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 BRIEF

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

PEARCE & DURICK
ZACHARY E. PELHAM, ND #05904
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Wayne Kukla

TABLE OF CONTENTS

		Page
Table of Authorities		ii
Statement of the Issue		1
Statement of the Case		1
Statement of the Facts		2
Standard of Review		5
Law and Argument		6
I.	The Judgment Provided for the Disposition of the Farm Property	6
II.	Rule 60(a) Does Not Apply Because no Mistake Occurred	8
III.	Rule 60(b)(i) and (vi) Do Not Apply as a Matter of Law	12
IV.	Bobbi Deeded Her Interests in the Farm Property to Wayne.	13
Conclusion		14

TABLE OF AUTHORITIES

Page(s)

Cases

Arndt v. Maki, 2012 ND 55, 813 N.W.2d 564 6
City of Wahpeton v. Drake-Henne, Inc., 228 N.W.2d 324 (N.D. 1975) 5, 12, 13
Dvorak v. Dvorak, 2007 ND 79, 732 N.W.2d 698 10
Fargo Glass and Paint Co. v. Randall, 2004 ND 4, 673 N.W.2d 261 5
Filler v. Bragg, 1997 ND 24, 559 N.W.2d 225 5
Gruebele v. Gruebele, 338 N.W.2d 805 (N.D. 1983) 6, 8
Hefty v. Aldrich, 220 N.W.2d 840 (N.D. 1974) 5
Krohnke v. Lemer, 300 N.W.2d 246 (N.D. 1980) 12
McGinnity v. J.I. Case Threshing Mach. Co., 164 N.W. 955 (N.D. 1917) 10
Peterson v. Peterson, 555 N.W.2d 359 (N.D. 1996) 5
Radspinner v. Charlesworth, 369 N.W.2d 109 (N.D. 1985) 14
Roth v. Hoffer, 2006 ND 119, 715 N.W.2d 149 8
Royse v. Easter Seal Society for Crippled Children, 256 N.W.2d 542 (N.D. 1977) 14

Rules

N.D.R.Civ.P. Rule 60(a) 1, 5, 6, 8, 10
N.D.R.Civ.P. Rule 60(b) 5, 13
N.D.R.Civ.P. Rule 60(b)(1) 1, 12, 13
N.D.R.Civ.P. Rule 60(b)(1)-(3) 12
N.D.R.Civ.P. Rule 60(b)(1)-(5) 12, 13
N.D.R.Civ.P. Rule 60(b)(6) 1, 12, 13
N.D.R.Civ.P. Rule 60(b)(i) 12
N.D.R.Civ.P. Rule 60(b)(vi) 12, 13
N.D.R.Civ.P. Rule 60(c)(1) 13

North Dakota Century Code

N.D.C.C. § 11-18-02.2(6)(i) 11
N.D.C.C. § 30.1-10-04(2)(b) 6
N.D.C.C. § 9-06-07 13

Other Authorities

N.D. Title Standards, 4-02 6
Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2864) 13

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in granting Appellee Roberta Marie Kukla's motion to amend and vacate a judgment entered over eight years ago.

STATEMENT OF THE CASE

Roberta Marie Kukla ("Bobbi") served a Complaint on Wayne Kukla ("Wayne") on or about May 19, 2003, seeking a divorce from Wayne. Appendix ("App.") i. Wayne filed his Answer on or about October 30, 2008. *Id.* Trial was set for January 15, 2004, but the parties entered into an oral settlement agreement just prior to trial. App. 93.

The district court entered its findings of fact, conclusions of law, and order for judgment on February 9, 2004. App. 66-78. Judgment was entered on February 11, 2004. App. 79-91. Bobbi moved to vacate and amend the judgment pursuant to N.D.R.Civ.P. Rule 60(a) and 60(b)(1) and (6) on April 16, 2012. App. iii. Wayne filed a response to the motion to vacate and amend the judgment on May 2, 2012. *Id.* Bobbi filed a reply in support of her motion to vacate and amend the judgment on May 14, 2012. *Id.* A hearing on the motion to vacate and amend the judgment was held on August 24, 2012. App. 1-64.

The district court's Order granting Bobbi's motion to vacate and amend the judgment was issued on November 8, 2012. App. 121-28. Amended findings of fact, conclusions of law, and order for amended judgment was entered on December 17, 2012. App. 142-46. Amended Judgment was entered on December 18, 2012. App. 133. Notice of entry of amended judgment was filed by Bobbi on or about December

19, 2012. App. 137. Notice of appeal was filed by Wayne on or about December 21, 2012. App. 147.

STATEMENT OF THE FACTS

This action was commenced by Bobbi who sought a decree of divorce against Wayne in 2003. App. i. Just prior to trial, a settlement agreement was reached involving the division of property from the marital estate as well as custody of the couple's then minor children. App. 93-102. An oral representation of the settlement agreement was read into the record; the parties stated they agreed with what was read into the record. *Id.*

Bobbi's attorney prepared the proposed Findings of Fact, Conclusions of Law, and Order for Judgment ("Order for Judgment") and filed it with the district court. App. 129. None of the parties objected to the proposed Order for Judgment and Bobbi's attorney even indicated he had consulted with Wayne's attorney and made some changes prior to submitting to the district court. *Id.* The parties did not execute a written settlement agreement. The Judgment disposed of marital real property, including the subject real property in Dunn County, ND, legally described as: Township 146, Range 95, Section 21: NW1/4 ("Farm Property"). App. 79-91.

The Judgment conveyed the Farm Property to Wayne and did not provide for any reservation of mineral interests for Bobbi. App. 85. Bobbi's attorney prepared a quit claim deed for the Farm Property and Bobbi executed it. App. 130-32. Bobbi did not reserve any minerals in the Farm Property; the deed was recorded. App. 130-31. As for separate and severed mineral interests that were jointly owned by Bobbi and

Wayne, the existence of a divorce decree caused the joint tenancy relationship to automatically transform into a tenancy in common. App. 61, 113.

Testimony was received at the hearing to vacate and amend the Judgment. App. 1-63. Bobbi claims that she had sought to address a perceived mistake in the Judgment with her attorney who handled the divorce right away. App. 106. But no documentation of these alleged attempts exist. The first that Wayne became aware of her claim that a mistake had occurred was in a letter dated January 30, 2006, to Wayne's attorney and copied to Bobbi's new attorney. App. 103. Nothing was filed with the district court, however, until 2012. App. iii. Bobbi claims that the reason for this delay was her inability to retain an attorney, though she was represented by other attorneys prior to 2012. App. 103, 106-10. Be all this as it may, the motion to vacate and amend Judgment was not filed until April 2012, more than eight years after Judgment had been entered.

Much has happened in eight years. In reliance on the Judgment and deed, Wayne leased the minerals on the Farm Property and has received royalty and bonus payments. He has deposited this money and has paid taxes on this income. Wayne, and others, have relied on the Judgment and deed.

At the hearing on Bobbi's motion to vacate and amend the Judgment, both parties argued their belief as to what the oral settlement agreement that was read into the record meant. Boiled down, the testimony amounted to a "he said, she said" exchange. App. 13, 49. The Order for Judgment, however, speaks for itself. App. 66-78. It provides the "Stipulated Terms for Judgment." App. 67. The Order for Judgment also states "THE PARTIES STIPULATE AND AGREE that the following

terms and provisions may, if approved by the Court be entered as the Judgment and Decree in the above-captioned case." *Id.* The Order for Judgment and Judgment both state at paragraphs 28 and 29:

> **Finality of Settlement**: This Agreement is intended as a full, complete, final and conclusive settlement of all marital rights and all property rights between the parties, and each party hereby releases and discharges the other absolutely and forever from any and all claims or demands, past, present, or future, for spousal support.
>
> **Validity of Agreement.** This Agreement shall be binding upon the parties hereto with respect to the above-entitled action, or any other action between the parties and it is agreed that the material provisions of this Agreement shall be incorporated in and made a part of any judgment or decree entered into this action.

App. 77-78, 90. The Order for Judgment and Judgment provided that Wayne was to receive the Farm Property. App. 73, 85. There is no provision in either document discounting what Wayne was to receive in terms of real property. Bobbi claims a mistake occurred in the Judgment, based on her interpretation of the oral settlement agreement. This claim is made despite the fact the Judgment was identical in terms to the Order for Judgment that was prepared by Bobbi's attorney and agreed upon by the parties prior to Judge Anderson signing it. Bobbi admitted in January 2006 that she "failed to retain half of the minerals when [she] conveyed the farm land to Wayne." App. 103.

The district court ordered that the Judgment be amended and that Wayne sever and convey one-half of the Farm Property's mineral interests to Bobbi and account for all profits received from leasing the minerals and pay Bobbi one-half of the profits he received from the date of the original Judgment. App. 127-28. Wayne appeals the district court's decision to amend the Judgment.

STANDARD OF REVIEW

This Court has outlined the standard for review of a motion to vacate under N.D.R.Civ.P. Rule 60(b):

> It is within the trial court's discretion whether to grant or deny a motion to vacate. Absent an abuse of this discretion, we will not set aside the trial court's decision on appeal. A trial court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law.

Filler v. Bragg, 1997 ND 24, ¶ 9, 559 N.W.2d 225. Rule 60 is to be interpreted to accomplish justice and it should be liberally construed. *City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2d 324, 330 (N.D. 1975). Yet when "the judgment sought to be set aside is entered pursuant to a stipulation of the parties": "the party challenging the judgment under Rule 60(b), N.D.R.Civ.P, has the additional burden of showing that under the law of contracts there is justification for setting the contract aside." *Peterson v. Peterson*, 555 N.W.2d 359, 361 (N.D. 1996). And relief under Rule 60(b)(6) "is not to be used to relieve a party from free, calculated, and deliberate choices he has made." *Drake-Henne, Inc.*, 228 N.W.2d at 330 (quoting *Hefty v. Aldrich*, 220 N.W.2d 840 (N.D. 1974)).

As for Rule 60(a), "[t]his Court has stated its preference for the use of the N.D.R.Civ.P. 60(b) procedure for relief from judgment. . . ." *Fargo Glass and Paint Co. v. Randall*, 2004 ND 4, ¶ 7, 673 N.W.2d 261. Nonetheless, the standard of review for Rule 60(a) has also been set forth by this Court:

> Generally, 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. We believe it clear that Rule 60(a) was not designed to affect substantive portions of a judgment or order, nor to act as a substitute for appeal. The rule is appropriately utilized only for 'the correction of irregularities which becloud but do not impugn [the

> judgment]....' It must be determined 'whether a substantive change or amendment was made or whether the amended conclusions and judgment were in the nature of corrections.'
>
> 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) (emphasis added).

LAW AND ARGUMENT

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

The district court concluded that the Judgment does not speak to any division of the minerals. App. 124. This is simply incorrect: the Judgment provided for the disposition of the Farm Property. It nearly goes without saying that "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 or the settlement agreement.

As for the separate and severed minerals that were owned jointly by the parties, there was no reason to include these in any Judgment because a divorce decree ends a joint tenancy and converts such to tenancy in common. N.D.C.C. § 30.1-10-04(2)(b); N.D. Title Standards, 4-02. While there is no explicit evidence of this in the record for being the reason these mineral interests were not mentioned in the Order for Judgment or Judgment, the reality is the severed minerals are not an issue based on operation of

law. And it is not too far of a leap to presume the attorneys handling this matter in 2004 knew what the law was and that the law provided real property owned in joint tenancy converted to tenancy in common upon divorce.

The Order for Judgment provides "Stipulated Terms for Judgment." App. 67. Also, the Order for Judgment states "THE PARTIES STIPULATE AND AGREE that the following terms and provisions may, if approved by the Court be entered as the Judgment and Decree in the above-captioned case." *Id.* The Order for Judgment and Judgment both state at paragraphs 28 and 29:

> **Finality of Settlement**: This Agreement is intended as a full, complete, final and conclusive settlement of all marital rights and all property rights between the parties, and each party hereby releases and discharges the other absolutely and forever from any and all claims or demands, past, present, or future, for spousal support.
>
> **Validity of Agreement.** This Agreement shall be binding upon the parties hereto with respect to the above-entitled action, or any other action between the parties and it is agreed that the material provisions of this Agreement shall be incorporated in and made a part of any judgment or decree entered into this action.

App. 77-78, 90.

The stipulation, prepared by Bobbi's attorney, explicitly orders the conveyance of the farm real estate to Wayne. There is no reservation of any minerals ordered. The oral settlement agreement was effectively reduced to writing by the proposed Order for Judgment drafted by Bobbi's attorney and signed by Judge Anderson. It is clear what the parties agreed to in the Order for Judgment. The stipulation in the Order for Judgment was detailed—Gramma's rocker and the "Old jar and misc on shelves in [the] kitchen" are included. App. 74. There is an incredibly detailed accounting of all marital property—including real property. The Judgment contained the stipulations of

the parties to this action and the district court abused its discretion in revisiting a Judgment entered into over eight years ago.

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

The standard district courts apply in reviewing a motion to vacate a judgment pursuant to Rule 60(a) has not been satisfied. Rule 60(a) is "not designed to affect substantive portions of a judgment or order. . . ." *Gruebele*, 338 N.W.2d 805, 811 (N.D. 1983). Neither is the rule "a vehicle for relitigating matters that have already been litigated and decided, nor to change what has been deliberately done." *Id.* at 812. The Court explained:

> The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Roth v. Hoffer, 2006 ND 119, 715 N.W.2d 149, 152 (internal citation omitted).

Rule 60(a) does not apply because this was not a clerical mistake or a mistake arising from oversight or omission in the Judgment. Bobbi's own attorney drafted the proposed Order for Judgment, presented it to Wayne's attorney for review, and the district court signed the Order for Judgment allowing Judgment to be entered. Wayne does not claim a mistake occurred as a result of the disposition of the parties' marital property. The evidence does not support Bobbi's claim, as she executed a quit claim deed drafted by her attorney conveying the Farm Property to Wayne soon after the Judgment was entered and waited eight years to bring her claim of mistake to the district court. But even if Bobbi made a mistake, it was her mistake alone. The district

court did not make a mistake—clerical or otherwise. The only one claiming a mistake is Bobbi, but her actions defeat her claims.

If a mistake occurred, Bobbi's execution of the quit claim deed, a contract, bound her to this legal consequence. She cannot reasonably claim eight years after a Judgment was entered that her action of signing a quit claim deed conveying all of her interest to Wayne supports the alleged mistake in the Judgment. Actions speak louder than words.

Here, the proposed Order for Judgment was presented to the district court and executed as *both* parties determined it should be. App. 129. 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—though she admitted she failed to reserve the minerals. App. 103. But Bobbi then waited until 2012 to bring a legal challenge to the purported mistake. In bringing the motion to vacate, Bobbi is attempting to re-litigate an issue that was resolved, or could have been, in 2004. The Judgment clearly provided for the conveyance of the Farm Property to Wayne. Bobbi's argument that an ambiguous and disputed oral agreement should act to countermand the clear statement and ruling of a Judgment upon which language was agreed upon by the respective parties in 2004 fails.

Moreover, Bobbi stated in her affidavit in support of her motion to vacate that she "brought the incorrect judgment to my Attorney at the time . . . when I received the judgment without mention of the minerals." App. 106. She goes on to state: "[h]e assured me that the minerals would be retained even though they were not mentioned." *Id.* Bobbi continues in her affidavit that she intended to hire another attorney and that she "continually called [her divorce attorney] to resolve these issues and he had advised

me to seek another attorney . . . ." *Id.* Eight years later, Bobbi finally attempted to do something about an issue she claims she knew about from day one. Knowledge of an attorney is imputed to the attorney's client. *McGinnity v. J.I. Case Threshing Mach. Co.*, 164 N.W. 955, 959 (N.D. 1917). And "a client is bound by the actions and inactions of that client's attorney which occur within the scope of the attorney's authority." *Dvorak v. Dvorak*, 2007 ND 79, ¶ 18, 732 N.W.2d 698. Bobbi's attorney knew exactly what the Order for Judgment, Judgment, and quit claim deed did. There was no mistake based on an oversight or omission on the part of Bobbi, her attorney, or anyone else involved in this matter. All of the parties agreed that the Judgment could be entered. 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.

The language of the settlement agreement that was read orally into the record states in part:

> 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. 96-97. While the above is not a model of clarity or eloquence, it at most creates an ambiguity over what was intended by the disposition of real property. This oral agreement was essentially prepared just prior to trial. App. 57. There are conflicting terms: conveyance of the farm real estate (without any mentioned reservations) and conveyance of the mineral acres in existence. The agreement as to what each party was to receive is at most ambiguous and conflicting. One can speculate as to what exactly was meant here. But the reality is even if an ambiguity existed in the oral agreement, it

was remedied in the Order for Judgment that was prepared by Bobbi's attorney and agreed to by both parties prior to submitting to the district court. If any doubt continued as to what the intentions of the parties were, Bobbi deeded the Farm Property to Wayne.

Taking any ambiguity in the oral agreement into account, one need only look at the actions of the parties after the oral agreement was read into the record to resolve any ambiguity in favor of Wayne. The settlement agreement was made on January 15, 2004. On February 11, 2004, the district court executed the Order for Judgment and entered Judgment. The Judgment, incorrectly, references a written settlement agreement; presumably it was intended to reference the oral agreement. App. 79. Then, on March 2, 2004, Bobbi deeded all of her interests in the Farm Property to Wayne. App. 130. Wayne's attorney signed as his agent certifying that N.D.C.C. § 11-18-02.2(6)(i) exempted a report of a statement of full consideration. *Id.* Bobbi's attorney drafted the deed.[1] App. 132.

Two years pass without any mention of a purported mistake. Two years later the value of the minerals in the area is realized when they are leased by Wayne. And it is then that Bobbi first claims mistake, though she admits at the same time to having "failed to retain half of the minerals" when she conveyed them to Wayne in 2004. App. 103. The picture that is painted is that the parties agreed to a property split and effected it pursuant to their agreement. While various reasons are offered by Bobbi as to why she waited, Bobbi waited until 2012 to move to vacate a judgment entered in 2004.

[1] The district court incorrectly concluded at page three of its Order that Wayne's attorney obtained Bobbi's signature for the quit claim deed. App. 123. The evidence shows this is incorrect; Bobbi's attorney procured Bobbi's signature. App. 132.

Wayne relied on the oral settlement agreement, the Judgment, and a recorded deed. While Bobbi testified that she attempted to do something about the purported mistake in the Judgment as early as 2006, substantively she admits she sat on her legal rights from the time Judgment was entered in 2004 until 2012 while Wayne relied on the final Judgment and deed conveying the Farm Property to him. App. 103, 106. In the same way "the law will not allow one to sit idly by and see his property destroyed through forces negligently set in motion by another and then collect damages occasioned by his own failure to make reasonable exertion to arrest such disaster," Bobbi should not be rewarded for sitting idly by while Wayne leased his minerals in the Farm Property on reliance on a final Judgment and a deed. *Krohnke v. Lemer*, 300 N.W.2d 246, 251 (N.D. 1980) (quotation omitted). The converse is also true, Wayne should not suffer the effect of potential adverse action against him by others (e.g., IRS, state Tax Commissioner, oil and gas company(ies)) because of his reliance on the Judgment and deed while Bobbi sat idly by and did nothing until eight years after Judgment and executing the deed. The district court abused its discretion and the Court should reverse the district court's order amending judgment.

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

Bobbi's attempt to apply the "catch all" Rule 60(b)(6) fails because the rationale given is simply a "back up" for application of Rule 60(b)(1). Courts have held that 60(b)(1)-(5) are mutually exclusive of 60(b)(6). In other words, a party cannot use 60(b)(6) as a "backup" should they miss the timeframe to move for relief under 60(b)(1)-(3). *See Drake-Henne, Inc.*, 228 N.W.2d at 330 (explaining 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") (citing Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2864).

Here, Bobbi claims that Rule 60(b)(6) applies because a mistake was allegedly made—there is no argument that there is "something more" or "extraordinary" from Rule 60(b)(1)-(5) other than the purported mistake made by Bobbi's own attorney (if in fact it was a mistake—which Wayne does not concede). A claim that a party made a mistake is one clearly contained in Rule 60(b)(1). A motion under Rule 60(b) based on mistake, inadvertence, surprise, or excusable neglect must be brought within a "reasonable time" or within one year of judgment being entered. N.D.R.Civ.P. Rule 60(c)(1). Because the allegation of Bobbi for application of Rule 60(b)(6) is the same allegation premised upon Rule 60(b)(1), Rule 60(b)(6) does not apply as a matter of law because Rule 60(b)(1) is an enumerated and mutually exclusive reason for relief from a judgment. *See Drake-Henne*, 228 N.W.2d at 330. And the timeframe in which to bring a claim seeking relief under 60(b)(1) has expired by either the passing of one year from judgment or that an unreasonable amount of time has passed since entry of Judgment. The district court erred as a matter of law in granting Bobbi's motion to amend the judgment pursuant to Rule 60(b)(vi).

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

The quit claim deed conveying all of the interests of Bobbi to Wayne superseded any prior oral settlement agreement entered into by the parties. "[A] contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." N.D.C.C. § 9-06-07. A deed is a written contract.

Radspinner v. Charlesworth, 369 N.W.2d 109, 112 (N.D. 1985). "[E]vidence of oral negotiations and agreements which preceded the written contract may not be offered to vary the terms expressed in the written contract, nor may such agreements be separately enforced." *Id.* And "'[t]he general rule is that because a grantor is presumed to have made all the reservations or exceptions he intended to make the reservations must be clearly expressed in the deed.'" *Id.* at 113 (quoting *Royse v. Easter Seal Society for Crippled Children*, 256 N.W.2d 542, 545 (N.D. 1977)).

Here, the quit claim deed conveyed all interests in the farm property owned by Bobbi to Wayne. App. 130-31. Bobbi signed the deed, which was drafted by her attorney, without reserving the mineral interests. This was a binding contract. The deed was recorded. *Id.* Bobbi is bound by her contractual agreement with Wayne. Bobbi has waived any right to argue a mistake exists in the Judgment by her own actions.

CONCLUSION

For all the reasons set forth above, this Court should reverse the district court's decision to vacate the Judgment and should reinstate the Judgment entered in 2004.

Dated this 1st day of April, 2013.

PEARCE & DURICK

ZACHARY E. PELHAM, ND #05904
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
Attorneys for Wayne Kukla

20120451

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**

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APR 03 2013
STATE OF NORTH DAKOTA

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 1st day of April, 2013, she mailed a copy of the foregoing *Appellant's Brief and Appellant's Appendix* by placing a true and correct copy thereof in an envelope, addressed to the following:

Suzanne M. Schweigert
Attorney at Law
P.O. Box 460
Bismarck, ND 58502-0460

and on April 2, 2013, she mailed a corrected copy of pages iii and iv of the appendix that were mistakenly reversed, by depositing, with postage prepaid, in the United States mail at Bismarck, North Dakota, to the following:

Suzanne M. Schweigert
Attorney at Law
P.O. Box 460
Bismarck, ND 58502-0460

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 2nd day of April, 2013.

Notary Public

JENNIFER JORISSEN
Notary Public
State of North Dakota
My Commission Expires December 29, 2014