide), and because that determination was made based on the admissions of the parties[3], the trial court then determined that the property and debt distribution issues were ripe. Any allegations that the marriage was not valid are collateral attacks on the trial court's finding that the parties were, actually, married – not attacks on the trial court's jurisdiction to decide whether a valid marriage occurred. That subject matter jurisdiction always existed.

B. The Appeal, Based on Jurisdictional Grounds, Should Be Dismissed.

The original Partial Decree of Divorce was filed August 24, 2005. That Order was based on Dennis' own oral Motion requesting the parties be divorced and the marriage ended. Inherent

[3] Judicial estoppel, discussed below, also applies to these admissions since Dennis obtained an advantage (a decree of divorce) by making such admissions.

in this request, and the Order itself, is a finding that the parties were married (otherwise, what is there to seek a divorce for). That Partial Decree of Divorce (which appears to have been prepared by Dennis' own trial attorney) included a Rule 54(b) Certificate, declaring that the divorce decree was "a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules." Any appeal of the Partial Decree of Divorce (including, of course, an appeal based on the invalidity of the marriage), must have been filed within 45 days of the entry of the Partial Decree of Divorce, or by October 10, 2005. *See I.R.C.P. 83(e); 6(a); 6(e)(1).* No party, including Dennis, appealed the original Partial Decree of Divorce. Accordingly, the issue of the validity of the marriage was never properly appealed. Dennis' continued attempts to raise the issue now, over seven years after the time to appeal expired, should be dismissed as untimely.

C. Dennis is Improperly Attempting, on Appeal, to Alter or Amend the Trial Court's Judgment, Without Properly Complying With Rules 52, 59 or 60.

The trial court made specific findings of fact, including that the parties were married, that certain property was separate vs. community property, and that an equalization payment from Dennis to Renee was required to equalize the community property allocations. In his appeal, Dennis is attempting to invalidate and/or dispute the factual findings and/or conclusions of law of the trial court. However, this attempt is being made without compliance with the Idaho Rules of Civil Procedure at the trial court level. For instance, Rule 52 provides the procedure for seeking an amendment of specific findings of the court; Rule 59 provides the procedure for seeking a new trial or amendment of a judgment for certain issues, including newly discovered evidence; Rule 60 provides the procedure for relief from a final judgment or order based on "mistake" or "newly discovered evidence." All of these rules require the party seeking such relief to do so within 14 days (or six months in the case of Rule 60) of the order they are seeking

relief from. In this case, Dennis failed to comply with these rules. No motions were made for any sort of relief from the original Partial Decree of Divorce, which ordered the divorce (including an inherent finding that the parties were married); no motions were made to amend the court's final Findings of Fact and Conclusions of Law, which integrated declarations related to the marriage itself. Having failed to properly comply with the Rules of Civil Procedure, Dennis is now seeking to use the appellate courts to solve his irreparable mistake of failing to comply with the relevant Civil Rules.

Not only has he failed to comply with the relevant Rules of Civil Procedure, but Dennis is seeking to overturn, through appeal, the trial court's decision using allegedly "newly-discovered" evidence of the alleged failure to have an actual marriage. *R*, p. 193-196 *(Original Notice of Appeal, dated February 9, 2012); see also Appellant's Brief (relying on allegedly newly-discovered evidence).*[4] However, the relevant Rules of Civil Procedure require that the "newly-discovered evidence" be evidence "which the party could not, with reasonable diligence, have discovered and produced at the trial" or that "could not have been discovered in time to move for a new trial." *See IRCP 59(a)(4); 60(b)(2).* Here, there is no allegation that Dennis could not have discovered the alleged evidence of the invalidity of the marriage prior to preparing and filing his Answer, admitting that the marriage was valid. This evidence (to the

[4] In his Appellant's Brief, Dennis repeatedly and flagrantly discusses evidence that was never presented to the trial court. First is the alleged evidence from the State of Oregon regarding the lack of filing of a marriage certificate. Second are repeated references to the individual who performed the marriage ceremony, and Dennis' assertions that Renee was the party who made the arrangements for the wedding. *See, e.g., Appellant's Brief, p. 27 – 31.* Setting aside the fact that both categories of evidence were never presented to the trial court, and therefore are improper for appeal, Dennis urges the court on appeal to simply take judicial notice of the first evidence (the State of Oregon "records"). However, this is a misuse of the judicial notice provisions of I.R.E. 201. *See I.R.E. 201(b)* (describing the kinds of facts which are subject to judicial notice); *see also "Does Anybody Even Notice,"* Terry L. Myers (Chief Bankruptcy Judge, District of Idaho), available at http://www.id.uscourts.gov/Articles/tlm-article-DoesAnybodyNotice.pdf (last visited January 17, 2013). Renee strenuously disputes the assertion that the marriage ceremony was performed by her "family friend" (and therefore that she somehow colluded with this friend to falsify the marriage). This dispute of facts is, of course, the exact reason why evidence must be presented to the trial court – not the appellate courts.

extent it is even evidence) is not "newly-discovered evidence" of the kind that will give Dennis any relief.

Further, Dennis is attempting to use this newly-discovered evidence for the first time on appeal – rather than at the trial court level. An appeal court will not address new issues or arguments on appeal. *See, e.g., McPheters v. Maile*, 138 Idaho at 397; *Wattanbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho at 323-24. Dennis tries to avoid the fact that he is raising new issues on appeal by arguing that this evidence deprives the court of subject matter jurisdiction – an issue that can be raised at any time, even for the first time on appeal. *See Appellant's Brief, p. 13 – 20.* Nevertheless, as argued above, the trial court had subject matter jurisdiction in this case – to decide the threshold question of whether the parties were actually married. The trial court did so, based on the parties' own admissions. This appeal is not about subject matter jurisdiction, it is about allegedly newly-discovered evidence that Dennis believes should change the trial court's decision regarding the parties' marriage. Clothing his untimely attempt to present allegedly new evidence in the garb of subject matter jurisdiction does not change the underlying fact that the court had jurisdiction. Dennis simply failed to investigate prior to admitting a marriage existed, and now disagrees with the court's conclusions. Nevertheless, Dennis failed to take the steps to properly present his position to the trial court.

D. Judicial Estoppel Dictates That Dennis' Arguments on Appeal Should Be Denied.

Judicial estoppel exists to prevent a party from taking one position to gain an advantage, and then later taking a different position to gain a different advantage. *See Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho at 748. Dennis argues that his marriage was invalid. However, at the trial court level, Dennis repeatedly admitted that he had been married, and repeatedly requested the court grant him orders (i.e., a dissolution order, and later property

division) based on that marriage. Having had a property division payment ordered against him, Dennis is now attempting to avoid the trial court's decision by arguing subject matter jurisdiction. However, Dennis already admitted, at the trial court level, that the court had jurisdiction to decide whether a marriage existed and should be ended. Principles of judicial estoppel prevent Dennis from now refuting his previous admissions (and the benefit he gained from them – dissolution of marriage and division of property).

IV.

ATTORNEY FEES ON APPEAL

The legal authorities and rules cited above are clear and unambiguous. The trial court clearly ruled the parties were married and subsequently granted them a divorce. This judgment was certified as a final judgment. As this authority is clear and well-developed, and the judgment granting a divorce based on a marriage was clearly a final judgment, Dennis' appeal of the sole issue in this appeal is untimely, frivolous, unreasonable, and without foundation. For this reason, and pursuant to Idaho Code § 12-121, Intervenor Jeremy J. Gugino is entitled to an award of attorney fees and costs for defending this appeal.

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V.

CONCLUSION

Here, there was substantial and competent evidence to support the magistrate judge's findings of fact (that the parties were married) and conclusions of law (that a divorce could be granted). The District Court on appeal affirmed the magistrate judge's decision. Accordingly, this Court should affirm the District Court's decision and decide this appeal in the Appellant and Intervenor's favor. Further, this Court should award the Intervenor his attorney fees and costs on appeal.

DATED this 18th day of February, 2014.

MATTHEW T. CHRISTENSEN
Attorney for Trustee/Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2014, I caused to be served two true and correct copies of the foregoing INTERVENOR'S BRIEF ON APPEAL by the method indicated below, and addressed to those parties below:

Renee L. Baird 15584 Riverside Rd. Caldwell, ID 83607-9628 *Respondent Pro Se*	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) E-mail ( ) Facsimile
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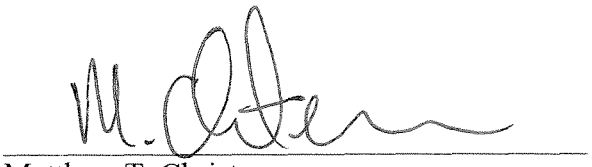

Matthew T. Christensen