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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Roberta (Bobbi) Marie Kukla,	)	
	)	
Plaintiff/Appellee,	)	
	)	Supreme Court No.: 20120451
vs.	)	Stark County No.: 045-03-C-00272
	)	
Wayne Kukla,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STARK COUNTY, NORTH DAKOTA
THE HONORABLE SONNA M. ANDERSON

BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

[¶1] Appellee, Robert (Bobbi) Kukla (hereinafter "Bobbi"), submits this brief in response to Wayne Kukla's (hereinafter "Wayne") *Appellant's Brief* dated April 1. 2013.

[¶2] Bobbie and Wayne were divorced on February 11, 2004 pursuant to an oral agreement read into the record. (App. 79-91, 93). On April 16, 2012, Bobbi brought a Motion for Rule 60(a) and 60(b) Relief requesting the Court correct the mistake/omission in the Judgment regarding the parties' mineral acres. (App. iii). Wayne filed a response opposing Bobbi's Motion for Rule 60 Relief on May 2, 2012. Id. Bobbi filed a Reply in regard to Wayne's response to her Motion for Rule 60 Relief on May 14, 2012. Id.

[¶3] On August 24, 2012, the Honorable Sonna Anderson presided over the hearing in regard to Bobbi's Motion for Rule 60 Relief. Id. On November 8, 2012, the District Court issued its Order granting Bobbi's request for Rule 60 Relief and awarded her an undivided one-half interest in all of the mineral acres owned at the time of the parties' divorce in February 2004. (App. 121-128). An Amended Judgment was entered on December 18, 2012 and Notice of Entry of Amended Judgment was filed on December 19, 2012. (App. 133-137). Wayne filed his Notice of Appeal appealing the Amended Judgment on December 21, 2012. (App. 147).

STATEMENT OF THE FACTS

[¶4] On May 27, 2003, Bobbi served Wayne with a Complaint seeking a divorce. (App. i.). Wayne responded to the Complaint by filling an Answer on June 3,

2003. Id. A trial was scheduled for January 15, 2004. (App. ii.). The parties were able to reach a settlement that was agreeable to both of them just prior to trial. Thus, on January 15, 2004, with all of the parties and their counsel present, Bobbi's attorney, Orell Schmitz read the parties' agreement into the record in front of the Honorable Benny Graff. (App. 92-102). Mr. Schmitz specifically stated "The mineral acres that are currently in existence will be divided equally. They will each have an undivided one-half interest in those mineral acres." (App. 96). At the end of the hearing, Judge Graff specifically asked both Wayne and Bobbi whether they had heard what Mr. Schmitz had stated was their agreement and whether each of them agreed with his recitation of that agreement. (App. 99). Both parties responded to Judge Graff stating they agreed with Mr. Schmitz's recitation of their agreement. Id. In addition, both parties told Judge Graff that they would do their best to live up to the terms and conditions of the agreement to the best of their ability. Id. Mr. Schmitz then drafted the Findings of Fact and Judgment which was signed by the Court on February 11, 2004. (App. 79-91, 93).

[¶5] However, the Judgment inadvertently omitted any mention of the mineral acres owned by the parties and the fact that the parties agreed to divide them equally with each party receiving an undivided one-half interest. (App. 79-91). On April 16, 2012, Bobbi filed a Motion for Rule 60(a) and (b) Relief requesting the District Court correct the omission of the mineral acres and award her a one-half undivided interest in the mineral acres pursuant to the parties' agreement on January 15, 2004. (R. 46). In Bobbi's affidavit in support of her Motion for Rule 60 Relief, Bobbi stated that she had contacted her previous attorney Orell Schmitz requesting he correct the Judgment, however, this was right before he left private practice to become a public defender. (App. 106-107).

Bobbi also stated that in an attempt to try and rectify this situation, she also contacted Wayne and his attorney. (App. 109). Bobbi attached a letter to her affidavit which she sent to Wayne's attorney, Ms. Mary Nordsven on January 30, 2006, wherein she specifically asks for them to fix the problem with the mineral acres. (App. 103). In addition, Bobbi states that it took her over 18 months to find the original court reporter so that she could get a copy of the transcript from the January 15, 2004 hearing. (App. 109). Further, once Bobbi hired a new attorney, the undersigned, another letter was also sent to Ms. Nordsven on November 16, 2011 requesting her client sign a stipulation to amend the Judgment to include the division of the mineral acres. (Supp. App. 1-2) Wayne refused to sign the stipulation to amend judgment.

[¶6] Wayne responded to Bobbi's Motion for Rule 60 Relief on May 2, 2012 wherein Wayne argued that Bobbi was not entitled to Rule 60 relief because there was no error in the Judgment. (App. 113). In Wayne's affidavit he states that Bobbi is not entitled to half of the mineral acres associated with the farm property, which he received in the divorce, because she signed a quit claim deed conveying the farm property to him without reserving her interest in the minerals. (App. 114). Wayne also argues that Bobbi should not be granted Rule 60 relief because eight years have passed since the Court entered their divorce judgment. (App. 115).

[¶7] Bobbi submitted a reply to Wayne's response arguing she is entitled to Rule 60 relief because the transcript from the January 15, 2004 hearing clearly shows that the parties agreed to divide equally all of the mineral acres that existed at the time of the divorce. (Supp. App. 3 - 7). Bobbi further explained that she was aware eight years have gone by, but that she did not have an attorney shortly after the divorce because Mr.

Schmitz became a public defender and she did not have any funds to hire a new attorney. (Supp. App. 3 ¶5). In addition, she also states that she believed Wayne would agree to correct the mistake because she cooperated in dealing with other issues they had that were omitted from the parties' Judgment, like the transfer of their brand. (Supp. App. 3 ¶5). Bobbi again respectfully requested the Court amend the Judgment to reflect the parties' agreement regarding the division of the mineral acres.

[¶8] On August 12, 2012 an evidentiary hearing was held in regard to Bobbi's Rule 60 motion. (App. 1). Judge Sonna Anderson presided over the hearing as Judge Graff had since retired. At the hearing, both Bobbi and Wayne testified. Bobbi introduced the transcript from the January 15, 2004 hearing, wherein the transcript specifically stated "The farm real estate will be awarded to the Defendant and the Plaintiff shall execute any necessary deeds as quitclaim or whatever that's needed to transfer that. The residence in Killdeer will be awarded to the Plaintiff. The mineral acres that are currently in existence will be divided equally. They will each have an undivided one-half interest in those mineral acres." (App. 96). Bobbi then testified that the parties' divorce Judgment failed to address the division of the mineral acres. (Tr.8: 12-14). The evidence revealed that at the time the parties divorced they owned mineral acres in: (1) Section 6 of Township 145, Range 95 and (2) Section 21, Township 145, Range 95. (Tr. 38: 23-4). The testimony revealed that Wayne and Bobbi still jointly owned the mineral acres in Section 6, Township 145, Range 95. (Tr. 15:1-25, Tr. 16:1-25). However, the mineral acres at issue for the Rule 60 motion are the 80 acres in Section 21, Township 145, Range 96, which are the mineral acres attached to the farm real estate. (Tr. 13-17).

[¶9] Bobbi testified that she tried to correct the omission of the mineral acres a number of times since the parties' divorce judgment was entered in 2004. For example, Bobbi stated that she called Ms. Nordsven in 2004 to tell her about the fact that the mineral acres were missing from the parties' divorce judgment. (Tr. 32:14-22). Bobbi also stated that she wrote Ms. Nordsven a letter in January 2006 requesting that the issue with the transfer of the minerals be corrected. (Tr. 36:24-25, 37:1-9). In addition, Bobbi also said it took her 18 months to find the original court reporter so that she could get a copy of the transcript from the January 15, 2004 hearing. (App.109). Bobbi stated she did all of this to no avail as Wayne has refused to correct the judgment and therefore now requests the Court's assistance in this matter. (Tr. 19:16-22, 20:11-17).

[¶10] When Wayne testified he agreed that he heard the settlement agreement Mr. Schmitz read into the record at the January 15, 2004 hearing and agreed with the terms that were read into the record. (Tr. 41:10-25). When asked whether his and Bobbi's agreement was to divide equally all of the mineral acres that were in existence, Wayne responded stating "I think so. I'm not sure." (Tr. 43:20-25). Wayne also admitted that the transcript from the January 15, 2004 hearing is correct. (Tr. 42:2-3). Wayne also agreed that nowhere in the parties' judgment does it address the division of the mineral acres. (Tr.42:8-11). Wayne also admitted that at the time the parties divorced they owned eighty mineral acres in Section 21. (Tr. 44:3-8). However, Wayne argued that because he was awarded the farm real estate in the divorce and assumed the debt that went with the farm real estate he believed he was also awarded the mineral acres that went with the farm land. (Tr. 49: 19-23).

[¶11] On November 8, 2012, the District Court issued its Order finding Bobbi was entitled to Rule 60(a) and 60(b)(6) relief because exceptional circumstances applied in this case since "the Judgment entered by the Court does not reflect the full agreement put on the record by counsel at the trial and specifically agreed to by the parties." (App. 127). The Court also stated that although eight years have passed since entry of Judgment, "the Court finds that Bobbie did what she could to correct the error in a timely fashion." Id. Thus, the District Court ordered an amended judgment be entered awarding Bobbi an undivided "½ interest in all of the mineral interests owned by the parties at the time of the divorce, whether the mineral interests were at that time severed or not." Id. In addition, the District Court required Wayne to "account to Bobbie for one-half of the proceeds of any lease bonus, royalty payment or other benefit attributable to Bobbi's one-half share of the mineral estate of the ranch property within 90 days after the date of this judgment and shall pay the same to Bobbie within a reasonable time after the accounting, not to exceed 12 months." (App. 128). Thereafter, Wayne filed his Notice of Appeal on December 21, 2012. (App. 147).

III. STANDARD OF REVIEW

[¶12] This Court has stated that N.D.R.Civ.P. 60(a) can only be used to "make the judgment or record speak the truth and cannot be used to make it say something other than what originally pronounced." Fargo Glass and Paint v. Randall, 2004 ND 4, ¶ 5, 673 N.W.2d 261. Thus, "[a] court may correct, pursuant to Rule 60(a), errors created by oversight or omission that cause the judgment to fail to reflect what was intended at the time of trial. However, Rule 60(a) is not a vehicle for relitigating matters that have

already been litigated and decided, nor to change what has been deliberately done." Gruebele v. Gruebele, 338 N.W.2d 805, 811-12 (N.D. 1983).

[¶13] This Court has also delineated the standard of review for a motion pursuant to N.D.R.Civ.P. 60(b). This Court has stated that a "trial court's decision on a Rule 60(b) motion for relief is within the trial court's sound discretion and will not be overturned absent an abuse of discretion." Olander Contracting Co. v. Gail Wachter Investments, Inc., 2003 ND 100, ¶ 8, 663 N.W.2d 204. "A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 51, 658 N.W.2d 363.

LAW AND ARGUMENT

A. The Judgment did not provide for the disposition of the farm mineral acres.

[¶14] Wayne argues that the District Court erred in finding that the Judgment "does not expressly grant any minerals to anyone." Appellant's Brief, pg. 6, (App. 124). In fact, the divorce Judgment does not mention minerals at all. (App. 124). Wayne argues the Court erred in making this finding because the Judgment specifically granted him the farm real estate. Appellant's Brief, pg. 6. However, the Judgment clearly shows that Wayne was granted the surface acres of the farm property and that was it. (App.85). The words "mineral acres" or "mineral rights" do not even exist in the Judgment. (App.79-91). Thus, the District Court's finding that the Judgment did not grant anyone

any mineral rights is correct because the Judgment completely fails to address the issue of mineral acres, which were specifically stipulated to and read into the record.

[¶15] Wayne goes on to state that he is entitled to the mineral acres associated with the farm property because the Judgment failed to specifically reserve the mineral acres for the farm. Appellant's Brief, pg. 6. This argument also fails because the transcript from the hearing on January 15, 2004, clearly states that the parties did reserve all of the mineral acres and agreed to split them equally with each of them getting an undivided one-half interest in the mineral acres that existed at the time of the divorce. (App. 96). The mineral acres at issue existed at the time of the divorce. Thus, there was a reservation of the mineral acres owned at that time. Id.

[¶16] Further, if the parties intended on Wayne receiving the mineral acres associated with the farm the transcript would read very differently. For example, instead of stating "[t]he farm real estate will be awarded to the Defendant and the Plaintiff shall execute any necessary deeds as quitclaim or whatever that's needed to transfer that" it would likely have stated the farm real estate and mineral acres associated with the farm real estate are awarded to the Defendant. It does not state that, rather it specifically awards the farm property to Wayne and then awards the Killdeer residence to Bobbi and then addresses all of the minerals by stating "[t]he mineral acres that are currently in existence will be divided equally. They will each have an undivided one-half interest in those mineral acres." (App. 96). Thus, there is no question that there was an explicit reservation of all of the mineral acres made at the January 15, 2004 hearing.

[¶17] Wayne goes on to argue that the reason the Judgment does not contain any reference to mineral acres is because a divorce decree automatically terminates a joint

tenancy relationship and turns it into a tenants in common relationship. See N.D.C.C. § 30.1-10-04(2)(b). Wayne's claim is without any evidence or any indication that this statement could be true. In fact, Wayne even states that "there is no explicit evidence in the record" that this is the reason there is no mention of the mineral acres in the Judgment. Appellant's Brief, pg. 6-7. Yet, he expects this Court to find that this may be the case because he claims it is possible that the attorneys handling this divorce knew that the parties' joint tenancy with the right of survivorship in the other mineral acres would automatically be severed by N.D.C.C. § 30.1-10-04(2)(b). Thus, that might be reason why there was no mention of the mineral acres in the Judgment. This argument must fail because it is completely based upon pure speculation. Further, if the attorneys supposedly knew this information and that is why they did not include the division of the mineral acres in the Judgment as Wayne claims, then why would they have made sure to state in the record at the hearing on January 15, 2004, how the mineral acres were going to be divided? There is no question it was a pure oversight that the division of mineral acres were not included in the final judgment.

B. The District Court did not abuse its discretion in determining N.D.R.Civ.P. Rule 60(a) was applicable.

[¶18] Wayne argues that the District Court erred because Rule 60(a) is not applicable. This Court has specifically stated that Rule 60(a) can only be used "to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." Fargo Glass and Paint, 2004 ND 4, ¶ 5, 673 N.W.2d 261. This is exactly why Rule 60(a) is applicable to this situation because the mistake/omission in the judgment arose from an oversight. Rule 60(a) must be used to

make the judgment "speak the truth" of what the parties agreed to. The parties specifically agreed to equally dividing the mineral acres in existence at the time of the divorce with each party receiving an undivided one-half interest. (App. 96). Thus, Rule 60(a) must be used to have the Judgment speak the truth of what was put on the record. The District Court specifically found that the language of the transcript was "clear and explicit and does not involve an absurdity." (App. 125). Further, the District Court also found that the language did not distinguish between severed and non-severed minerals. Id. In fact, as previously stated the District Court found that the "Findings and Judgment are silent as to the mineral estate." (App. 127). Thus, there is no question Rule 60(a) relief is appropriate in this situation because there was an error arising from an oversight or omission which left the Judgment silent as to the division of the mineral acres. See N.D.R.Civ.P.60(a).

[¶19] Further, the testimony presented at the hearing on August 24, 2012 confirms that there was an error in the Judgment arising from an omission. At the hearing on August 24, 2012, Wayne specifically admitted that the January 15, 2004 transcript was accurate and accurately reflected the agreement between the parties. (Tr. 42:2-3). Wayne also agreed that nowhere in the Judgment were the mineral acres addressed. (Tr.42:8-11). In addition, Wayne also admitted at the August 24, 2012 hearing that at the time the parties divorced they owned eighty mineral acres in Section 21. (Tr. 44:3-8). The very minerals that are at issue here now. It is also important to note that when Mr. Schmitz read the parties' agreement into the record on January 15, 2004, the Honorable Benny Graff specifically asked each party if he/she had heard what Mr. Schmitz had stated in terms of their agreement and whether they agreed with the terms as

described by Mr. Schmitz. (App. 99). Both Wayne and Bobbi stated they had heard Mr. Schmitz's recitation of the terms of their agreement and agreed with the terms as described by him. (App. 99). In addition, at the August 24, 2012 hearing, Bobbi produced Exhibit D-1 which was exchanged by Bobbi and Wayne through their attorneys in discovery, wherein the parties were valuing the property they owned and next to the "mineral acres" they had written in "Value is of no concern To be split evenly, and Undivided." (Supp. App. 8 - 11). Therefore, there is no question that the Judgment inadvertently failed to address the division of the mineral acres because the evidence presented clearly shows the parties agreed to split all of the mineral acres owned at the time of the divorce equally, with each of them receiving an undivided one-half interest. Thus, Rule 60(a) is applicable to this situation and the District Court properly utilized that Rule to grant Bobbi's request for Rule 60 relief.

[¶20] Wayne goes on to argue that even if there was a mistake, Bobbi was not entitled to relief because her actions since the divorce Judgment was entered defeat her claim for relief. Wayne first contends that Bobbi is not entitled to Rule 60 relief because she waited eight years to bring her motion for Rule 60 relief. The District Court addressed this issue and specifically found that "Bobbi did what she could to correct the error in a timely fashion." (App. 127). Further, the evidence shows that Bobbi called Wayne's attorney in 2004 and told her about the error. (Tr. 32:14-22). Bobbi also wrote Ms. Nordsven a letter on January 30, 2006 wherein she specifically addressed the fact that the Judgment needed to be corrected in regard to the mineral acres. (App. 103). In addition, Bobbi testified that it took her 18 months to find the original court reporter so that she could get a hold of the transcript from their January 15, 2004 hearing. (App.109).

Bobbi did all of this just to basically be ignored by Wayne and his attorney. It is not like Bobbi did nothing during the time that has passed since the Judgment has been entered. She did everything she could before she was forced to once again hire another attorney and proceed through the judicial process. Therefore, Wayne's argument that Bobbi is not entitled to Rule 60 relief fails because Bobbi did take reasonable steps to correct the mistake in the Judgment during the past eight years.

[¶21] Further, Wayne's statement that "nothing happened for two whole years, when in 2006 Bobbi for the first time claimed the Judgment was not correct and a mistake had occurred" is not true. As previously stated, the evidence presented at the hearing on August 24, 2012 reflects that Bobbi called Ms. Nordsven in 2004 and made her aware of the mistake in the Judgment. (Tr. 32:14-22). Thus, Bobbi did not wait two years to act on the mistake. She did it immediately however, Wayne and his attorney refused to live up to the agreement they had made in Court and refused to amend the judgment.

[¶22] Wayne next argues that Bobbi is not entitled to Rule 60(a) relief because Bobbi is trying to re-litigate issues that were already addressed by the parties' Judgment. Appellant's Brief, pg. 9. This statement is again not supported by the evidence because Bobbi is not trying to relitigate any issues. Bobbi is simply requesting that the Judgment be amended to reflect the parties' actual agreement as described in the January 15, 2004 transcript. Wayne believes that because Bobbi signed a quit claim deed deeding him her interest in the farm real estate that somehow that shows that the parties' agreement was only to share equally in the mineral acres they owned jointly with the right of survivorship, but not to share equally in the mineral acres they owned associated with the

farm real estate. However, there is absolutely no evidence that was the parties' intent. Appellant's Brief, pg. 9-11. In fact, the January 15, 2004 transcript clearly contradicts Wayne's theory. It specifically states that Wayne is entitled to the farm real estate and Bobbi is entitled to the residence in Killdeer and then it states that all mineral acres currently in existence would be divided equally with each party receiving an undivided one-half interest in all of the mineral acres. (App. 96). It does not state anything about Wayne getting the mineral acres associated with the farm real estate or the parties were only going to share equally in the mineral acres that they owned jointly with the right of survivorship. Rather, the black and white words of the transcript state that they will divide equally the mineral acres in existence. (App. 96). Thus, Bobbi is not trying to re-litigate anything; she is merely asking that the Judgment be amended to actually reflect the true agreement of the parties as evidence by the transcript from the January 15, 2004 hearing. Therefore, the District Court properly granted her Rule 60(a) relief because an error exists in the Judgment due to the omission of the division of minerals.

[¶23] Wayne goes on once again to argue that Bobbi is not entitled to Rule 60 relief because she "sat on her legal rights" until 2012. Appellant's Brief, pg. 11-12. Wayne's argument again fails because Wayne completely ignores the evidence presented at the August 24, 2012 hearing demonstrating that Bobbi took numerous steps to correct this error, starting as far back as 2004. In fact, Bobbi testified that not only did she tell her attorney about the error in the judgment regarding the minerals but she contacted Wayne's attorney right away in 2004 to tell her about the error in the judgment. (Tr. 32:14-22). Thus, Wayne's statement that two years passed from entry of judgment before Bobbi made any mention of a mistake in the judgment is not true as the evidence

clearly showed that Bobbi told her attorney about the mistake but he was leaving private practice and Bobbi also called Wayne's attorney and told her about the mistake right away in 2004. Id. In addition, Bobbi wrote Ms. Nordsven a letter in January 2006 requesting the mistake be corrected. (Tr. 36:24-25, 37:1-9). After Ms. Norsdven refused to correct the mistake, Bobbi began searching for the original court reporter to get a transcript of the January 15, 2004 hearing. Bobbi testified that it took her over 18 months to find the court reporter and get a copy of the transcript. (App. 109). After Bobbi received a copy of the transcript, Bobbi hired the undersigned and the undersigned contacted Ms. Nordsven in November, 2011 and requested that Wayne sign a stipulation to amend the Judgment. (Supp. App. 1- 2). Wayne refused which forced Bobbi to bring the Rule 60 motion. Therefore, the evidence supports the District Court's finding that "Bobbi did what she could to correct the error in a timely fashion." (App. 127). Thus, Bobbi did not sit on her rights from 2004 to 2012.

C. The District Court properly applied Rule 60(b)(vi) because extraordinary circumstances do exist in this case.

[¶24] Wayne argues that the District Court abused its discretion in applying the "catch all" provision of Rule 60(b). Appellant's Brief, pg. 12. However, this Court has stated that the "catch-all clause in N.D.R.Civ.P. 60(b)(vi) gives the court 'a grand reservoir of equitable power to do justice in a particular case.'" Olander Contracting Co., 2003 ND 100, ¶ 9, 663 N.W.2d 204 (quoting Compton v. Alton Staemship Co., Inc., 608 F.2d 96, 106 (4th Cir. 1979)). Further, this Court has "recognized 'N.D.R.Civ.P. 60(b)(vi) provides the ultimate safety valve to avoid enforcement by vacating the judgment to accomplish justice.'" Kopp v. Kopp, 2001 ND 41, ¶ 10, 622 N.W.2d 726. Based upon

these principles, Rule 60(b)(6) relief was appropriate to allow the District Court to do justice in this particular case. Frankly, it would be a travesty of justice had the District Court not granted Bobbi relief from the Judgment because the transcript clearly reflects the parties' intent to equally divide the mineral acres owned at the time of the divorce. However, after Wayne realized there was a mistake in the judgment that clearly benefitted him, he refused to uphold his end of the agreement. Thus, the catch-all provision was created for cases just like this one, where an injustice would clearly occur if the District Court was not allowed to grant Bobbi relief from the judgment.

[¶25] Wayne then again argues that Bobbi is not entitled to Rule 60(b)(6) relief because she missed the timeline delineated in Rule 60(b)(1). Appellant's Brief, pg. 12-13. However, Rule 60(b)(1) states that a motion should be brought within a reasonable time or within one year of the judgment being entered. See N.D.R.Civ.P. 60(b)(1). As previously stated, the District Court specifically found that Bobbi brought her Rule 60(b) motion within a timely fashion. (App. 127). Wayne provides no explanation for why the District Court's finding that Bobbi brought the Rule 60(b) motion in a timely fashion is an abuse of discretion. Wayne does not prove how the District Court's finding is unreasonable, unconscionable or not the product of a rational mental process as required for Wayne to establish the District Court abused its discretion in finding Rule 60(b) relief was appropriate. Thus, Wayne's argument must fail and the District Court's decision should be affirmed.

D. Bobbi is still entitled to Rule 60 Relief even though she signed the Quit Claim Deed deeding Wayne the Farm Property.

[¶26] Wayne argues that Bobbi is not entitled to Rule 60 relief because any claim that Bobbi had to the mineral acres associated with the farm property was extinguished when Bobbi signed the quit claim deed deeding Wayne her interest in the farm property without reserving her interest in the mineral acres. Appellant's Brief, pg. 13. Wayne argues that the quit claim deed is a contract that supersedes any oral agreement the parties had. Id. However, N.D.C.C. § 9-07-05 states that "[w]hen through fraud, mistake or accident a written contract fails to express the real intentions of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded." In this case, the written Judgment does not express the real intentions of the parties because of the mistake that occurred when the division of the mineral acres was omitted from the written judgment even though it was specifically included in the transcript of the parties' agreement. Thus, the quit claim deed signed by Bobbi does not trump the parties' settlement agreement because the Court must enforce the true intentions of the parties, which are clearly evidenced by the transcript from the January 15, 2004 hearing.

[¶27] Further, the quit claim deed and the settlement agreement are two separate contracts. They are not one in the same. The District Court's job in this case was to enforce the contract made between the parties to settle their divorce. That contract was read orally into the record which was then reduced into a written transcript. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." N.D.C.C. § 9-

07-03. The transcript from the January 15, 2004 hearing clearly shows the mutual intention of the parties was to equally divide the mineral acres owned at the time of the divorce so that each of them had an undivided one-half interest in all of the mineral acres. (App. 96). The testimony from the August 24, 2012 hearing unmistakably showed that the parties owned the mineral acres associated with the farm property at the time the parties divorced. (Tr. 13-17, 44:3-8). Thus, the District Court did not abuse its discretion when it granted Bobbi's Rule 60 motion because the District Court was honoring the parties' mutual intent to equally divide all of the mineral acres owned by the parties at the time of the divorce in 2004. Therefore, Bobbi respectfully requests the Court affirm the District Court's Order awarding her an undivided one-half interest in all of the mineral acres owned by the parties at the time of the divorce, including the eighty mineral acres associated with the farm property.

CONCLUSION

[¶28] For all of the reasons stated above, Roberta Marie Kukla respectfully requests the Court Affirm the District Court's November 8, 2012 Order awarding her an undivided one-half interest in all of the mineral acres owned by the parties at the time of the divorce in 2004.

[¶29] DATED this 29th day of April, 2013.

SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG

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CERTIFICATE OF COMPLIANCE

[¶30] The undersigned, as attorneys for the Appellee, Roberta "Bobbi" Kukla, in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 5,213.

Dated this 30th day of April, 2013.

SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG

By: _____

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CERTIFICATE OF SERVICE

[¶31] I hereby certify that a true and correct copy of the foregoing **BRIEF OF THE APPELLEE,** was on the 30th day of April, 2013, served via electronic mail to the following:

Zachary Pelham
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_____
Suzanne M. Schweigert