20120451
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 5, 2013
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

REQUEST FOR REHEARING

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RULES:

[¶1] Appellee, Roberta Kukla (hereinafter "Bobbi"), submits this Request for Rehearing in response to the Opinion issued by this Court on October 22, 2013 wherein the Supreme Court reversed the District's Court's decision granting Bobbi's Rule 60(a) and 60(b) Relief. By reversing the District Court's decision, the Supreme Court has reinstated the parties' 2004 Divorce Judgment that does not provide for an award of mineral rights to either party.

[¶2] This Court determined the District Court abused its discretion in granting Bobbi's Motion for Rule 60(a) Relief because "the amended judgment entered by the District Court went beyond merely correcting a 'clerical mistake' or a 'mistake from an oversight or omission,' but rather affected a substantive portion of the divorce judgment." Kukla v. Kukla, 2013 ND 192. This Court erred in finding the same because the parties' Judgment failed to grant either party any interest in any of the minerals owned at the time of the divorce. In fact, the judgment does not even contain the words "mineral acres." The transcript from the January 15, 2004 hearing shows the parties expressly agreed to split equally all of the mineral acres owned at the time of their divorce. (App.96). Rule 60(a),N.D.R.Civ.P. allows the Court to correct a mistake or omission whenever one is found in a judgment. See Gruebele v. Gruebele, 338 N.W.2d 805, 811(N.D.1983). The District Court acknowledges it was a complete oversight that the District Court entered the 2004 Judgment without catching the mistake regarding the division of mineral interests and the lack of any provision in the judgment to account for that division. (App.126). Thus, Rule 60(a), N.D.R.Civ.P., does apply as the transcript shows an error of omission occurred because the final judgment doesn't reflect what the parties intended at the time the stipulation was orally put on the record. Plainly, it does not reflect the

parties' agreement. Therefore, Rule 60(a) is an appropriate mechanism for the District Court to correct the omission.

[¶3] This Court further states the District Court was not allowed to correct the clerical mistake regarding the minerals because the amended judgment awarding Bobbi an undivided one-half interest in the mineral acres directly contradicted Bobbi's execution of the quit claim deed to Wayne for the farmland, without reserving her interest in the minerals. Kukla, at ¶19. Bobbi was represented by counsel at the time she signed the quit claim deed, which failed to reserve her interest in the minerals. Bobbi should not be held accountable for the mistakes made by her previous counsel. Further, Bobbi should not be further punished by this Court because she worked diligently to correct the mistake on her own. The record reflects Bobbi not only talked to her attorney about the mistake made in the judgment, but Bobbi also contacted Wayne's attorney, Ms. Nordsven, right away in 2004 asking she correct the mistake. (Tr.32:14-22). Ms. Nordsven and Wayne refused to do so as this error benefited him substantially. The record also reflects Bobbi continued to pursue correction of the mistake by also writing a letter to Ms. Nordsven in 2006 requesting the correction. (App.103;Tr.36:24-25,37:1-9,45-46:25,1-2). In fact, Wayne admitted at August 24, 2012 hearing that around that same time, in 2006, Wayne requested Bobbi sign off on the brand release, which also was not addressed in the Judgment, and Bobbi did. (Tr.46:3-15; App.107,¶8;). Wayne assured Bobbi he would transfer the minerals for the brand release. (App.107,¶8). After she signed off, Wayne told her that she "was not getting "sh*t" for the minerals." Id. In addition, in attempting to preserve her interest in the minerals, Bobbi also filed a Statement of Claim of Mineral Interests and a copy of the divorce proceedings.

(App.109,¶12). Bobbi also contacted the leasing companies and obtained title opinions in hopes they could help her. Id. Thus, Bobbi did not sit idly by doing nothing. She was doing all she could to try and rectify the problem on her own, due to a lack of funds to hire an attorney. While searching for the Court Reporter, Bobbi stated she put the emotional welfare of their children first and waited until they all graduated from high school and had a choice to leave the pressure of Wayne as she knew he would put the children between Bobbi and the mineral issue. (App.109,¶11). Bobbi testified it took her over 18 months to find the court reporter and get a copy of the transcript.(App.109). She received transcript in October 2011 and when Wayne refused to sign a proposed Stipulation, she initiated her Rule 60 Motion. (Supp.App.1-2)(R.46-52.) 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). Bobbi shouldn't be punished for the mistakes of her previous counsel as he assured her "the minerals would be retained even though they were not mentioned." (App.106,¶6).

[¶4] Further, Wayne should not benefit from being dishonest. Wayne knows what the parties agreed to but refused to do the right thing. In fact, at the hearing on Bobbi's Rule 60 Motion, Wayne admitted the transcript of the January 15th hearing was "accurate". (App.43:2-3). In addition, Wayne specifically admitted that he and Bobbi owned "those 80 mineral acres jointly as of January 15th, 2004", which was the day the stipulation was read into the record at the trial.(Tr.46-47:23-25,1). Wayne also admitted at the January 15th hearing that he had heard what the attorneys said and he agreed that was his understanding of the agreement. (Tr.8:14-20;App.48:2-8). He also answered "yes" to Judge Graff's question of "And will you do your best to live up to the terms and

conditions of that agreement as well." (Tr.47:9-15). Thus, it is clear from the transcript from January 15, 2004 as well as the Transcript from August 24, 2012 that the parties agreed to split all mineral acres in existence on January 15, 2004 equally, with each receiving an undivided one-half interest. Even Ms. Norsdven, Wayne's counsel at the Rule 60 Hearing, admitted that Wayne was "not disputing that the transcript is not is(sic) accurate." (Tr.43:6-8). Furthermore and in support of Bobbi's position, Bobbi attested in her affidavit of 4/13/12, that she agreed to take a cash settlement of $75,000, which was the amount she inherited from her parents' estate, instead of ½ of the equity in the ranch of $129,736.50, if Wayne agreed to let her retain her half of the minerals under the ranch. (App.105,¶4). That was ultimately the agreement that was put on the record on January 15, 2004. (App.96:2-10). Rule 60(a) allows the Court to amend the judgment to correct an omission or mistake to reflect the parties' agreement. Therefore, Bobbi respectfully requests the Court grant her petition for rehearing and ultimately find the District Court did not abuse its discretion in determining Rule 60(a) relief was appropriate.

[¶5] Finally, this Court determined the District Court erred in granting Bobbi Rule 60(b) relief because Bobbi failed to file her Rule 60(b) motion within a reasonable amount of time. Kukla,at¶26. Specifically, this Court states the District Court abused its discretion in finding Bobbi "did what she could in seeking relief from the judgment" because that finding is not supported by the evidence since Bobbi did not proffer any evidence showing why she was prevented from filing her motion for relief from judgment for eight years. Id.at 29. That is not accurate. Bobbi stated in her original affidavit to the Court dated 4/13/12 that she put the "emotional welfare" of her children first and waited. (App.109,¶11). Bobbi attested in her affidavit that Wayne controlled Bobbi "through the

kids" and that "His alienation became extremely aggressive toward the kids, making the whole divorce traumatic for them especially." Id. Thus, for that reason alone she waited until all the children had graduated from high school. Additionally, Bobbi did not have the funds to hire an attorney at that time, and Wayne knew that. (App.110,¶13). Finally, Bobbi had to resort to tracking down the court reporter to get the transcript from the 1/15/2004 hearing. (App.109). It took Bobbi 18 months to find the court reporter. Id. Once Bobbi obtained the transcript she did hire the undersigned to get this matter resolved. The undersigned immediately tried to work with Wayne by sending Ms. Nordsven a copy of the January 15, 2004 hearing transcript and requested her client sign a stipulation to amend the judgment. (Supp. App.1-2). Wayne refused and Bobbi filed her motion for Rule 60 relief. This Court and all District Courts have always encouraged parties to try and work together and resolve issues without the Court's involvement. This is exactly what Bobbi did. Thus, Bobbi did provide evidence demonstrating why she was unable to bring her Rule 60(b) motion until the spring of 2012. The opinion of this Court seems to be even though the parties agreed to split the minerals equally, because too much time passed, Bobbi is no longer entitled to those minerals. The premise behind that opinion is simply wrong. Bobbi was taken advantage of by her ex-husband and now the Supreme Court has given Wayne its stamp of approval that it is okay to take advantage of the less fortunate when they are down and out. The Divorce Judgment was erroneous and the District Court in granting the Rule 60 Motion for Relief rectified the wrong. The District Court did not abuse its discretion.

[¶6] Furthermore, it is important to discuss the reasons Rule 60(b)(vi) was enacted. This Court has stated that the Rule 60(b)(vi) "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.v. Gail Wachter Investments, Inc., 2003 ND 100,¶9,663 N.W.2d 204. This is exactly what the District Court did in this case. This is the perfect case where this provision should come into play because if this Court allows the 2004 divorce judgment to remain in place a major travesty of justice occurs. The mistake made by Bobbi's counsel and the District Court will cost Bobbi hundreds of thousands of dollars and constitutes an injustice to Bobbi. In addition, reinstating the 2004 judgment rewards Wayne for being dishonest and refusing to honor and comply with the parties' stipulation to resolve their divorce. He admitted to Judge Graff he would do his best to live up to the terms and conditions of the parties' agreement. (App.99). Wayne has not done that. Wayne should not be rewarded for such behavior. Bobbi will be unjustly punished for trying to get along with her ex-spouse and Wayne will reap the benefits of being a less than an upstanding citizen. The undersigned is not sure this is a message this Court would like to send to individuals in this circumstance. However, that will be the message sent to anyone in this type of situation because if they refuse to work with the ex-spouse long enough to correct a problem they will essentially cause the other person to lose their right to relief and in the end the difficult, untrustworthy and dishonest person will prevail. Rule 60(b)(vi) was specifically created to correct injustices like the one in this case. Accordingly, Bobbi respectfully requests the Court grant her petition for rehearing allowing this Court to prevent a major injustice from occurring.

CONCLUSION

[¶7] For all of the reasons stated above, Roberta Marie Kukla respectfully requests the Court GRANT a Rehearing to reconsider the District Court's November 8,

2012 Order and award her an undivided one-half interest in all of the mineral acres owned by the parties at the time of their divorce in 2004.

[¶8] DATED this 5th day of November, 2013.

SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG

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CERTIFICATE OF COMPLIANCE

[¶9] 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 1,929.

Dated this 5th day of November, 2013.

SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG

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CERTIFICATE OF SERVICE

[¶10] I hereby certify that a true and correct copy of the foregoing **REQUEST FOR REHEARING,** was on the 5th day of November, 2013, served via electronic mail to the following:

Zachary Pelham
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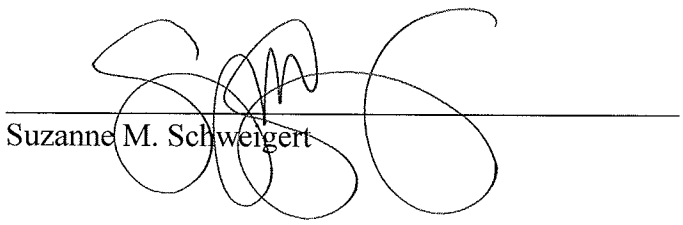

Suzanne M. Schweigert