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IN THE SUPREME COURT OF THE  
STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

MAR 7 2009

STATE OF NORTH DAKOTA

Gretchen W. Vann,	)	
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	<u>APPELLANT'S BRIEF</u>
	)	
James P. Vann,	)	
	)	Supreme Ct. No. 2008 0344
Defendant/Appellant.	)	Sargent Co. Ct. No. 08 C 0023

Appeal of Order Denying  
Appellant's Motion to Vacate  
Divorce Judgment and Decree  
by the District Court,  
County of Sargent, State of North Dakota,  
Honorable Daniel D. Narum, Presiding Judge

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## **STATEMENT OF THE ISSUES**

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STATEMENT OF THE CASE

This is an appeal from an order denying Defendant James P. Vann's (hereinafter "Jamie") motion to vacate the divorce decree on the basis that the property distribution was unconscionable. Jamie is also appealing his alternative motion for enforcement of the property settlement agreement, which was not addressed by the trial court.

The parties were married July 11, 1999. They were divorced in Sargent County, North Dakota, pursuant to a Stipulation dated March 9, 2007, and a Judgment and Decree entered on March 20, 2007. (R. 6 & 8; App. 3 & 11.) Plaintiff Gretchen W. Vann (hereinafter "Gretchen") was represented by attorney Earl W. Anderson. (R. 6 & 8; App. 3 & 11.) James was not represented by counsel. (R. 6 & 8; App. 3 & 11; Trans. 52.)

On March 4, 2008, Jamie served upon Gretchen a motion to vacate the judgment and decree on the basis that the property settlement agreement was (a) unconscionable; (b) signed by Jamie at a time when he was incompetent; and (c) signed by Jamie due to Gretchen's fraud. (R. 11; App. 20.) In the alternative, Jamie moved that certain provisions of the property settlement agreement be enforced. (R. 11; App. 20.)

A trial was held on the motion on July 29, 2008. The trial court, the Honorable Daniel D. Narum, Judge of District Court, presiding, denied the motion to vacate by Order dated October 29, 2008. (R. 36; App. 47.) The alternative motion was not addressed. (R. 36; App. 47.)

On November 18, 2009, Jamie moved for amended findings and a new trial, which was denied by Order dated December 18, 2008. (R. 40 & 45; App. 51 & 53.)

Jamie filed a Notice of Appeal on November 19, 2008. (R. 46; App. 54.)

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### **STATEMENT OF THE FACTS**

The parties (hereinafter “Gretchen” and “Jamie”) were married July 11, 1999. James was almost 44 years old (dob 7/19/55) (Trans. Ex. 2.) and Gretchen was 45 years old (dob 2/7/54). (Trans. 153.) They did not live together before the marriage, but knew each other for one to two years beforehand. (Trans. 165.)

At the time of the marriage, Jamie had a good job making approximately \$80,000 per year plus benefits. (Trans. 43.) Both parties agreed that Jamie brought into the marriage his father’s home in Washington worth approximately \$350,000 and a 401 K worth about \$8,000. (Trans. 44: R. 20; App. 40, ¶ 20.)

Gretchen was employed part-time when the parties were married, but was “pretty much a housewife.” (Trans. 181.) She entered the marriage with 2.5 million dollars from a previous divorce settlement. (Trans. 46, 167). Neither party had debt. (Trans. 46.)

Jamie claims he quit his job shortly after the marriage because they both decided she had enough money to support them and it would allow them to do things together, such as travel and spend time in Gretchen’s hometown of Forman/Rutland, North Dakota. (Trans. 46-7.) Gretchen disputes this, testifying that the decision to leave his employment was Jamie’s alone and that she never influenced that decision, although she indicated that she wanted him to find a different job than the one he currently held in the wine business. (Trans. 166-67.) Jamie brought his gun collection into the marriage and did start a small gun dealership during the marriage, which lost or made no money in the four years tax returns were used at the motion hearing, except a profit of \$1,497 in 2003. (Trans. 91, 204-5.) Other than that, he has not been employed since the marriage. (Trans. 81.)

During the first part of the marriage, the parties lived in Jamie's father's home in Washington. (Trans. 47.) Jamie testified they traveled and spent money on motor homes to do so. (Trans. 47.) They went to Hawaii and the Caribbean. (R. 13; App. 23, ¶ 6.) Gretchen testified they had a good lifestyle, traveled, and enjoyed their home. (Trans. 183.)

In approximately 2004, Gretchen moved to the Forman/Rutland, North Dakota, area to be closer to her family and to open a general store. (Trans. 178.) She testified she told Jamie to remain in Oregon because of his drinking, but he came to North Dakota anyway. (Trans. 179.) Jamie, however, testified that she didn't move back to North Dakota until 2006. (Trans. 48.)

Gretchen proceeded to buy some land and build a general store in Rutland. (Trans. 48-9.) She testified that the store was completely her idea and something she really wanted and that Jamie was content to remain in Oregon. (Trans. 200.) The parties agree that the store was not done on the date of the divorce (3/20/07), but was opened on June 18, 2007. (Trans. 50, 163.) Jamie testified that she spent about \$900,000 on the store and inventory. (Trans. 49.) Gretchen testified the store cost \$900,000 to \$1,000,000 and was built over a one year period, but on the date of the motion hearing, was worth only \$250,000 because of its location. (Trans. 151, 186, 200.) She admitted that \$750,000 of her property was lost to the store (\$1,000,000 cost less value of \$250,000). (Trans. 200.) They also both testified that Gretchen works at the store full time, has several employees, and lives above the store. (Trans. 50, 163; R. 20.) She testified she plans to work there for as long as she can. (Trans. 182.)

A fair amount of the testimony at the motion hearing centered on Jamie's alcohol abuse. Jamie testified he started drinking heavily in approximately 2001. (Trans. 51.) He attributed this to losing his father, selling the home in Oregon, and having too much time on his hands. (Trans. 51.) The alcohol abuse continued up to and after the divorce, as did severe anxiety and depression. (Trans. 55, 66.) Before the divorce, Jamie was in and out of treatment for his alcoholism on several occasions, for which Gretchen testified she paid at least \$10,000. (Trans. 176-8.) Gretchen also testified at length about James' alcohol consumption, which she claimed was the biggest reason for the divorce. (Trans. 174-178, 184-186.)

Gretchen testified that in approximately January or February of 2007, she had her attorney, Earl W. Anderson of Rutland, draft a Property Settlement Agreement. (Trans. 170.) She then had the first draft modified to give James approximately \$50,000 less, and this modified draft was the Property Settlement Agreement that was ultimately signed. (Trans. 209-10.) This testimony is contrary to her affidavit submitted in response to the motion, where she stated that "Jamie reviewed the documents and requested changes he wanted made to the documents." (R. 20, ¶ 14.) The trial court's findings indicate that "The Defendant had the stipulation papers for more than a month and requested several changes of the attorney who drafted the documents, all of which changes were in his favor and those changes were made." (R. 36; App. 49, ¶ 10.) (While this finding dealt with the issue of whether Jamie was competent when he signed the Agreement, which is not an issue being appealed, it is nevertheless relevant in evaluating the circumstances of the case, as well as supporting Jamie's argument the findings were clearly erroneous.)

Gretchen testified that after the Property Settlement Agreement was in its final form, she watched Jamie carefully for three days to make sure he hadn't drank any alcohol, at which point he indicated a willingness to sign the Agreement. (Trans. 171-2.) Gretchen testified that just before Jamie signed the Agreement in front of the Sargent County Clerk of Court on March 9, 2007, she asked him if he had read it, and he said he had not. (Trans. 172.) She testified she then told him to read it, but he said he didn't care and he signed it anyway. (Trans. 172.) She believed he had read it, though it wasn't clear why she thought that. (Trans. 172.) At no time was Jamie represented by counsel. (Trans. 52.)

The language of the Property Settlement Agreement was incorporated into the Judgment and Decree of Divorce. (R. 6 & 8: App. 3 & 11.) Values were provided for all items of property except for three. At the motion hearing on July 29, 2008, the parties testified as to the value of those three items, as well as the other property values, at the time of the divorce. Their testimony as to the values of the property at the time of the divorce were pretty much identical to the values contained in the Judgment and Decree, except Gretchen testified that the store was worth \$50,000 to \$100,000 at the time of the divorce, not \$250,000 as stated in the Judgment and Decree. (Trans. 155-6.) A summary of those values is as follows (see Gretchen's testimony at Trans. 152-161, Ex. 27, and Jamie's testimony at Tran. 76-80, Ex. 23):

(See chart on next page.)

### Property Awarded to Gretchen

<u>Property</u>	<u>Value in Judgment</u>	<u>Gretchen's Testimony</u>	<u>Jamie's Testimony</u>
A. U.S. Bank Checking Account	\$ 5,000	\$ 5,000	\$ 5,000
B. Smith Barney Broker Account	500,000	not sure	500,000
C. First National Bank, Milnor	20,000	20,000	20,000
D. Rutland General Store (see Item L)			
E. Ole's, LLC (rental home in Rutland - see item K)			
F. All personal property in home in Forman		5,000	5,000
G. All personal property in home at Sauvie Island, Oregon			
H. 2006 Honda Civic		20,000	20,000
I. 2000 Dodge Durango		8,000	10,000
J. Marital home in Forman	50,000	50,000	50,000
K. Rental home in Rutland	20,000	20,000	20,000
L. Rutland General Store	250,000	50-100,000	800,000
M. Home at Sauvie Island, Oregon	650,000	650,000	650,000
N. Cash to be paid James	( 50,000)	( 50,000)	( 50,000)
Total	<u>\$1,445,000</u>		

Thus if the Judgment values are used for all items, Gretchen was awarded property worth \$1,445,000, not including items F, H, and I. If Gretchen's values are used for items F, H, and I, then the property awarded her is valued at \$1,445,000 + \$5,000 + \$20,000 + \$8,000 = \$1,478,000. If Jamie's values are used for items F, H, and I, then the property awarded Gretchen is valued at \$1,445,000 + \$5,000 + \$20,000 + \$10,000 = \$1,480,000.

With regard to the property awarded to Jamie, a summary of that property and its values as presented at the July 29, 2008, motion hearing is as follows:

(See chart on next page.)

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Property Awarded to Jamie

<u>Property</u>	<u>Value in Judgment</u>	<u>Gretchen's Testimony</u>	<u>Jamie's Testimony</u>
A. Furniture in family room & bedroom, Sauvie Island, Oregon	\$ 15,000	\$ 8,000	\$ 15,000
B. 1997 Jeep	5,000	5,000	5,000
C. 1952 MG	25,000	25,000	25,000
D. Family heirlooms		1,000	1,000
E. Cash to be paid by Gretchen	50,000	50,000	50,000
F. Firearms collection	<u>25,000</u>	<u>had no idea</u>	<u>25,000</u>
	<u>\$ 120,000</u>		

With respect to the property awarded Jamie, the parties pretty much agreed on the values placed in the Judgment, and if the Judgment values are used, then Jamie was awarded property valued at \$120,000.

In the final analysis, if the Judgment values are used except for items F, H, and I, and if Gretchen's values are used for items F, H, and I, then the property awarded the parties can be summarized as follows:

	<u>Value</u>	<u>Percentage</u>
Property awarded to Gretchen	\$1,478,000	92.5 %
Property awarded to Jamie	<u>\$ 120,000</u>	<u>7.5 %</u>
Total	<u>\$1,598,000</u>	<u>100 %</u>

Another way to analyze the division is to look at the value awarded each party compared to what each brought in as a percentage:

Gretchen:

$$\text{Property awarded} / \text{Property brought into marriage} = \\ \$1,478,000 / \$2,500,000 = \cancel{64\%} \quad 59\%$$

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Jamic:

Property awarded / Property brought into marriage =  
\$120,000 / \$350,000 = 34%

Stated another way, Gretchen left the marriage with <sup>59%</sup>~~64%~~ of what she brought in,  
while Jamie left the marriage with 34% of what he brought in.

So why did Jamie sign the Agreement? First, Jamie testified that Gretchen told him that she was getting most of the property in order to make sure he didn't waste it on drinking, and that once he was better, she would give him his share. (Trans. 73-4.) He testified he trusted her and believed she had his best interests in mind. (Trans. 75.) Gretchen denied this. (Trans. 173.)

Second, Jamie claimed he was incompetent to sign the Agreement due to his alcohol use, depression, and anxiety. (Trans. 53-5.) After the Judgment dated March 20, 2007, and specifically, beginning on April 24, 2007, Jamie began seeing Stacey Meehl, a licensed professional clinical counselor, for alcohol issues, depression, and anxiety. (Trans. 23, Ex. 1-3.) She testified that if Jamie's condition was the same on March 9, 2007, the day he signed the divorce settlement, as it was on April 24, 2007, then he would have been incompetent at the time to sign it. (Trans. 27.) (Note — Jamie's claims that Gretchen defrauded him and that he was incompetent when he signed the Agreement were both rejected by the trial court and, although Jamie disagrees with that portion of the decision, those claims are not being raised on appeal.)

Another issue at trial was why it took Jamie nearly a year to make the motion. (Note — no Finding was made in this regard.) The evidence was twofold in this regard.

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First, Jamie's drinking continued after the divorce. (Trans. 55.) He had DUI charges in May and June of 2007 and ended up being committed to the State Hospital in Jamestown on November 4, 2007, for his alcoholism, anxiety and depression. (Trans. 55- 63, Ex. 4-14, being law enforcement & Jamestown records.) He was discharged December 11, 2007. (Trans. Ex. 14.) Upon release, Jamie testified that he finally realized that he had been taken advantage of so that Gretchen could pay for the store. (Trans. 70, 76.)

Second, Jamie and Gretchen both testified that their relationship continued after the divorce. Jamie testified they discussed reconciliation from March 7 to December of 2007 and that she treated him like a wife treats a husband. (Trans. 69.) He testified she visited him while he was in Jamestown. (Trans. 68.) Gretchen testified that they continued living together after the divorce and that she told him they might reconcile if he could basically stop drinking. (Trans. 174, 185-6.) Stacey Meehl testified that Jamie thought he and Gretchen would reconcile, and it was only after he got out of Jamestown in December of 2007 that he realized that was not going to happen and that he had been taken advantage of. (Trans. 27-29.)

The trial court issued a Memorandum Opinion on August 6, 2008. and signed Findings of Fact and Order Denying Motion to Vacate Divorce Decree on October 29, 2008. (R. 33 & 36; App. 44 & 47.) The alternative motion to enforce the property division were not addressed. A Motion to Amend Findings and for a New Trial was denied by Order dated December 18, 2008. (R. 40 & 45; App. 51 & 53.)

Jamie now appeals the denial of his motion to vacate on the grounds the property division was unconscionable, as well as the denial of his request for alternative relief.

## **ARGUMENT**

1. **The trial court erred in not vacating the divorce judgment and decree on the basis that it was unconscionable.**

### **Standard of Review**

When the Court is reviewing a trial court's denial of a Rule 60(b) motion, the standard of review is abuse of discretion. Terry vs. Terry, 2002 ND 2, ¶ 4, 638 NW2d 11, 13. An abuse of discretion occurs only when the trial court acts in an arbitrary, unconscionable, or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. Knutson vs. Knutson, 2002 ND 29, ¶ 7, 639 NW2d 495, 498.

Furthermore, since unconscionability is a question of law that relies on factual findings, besides the abuse of discretion standard, the appellate court reviews the factual findings under the clearly erroneous standard of review. Knutson vs. Knutson, *supra*, at ¶ 16, 501. A finding of fact is clearly erroneous if it does not have support in the evidence, or even if there is some supporting evidence, the reviewing court is left with a definite and firm conviction a mistake has been made. Weber vs. Weber II, 1999 ND 11, ¶ 8, 589 NW2d 358, 360.

### **Discussion**

When a divorce is granted, NDCC § 14-05-24 requires a trial court to "make an equitable distribution of the property and debts of the parties." If that distribution is made pursuant to the parties' stipulation, this Court has encouraged district courts to recognize valid agreements between divorcing parties, as the public policy on divorce favors a

“prompt and peaceful resolution of disputes.” Weber vs. Weber II, 1999 ND 11, ¶ 9, 589 NW2d 358, 360 (see Add. 1). So long as “competent parties have voluntarily stipulated to a particular disposition of their marital property, a court ordinarily should not decree a distribution of property that is inconsistent with the parties’ contract.” Id.

On the other hand, district courts should not blindly accept property settlement agreements. Weber II, supra, at ¶ 10, 360. A district court’s duty to make a just and proper distribution of property under NDCC § 14-05-24 includes the authority to rewrite a property settlement agreement for mistake, duress, menace, fraud, or undue influence. Weber II, supra, at ¶ 10, 360. Furthermore, this Court has held that a district court should not enforce an agreement if it is unconscionable. Weber II, supra, at ¶ 11, 360.

In this case, Jamie made a Rule 60(b)(6) motion on the basis that the Property Settlement Agreement was unconscionable. Rule 60(b)(6) provides that the trial court may relieve a party from a final judgment for “any other reason justifying relief from the operation of the judgment.” This Court has stated that “Rule 60(b)(6) provides the ultimate safety valve to avoid enforcement by vacating a judgment to accomplish justice.” Crawford vs. Crawford, 524 NW2d 833, 835 (ND 1994) (see Add. 6.)

In considering whether a settlement agreement between divorcing parties should be enforced, district courts should make two findings. Weber II at ¶ 12, 361. First, is the agreement free from mistake, duress, menace, fraud, or undue influence under NDCC § 9-09-02(1)? Weber II, at ¶ 12, 361. Second, if it is, then is the agreement unconscionable? Weber II, at ¶ 13, 361.

In this case, Jamie moved to vacate first on the grounds that the agreement was

invalid based on Gretchen's fraud and his incompetence. The district court denied the motion on both bases, and Jamie, while respectfully disagreeing with the district court's analysis, is not basing his appeal on that denial, as it unlikely this Court would find the findings in that regard to be clearly erroneous.

However, moving to the second part of the inquiry, Jamie does claim that the district court's finding that the agreement was not unconscionable is error as a matter of law and is based on findings that are clearly erroneous. The findings made by the court relative to whether the divorce decree was unconscionable are as follows:

5. The Plaintiff [Gretchen] brought cash and other assets into the relationship totaling 2.5 million dollars. The Defendant [Jamie] brought into the relationship property valued at \$350,000. At the end of this short term marriage, the value had been diminished from \$2,850,000 to \$1,022,000.
6. The Defendant received \$122,000 of the marital estate, slightly above what he was to receive under the stipulated settlement. The Plaintiff retained cash and property valued by the parties at \$900,000. During this short term marriage of between six and seven years (part of which they were separated), the Plaintiff's net worth was reduced by \$1,600,000.00. The Plaintiff retained 36% of her premarital property and the Defendant retained 35.8 % of his premarital property. The parties spent the money together traveling and living a life of leisure.

11. Defendant claims that the agreement is unconscionable.  
  
Both parties testified that during their marriage they lived a leisure lifestyle. Both parties further testified that the Defendant quit a job where he was earning approximately \$80,000 a year so that he could travel with the Plaintiff during their marriage and enjoy their leisure lifestyle.
12. The parties agreed that the Plaintiff brought cash and assets of \$2.5 million dollars into the relationship and was able to retain only \$900,000 at the end of this short term relationship. The Defendant brought into the relationship property valued at \$350,000 and was left with \$122,000. These numbers are based on the testimony of both parties.
13. Based on the duration of this short term marriage of between six and seven years, the fact that the Defendant was able to earn a substantial income, around \$80,000 at the time of the marriage, and the source of the vast majority of the marital estate being cash and assets brought into the relationship by the Plaintiff, the Marital Termination Agreement is not unconscionable but is fair and reasonable based on the facts of the marriage.  
  
(R. 36; App. 47.)

It is Jamie's position that some of the above findings are clearly erroneous, as they have no support in the evidence. **First**, with respect to values, the evidence clearly and

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without dispute established that the stipulated value of the property as contained in the Property Settlement Agreement and adopted by the trial court in the divorce decree was <sup>1.62</sup>~~\$1.72~~ million at the time of the divorce, with <sup>1.5</sup>~~\$1.6~~ million going to Gretchen and \$120,000 to James. (See pp. 7 & 8 of FACTS above for this computation.) This is in sharp contrast to the trial court's findings that Gretchen received only \$900,000 of the property. An error of such magnitude is not supported in the evidence.

So where did the \$900,000 figure discussed in paragraphs 5, 6, and 12 come from? Gretchen's affidavit in opposition to the motion indicates that, "During the short time that I was married to Jamie, my assets went from \$2.5 million to less than \$900,000 at the time of the divorce." (Emphasis added.) (R. 20; App. 34, ¶ 26.) Interestingly, the next sentence in that affidavit is, "Now all I have left is my store in Rutland, my rental in Rutland and the home Jamie is living in in Forman." (Emphasis added.) On cross examination, Gretchen admitted that that statement was not true when signed on March 14, 2008, as she also owned on that date a bank account containing approximately \$628,000. (Trans. 202.) If the \$628,000 is added to the present value of the store (\$250,000), the rental in Rutland (\$20,000), and the home in Forman (\$50,000), the sum is approximately \$950,000. Thus it appears that the \$900,000 figure is closer to what Gretchen has now as opposed to what was awarded her in the divorce. This is supported by her testimony that she came into the marriage with \$2.5 million and now (meaning the date of the hearing on 7/29/08) has about \$900,000 in assets. (Trans. 199.) In any event, the values that the trial court should have utilized at the motion hearing are those contained in the divorce decree, not the parties' financial condition at the motion hearing.

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as Jamie is claiming the property division contained in the divorce decree was unconscionable.

The second clearly erroneous finding is in paragraph 6, where the trial court found that "the Plaintiff retained 36% of her premarital property and the Defendant retained 35.8 % of his premarital property." Again, as spelled out in the property value figures at pages 7, 8, and 9 of the FACTS above, the percentage of the premarital property each party retained at the time of the divorce is as follows:

Gretchen:

Property awarded / Property brought into marriage =  
\$1,478,000 / \$2,500,000 = ~~64%~~ 59%

Jamie:

Property awarded / Property brought into marriage =  
\$120,000 / \$350,000 = 34%

Such a discrepancy in the evidence versus what the trial court found is significant, as Gretchen actually retained ~~64%~~ 59% of her premarital property, nearly twice the 36% found by the trial court.

The third clearly erroneous finding is in paragraph 13. The trial court's language indicates that Jamie was able to earn \$80,000 at the time of the marriage. While the findings do not indicate James' earning ability at the time of the divorce, to the extent they are interpreted to imply that he did, they are clearly erroneous. The only evidence regarding Jamie's ability to earn \$80,000 at the time of the divorce was Gretchen's testimony that James could "get an office job tomorrow . . . and make really good money." (Trans. 197-8.) On the other hand, the evidence established that at the time of

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the divorce, Jamie was 51 years old, had not worked in about 8 years (Trans. 46-7), did not have a college degree (Trans. 99), his last job had been in the wine industry (somewhere he should no longer be working, due to his alcoholism) (Trans. 166-7), and he was suffering from alcoholism, depression, and anxiety, which resulted in a commitment to the State Hospital in Bismarck 8 months after the divorce. (Trans. 23, 55-63; R. 36, App. 48, Finding ¶ 4.) Stacey Meehl also testified that Jamie was not employable at this time, due to his anxiety and depression. (Trans. 29-30.) Other than the fact that Jamie made \$80,000 per year at the time the parties married, there simply is no support in the record as to Jamie's ability to make anywhere near that amount at the time of the divorce.

**Fourth**, albeit not a significant point, the above findings are clearly erroneous because they indicate the marriage lasted between six and seven years. The parties were married July 11, 1999, and divorced March 20, 2007. This is nearly eight years, which is somewhat important because the length of the marriage is a factor in the property division.

Not only are the findings clearly erroneous, but the trial court's decision is error as a matter of prior case law. The leading case on point is Weber vs. Weber II, 1999 ND 11, 589 NW2d 358. (Add. 1.)

In Weber I, 548 NW2d 781, the parties (Moos and Weber) signed a property settlement agreement approximately one month after being married. Id. at 782. Weber was not represented by an attorney. Id. Moos's attorney advised Weber to obtain his own attorney, but Weber declined and signed the agreement after reviewing it. Id. The

agreement gave Moos ownership of a condominium worth about \$70,000 that was owned by Weber prior to the marriage. Id. The agreement was filed a few days later. Id. That same day, Weber moved the district court to set aside the settlement, but the district court denied the motion and entered judgment pursuant to the agreement. Id.

Weber appealed, and this Court reversed and remanded, indicating that the district court erred in finding that the doctrine of unconscionability did not apply because there was a lack of a trust relationship between the parties.

On remand, the district court granted Weber's motion to vacate on the basis that it was unconscionable. Weber vs. Weber II, 1999 ND 11, 589 NW2d 358. In doing so, the district court addressed three issues in determining whether or not the agreement was unconscionable:

1. Was the property settlement agreement "one-sided," based on the circumstances of the marriage?
2. Did the agreement create a hardship on either party?
3. Was the agreement "unfair and unjust" when analyzed under the Ruff-Fischer guidelines?

Weber II at ¶ 6, 360.

Jamie will discuss each of the three factors as applied to the facts in this case.

**a. One sided.**

In Weber II, the district court found the agreement to be "one-sided" based on the brevity of the marriage, the additional assets of \$75,000 Moos received during the brief marriage, the gifts given by Weber to Moos during the marriage, and Weber giving up his only residence. Weber II at ¶ 13, 361. In affirming the finding of the district court that the

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agreement was one-sided, the Weber II Court stated:

Although the district court does not call the agreement between Moos and Weber "rankly unfair" or "blatantly one-sided," that does not mean it could not have been described as such. The agreement left Weber with far less than he brought into the one-month marriage. This appears to be the kind of agreement no rational, undeluded person would make, and no honest and fair person would accept. The district court did not err in finding the agreement one-sided. Whether it was characterized as "rankly" or "blatantly" one-sided is not important.

Weber II at ¶ 15, p. 361.

Applying the Weber II analysis to the case at bay, clearly the agreement was one-sided, for numerous reasons. First, it left James with far less than he brought into the nearly 8 year marriage. He came in with \$350,000 and left with approximately \$120,000. While Gretchen also left with less, the disparity was not nearly as great. She entered the marriage with \$2.5 million and left with about <sup>1.5</sup>~~\$1.6~~ million. (See FACTS, pp. 7-8.) If reduced to percentages, James left with about 34% of what he brought in, while Gretchen left with about <sup>59%</sup>~~64%~~ of what she brought in.

Second, the agreement is one-sided because Gretchen was awarded 92.5% of the property, with Jamie receiving 7.5%. This is a much more lopsided distribution than that contained in Weber II, and furthermore, the marriage in this case was nearly eight years compared to one month in Weber II.

Third and finally, the agreement in this case was one-sided because it "appears to be the kind of agreement no rational, undeluded person would make, and no honest and fair person would accept." Weber II, *supra*. No rational person would sign an agreement which awarded him \$120,000 of a marital estate worth <sup>1.62</sup>~~\$1.72~~ million, or roughly seven percent of the marital estate. Who in their right mind would accept such a paltry

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percentage of the marital estate? Who in their right mind would accept a third of what he brought in, while his spouse received nearly two-thirds of what she brought in? Especially when he is unemployed, has no place to live, and suffers from alcoholism, depression, and anxiety, while his spouse is awarded significant assets and a store that provides her with a career position and a place to live? Jamie entered the marriage with a \$350,000 home and a good job; he left with \$120,000 and no job.

**b. Hardship.**

On this issue, the Supreme Court in Weber II noted:

The district court's second finding on unconscionability in Weber II was that the agreement created a greater hardship on Weber. Weber gave up his condominium and lost his household furnishings and he would have had to expend a substantial portion of his retirement assets to replace the condominium. Moos, on the other hand, could resume renting an apartment comparable to her previous accommodations without reducing her assets. Moos argues the agreement allowed Weber to retain 73% of the marital estate. This argument fails, however, to consider Weber brought nearly 100% of the estate into the one-month marriage. The district court did not err in finding the agreement placed a greater hardship on Weber.

Weber II at ¶ 16, p. 361.

Applying the hardship factor to this case, it is obvious that the trial court was clearly erroneous. As noted above, Jamie gave up a home worth \$350,000 and received \$120,000 back. Gretchen left with approximately two-thirds of her \$2.5 million.

Furthermore, Weber gave up a residence and would now have to expend a substantial portion of his retirement to replace that residence. Analogously, Jamie gave up his residence in Oregon and would now have to expend most or all of the \$120,000 awarded him to replace that residence. Gretchen, on the other hand, was awarded a

source of income (a store built for \$1 million dollars), a residence (above the store), and considerable cash to live on.

Another thing Jamie gave up was a good job. Without a college degree and without being in the work force for 8 years, he is now faced with a hardship. He testified he wanted to go back to school. (Trans. 100.) Gretchen, on the other hand, has a source of income for life.

In a nutshell, nothing has changed for Gretchen. She has income and assets to fall back on. Jamie, on the other hand, has had his world turned upside down. He has gone from owning a \$350,000 home and having an \$80,000 per year plus benefits job to assets of \$120,000 and a high unlikelihood of ever obtaining anywhere near an \$80,000 job in the future. By anyone's standards, Jamie has suffered a hardship as a result of the grossly unequal and inequitable property division.

c. **Ruff-Fischer.**

The Weber II Court stated that the Ruff-Fischer guidelines are traditionally applied in divorce cases to distribute the property, absent an agreement. Weber II, supra, at ¶ 17, 362. While the Ruff-Fischer guidelines are not the standard in a domestic relations case to determine unconscionability of a settlement agreement of divorcing parties, it is appropriate for a district court to consider. Id.

The Ruff-Fischer guidelines consider the ages of the parties, their earning ability, their conduct during the marriage, the duration of the marriage, their station in life, their health and physical condition, their necessities, their financial and other circumstances, the value and income-producing capacity of the property, the source of the property, and

the efforts and attitude of each party toward its accumulation. It is unclear from the trial court's Findings and Order as to the extent these factors were considered. While the evidence covered all of the factors, the Findings on unconscionability do not explicitly indicate how, if at all, they factored into the trial court's decision. Regardless, as already discussed above, nearly all of these favor a finding that the property division contained in the Agreement was unconscionable. Jamie will discuss each factor briefly.

Both parties were about the same age at the time of the divorce, being 52 and 53. The parties are no longer young, with the world and its opportunities at their feet. Their time to enter the job market and find decent employment is limited. Neither has a college degree. Based on that, this factor would favor a more-equal division of property.

Their **earning ability** is extremely limited, due to their age, lack of college degree, and being out of the job market for 8 years. Jamie's most recent employment was in the liquor industry, somewhere he should no longer work due to his alcohol issues. (Trans. 42.) He has experience brokering aircraft, but his alcohol issues probably put a kibosh on that. (Trans. 90.) While Gretchen claims no part in Jamie's decision to quit his job, she did testify she wanted him out of the wine industry (Trans. 166-7), and furthermore, the trial court found that "**both** parties further testified that the Defendant quit a job where he was earning approximately \$80,000 so that he could travel with the Plaintiff during their marriage and enjoy their leisure lifestyle." (R. 36; App. 49, ¶ 11.) Thus based on this finding, which appears to put the blame on both parties for Jamie quitting his job, as well as age, lack of education, and absence from the job market, this factor would favor a more-equal division of property.

The **conduct of both parties** during the marriage resulted in diminution of the marital estate. Both parties testified, and the trial court found, that they lived a life of leisure after Jamie quit his job. (R. 36; App. 49, ¶ 11.) Gretchen admitted to investing \$1 million dollars in a general store that is now worth only \$250,000, thus admitting that she lost \$750,000 of her \$2.5 million to the store. (Trans. 200.) Jamie's drinking and treatment undoubtedly caused money to disappear. While there was no evidence as to the extent of the cost of the liquor he purchased, Gretchen testified she spent at least \$10,000 in treatment for him. (Trans. 178.) Her affidavit indicates a figure of \$20,000. (R. 20; App. 36-7, ¶ 11.) Her affidavit also contains a statement that Jamie's addictions caused her to lose "hundreds of thousands of dollars." (R. 20; App. 42, ¶ 28.) None of these three different figures is supported by ANY other evidence. Ultimately, she claims, the drinking was the biggest reason for the divorce. (Trans. 178.) The trial court never made a specific findings as how the conduct of the parties affected its decision to deny the motion to vacate, as the evidence supports a finding of fault by both. In the final analysis, if the trial court's decision is reversed and remanded, the trial court would hopefully do so.

The **duration of the marriage** was nearly eight years. The trial court found the marriage to be "short term." (R. 36; App. 48, ¶ 5.) This Court has stated that the trial court has wide discretion in labeling a marriage as long term or short term, as "there is no bright-line rule to determine whether a marriage should be deemed short- or long-term." Hitz vs. Hitz, 2008 ND 58, ¶ 16, 746 NW2d 732, 738. This Court has also stated that, "In general, a lengthy marriage supports an equal division of all marital assets." Id. In light

of the trial court's finding of a short-term marriage. this factor would presumably provide some basis for an unequal distribution of property to the parties.

The **parties' station in life**, or social rank and position, is about equal. Neither has a college degree and neither has been in the job market for some time. James had a job paying \$80,000 per year, but as previously argued, his age and psychological condition make it unlikely he will ever achieve that again.

The **health and physical condition of the parties** appears to favor Jamie, as he has alcoholism, anxiety, and depression.

The **necessities of the parties** was not really an issue.

The **parties' financial and other circumstances** favors Jamie. He has no job and is unlikely to get one that pays much more than an entry level wage. Gretchen has the store and a place to live.

The **value and income-producing capacity of the property**. The property awarded to both is valuable and income producing. However, again, Gretchen has the store, meaning she is never subject to being terminated.

The **source of the property** definitely favors Gretchen.

The **efforts and attitude of each party toward the accumulation of the property** is not really an issue, as no property was accumulated during the marriage. Arguably they accumulated the store, but this resulted in a loss to the marital estate of \$750,000.

The trial court appears to apply the Ruff-Fischer guidelines by finding (a) the marriage to be short term, (b) Jamie once had a job that paid \$80,000, and (c) Gretchen

brought most of the assets into the marriage. (R. 36; App. 50, ¶ 13.) The issue then becomes whether that analysis is sufficient to justify the award in this case. In that regard, a review of other cases decided by this Court appear to support Jamie's position that the property division should be vacated.

In Crawford vs. Crawford, 524 NW2d 833 (ND 1994) (Add. 6), the wife made a motion five months after a stipulated agreement to vacate the judgment, claiming the agreement was unconscionable. The district court denied the motion. On appeal, this Court reversed, indicating that the trial court abused its discretion in upholding a stipulation that was so one-sided and unjust and created such a hardship that it "must be deemed the product of either the husband's overreaching or the wife's incapacity to understand it" and therefore unconscionable. Id. The stipulation awarded custody of all four children to the husband, even though the wife had been the primary caregiver; allowed the husband to keep nearly all of his \$130,000 income from his medical degree (which degree he had obtained during the marriage); and awarded the husband the home and the mortgage. Also considered was the fact that the wife had had a brain tumor, which she claimed had incapacitated her, but the trial court found no expert evidence supporting her claim of incapacity and furthermore found the tumor had been successfully treated. Crawford at 835. The marriage lasted 15 years.

Of note in Crawford is this Court's comments that marriage involves a confidential relationship, and the law should not permit one marital partner to take "unconscientious advantage" over the other through the trust which is part of that relationship. Crawford at 836. In such a case, relief under Rule 60(b)(vi) should be

liberally construed and applied.” Id. Those comments apply in the present case.

Gretchen used the marriage relationship to take unfair advantage of Jamie through the trust they had developed for each other. At a time when he was experiencing alcoholism, depression, and anxiety and had no attorney, she took advantage of him to get him to sign an agreement

In Terry vs. Terry, 2002 ND 2, 638 NW2d 11 (Add. 11), the wife’s motion to vacate the provisions of the stipulated divorce decree dealing with spousal support and property division was denied. The wife claimed the agreement was unconscionable. This Court affirmed, noting the husband earned \$2,815 per month while the wife earned \$1,300 per month; the wife was awarded custody of the children and child support of \$808 per month; the personal property division appeared to be approximately equal; the husband received the home worth \$118,000 and agreed to pay the associated debt of \$110,800; and the husband had agreed to pay the wife \$4,500 plus help with moving expenses and the purchase of a mobile home. The award in Terry thus appears to have been much more equal than in this case.

As the cases regarding vacating a stipulated divorce decree on the basis of an unconscionable property division are limited, it is somewhat useful to look at cases where a court has, after hearing the evidence, made unequal property divisions. In Hitz vs. Hitz, 2008 ND 58, 746 NW2d 732 (Add. 20), the husband was awarded 62% of the property after a ten plus year marriage. The basis for the award was that the husband had entered the marriage with twice as much property as the wife and that the wife had incurred \$180,000 in debt in the 22 months after the separation (which increased the value of the

property very little). Nevertheless, the wife still received over \$500,000 in property. Furthermore, there were no children and the parties kept their finances separate, both of which factored into the division. Id. at ¶ 16.

In Overland vs. Overland, 2008 ND 6, 744 NW2d 67 (Add. 26), a 7 year marriage, the wife was awarded \$104,402, one-half the house worth \$74,802, and debt of \$22,665, which came to \$119,138. Id. at ¶ 4, 69. The husband was awarded \$27,138 in property, one-half the house worth \$74,802, and debt of \$22,665, which came to \$41,874. Id. She had come into the marriage with \$100,000 in property and retirement assets, while he had few assets and some debt. Id. at ¶ 5, 69. The trial court also ordered the husband to pay spousal support of \$500 per month for 60 months, or \$30,000, in order to offset to some degree the financial damage she suffered during the marriage and to restore her somewhat to her premarital financial condition. Id. at ¶ 6, 69. Husband earned \$64,000 per year compared to wife earning \$24,000 per year. This Court affirmed, noting that pre-marital ownership, standing alone, will not justify a wide disparity in property distribution; there must be additional factors to support such a distribution of property. Id. at ¶ 10, 70. Those other factors included the husband causing much of the divorce due to his long work hours, alcohol use, and extensive entertainment of clients, as well as the wife being generous with her money with her husband. Id. at ¶s 12-15, p. 70-1.

A final case is Mellum vs. Mellum, 2000 ND 47, 607 NW2d 580 (Add. 36). After a 26 year marriage, the husband was awarded 35% of the property, based on his having extramarital affairs, his greater earning capacity, and her receiving no spousal support. Id. at ¶s 14-19. This Court affirmed the award, based on those factors. While the

undersigned realizes that dissenting opinions are not heavily weighed, Justice Sandstrom found it to be “one of the most disparate property distributions we have seen,” and furthermore indicated that the trial court did not make adequate findings to support its position. Id. at ¶s 25, 28.

The above three cases are relevant in the case now before the Court. While the facts in Overland are perhaps the most similar, the husband there left the marriage with more than 25% of the property and with quite a bit more than what he came in with. He also had two and a half times the income of the wife. Furthermore, there was no evidence that the wife in Overland committed the type of waste Gretchen did in losing \$750,000 to the store. None of the three cases resulted in one spouse getting less than 25% of the property. Finally, these three cases all involved a division of property after all of the evidence had been heard. That wasn’t the case here, as the parties agreed at trial that if the judgment was vacated, then a trial on the merits would be held. (Trans. 86.)

In sum, the undersigned is unaware of any North Dakota decision that left a 52 year old spouse with 7.5% of the property and no job or house after nearly 8 years of marriage, while the other spouse was awarded 92.5% of the property, a steady source of income, and free housing. Furthermore, any divorce settlement signed in the circumstances under which this one was signed lends credence to the argument that things just weren’t done fairly. As noted by the Weber II, Court, “the haste with which the agreement was entered and the involvement of only one attorney is also troubling. The action by Weber to rescind immediately after having signed the agreement is also persuasive.” Weber II at ¶ 18, 362. The circumstances surrounding the signing of the

agreement are troubling in this case also. The agreement was drafted by Gretchen's attorney; Jamie had no attorney; Gretchen testified it was changed once to give her \$50,000 more property; Gretchen testified Jamie said he never read it but would sign and didn't care what he signed; there is no question Jamie was suffering from alcoholism, depression, and anxiety at the time, and before the end of 2007 saw a therapist, was charged with two DUIs, and was committed to the State Hospital in Jamestown; and the parties both testified they continued to live with each other afterwards.

To conclude, it would surprise the undersigned if anyone with a straight face could come forward and deny that "this appears to be the kind of agreement no rational, undeluded person would make, and no honest and fair person would accept." The circumstances surrounding the signing of the Agreement are also troubling. Clearly this is exactly the kind of case the doctrine of unconscionability was meant to apply to. The Judgment should be vacated and the case remanded for trial on the merits.

2. **In the alternative, the trial court erred in not enforcing the property settlement agreement.**

### **Standard of Review**

In all actions tried upon the facts without a jury, the court shall find the facts specially. Rule 52, North Dakota Rules of Civil Procedure. Findings of fact shall not be set aside unless clearly erroneous. Id. A finding of fact is clearly erroneous if it does not have support in the evidence, or even if there is some supporting evidence, the reviewing court is left with a definite and firm conviction a mistake has been made. Weber vs. Weber II, 1999 ND 11, ¶ 8, 589 NW2d 358, 360.

### **Discussion**

Jamie's Motion to Vacate included an alternative motion to enforce certain property division portions of the divorce decree. (R. 11; App. 20.) Those provisions included awarding Jamie certain personal property items and reimbursement for funds Gretchen took out of Jamie's account. (R. 11; App. 20.) James testified he wanted the property back, and both parties testified about the reimbursement of funds to which Jamie was entitled. (Trans. 137-8; 193-4.)

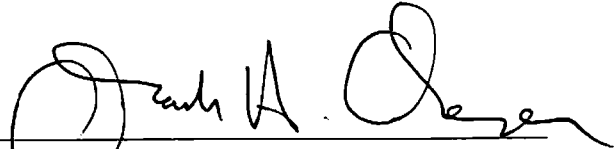
The trial court did not address the alternative motion in its Findings and Order. (R. 36; App. 47.) Furthermore, the trial court did not address the alternative motion in its Order Denying Motion to Amend Pleadings and for a New Trial. (R. 40; App. 51.)

The failure by the trial court to address these issues is clearly erroneous. As the issues were not even addressed, the reviewing court should be left with a definite and firm conviction a mistake has been made.

## CONCLUSION

The divorce decree should be vacated and a trial held on the merits. In the alternative, the case should be remanded so that the trial court can address Jamie's alternative motion that certain personal property be returned to him and monies reimbursed to him.

Dated this 7th day of March, 2009.

A handwritten signature in black ink, appearing to read "Mark A. Meyer", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

Mark A. Meyer, Attorney for Appellant, hereby certifies that on March 7, 2009, the following documents:

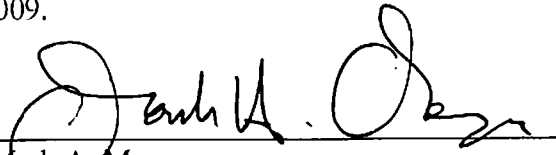
1. Appellant's Brief; and
2. Appellant's Appendix

were served upon:

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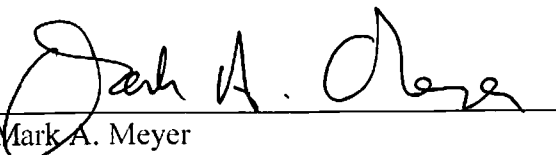
Dated this 7th day of March, 2009.

  
\_\_\_\_\_  
Mark A. Meyer  
Attorney for Appellant

**CERTIFICATE OF WORD COUNT**

Mark A. Meyer, Attorney for Appellant, hereby certifies that the word count for the Appellant's Brief, including cover sheet, table of contents, table of authorities, statement of the issues, the main body of the brief, the certificates of service and word count, and the addendum index is 8,615 words.

Dated this 7th day of March, 2009.

  
\_\_\_\_\_  
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