

20050328

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

Supreme Court File Number 20050328  
Burleigh County File Number 01-C-02605

NOV 21 2005

STATE OF NORTH DAKOTA

Todd A. Roth,

Plaintiff/Appellant,

vs.

Lynette Hoffer,

Defendant/Appellee.

---

---

APPEAL FROM THE SECOND AMENDED DIVORCE JUDGMENT AND ORDER  
DENYING MOTION FOR NEW TRIAL AND TO QUASH EXECUTION  
OF THE BURLEIGH COUNTY DISTRICT COURT

---

---

---

---

BRIEF OF APPELLANT

---

---

Todd A. Roth  
P.O.Box 5521  
Bismarck, N.D. 58506  
Phone: None

TABLE OF CONTENTS

	page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES .....	vii
STATEMENT OF THE CASE .....	1
STATEMENT OF THE FACTS .....	3
STANDARD OF REVIEW .....	7
ARGUMENT .....	8
I.    THE DISTRICT COURT ACTED WITHOUT JURISDICTION TO DO WHAT IT DID. ....	8
II.   A CONSTRUCTIVE TRUST DOES NOT IMPOSE PERSONAL LIABILITY, AND THERE WAS A LACK OF POSSESSION OF THE MONEY. ....	11
III.  THERE WAS NO MISTAKE, NOR WAS THERE AN ACTIONABLE MISTAKE. ....	12
IV.   THE DISTRICT COURT WAS WITHOUT PERSONAL JURISDICTION OF SCHLAHT. ....	16
V.    SATISFACTION, WITHOUT MORE, IS INSUFFICIENT TO MOOT THE CASE OR CONTROVERSY. ....	16
VI.   ON THEIR FACE, THE CLAIM AND RULING ARE VOID. ....	20
VII.  HOFFER IS BARRED FROM HER DEFENSE BECAUSE SHE WAS ARBITRARY, DID NOT GIVE NOTICE. ...	23
VIII. A VOID JUDGMENT GIVES A COURT NO JURISDICTION OR DISCRETION TO NOT VACATE IT. ....	27
IX.   THE FILING OF THE MOTION ITSELF DENIES HOFFER'S DEFENSE. ....	30
X.    THE ELEMENTS FOR PAYMENT WERE NOT SHOWN. ..	30
XI.   IT WAS NOT SHOWN THAT IT WAS ROTH WHO PAID. ....	33
XII.  THE RULE OF "LYON V. FORD MOTOR CO." IS TOO NARROW. ....	34
CONCLUSION .....	37

TABLE OF AUTHORITIES

	page
Administrative Com. of Wal-Mart Assoc. v. Willard, 393 F.3d 1119 (10th Cir. 2004) .....	12
Albrecht v. Metro Area Ambulance, 1998 ND 132, 580 N.W.2d 583 .....	16
American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 79 S.Ct. 170 (1958) .....	9
Andre v. Morrow, 680 P.2d 1355 (Idaho 1984) .....	10, 12
ARW Exploration v. Aguirra, 45 F.3d 1455 (10th Cir. 1995) .....	25
Baird v. Ellison, 70 N.D. 261, 293 N.W. 794 (1940) .....	28
Bender v. Beverly Anne, 2002 ND 146, 651 N.W.2d 642 .....	28
Britt v. Whitmire, 956 F.2d 509 (5th Cir. 1992) .....	9
Carpenters Pension and Annuity v. Banks, 271 F.Supp.2d 639 (E.D.Pa. 2003) .....	12
Carson v. Johnson, 112 F.3d 818 (5th Cir. 1997) .....	23
Clark v. Glazer, 609 P.2d 1177 (Kan.App. 1980) .....	29
Crumlish's Adm'r v. MP Co., 38 W.Va. 390, 18 S.E. 456 ....	31
Dakota County v. Glidden, 113 U.S. 222, 5 S.Ct. 428 (1885) .....	36
Dakota Northwestern Bank Nat Ass'n v. Schollmeyer, 311 N.W.2d 164 (N.D. 1981) .....	18
DeCoteau v. Nodak Mut. Ins. Co., 2001 ND 182, 636 N.W.2d 432 .....	34
Dembowski v. Central Const. Co., 185 N.W.2d 461 (Neb. 1971) .....	32
Earnest v. Garcia, 1999 ND 196, 601 N.W.2d 260 .....	2
Eggl v. Fleetguard, Inc., 1998 ND 166, 583 N.W.2d 812 ....	28
Erin v. Lowry, 48 U.S. 172, 12 L.Ed. 655 (1849) .....	36
Fargo Glass and Paint Co. v. Randall, 2004 ND 4, 673 N.W.2d 261 .....	8

	page
Farmer's Union Oil Co. of Dickinson v. Wood, 301 N.W.2d 129 (N.D. 1980) .....	32
Fast v. Mayer, 2005 ND 37, 694 N.W.2d 681 .....	25
First Western Bank & Trust v. Wickman, 527 N.W.2d 278 (N.D. 1995) .....	28
Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962) .....	25
Ford v. Willits, 688 P.2d 1230 (Kan.App. 1984) .....	10, 29
Froemke v. Parker, 39 N.D. 628, 169 N.W. 80 (1918) .....	22
Gagnon v. United States, 193 U.S. 451, 24 S.Ct. 510 (1904) .....	9
Giese v. Giese, 2002 ND 194, 653 N.W.2d 663 .....	5
Grady v. Hansel, 57 N.D. 722, 223 N.W. 937 (1929) ....	18, 19
Great West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002) .....	11
Grey Bear v. North Dakota Dept. of Human Services, 2002 ND 139, 651 N.W.2d 611 .....	16
Gruebele v. Gruebele, 338 N.W.2d 805 (N.D. 1983) .....	9
Hanson v. North Dakota Workmen's Compensation Bureau, 63 N.D. 479, 248 N.W. 680 (1933) .....	29
Hasse v. Fraternal Order of Eagles #421 of Vermillion, 658 N.W.2d 410 (S.D. 2003) .....	21
Hengel v. Hyatt, 252 N.W.2d 105 (Minn. 1977) .....	29
Hettinger County v. Trousedale, 5 N.W.2d 417 (N.D. 1942) ..	33
In re Craddock, 149 F.3d 1249 (10th Cir. 1998) .....	8
In re Guardianship/Conservatorship of Van Sickle, 2005 ND 69, 694 N.W.2d 212 .....	20
Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) .....	27
Kilmer v. Kilmer, 23 N.W.2d 510 (Wis. 1946) .....	21
Kimball v. Landeis, 2002 ND 162, 652 N.W.2d 330 .....	14, 15
Kishter Principal Life Ins. Co., 186 F.Supp.2d 438 (S.D.N.Y. 2002) .....	11

	page
Kuehl v. Lippert, 401 N.W.2d 523 (N.D. 1987) .....	14
Kusay v. U.S., 62 F.3d 192 (7th Cir. 1995) .....	9
Lang v. Barrios, 472 N.W.2d 464 (N.D. 1991) .....	22
Little v. Sowers, 204 P.2d 605 (Kan. 1949) .....	22
Long v. Brooks, 636 P.2d 242 (Kan.App. 1981) .....	29
Luckenbach v. W.J. McCahan Sugar Refining Co., 248 U.S. 139, 39 S.Ct. 53 (1918) .....	33
Lumenite Control Technology, Inc. v. Jarvis, 252 F.Supp.2d 700 (N.D.I. 2003) .....	12
Lyon Financial Services, Inc. v. Waddill, 625 N.W.2d 155 (Minn.App. 2001) .....	10
Lyon v. Ford Motor Co., 2000 ND 12, 604 N.W.2d 453 .....	17, 19, 21, 25, 34, 37
Matter of West Texas Marketing Corp., 12 F.3d 497 (5th Cir. 1994) .....	9
Mees v. Ereth, 466 N.W.2d 135 (N.D. 1991) .....	22
Moore v. Baugh, 308 N.W.2d 698 (Mich.App. 1981) .....	21
Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp., 2002 ND 140, 651 N.W.2d 625 .....	18, 19, 30
Naldor v. Crest Corporation, 472 P.2d 310 (Idaho 1970) ...	22
Nind v. Meyers, 15 N.D. 400, 109 N.W. 335 (1906) .....	28
Nodak Mut. Ins. Co. v. Stegman, 2002 ND 113, 647 N.W.2d 133 .....	17, 18
Northwestern Fuel Co. v. Brock, 139 U.S. 216, 11 S.Ct. 523 (1891) .....	21
Office of Child Advocate v. Lindgren, 296 F.Supp.2d 178 (D.R.I. 2004) .....	28
O'Hara v. Macconnell, 93 U.S. 150, 23 L.Ed. 840 (1876) ...	36
Opat v. Ludeking, 666 N.W.2d 597 (Iowa 2003) .....	10
Primas Recoveries, Inc. v. Carey. 247 F.Supp.2d 337 (S.D.N.Y. 2002) .....	12

Production Credit Ass'n of Minot v. Schlak, 383 N.W.2d 826 (N.D. 1986) .....	26
Radspinner v. Charlesworth, 369 N.W.2d 109 (N.D. 1985)..	11
Renner v. J. Gruman Steel Co., 147 N.W.2d 663 (N.D. 1966) .....	22
Riemers v. O'Halloran, 2004 ND 79, 678 N.W.2d 547 .....	23
Riley v. State, 506 N.W.2d 45 (Neb. 1993) .....	11
Roe v. Doe, 2002 ND 136, 649 N.W.2d 556 .....	7, 28
Roth v. Hoffer, 2004 ND 72, 688 N.W.2d 402 .....	1, 6, 23
Sargent County Bank v. Wentworth, 547 N.W.2d 753 (N.D. 1996) .....	22
Schillerstrom v. Schillerstrom, 32 N.W.2d 106 (N.D. 1948) .....	10
Schlesinger v. Councilman, 420 U.S. 738, 95 S.Ct. 1300 (1975) .....	22
Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 .....	11
Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 54 N.W.2d 392 (Neb. 1952) .....	32
Signor v. Clark, 13 N.D. 35, 99 N.W. 68 (1904) .....	17-18
Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523 (1913) .....	32
Smith v. Grilk, 64 N.D. 163, 250 N.W. 787 (1933) .....	21
Snyder v. North Dakota Workers Compensation Bureau, 2001 ND 38, 622 N.W.2d 712 .....	23
Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975) .....	34
State v. Liberty Nat. Bank and Trust Co., 472 N.W.2d 307 (N.D. 1988) .....	22
State v. Schuh, 496 N.W.2d 41 (N.D. 1993) .....	25
State ex rel. Ness v. Board of Com'rs of City of Fargo, 63 N.D. 33, 245 N.W. 887 (1932) .....	10
State ex rel. Wiles v. Albright, 11 N.D. 22, 88 N.W. 729 (1901) .....	36

	page
Taylor v. Oulie, 55 N.D. 253, 212 N.W. 931 (1927) .....	10
Trujillo v. Longhorn Mfg. Co., Inc., 694 F.2d 221 (10th Cir. 1982) .....	8
Twin City Const. v. Turtle Mountain Indians, 911 F.2d 137 (8th Cir. 1990) .....	25
U.S. v. Dunkel, 927 F.2d 955 (7th Cir. 1991) .....	23
U.S. v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990) .....	23
U.S. v. Isthmian Staemship Co., 359 U.S. 314, 79 S.Ct. 857 (1959) .....	33
U.S. v. National Exchange Bank of Providence, 214 U.S. 302, 29 S.Ct. 665 (1909) .....	31
Valley Honey Co., L.L.C. v. Graves, 2003 ND 125, 666 N.W.2d 453 .....	28
Vander Zee v. Karabatsos, 683 F.2d 832 (4th Cir. 1982)..	28
Waltman v. Austin, 142 N.W.2d 517 (N.D. 1966) .....	10
Watts v. Pinckney, 752 F.2d 406 (9th Cir. 1985) .....	27
Week v. Jones, 100 F.3d 124 (11th Cir. 1996) .....	9
West v. West, 262 N.W.2d 87 (Wis. 1978) .....	29
Black's Law Dictionary, Fourth Edition .....	20, 24
Black's Law Dictionary, Eighth Edition .....	20, 24
Bouvier's Law Dictionary, 1914 Edition .....	31
5 C.J.S. Appeal and Error, §934 and §996 .....	21
49 C.J.S. Judgments, §18 .....	11
Rule 8, N.D.R.Civ.P. ....	35, 37
Rule 60(a), N.D.R.Civ.P. ....	8, 9, 10
N.D.C.C. 14-05-25.1 .....	21

STATEMENT OF THE ISSUES

	page
I. Does a motion to correct a clerical error authorize the Second Amended Judgment? .....	8
II. Does a constructive trust impose personal liability? .....	11
III. Was there a mistake, and an actionable mistake? .....	12
IV. Did the District Court have personal jurisdiction of Schlaht? .....	16
V. Is satisfaction, without more, sufficient to moot or waive the case or controversy? .....	16
VI. Is the defense and ruling void on their face? ...	20
VII. Is Hoffer barred from her defense for being arbitrary, for not giving notice? .....	23
VIII. Did the District Court have the discretion to consider Hoffer's defense? .....	27
IX. Did the filing of the motion itself deny Hoffer's defense? .....	30
X. Was there a payment? .....	30
XI. Must it have been shown that it was Roth who paid? .....	33
XII. Is the rule of "Lyon v. Ford Motor Co." to narrow? .....	34

STATEMENT OF THE CASE

Todd Roth, plaintiff, and Lynette Hoffer, defendant, were divorced. Judgment was entered on July 28, 2003. R.A.#97. An amended judgment was filed on September 8, 2003. R.A.#106. The QDRO (Qualified Domestic Relations Order) was issued on September 5, 2003. R.A.#105.

Direct appeal was taken by Roth in the case of Roth v. Hoffer, 2004 ND 72, 688 N.W.2d 402. R.A.#132-133.

Fifteen months after the judgment was entered, Hoffer, changing divorce attorneys from Richard Baer to Kent Morrow, on October 21, 2004, filed her "Motion to Amend Qualified Domestic Relations Order and Judgment". R.A.#136; App.P.5. On November 4, 2004, Roth filed his "Reply". R.A.#138; App.P.7.

In response, on November 10, 2004, Hoffer filed her "Addendum to Motion to Amend Qualified Domestic Relations Order and Judgment". R.A.#140; App.P.11. Roth responded on November 24, 2004 with his "Reply to Addendum". R.A.#142. However, it was not filed until after the hearing, on January 5, 2005! R.A.#142

A hearing was held on December 23, 2004. R.A.#141. The transcript for this hearing is filed at R.A.#157. Lynette Hoffer was the only witness for herself. She had no other witnesses to show mistake, whether Mitchell Schlaht possessed the money from the 401K account, etc.

After the December 23, 2004 hearing, that evening, Roth was informed by his ex-wife, Lynette Hoffer, that

they had 'lost' the file, did not have the file at the hearing, so Roth sent Judge Riskedahl a letter about this. R.A.#144. Judge Riskedahl responded by letter on January 4, 2005. R.A.#145.

On January 10, 2005, Hoffer filed her "Closing Argument". R.A.#146. On January 14, 2005, Roth filed his "Post-Hearing Statement". R.A.#148.

On February 4, 2005, Hoffer sent Judge Riskedahl a letter, referring to the suit in Federal Court against Roth, stating for the first time that her motion to amend the judgment was actually seeking a constructive trust. This letter is not listed in the Register of Actions, but Roth assumes it is filed in the 'left-hand side of the file', where miscellaneous documents are filed. Roth referred to this letter on pages 3 and 6 of his "Motion for New Trial or to Reconsider and to Quash the Levy and Execution". R.A.#160.

Four days later, on February 8, 2005 The District Court entered its "Memorandum Opinion and Order", granting Hoffer her relief. R.A.#149; App.P.13.

An Amended Qualified Domestic Relations Order and an Amended Judgment was filed on February 23, 2005. R.A.#151-152. The "Second Amended Judgment" was filed on March 3, 2005. R.A.#154; App.P.15.

The "Sheriff's Return" that execution was wholly satisfied was filed by the Sheriff on April 29, 2005. R.A.#158.

On May 6, 2005, Roth filed his "Motion for New Trial or to Reconsider, and to Quash or Set Aside the Levy and Execution". R.A.#160. On May 25, 2005, Hoffer filed her "Reply to Motion". R.A.#161.

44 days later, on July 8, 2005, Hoffer filed her "Satisfaction of Judgment". R.A.#162.

On August 1, 2005, the District Court entered its "Memorandum Opinion and Order" denying the new trial motion. R.A.#163; App.P.20.

On September 16, 2005, Roth filed his Notice of Appeal. R.A.#165; App.P.22.

#### STATEMENT OF THE FACTS

The District Court amended the property distribution portion of the divorce judgment by establishing a constructive trust against Todd Roth and Mitchell Schlaht in the amount of \$15,265.58. App.P.16-17, ¶9(B-C). In addition, a personal judgment for the same amount was also awarded against both Roth and Schlaht, jointly and severally. The Court also amended the QDRO, the writ of garnishment. R.A.#152. The purpose and effect is to give Hoffer a 100% property division.

However, the basis for Hoffer's motion was to correct a clerical mistake pursuant to Rule 60(a), N.D.R.Civ.P. App.P.11.

Mitchell Schlaht was not a defendant in this divorce case and was never made a defendant in this case. Schlaht was never served with a summons and complaint. Nor was

he served with the motion to amend the judgment.

The July 28, 2003 Judgment, R.A.#97, and the prior Findings of Fact, Conclusions of Law, and Order for Judgment, R.A.#96, stated that:

"The plaintiff had a 401K plan with his employer with North American Coal with a gross value of \$53,620.91, but against which the plaintiff took a loan of \$11,233.77, leaving a net value of \$42,387.14. The Court awards to the defendant 65% of the net value (\$27,551.64). This to be done ASAP in conformance with plan requirements."

Prior, the District Court's May 1, 2003 "Memorandum Opinion", R.A.#94, at page 3, stated that:

"The Vanguard Group -- North American Coal 401K related to the plaintiff's employment with North American Coal will be divided between the parties, with 65 percent going to Lynette, and 35 percent to Todd. The Court is taking into account the diminishment of this account as a result of loans made against it by the plaintiff prior to the divorce."

The Court's September 5, 2003 QDRO (Qualified Domestic Relations Order), R.A.#105, at page 2, §4, stated:

"... the Plan administrator of the Plan is hereby ordered to divide the vested account balance of the Participant (Roth) under the Plan and hold for the Alternative Payee (Hoffer) the sum of \$27,551.64 thereof as a separate account for the Alternative Payee, ... the remainder to be held by the Participant in a separate account ..."

On September 5, 2003, Roth withdrew the money from his 401K account at NACCO, his former employer, according to the Plan document and the ERISA statutes. The QDRO was not served on NACCO by Hoffer until September 26, 2003. R.A.#143, which is a copy of a letter NACCO sent to Roth, dated October 3, 2003, Hoffer introducing this letter at The December 23, 2004 hearing, as Exhibit 1, Tr.P.4, L.22-24. Note that this letter says they gave Roth his money

according to the requirements of the Plan Document and did not say it was contrary to the statutes of ERISA, 26 U.S.C.414(p) and 29 U.S.C.1056(d). But they demanded the money back anyway, even though it was not shown that any rule of law or contractual provision was violated. NACCO gave Roth \$42,738.79, all the money in the account after taxes and the loan.

Hoffer, acting through her attorney, Richard Baer, was dilatory. He did not get the QDRO issued until September 5, 2003. R.A.#105. He did not get it served until September 26, 2003. R.A.#143. The District Court instructed Baer to garnish "ASAP", quoting from the Judgment, R.A.#97. Also, prior, on May 5, 2003, on the last paragraph on page 5 of the Court's "Memorandum Opinion", R.A.#94, the District Court warned Baer to prepare the QDRO and have it ready to be signed and served at the same time as the judgment. Richard Baer was likewise dilatory in getting the QDRO served in the case of Giese v. Giese, 2002 ND 194, ¶2, 653 N.W.2d 663, 665 (Baer was three years dilatory, despite the Court's directive to prepare the QDRO).

At the December 23, 2004 hearing, Hoffer did not present any facts of a clerical mistake (nor of any type of a mistake). The only evidence was that it was Hoffer's claim of understanding. Transcript page 3, lines 11-15 (Tr.P.3, L.11-15). The transcript is filed at R.A.#157.

Hoffer bases her 'claim' on events occurring subsequent

to the judgment. Tr.P.5, L.2-15 and Tr.P.6, L.22-25.

Hoffer feels she is entitled to an additional \$15,265.58, just so the Court's intentions are honored. Tr.P.7-8, L.22-25 and 1. But she did not present a witness or facts of why that was the Court's intent as opposed to what was ordered and done.

Her claim is really because it is her desire of the Court. Tr.P.8, L.2-3.

Her motion and evidence were not based on facts in the judgment or record, but on events subsequent to the judgment, which is not a clerical mistake, nor even a mistake.

No facts were introduced that Schlaht had or still has the money. Tr.P.5, L.16-22 and page 8, L.4-15. She could not testify, and did not testify, that Schlaht even deposited the money in his account at Capital Credit Union.

Hoffer did testify that she did receive the money from NACCO. Tr.P.7, L.15-16. Also, at the oral argument before the N.D. Supreme Court, on direct appeal, Roth v. Hoffer, 2004 ND 72, appeal number 20030282, at about half way through the oral argument, A Justice asked Richard Baer, Hoffer's attorney, if she had received the money, and he said yes.

Hoffer's Motion to Amend the Judgment asks that she be given 65% of the gross value of the account. App.P.6.

The original Judgment, R.A.#97, awarded Hoffer 65% of the net value, after the loan, plus, according to Plan

terms, including the factor of after taxes.

With Hoffer's method, she received slightly more than 100% of the account after taxes, including the 10% early withdrawal tax penalty, leaving Roth with all the taxes and less than 0%, not 35%. Hoffer did not present any fact showing a clerical mistake in the Judgment or record. She produced no witnesses to testify as to a mistake. She made no attempt to explain why the discount for the loan in the original Judgment was not supposed to be. She only testified as to what she wanted.

Hoffer did not explain why, according to the terms of the Judgment, R.A.#97, a duty from Roth owing to Hoffer existed. Hoffer had no entitlement or right or claim to the money in the 401K Plan except in conformance with ERISA and the Plan document. R.A.#97.

Hoffer's Motion to Amend, App.P.5-6, asks for \$14,775.58. At the hearing on December 28, 2004, the figure arbitrarily changed to \$15,265.58. Tr.P.7, L.17. The gross value of the account increased by \$1,000.00, from \$64,657.26, to \$65,657.26. Tr.P.7, L.10-11. The mathematics for her initial \$14,775.58 request, according to her method of calculation, is \$300.00 too much. Her final inflated \$15,265.58 claim is not even accurate by using her new arbitrary numbers. Anything she wanted happened.

#### STANDARD OF REVIEW

The standard of review is plenary. Roe v. Doe, 2002 ND 136, ¶6, 649 N.W.2d 566,568. When the issue challenges

the judgment as void, the Court's sole task is to determine the validity of the judgment. Id.

#### Argument

#### I. THE DISTRICT COURT ACTED WITHOUT JURISDICTION TO DO WHAT IT DID.

The Second Amended Judgment, ¶9(A-C), App.P.16-17:

- A. Is based on events and facts subsequent to the Judgment.
- B. Creates and adds a constructive trust to the Judgment.
- C. Creates and adds a personal liability to the Judgment.
- D. Adds Mitchell Schlaht as a party to this divorce case.

All this is supposed to be a clerical mistake according to Rule 60(a), N.D.R.Civ.P. Hoffer's motion to amend the judgment is a motion to correct a clerical mistake pursuant to Rule 60(a), N.D.R.Civ.P.

A correction under Rule 60(a) can not require any additional proof, nor is it available to correct something that was deliberately done but later discovered to be wrong. Trujillo v. Longhorn Mfg. Co., Inc., 694 F.2d 221, 226 (10th Cir. 1982); In re Craddock, 149 F.3d 1249, 1254 note 4 (10th Cir. 1998).

Rule 60(a) can not be used to introduce new parties, nor new facts, via affidavit or hearing, to the record. Fargo Glass and Paint Co. v. Randall, 2004 ND 4, ¶6, 673 N.W,2d 261,263.

While the Court may correct clerical errors to reflect what was intended at the time of the ruling, errors that affect substantial rights of the parties are beyond the

scope of Rule 60(a), they are mistakes of law, they are errors of substantive judgment, and thus are not clerical. Weeks v. Jones, 100 F.3d 124, 128-129 (11th Cir. 1996); Matter of West Texas Marketing Corp., 12 F.3d 497, 503-505 (5th Cir. 1994) (Rule 60(a) is not a right to apply different legal rules or new additional legal preambulations, it can not affect substantive rights); Britt v. Whitmire, 956 F.2d 509, 512-514 (5th Cir. 1992) (Rule 60(a) did not authorize an amendment ordering defendant to pay the differences in value of the stock because it fell in value since the date of the conversion of the stock, because it was a substantive judgment affecting the substantial rights of the parties.--page 513-514); Gruebele v. Gruebele, 338 N.W.2d 805, 811 (N.D. 1983) (A substantive change can not be made).

Rule 60(a) is derived from or is a codification of the common law rule of 'nunc pro tunc'. Black's Law Dictionary, Sixth Edition, defining 'nunc pro tunc'; American Trucking Assn's v. Frisco Transp. Co., 358 U.S. 133, 145, 79 S.Ct. 170, 177 (1958), citing Gagnon v. United States, 193 U.S. 451, 456, 24 S.Ct. 510, 511 (1904), a 'nunc pro tunc' case.

'Nunc pro tunc', (or Rule 60(a)), can not be used to rewrite history. Kusay v. U.S., 62 F.3d 192, 193 (7th Cir. 1995). Originally, Hoffer could not have asked for personal liability against Roth to pay the money from the 401K Plan, nor have made Schlaht a party, nor asked for

a constructive trust. Hoffer can not now rewrite history and do now what she could not have done originally.

The changes made in the Second Amended Judgment are not clerical mistakes, are not cognizable under Rule 60(a).

The Second Amended Judgment is void. The Court was without jurisdiction to render the judgment rendered.

Three things are essential to the jurisdiction of a court: (a) Jurisdiction of the subject matter; (b) Jurisdiction of the person; and (c) Jurisdiction, the power and authority to render the particular judgment.

Schillerstrom vs. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1948); Taylor v. Oulie, 55 N.D. 253, 212 N.W. 931, 932 (1927); Opat v. Ludeking, 666 N.W.2d 597, 606 (Iowa 2003); 49 C.J.S. Judgment, §18(d); Andre v. Morrow, 680 P.2d 1355, 1367-1368 (Idaho 1984); State ex rel. Ness v. Board of Com'rs of City of Fargo, 63 N.D. 33, 245 N.W. 887, 892 (1932); Waltman v. Austin, 142 N.W.2d 517, 521 (N.D. 1966); Lyon Financial Services, Inc. v. Waddill, 625 N.W.2d 155, 158 note 3 (Minn.App. 2001); Ford v. Willits, 688 P.2d 1230, 1237 (Kan.App. 1984).

Alternatively, looking at the facts from a different viewpoint: Rule 60(a) gives a court jurisdiction to decide an issue if the issue is authorized to be decided by the terms of the Rule. Rule 60(a) does not give a court jurisdiction to create a constructive trust, to add a new party, to create personal liability, and to consider facts and events occurring subsequent to the judgment.

The District Court was without jurisdiction of these issues or questions. 49 C.J.S. Judgments, §18(d) note 2 (It is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide); Riley v. State, 506 N.W.2d 45, 51 (Neb. 1993) (For validity of a judgment, a court must have jurisdiction to decide a question or issue in the subject matter presented to the court).

The Second Amended Judgment is void. The Court was without jurisdiction to render the judgment rendered, or the Court was without jurisdiction of the issues presented to the Court.

**II. A CONSTRUCTIVE TRUST DOES NOT IMPOSE PERSONAL LIABILITY, AND THERE WAS A LACK OF POSSESSION OF THE MONEY.**

The Second Amended Judgment granted a constructive trust. But it also imposed personal liability.

Personal liability can not be derived from or imposed by a constructive trust. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-214, 122 S.Ct. 708, 714-715 (2002).

A constructive trust can not be used to seize money which is not identifiable as coming from the constructive trust, as there is no personal liability. Kishter v. Principal Life Ins. Co., 186 F.Supp.2d 438, 445 (S.D.N.Y. 2002); Schroeder v. Buchholz, 2001 ND 36, ¶24, 622 N.W.2d 202, 209; Radspinner v. Charlesworth, 369 N.W.2d 109, 114

(N.D. 1985); Andre v. Morrow, 680 P.2d 1355, 1370 note 6 (Idaho 1984); Primas Recoveries, Inc. v. Carey, 247 F.Supp.2d 337, 341 (S.D.N.Y. 2002); Administrative Com. of Wal-Mart Assoc. v. Willard, 393 F.3d 1119, 1121-1122 (10th Cir. 2004); Lumenite Control Technology, Inc. v. Jarvis, 252 F.Supp.2d 700, 703-704 (N.D.I. 2003).

Likewise, lack of possession of the money forbids a judgment for a constructive trust.

The money must be in Schlaht's or Roth's possession in order to state a claim and render a judgment for a constructive trust. Carpenter's Pension and Annuity v. Banks, 271 F.Supp.2d 639, 642 (E.D.Pa. 2003).

Hoffer failed to bear her due process burden of proof to prove possession. The evidence is insufficient to show possession, in fact, no fact was introduced that Schlaht was in possession, much less at one time had possession or that it was deposited in his bank account at Capital Credit Union.

The District Court was without jurisdiction to render the judgment rendered, a judgment of personal liability, and that Roth and Schlaht were in possession of the money.

**III. THERE WAS NO MISTAKE, NOR WAS THERE AN  
ACTIONABLE MISTAKE.**

Even if Hoffer were allowed to sue for a constructive trust, she still failed to prove a claim upon which relief could be granted. (Of course she can not sue for a constructive trust via motion, as a separate cause of action,

there also is no cause of action).

No mistake exists clerical, judicial, or otherwise.

Hoffer says there is a mistake because: "The clerical mistake arises from the failure of the terms of the Qualified Domestic Relations Order to accurately reflect the order of the court as to the amount of funds to be received by Hoffer. ... By reason of the mistake, Hoffer did not receive her intended amount of the fund and Roth received too much."--quoting from her "Addendum to Motion to Amend", App.P.11.

First:

Hoffer uses the gross value of the account as opposed to the net value due to the loan.

Hoffer's claim is not a claim of mistake. It is a lie.

As noted on page 6 above, Hoffer presented no facts of a mistake. She presented no facts or witnesses why the discount for the loan was a mistake. She does not claim that her divorce attorney, Richard Baer, The Court, or anybody else erred in discounting for the loan. She says the May 1, 2003 "Memorandum Opinion", at page 3, R.A.#94, awarded her 65% of the (gross) value. She ignores the next sentence which says "The Court is taking into account the diminishment of this account as a result of loans made against it by the plaintiff prior to the divorce"; and the subsequent Findings of Fact, Conclusions of Law, and Order for Judgment, R.A.#96, and the Judgment, R.A.#97,

which discounted for the loan. Hoffer does not say why this was a mistake.

Second:

Hoffer uses the increase in the value of the account after the Judgment to claim that Roth owes her more money, or that she was somehow deprived of her allotted share.

A change in value of the account, which was invested in a mutual fund, is not a mistake. It is an event, a foreseeable event. Kuehl v. Lippert, 401 N.W.2d 523, 525 (N.D. 1987).

A mistake is an erroneous belief, an error, misconception or misunderstanding. Black's Law Dictionary, Eighth Edition, defining mistake.

Third:

Hoffer says that by reason of the mistake that she did not receive enough and Roth received too much.

Here, she ignores her own disobedience to the original Judgment, by not timely, "ASAP", serving the QDRO. R.A.#97.

Even what she claims to be a mistake, is not an actionable mistake, because it was not the proximate cause of her loss, because she garnished on an account that no longer existed. Kimball v. Landeis, 2002 ND 162, ¶7, 652 N.W.2d 330, 334 (Negligence is actionable if it caused or proximately caused the detriment). The mistake was not the cause of her loss, it was her dilatoriness in serving the writ of garnishment which caused her to not receive the money. Kimball v. Landeis, Id. ("A proximate cause

is a cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred." ).

Even if a mistake did exist, Hoffer would not be entitled to any money from Roth, even under her illegal cause of action and motion, because the account was empty at the time she served the writ of garnishment, the QDRO, on NACCO, the garnishee. That is, the mistake did not cause her to not receive the money. She was dilatory in serving the QDRO, but in fact, received the money anyway. Hoffer didn't even suffer any detriment due to her own dilatoriness, and especially not due to her claimed mistake.<sup>1</sup>

The evidence is insufficient, there are no facts of a mistake. Hoffer's dilatoriness never caused her not to receive the money and there is no actionable mistake.

The judgment is void. The Court was without jurisdiction to render the judgment rendered as the facts did not authorize it.

---

1. Hoffer says she received the \$28,651.85 from NACCO. This 'claim may appear to contradict this. But what NACCO did, if they in truth did give her the money, was of their own voluntary act, not required by the Plan, nor by ERISA. Even though Hoffer says she received the money, NACCO has never admitted they paid her the money, even though Roth has asked them twice if they did--one would have to believe that NACCO wasn't thinking clearly if they did pay her. It might be that Hoffer only believes she has received the money because she told Roth they put it in a special account for her, not actually receiving a check. There is reason to think, if Richard Baer, is the one who told her the money was put into an account for her, that is he is only trying to protect himself from his own dilatoriness.

IV. THE DISTRICT COURT WAS WITHOUT PERSONAL JURISDICTION OF SCHLAHT.

Mitchell Schlaht was never served with a summons and complaint, nor any other writ which would give the District Court 'in personam' jurisdiction of Schlaht. He was not even served with a copy of the motion to amend, not that it would have given the Court 'in personam' jurisdiction.

The District Court was without personal jurisdiction of Schlaht because he was not served with a summons. Grey Bear v. North Dakota Dept. of Human Services, 2002 ND 139, ¶27-29, 651 N.W.2d 611,621.

The judgment is void because of lack of personal jurisdiction over Schlaht. Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶10, 580 N.W.2d 583,585.

V. SATISFACTION, WITHOUT MORE, IS INSUFFICIENT TO MOOT THE CASE OR CONTROVERSY.

Hoffer responded to Roth's motion for new trial or to reconsider and to quash or set aside the levy and execution, saying only that: "The motion is moot. The judgment has been paid and satisfied. There is no longer any issue to decide. There is no longer any judgment to seek to set aside." R.A.#161. Nothing else was said. No affidavit in support of her 'defense' or 'claim' was submitted. No court case or other reasoning was cited.

The District Court found and ruled that: "Recent filings with the clerk of court indicate that the monetary judgment awarded to the defendant in the Second Amended

Judgment dated March 3, 2005, has been satisfied. Based on the above, the Court concludes that issues regarding the 401K plan have finally been settled, and matters raised in the plaintiff's motion are moot. The plaintiff's motion is, in all things, DENIED." R.A.#163; App.P.20-21. Nothing else was found or said, no case law was cited.

In order to state a claim upon which relief can be granted, or to "state with particularity the grounds" for their defense, it must be pleaded and shown that the judgment has been "voluntarily paid and satisfied of record", or a party who "voluntarily pays a judgment against him waives the right to attack the judgment." Lyon v. Ford Motor Co., 2000 ND 12, ¶7, 10 and 13-14, 604 N.W.2d 453, 455, 458; Nodak Mut. Ins. Co. v. Stegman, 2002 ND 113, ¶7, 647 N.W.2d 133, 136.

It must be noted that Hoffer did not say that her defense was based on this "Lyon v. Ford Motor Co. concept, and the District Court did not say that its ruling is based on this "Lyon v. Ford Motor Co." concept.

To properly plead a motion or defense to dismiss an appeal or motion, one must plead that Roth voluntarily paid the judgment in full; that Roth paid the judgment for his benefit and at his request; and it was formally satisfied of record; and that Roth's right to pursue his motion was waived by such voluntary payment and satisfaction; and affidavits must be used to introduce the facts not of record. Signor v. Clark, 13 N.D. 35,

99 N.W. 68, 70 (1904) ("The facts, therefore, make the case one of voluntary payment. The payment alone would not defeat the appeal.") page 71.

Hoffer did not plead and show that the payment was voluntary. As a matter of law, her claim is insufficient.

The District Court's ruling is likewise insufficient and void because it did not find that the payment was voluntary.

In addition: Even though Hoffer's motion pleaded that the judgment was "paid and satisfied", there was no plea of "paid and satisfied of record". Thus, her claim should not have been granted. Nodak Mut. Ins. Co. v. Stegman, id., ¶10, page 137; Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp., 2002 ND 140, ¶9, 651 N.W.2d 625, 630 (Must be "properly" satisfied of record).

The burden was on Hoffer to prove that the payment was voluntary. Mr. G's, id., ¶13, page 630.

The record, R.A.#158, shows and states that the money was taken via writ of execution and levy, and thus the payment was not voluntary. Dakota Northwestern Bank Nat. Ass'n v. Schollmeyer, 311 N.W.2d 164, 166 (N.D. 1981) (Money taken by execution or paid under duress imposed by execution is not voluntary).; Grady v. Hansel, 57 N.D. 722, 223 N.W. 937, 938 (1929) (The motion made in this case was arbitrary, the same as Hoffer's motion).

The presumption that the payment was voluntary where there is no showing other than that the judgment was paid

does not apply to this case. This is because this presumption depends upon the facts and circumstances of the particular case, and where the record shows involuntariness, such as that payment was made on a writ of execution, then there is no presumption, but the movant then bears the burden to plead and produce facts of waiver. Lyon v. Ford Motor Co., id., ¶14, page 458; Grady v. Hansel, id., page 938. This presumption does not give license to Hoffer and to the District Court to merely plead and find satisfaction and that thus the motion and ruling are sufficient.

Also, the statement or rule that "a satisfaction of judgment extinguishes the claim, the controversy is deemed ended, leaving the appellate court with nothing to review", Lyon, id., ¶10, page 456-457, Mr. G's., id., ¶9, page 630, standing alone, is not the rule of law, for it is qualified by additional criteria, whether the payment was voluntary. Thus, to use this statement or rule by itself, is taking it out of context, is insufficient as a claim or ruling.

Hoffer's claim or affirmative defense, and the District Court's ruling are insufficient. Voluntariness was not pleaded and found.

The record itself shows that Hoffer had a duty to plead and prove more than mere satisfaction, because the record showed that the money was collected under duress and coercion, was collected via execution and levy.

The District Court was without jurisdiction to render

the judgment rendered. The judgment is void.

**VI. ON THEIR FACE, THE CLAIM AND RULING ARE VOID.**

Hoffer's defense did not show or explain its conclusion of law, other than to nakedly state that the motion is moot. Likewise, the District Court's ruling simply said the motion was moot.

That is, they did not explain that their reasoning was along that as stated in the cases cited in Part V above.

In Part V, Roth assumed they were trying to rely upon the reasoning of "Lyon v. Ford Motor Co.", etc. But they did not say this.

Taking their argument at face value:

They say the issues are moot.

An issue is moot if there is no controversy left to be determined, if it is impossible for the court to issue relief, or if the matter is not capable of repetition, yet evading review. In re. Guardianship/Conservatorship of Van Sickle, 2005 ND 69, ¶12, 694 N.W.2d 212, 217-218. An issue is moot when one seeks to get "a judgment on some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." Black's Law Dictionary, 4th Edition, defining moot. A case is moot "in which a controversy no longer exists" or "that does not arise from existing facts or rights". Black's Law Dictionary, 8th Edition, defining moot case.

The motion for new trial and to quash showed that

there are still issues to decide. The fact that the judgment has been satisfied has no meaning, is surplusage--remember, they did not explain their conclusion of law, why satisfaction makes the issues moot, why the issues are settled.

There is a judgment which can be set aside--again, they did not explain their conclusion of law, why satisfaction means the issues are settled, and matters raised in the plaintiff's motion are moot.

The District Court can grant relief to Roth.

An appellate court or the trial court can order restitution on reversal of the judgment. 5C.J.S. Appeal and Error, §934 and §996; Moore v. Baugh, 308 N.W.2d 698, 700 (Mich.App. 1981); Smith v. Grilk, 64N.D. 163, 250 N.W. 787, 793 (1933); Northwestern Fuel Co. v. Brock, 139 U.S. 216, 219, 11S.Ct. 523, 524 (1891); Hasse v. Fraternal Order of Eagles #421 of Vermillion, 658 N.W.2d 410, 413 (S.D. 2003); Kilmer v. Kilmer, 23 N.W.2d 510, 512 (Wis. 1946); Lyon v. Ford Motor Co., id., ¶11-12, page 457.

Reversal would give Roth restitution. Hoffer does have assets which can be obtained. She has the \$15,000.00 or what is left of it, and she has \$5,500.00 to now over \$6,000.00 with accumulated interest in her retirement account which can be executed on. See ¶9(C) of the original Judgment, R.A.#97. This can be executed on. N.D.C.C. 14-05-25.1. This statute allows restitution if it is granted in this divorce case, as opposed to a separate

action at law.

Third, the issues are capable of repetition yet evading review. Both Roth and Schlaht retain the right to sue for trespass or abuse of process because the judgment and execution are void. Renner v. J. Gruman Steel Co., 147 N.W.2d 663, 669 (N.D. 1966); Lang v. Barrios, 472 N.W.2d 464-466 (N.D. 1991); Mees v. Ereth, 466 N.W.2d 135, 136-137 (N.D. 1991); Sargent County Bank v. Wentworth, 547 N.W.2d 753, 759-760 (N.D. 1996); Little v. Sowers, 204 P.2d 605, 608 (Kan. 1949); Nalder v. Crest Corporation, 472 P.2d 310, 315 (Idaho 1970); Schlesinger v. Councilman, 420 U.S. 738, 747-748, 95 S.Ct. 1300, 1308 (1975).

For the above three reasons, the issues are not moot. See State v. Liberty Nat. Bank and Trust Co., 427 N.W.2d 307, 308-309 (N.D. 1988) (Even though the subject matter of the dispute had been satisfied in that the land had been sold and divested, and thus the State obtained what they sued for, the Court concluded that because the issue was capable of repetition, yet evading review, that the issue was not moot); Froemke v. Parker, 39 N.D. 628, 169 N.W. 80, 80 (1918) ("If the matter had become a moot question, then a reversal of the judgment could not affect the rights of the parties.")

The District Court was without jurisdiction to render the judgment rendered, to declare the issues moot. The judgment is void.

VII. HOFFER IS BARRED FROM HER DEFENSE BECAUSE  
SHE WAS ARBITRARY, DID NOT GIVE NOTICE.

Hoffer responded to Roth's new trial motion with a curt, arbitrary defense. R.A.#161.

She did not cite any authority or give reasoning why the facts pled give rise to mootness.

"A single unreasoned paragraph ... a skeletal 'argument', really nothing more than an assertion, does not preserve a claim. ... claims of waiver may themselves be waived." U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). "A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is a good point despite lack of supporting authority or in the face of contrary authority, forfeits the point. ... We will not do his research for him. ... But having found no cases on point the government could still have given us reasons ..." U.S. v. Giovannetti, 919 F.2d 1223, 1230 (7th Cir. 1990). Failure to provide analysis of an issue waives the issue. Carson v. Johnson, 112 F.3d 818, 821 note 3 (5th Cir. 1997).

Without citations to relevant authority or supportive reasoning, the argument is assumed to be without merit. Snyder v. North Dakota Workers Compensation Bureau, 2001 ND 38, ¶20, 622 N.W.2d 712, 719-720; Riemers v. Halloran, 2004 ND 79, ¶8, 678 N.W.2d 547, 550. Issues not adequately briefed will not be considered. Roth v. Hoffer, 2004 ND 72, 688 N.W.2d 402.

Although waiver has a meaning, what is involved here is not necessarily the intentional, knowing and voluntary relinquishment of a right, but it is "the excuse of the nonoccurrence of or a delay in the occurrence of a condition of a duty." Black's Law Dictionary, Eighth Edition, defining waiver. This is really a 'failure to properly and fully plead an argument so as to give notice as to what the reason for the rule is', comparing to a failure to state a claim upon which relief can be granted.

Hoffer had a duty to explain why the facts show mootness. She did not do this. She did not give the reason for the rule. Nor did she cite a case showing the reason for the rule.

Not only has this conduct been named a waiver, but it is a forfeiture of the issue because of her breach of her duty to explain her reasoning. Black's, *id.*, defining forfeiture.

Her duty to explain the reason for her conclusion of law is based on the law of notice and the opportunity to defend, no arbitrariness.

Due process demands that Hoffer give notice, and thus knowledge so as to defend. Notice and opportunity to defend, and no arbitrariness, is the foundation of due process of law. Black's Law Dictionary, Fourth Edition, defining due process.

And, of course, her duty to explain the reason for her conclusion of law is based on her duty to prove her

case and point.

Even though this type of briefing conduct, arbitrariness, is named a waiver or deemed waiver, it really is a forfeiture as a penalty for not giving notice, for not doing one's duty. Or, it is the judgment for failure to properly and fully plead the argument. Black's Law Dictionary, Eighth Edition, defining waiver (Waiver is a word used to "cover a multitude of sins"; "Waiver is often asserted as the justification for a decision when it is not appropriate to the circumstances.")

The District Court's Opinion was likewise arbitrary, not giving reasoning, not citing any case to explain its reasoning.

A court abuses its discretion when it does not give reasons for its conclusion. ARW Exploration v. Aguirra, 45 F.3d 1455, 1459 (10th Cir. 1995); Twin City Const. v. Turtle Mountain Indians, 911 F.2d 137, 139 (8th Cir. 1990); State v. Schuh, 496 N.W.2d 41, 44 (N.D. 1993); Fast v. Mayer, 2005 ND 37, ¶16, 694 N.W.2d 681, 689; Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962) (Not giving reasons or explanation is not an exercise of discretion, but is an abuse of discretion.) Being arbitrary is contrary to the due process requirement that notice be given or that justice not be arbitrary.

The law firm who 'won' on the issue of waiver in the case of Lyon v. Ford Motor Co., *id.*, was the law firm of "Severin, Ringsak, & Morrow", Bismarck, with Marnell Ringsak

arguing the case. Kent Morrow, the attorney for Hoffer, is a member of this law firm.

Kent Morrow was the attorney in the case of Earnest v. Garcia, 1999 ND 196, 601 N.W.2d 260. In ¶10-13, page 263-264 of this case, Kent Morrow was ruled against in part because he made no explanation or connection between the factual assertions and the legal theory of his claim.

It was Morrow's intent to use his arbitrary and insufficient defense in an attempt to pull a 'fast one' on Roth, in the hope Roth would not understand what was going on; and, to just plain obtain a ruling contrary to the rule of law. A party's intent may be derived from the facts, circumstances and conduct of both the party and the court. Production Credit Ass'n of Minot v. Schlak, 383 N.W.2d 826, 827 (N.D. 1986) (The conduct of the party and the court showed that the party intended to obtain judgment without giving notice to the other party, to keep the other party from being able to defend.)

For the above reasons, Hoffer is barred from claiming a defense, or she has forfeited or waived a defense.

Of course, looking at the merits, there was no voluntary payment, which is why Morrow did not plead with particularity, which is why he did not plead reasons or cite case law. Morrow knew about the case of "Lyon v. Ford Motor Co.", knowing it would rule against her claim.

The District Court was without jurisdiction to render the judgment rendered, an arbitrary judgment. It was without

jurisdiction to proceed forward towards judgment in the manner it proceeded, proceeding forward contrary to the due process of law requirement that notice be given, that reasoning be given, that one not be arbitrary.

VIII. A VOID JUDGMENT GIVES A COURT NO JURISDICTION OR DISCRETION TO NOT VACATE IT.

Roth's motion to quash and to reconsider and for new trial was based on the issue that the judgment was void, that the Court's conduct was 'coram non judice'.

"A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." Jordan v. Gilligan, 500 F.2d 701, 704 (6th Cir. 1974). A court must vacate a judgment entered in excess of its jurisdiction. Id., page 710. "A void judgment is no judgment at all and is without legal effect." Id. Waiver or res judicata does not preclude a party from raising the issue of voidness. Id.

Satisfaction of a judgment, voluntarily paid, is no bar to attack on the judgment, where the judgment is void, and restitution of the amount paid must be given. Watts v. Pinckney, 752 F.2d 406, 409-410 (9th Cir. 1985) (It was argued that satisfaction made the judgment to no longer exist, and that there remains nothing from which the party seeking relief can be relieved. A court is compelled to vacate a void judgment because it is a legal nullity and a court considering the motion to vacate has no discretion

in determining whether it should be set aside). page 410.

A garnishee is entitled to restitution of payment made on a void judgment. Vander Zee v. Karabatsos, 683 F.2d 832, 834 (4th Cir. 1982) (Payment on a void judgment is considered involuntary).

Where the judgment is void, the satisfaction is void. Nind v. Myers, 15 N.D. 400, 109 N.W. 335, 339 (1906) (If the judgment is void, the sale of property pursuant to the judgment is void).

A motion for relief from a void judgment is not left to the court's discretion; the court's task is purely to determine the validity of the judgment; if the judgment is valid, the motion must be denied; if the judgment is void, the court has no discretion to protect it; the question to be resolved is whether the judgment is void as a matter of law. First Western Bank & Trust v. Wickman, 527 N.W.2d 278, 279 (N.D. 1995); Bender v. Beverly Anne, Inc., 2002 ND 146, ¶18, 651 N.W.2d 642, 648; Roe v. Doe, 2002 ND 136, ¶6, 649 N.W.2d 566, 568; Eggl v. Fleetguard, Inc., 1998 ND 166, ¶4, 583 N.W.2d 812, 814; Office of Child Advocate v. Lindgren, 296 F.Supp.2d 178, 184 (D.R.I. 2004) (Motion filed 16 years later. Staleness can not be considered because the judgment is void); Valley Honey Co., LLC v. Graves, 2003 ND 125, ¶24, 666 N.W.2d 453, 460; Baird v. Ellison, 70 ND 261, 293 N.W. 794, 796-797, 801 (1940) (Estoppel does not apply to bar an attack on a void judgment, even though the defendant knew about the defect

but did not make their motion to vacate it until 10 years later).

A motion to vacate a void judgment involves no question of discretion, if the judgment is void, it must be set aside without regard to such factors as the existence of a meritorious defense. Hengel v. Hyatt, 252 N.W.2d 105, 106 (Minn. 1977) (Waiver is not a defense to a void judgment); West v. West, 262 N.W.2d 87, 90 (Wis. 1978) (Laches is not a defense to a void judgment).

Defenses do not bar setting aside a void judgment, there is nothing left of the judgment to which even equitable principles could be applied. Cf. Clark v. Glazer, 609 P.2d 1177, 1180 (Kan.App. 1980); Long v. Brooks, 636 P.2d 242, 245 (Kan.App. 1981).

The theory underlying the concept of a void judgment is that it is legally ineffective--a legal nullity, and a defense "cannot infuse the judgment with life". Ford v. Willits, 688 P.2d 1230, 1238 (Kan.App. 1984).

The issue here is the usurpation of power, a void judgment, an excess of jurisdiction is a subject which relates to the power of the court and not the rights of the parties as between themselves, the merits of the case are not invoked, the only question is the power of the court. Hanson v. North Dakota Workmen's Compensation Bureau, 63 N.D. 479, 248 N.W. 680, 687 (1933) (Dissenting opinion).

The District Court was without jurisdiction to render

the judgment rendered, the only question is whether the judgment is void. The defense of mootness or deemed waiver can not be considered.

**IX. THE FILING OF THE MOTION ITSELF DENIES  
HOFFER'S DEFENSE.**

After execution was had, Roth filed his motion to quash the levy and execution and to reconsider or for new trial. R.A.#158 and #160.

When a judgment is satisfied before the time for appeal has expired, the action is no longer pending, and the court is without jurisdiction of the case, "unless a motion is made to reinvoke jurisdiction." Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp., 2002 ND 140, ¶10, 651 N.W.2d 625, 630.

The judgment did not cease to have any existence because Roth's motion maintained jurisdiction or reinvoked jurisdiction.

It is noted that the "Satisfaction" was filed by Hoffer after the motion was made, and after Hoffer's response to it. This is the act of Hoffer, not Roth. Thus, no estoppel arises against Roth due to something that was not his act.

The District Court was without jurisdiction to render the judgment rendered, because the filing of the motion itself showed that the controversy was not ended.

**X. THE ELEMENTS FOR PAYMENT WERE NOT SHOWN.**

Hoffer says that payment was made. R.A.#161.

Execution was had against Schlaht, not Roth. R.A.#160,

pages 1, 4, 12, 14, and 18 of Roth's motion for new trial and to quash.

In order for payment to be payment, certain elements must be fulfilled.

"A payment of a debt by a stranger without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned, and also as to the debtor, if he ratify it." Crumlish's Adm'r v. MP Co., 38 W.Va. 390, 18 S.E. 456; Bouvier's Law Dictionary, 1914 Edition, defining payment. Roth did not ratify the payment, and Hoffer did not plead ratification.

"Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it." Bouvier's, id., defining payment.

Payment may be recovered back when the creditor has no right or title or authority to receive the money. U.S. v. National Exchange Bank of Providence, 214 U.S. 302, 316, 29 S.Ct. 665, 669 (1909) (Whenever money is paid upon the representation of the receiver that he has either a certain title or a certain authority to receive the money paid, when in fact he has no such title or authority, and even if there were no fraud or misrepresentation on his part, the money may be recovered back, because in equity and good conscience the money has never ceased to be the property of the payor, there is never, at any stage of the transaction, any consideration for the payment).

Hoffer can not claim that payment was made and that

thus the judgment is extinguished or that Roth waived his right to challenge the issues, when Hoffer knew that Schlaht or the payor or levied upon person had no authority to act on behalf of Roth, was not Roth's agent or was not a 'judgment' agent for Roth. Farmer's Union Oil Co. of Dickinson v. Wood, 301 N.W.2d 129, 133 (N.D. 1980) (A 'claimed' agent, Schlaht, never has authority to do an act which is, and is known by Hoffer, to be a fraud upon Roth). Hoffer can not claim that Roth is bound by the acts of Schlaht or by the execution on Schlaht.

One who deals with a 'claimed' agent, knowing that his act transcends his power, cannot hold his principal. Slocum v. New York Life Ins. Co., 228 U.S. 364, 374, 33 S.Ct. 523, 527 (1913).

Hoffer can not hold Roth to the adverse effect of the satisfaction, to waiver or extinguishment of the judgment, when Hoffer knew she had no authority to transact with Schlaht, to execute on Schlaht or to take money from Schlaht, or that Schlaht was not speaking and acting for Roth. Dembowski v. Central Const. Co., 185 N.W.2d 461, 463 (Neb. 1971); Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 54 N.W.2d 392, 399 (Neb. 1952).

Hoffer knew, and knew she did not have facts to know, that Schlaht was Roth's agent. And, since the judgment was void, Hoffer knew that Schlaht was not a judgment debtor and thus was not a judgment agent of Roth.

In order for a payment to be a payment, the money

must pass from the (judgment) debtor to the (judgment) creditor for the purpose or intent of extinguishing the debt/judgment. Hettinger County v. Trousdale, 5 N.W.2d 417, 421 (N.D. 1942); U.S. v. Isthmian Steamship Co., 359 U.S. 314, 318-319, 79 S.Ct. 857, 860 (1959); Luckenbach v. W.J. McCahan Sugar Refining Co., 248 U.S. 139, 39 S.Ct. 53, 55 (1918).

Hoffer failed to plead, and the District Court did not find that Roth ratified the execution on, or payment by Schlaht; that Hoffer had a right, title or authority to receive the money; that Hoffer had a right to demand payment from Schlaht; that Schlaht had authority to waive the issues on behalf of Roth; and that the money passed to Hoffer with the intent of extinguishing the judgment or waiving the issues.

Hoffer's claim of payment and the Court's finding was insufficient to show payment.

The District Court was without jurisdiction to render the judgment rendered. The judgment is void.

**XI. IT WAS NOT SHOWN THAT IT WAS ROTH WHO PAID.**

In this case, the interests between Roth and Schlaht are different. This 'fight' is not Schlaht's. The divorce and property distribution is of no concern to Schlaht. He was unwillingly dragged into this. Schlaht is not a joint tort-feasor, in fact, the claim is not in tort, but in equity.

Where there is more than one party to a case, mootness

of one party does not moot the other party, where he has an interest separate from the one who paid the judgment. Cf. Sosna v. Iowa, 419 U.S. 393, 399, 95 S.Ct. 553, 557 (1975) (The other parties/class had a legal status separate from the interest asserted by the mooted party); DeCoteau v. Nodak Mut. Ins. Co., 2001 ND 182, ¶10, 636 N.W.2d 432, 434 (Special mootness rules apply where more than one interest is involved).

Roth's and Schlaht's interests were different. Hoffer did not plead, and the Court did not find, that it was Roth who paid the judgment.

The District Court was without jurisdiction to render the judgment rendered.

**XII. THE RULE OF "LYON V. FORD MOTOR CO."  
IS TO NARROW.**

The rule of "Lyon v. Ford Motor Co.", *id.*, is too narrow, is insufficient, is not according to defenses at the common law, according to due process of law.

"Lyon" held that a deemed waiver waives the right to challenge the issues, and it was further affirmed that where there is no other fact on the record other than satisfaction, that it will be presumed that the payment was voluntary.

While it may be said that voluntariness is material to a lot of issues or intents, it is not in and of itself complete and sufficient.

Release, accord and satisfaction, waiver, and mootness,

etc. are common law affirmative defenses to claims which arose between sovereign citizens, between people presumably on an equal footing with each other, claims which arose before the parties came to court. See Rule 8(c), N.D.R.Civ.P.

However, once in court, and armed with a judgment, even with a void judgment, the creditor is now no longer a creditor, she is now a judgment creditor. She is no longer on an equal footing with the debtor. She now is dominant because she is armed with the all powerfull hand, might and respect of the State, of the Court, and of the Sheriff. The parties are no longer acting and thinking and intending on an equal footing, in a natural environment.

While it may be said the rule of "Lyon" is derived from common law defenses, it is only a deemed defense. It does not encompass or encourage or allow all the issues to be litigated, or require the judgment creditor to plead and prove all the elements or issues.

Instead of the deemed waiver rule, or deemed mootness rule, the rule should be that the creditor be left to only common law defenses. This standard is made more necessary because one is not operating in a strictly common law environment, one is now operating in a judgment creditor and judgment debtor environment.

Each case should be judged on its own merits, not by a 'hard and fast' rule of deemed waiver, assumed waiver.

The common law judges the rights and liabilities of the parties before they came to court, but once in court,

due process of law should no longer judge between the parties!

The deemed waiver or deemed mootness rule was not the rule at common law.

Quoting: "There can be no question that a debtor against whom a judgment for money is recovered, may pay that judgment, and bring a writ of error to reverse it, and if reversed can recover back his money. ... the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so, if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in other ways satisfied that judgment without changing the rights of the parties in any other respect, its rights to prosecute this writ of error would have remained unaffected." Dakota County v. Glidden, 113 U.S. 222, 224, 5 S.Ct. 428, 429 (1885). "... in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Erin v. Lowry, 48 U.S. 172, 184, 12 L.Ed. 655 (1849); O'Hara v. Macconnell, 93 U.S. 150, 154, 23 L.Ed. 840 (1876); State ex rel. Wiles v. Albright, 11 N.D. 22,

88 N.W. 729, 732 (1901).

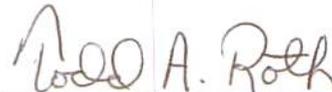
To deem a waiver or to deem mootness is a taking of property without due process of law. It deprives, not with defenses or claims, but with deemed defenses or claims.

Respectfully, Roth asks this Supreme Court to reconsider its rule now solidified as law in "Lyon". Nobody should be allowed to claim that payment and satisfaction extinguishes the judgment and thus there is no longer a judgment to seek to set aside, and claim that this is a rule of due process of law, or claim an unintended waiver of the right to challenge the issues. The rule should be defenses at the common law, according to due process of law. Rule 8(c), N.D.R.Civ.P. Just because judgment has been entered should not annul the need to judge between the parties other than according to the rules of due process of law.

CONCLUSION

Wherefore, Roth prays that this Supreme Court vacate the judgment and order restitution; or remand to the District Court with instructions to hear the motion to quash and to reconsider or for new trial and to deny Hoffer's unfounded defense of mootness; and rule the judgment void; and the District Court's conduct 'coram non judice'.

Dated this 20th day of November, 2005.



Todd A. Roth  
P.O.Box 5521  
Bismarck, N.D. 58506-5521



**CERTIFICATE OF SERVICE BY MAIL**  
 DEPARTMENT OF CORRECTIONS & REHABILITATION  
 PRISONS DIVISION  
 SFN 50247 (Rev. 04-2001)

20050328

STATE OF NORTH DAKOTA )  
 ) SS. Supreme Court File No. 20050328  
 COUNTY OF BURLEIGH ) Burleigh County File No. 01-C-2605

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 21<sup>st</sup> Day of November, 2005, \_\_\_\_\_ M, I mailed the following:

Eight copies of Appeal Brief, Appendix, Certificate of Mailing, and cover letter to Penny Miller

One copy of Appeal Brief, Appendix, and Certificate of Mailing to Kent Morrow.

by placing it/them in a prepaid enveloped, and addressed as follows:

Ms. Penny Miller  
 Clerk of N.D. Supreme Court  
 600 E. Blvd. Ave., Dept.180  
 Bismarck, N.D. 58505-0530

Mr. Kent Morrow, Atty.  
 P.O.Box 2155  
 Bismarck, N.D. 58502-2155

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

**FILED**  
 IN THE OFFICE OF THE  
 CLERK OF SUPREME COURT

NOV 21 2005

STATE OF NORTH DAKOTA

AFFIANT

*Wanda A. Roth*  
 P.O. Box 5521  
 Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 21<sup>st</sup> day of November, 2005.

Notary Public

*Patrick Schatz*

My Commission Expires On

10-31-08

**PATRICK SCHATZ**  
 Notary Public  
 State Of North Dakota  
 My Commission Expires Oct. 31, 2008