IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Roberta (Bobbi) Marie Kukla,	)	Supreme Court No. 20120451
	)	Stark County Civil No. 45-03-C-00272
Appellee,	)	
	)	
vs.	)	
	)	
Wayne Kukla,	)	
	)	
Appellant.	)	

APPELLANT'S REPLY BRIEF

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

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LAW AND ARGUMENT

I. The Judgment Provided for the Disposition of the Farm Property.

The Judgment does not mention minerals because there is no need to mention minerals. The Judgment provided that the Farm Property is to be conveyed to Wayne, and the oral settlement agreement called for the same. Bobbi argues that the oral settlement agreement states that the parties agreed to split all of the mineral acres they owned while married, including the minerals under the Farm Property. Appellee's Brief, p. 8. However, this is a mischaracterization of the oral settlement agreement. Instead, the transcript reads:

> 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). The settlement agreement does not state that only the farm surface acres will be awarded to the Defendant. Instead, the agreement reads, "farm real estate." The clear intention of the settlement agreement, when read as a whole, is that the severed mineral acres that the parties owned would be divided equally. This was done by way of the divorce automatically.

The word "all" is not included in the 2004 transcript. Wayne testified at the hearing in 2012 that he believed the settlement read into the record by Mr. Schmitz was that Wayne was going to take over the farm property debt, which included the minerals.

(App. 49). Wayne further testified that he believed the language, "mineral acres that are currently in existence" meant the severed mineral acres the parties acquired. (App. 49). At the time of the divorce, Wayne did not agree to split the minerals under the farm property with Bobbi. (App. 49-50). Wayne testified that since he was responsible for the farm property debt, he "assumed that the mineral acres stayed with the land." (App. 50).

Bobbi argues that if the parties intended on Wayne receiving the mineral acres under the Farm Property, the oral agreement would state that the farm real estate and mineral acres associated with the farm would be awarded to Defendant. Appellee's Brief, p. 8. However, the opposite is true. Bobbi's attorney summarized the parties' agreement as to the real property. The "farm real estate" goes to Wayne, the Killdeer residence goes to Bobbi, and the remaining mineral acres in existence should be split. Bobbi argues that "there is no question that there was an explicit reservation of all of the mineral acres . . ." Appellee Brief, p. 8. However, Mr. Schmitz did not say that and the parties did not agree to that at the hearing in 2004. Bobbi's attorney could have easily stated, "All of the mineral acres that are currently in existence including those under the farm and the residence in Killdeer," or the parties could have corrected his statement when asked by the judge if this is what was agreed upon.

The transcript of Bobbi's attorney's summary of the settlement agreement reads that Bobbi will quitclaim the farm real estate to Wayne. There was no mention at the hearing in 2004 of any reservation of minerals. Bobbi's attorney then drafted the quitclaim deed. Bobbi, who had knowledge and experience in real estate documents, then signed the Quit Claim Deed to Wayne for the farm real estate, which did not

reserve any minerals. This shows that the true intention of the parties' agreement was that Wayne would get the farm real estate, encompassing all interests in the property.

There was no need to mention the mineral acres in the judgment, because the divorce decree automatically split the severed mineral acres the parties owned during their marriage. N.D.C.C. § 30.1-10-04(2)(b). Bobbi argues this argument is mere speculation as to why there was no mention of the mineral acres in the judgment, and argues that "[t]here is no question it was a pure oversight that the division of mineral acres were not included in the final judgment." Appellee Brief, pp. 8-9. Bobbi's argument regarding an oversight is speculation and fails.

Bobbi's attorney prepared the deed for Bobbi's signature. Bobbi claims that she "brought the mineral discrepancy to [her] Attorney [and] was advised by him to just sign what his office prepared and we would straighten any other discrepancies with additional papers filed." (Supp. App. 4). Reliance on the advice of counsel is not a valid defense. *See Dvorak v. Dvorak*, 2007 ND 79, ¶ 18, 732 N.W.2d 698 ("a client is bound by the actions and inactions of that client's attorney which occur within the scope of the attorney's authority"). If Bobbi feels wronged by her legal counsel and his advice, her proper remedy is not to attack a judgment her attorney prepared.

Bobbi waited eight years to file a motion to amend/correct the judgment. The district court found that Bobbi "did what she could to correct the error in a timely fashion." (App. 127). However, the record clearly shows otherwise. By Bobbi's own admission, both she and her attorney were aware that the judgment and the quit claim deed gave the farm property, including its minerals, to Wayne at the time they were entered. (App. 35, 106). And again, any argument as to reliance on counsel's advice is

invalid. *See Dvorak*, 2007 ND 79, ¶ 18. Bobbi also claims it took her over 18 months to find the original court reporter so that she could get a copy of the 2004 hearing transcript. Appellee's Brief p. 3, (App. 109). However, in her affidavit, Bobbi admits that she first began to research where to find the court reporter and judge when her youngest graduated in May 2011. (Supp. App. 5). The transcript was filed in October 2011. Bobbi's excuse of not being able to locate the court reporter is unsupported.

Bobbi's other excuses as to why it took her so long are unsupported. She claims that she contacted Wayne and his previous attorney, Mary Nordsven, "in an attempt to rectify the situation." Appellee's Brief, p. 3. Claiming that the other party was aware that she felt she deserved the minerals is no excuse. Wayne disputes that he agreed to split the farm property's minerals. There was no agreement that altered the judgment or the quit claim deed as to a division of real property. Bobbi's testimony as to her reasons why she waited so long to bring this motion is unreliable as shown by the discrepancies in her affidavit. The district court erred in finding that Bobbi "did what she could to correct the error in a timely fashion" because it simply is not supported by the record.

The district court concluded that the Judgment does not speak to any division of the minerals. (App. 124). This is incorrect: the Judgment provided for the disposition of the Farm Property. "[A] conveyance without exception or reservation conveys not only the surface but also the minerals." *Arndt v. Maki*, 2012 ND 55, ¶ 19, 813 N.W.2d 564. The Judgment called for the conveyance of the Farm Property to Wayne; the oral settlement agreement called for the conveyance of the Farm Property to Wayne. There

was no stated reservation of un-severed minerals that are a part of the Farm Property in the Judgment, the oral settlement agreement, or the quit claim deed.

The agreement outlined in the Order for Judgment and Judgment was "a full, complete, final and conclusive settlement of all marital rights and all property" and "binding upon the parties." (App. 77-78, 90). The oral agreement made at the hearing was reduced to writing by the Order for Judgment and Judgment. These documents are unambiguous. Parties should be able to rely on final judgments. Wayne relied upon the Judgment to his extreme prejudice. The district court abused its discretion in revacating a Judgment entered over eight years ago.

II. Rule 60(a) Does Not Apply Because No Mistake Occurred.

Bobbi argues that the failure to divide the mineral acres under the farm property constitutes a clerical mistake or a mistake arising from oversight or omission under Rule 60(a). If Bobbi thought there was a mistake with the settlement read in open court or with the judgment, she had several opportunities to correct her alleged mistake. If Bobbi thought a mistake was made, she could have clarified what her attorney said at the 2004 hearing when asked by the court if she agreed to the oral agreement; she could have included the split of farm property minerals in the proposed judgment that her attorney prepared for the court's signature; or she could have reserved the minerals in the quit claim deed. Instead, she waited until the value of the minerals under the farm property was realized to bring a Rule 60 motion – eight years after the judgment was entered. Relief under Rule 60(a) is not a correct remedy for altering the distribution of real property from a divorce judgment. Changing the parties' division of real property is not a clerical mistake, it is a substantive change.

Bobbi claims that a document referred to as Exhibit D-1, listing the parties' assets, was exchanged during discovery and shows that all minerals would be split evenly. Appellee Brief ¶19. However, Ms. Nordsven told the court that she did not know where Exhibit D-1 came from but that it was not included in the discovery process. (App. 60). Ms. Nordsven did not have a copy of Exhibit D-1 in her file. (App.14). Exhibit D-1 has no signatures and it was not entered into evidence along with any interrogatories or other discovery. Bobbi's testimony supports the conclusion that Exhibit D-1 was a working document that she and her attorney prepared, since she had to get the value of the cattle from Wayne. (App. 15). There is no evidence that Wayne agreed to Exhibit D-1.

Bobbi is attempting to utilize Rule 60(a) as a means to re-litigate an issue that was resolved in 2004. The district court's reliance on Rule 60(a) in granting Bobbi's motion to amend and vacate the Judgment is misplaced and should be reversed.

III. Rule 60(b)(i) and (vi) Do Not Apply as a Matter of Law.

As discussed above, Bobbi had several opportunities to correct her alleged mistake. If Bobbi thought a mistake was made, she could have clarified what her attorney said at the 2004 hearing when asked by the court if she agreed to the oral agreement; she could have included a division of the farm property minerals in the proposed judgment that her attorney prepared for the court's signature; she could have brought a motion to amend/correct within a reasonable time after the judgment was filed; she could have reserved the minerals in the quit claim deed; or she could have brought a quiet title and reformation action against Wayne for the minerals that are in dispute. Instead, Bobbi waited eight years before bringing this motion.

Bobbi seems to argue that the district court found that relief was warranted under Rule 60(b)(1). This is clearly not the case. The district court specifically found that "relief, if any, to be granted to Bobbie must be the result of Rule 60(a) . . . or Rule 60(b)(6) . . ." (App. 123). Bobbi misstates the law in her brief when arguing that "Rule 60(b)(1) states that a motion should be brought within a reasonable time or within one year of the judgment being entered." Appellee's Brief, p. 15. A motion under Rule 60(b)(1) must be made within one year. N.D. R. Civ. P. 60(c)(1). Bobbi is arguing mistake; therefore, the timeline of one year applies under Rule 60(b)(1).

The judgment did not include a reservation of mineral acres, which Bobbi argues was a mistake or oversight. As such, Rule 60(b)(1) is the proper procedural avenue to bring such a motion since it allows a court to relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(6) covers "any other reason that justifies relief." (emphasis added). Bobbi missed the deadline of one year under Rule 60(b)(1), she cannot use Rule 60(b)(6) as a back-up. *See City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2d 324, 330 (N.D. 1975) (explaining that Rule 60(b)(6) "is not to be used in cases where subdivisions (1) to (5) . . . might be employed—it and they are mutually exclusive"); *see also Arrieta v. Battaglia*, 461 F.3d 861, 865 (7th Cir. 2006) (finding that Fed. R. Civ. P. 60(b)(1) and (b)(6) are mutually exclusive because otherwise the one-year time limitation imposed would be meaningless).

In her appellee brief, Bobbi now argues "it would be a travesty of justice" if she is not granted relief from the judgment because of the mistake. Appellee's Brief, p. 15. She argues that Rule 60(b)(6) was created "for cases just like this one." Bobbi cites to *Olander Contracting Co. v. Gail Wachter Investments*, 2003 ND 100, 663 N.W.2d 204.

In *Olander*, the Court held that Rule 60(b) does not have an unlimited reach and reversed the trial court's amended judgment that granted relief under Rule 60(b)(6). *Drake-Henne, Inc.* and similar case law are directly on point to the issues present in this case.

IV. Bobbi Deeded Her Interests in the Farm Property to Wayne.

Bobbi claims mistake under N.D.C.C. § 9-07-05 in an attempt to bring in parol evidence to alter the quit claim deed. However, the mistake under N.D.C.C. § 9-07-05 must be mutual. *See Spitzer v. Bartelson*, 2009 ND 179, 773 N.W.2d 798, 803. Here, there was no mistake, but even if there was a mistake, it was Bobbi's mistake alone. Wayne believed the settlement between the parties involved him receiving all interests the parties owned of the farm property. Bobbi's attempt at reforming a quit claim deed through a Rule 60 motion is inappropriate.

Bobbi further argues that the quit claim deed and the settlement agreement are two separate contracts. Any agreement regarding transferring real property has to be in writing to be valid. *See Green v. Gustafson*, 482 N.W.2d 842, 848 (N.D. 1992) ("The general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing."); N.D.C.C. § 9-06-04; N.D.C.C. § 47-10-01. The written settlement agreement was included in the Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment, which were drafted by Bobbi's attorney and agreed to by both parties. These written documents, along with the quit claim deed, are unambiguous and Bobbi explicitly consented to them.

CONCLUSION

For all the reasons set forth above and in the Appellant's Brief, this Court should reverse the district court's decision to vacate the Judgment.

Dated this 17th day of May, 2013.

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 17th day of May, 2013, she mailed a copy of the foregoing *Appellant's Reply Brief* by placing a true and correct copy thereof in an envelope, addressed to the following:

Suzanne M. Schweigert
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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 17 day of May, 2013.

Dayna Barone
Notary Public

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Roberta (Bobbi) Marie Kukla, Appellee, vs. Wayne Kukla, Appellant.	)	Supreme Court No. 20120451 Stark County Civil No. 45-03-C-00272 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 20th day of May, 2013, she mailed a copy of the foregoing corrected Table of Authorities and page seven of *Appellant's Reply Brief* that was filed on May 17, 2013, by placing a true and correct copy thereof in an envelope, addressed to the following:

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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

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Subscribed and sworn to before me this 20 day of May, 2013.

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