

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20150153

Curtis L. Erickson,)
))
Plaintiff and Appellee,)
))
vs.))
))
Dean Olsen, Susan Olsen, Bobby Olsen,)
Clee Raye Olsen, Marion Bergquist and)
the Estate of Clarence Erickson,)
))
Defendants,)
))
Dean Olsen, Susan Olsen, Bobby Olsen,)
Clee Raye Olsen, and Marion Bergquist,)
))
Appellants.)

APPELLANTS' BRIEF

*APPEAL FROM THE MEMORANDUM AND ORDER GRANTING PLAINTIFF'S
RENEWED MOTION TO CORRECT JUDGMENT ENTERED MAY 15, 2015, AND
THE SECOND AMENDED JUDGMENT ENTERED MAY 18, 2015, BY THE
HONORABLE JUDGE CYNTHIA FELAND, SOUTH CENTRAL DISTRICT COURT,
BURLEIGH COUNTY, NORTH DAKOTA, CASE NO. 08-2011-CV-2612*

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STATEMENT OF THE ISSUES

- [¶1] I. Whether the district court erred by awarding Erickson substantive relief beyond the scope of N.D.R.Civ.P. 60(a) and for which no evidence exists in the record.
- II. Whether the doctrine of res judicata bars Erickson from relitigating claims for additional substantive relief.

STATEMENT OF THE CASE

[¶2] This case was previously before this Court in Erickson v. Olsen, 2014 ND 66, 844 N.W.2d 585. Appellants Dean Olsen, Susan Olsen, Bobby Olsen, Clee Raye Olsen, Marion Bergquist, and the Estate of Clarence Erickson (hereinafter collectively referred to as the “Olsens”) are appealing from the *Memorandum and Order Granting Plaintiff’s Renewed Motion to Correct Judgment* (Appx. at 75-82) and *Second Amended Judgment* (Appx. at 83-85) entered by the district court. (Appx. at 86-87). The facts relevant to the issues submitted for review in this appeal are based on procedural errors made by the district court following this Court’s Opinion (Appx. at 50-64) and Judgment (Appx. at 65). The Olsens hereby incorporate the below Statement of Facts as identifying the nature of the case, course of proceedings, and disposition of the district court.

STATEMENT OF THE FACTS

[¶3] This is the second appeal from a civil action in which Appellee Curtis L. Erickson (“Erickson”) petitioned the district court to invalidate certain transfers of personal and real property made by Clarence Erickson (“Clarence”) to Appellants Dean and Susan Olsen, and Bobby and Clee Raye Olsen. (Appx. at 6-12). In contesting the validity of such transfers, Erickson alleged that the transactions in question were the result of Clarence’s alleged incompetence, undue influence, duress, or misrepresentation, and further petitioned to invalidate Clarence’s last will and testament on the grounds of lack

of testamentary capacity. (Id.) The Olsens denied the allegations of Erickson. (Appx. at 13-15).

[¶4] A bench trial was held before the district court on January 31, 2013, with the Honorable Cynthia Feland presiding. (Appx. at 2). The district court issued its *Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment* on March 12, 2013, finding in favor of Erickson. (Appx. at 16-35). On March 14, 2013, the district court entered a judgment invalidating the transfers in question and invalidating Clarence's last will and testament. (Appx. at 36-37). Specifically, two warranty deeds executed by Clarence on March 16, 2010 (recorded as Bowman County Document Numbers 169039 and 169040) were voided by the district court. (Id.) Despite invalidating these deeds, the district court's judgment did not take into account the repayment of the purchase price paid by Dean and Susan Olsen and Bobby and Clee Raye Olsen in these transactions. (Id.) The district court denied a subsequent *Motion to Amend Findings and Judgment* made by the Olsens under N.D.R.Civ.P. 52(b). (Appx. at 38-39).

[¶5] On July 11, 2013, the Olsens filed a *Motion to Correct Judgment* under N.D.R.Civ.P. 60(a), requesting the district court to amend its March 14, 2013 *Judgment* to account for the re-payment of the purchase prices in relation to the voided real property transfers. (Docket ID # 53, 54). Evidence had been presented at trial, and a specific finding of fact made by the district court, that Clarence had sold and transferred the parcels in question to Dean and Susan Olsen and Bobby and Clee Raye Olsen for \$200 per acre. (Appx. at 20). On July 12, 2013, the Olsens filed a *Notice of Appeal*,

appealing from the district court's March 14, 2013 *Judgment* and subsequent *Order on Rule 52(b) Motion to Amend Findings and Judgment*, dated May 31, 2013. (Appx. at 40).

[¶6] On July 25, 2013, Erickson filed a *Return to Respondent's Motion to Correct Judgment and Counter Motion for the Same with Brief*. (Docket ID # 64). Erickson did not dispute the Olsons should be refunded the amounts paid for the voided real property transactions. (*Id.*) However, under the veil of a Rule 60(a) countermotion, Erickson sought additional substantive claims for relief, namely that the estate be compensated for the "attorney's fees incurred [by Clarence Erickson] as a result of the transfer (from Sadowski & Wild), the abstract and title fees, mineral lease bonuses received, crop income/reasonable rental cost of the land, government subsidies received, and any other financial matters necessary to put all parties to this matter in the correct position as a result of the rescinding of the transactions." (*Id.*) No evidence had been presented by Erickson, and no findings were made by the district court, regarding such additional claims for relief.

[¶7] Because the district court lost jurisdiction when the *Notice of Appeal* was filed on July 12, 2013, the Olsens made a *Motion for Remand* with this Court on August 30, 2013, requesting a remand to the district court for resolution of their Rule 60(a) *Motion to Correct Judgment*. (Appx. at 41-42). Erickson made no attempt for his Rule 60(a) countermotion to be addressed by the district court. On September 3, 2013, this Court entered an *Order of Remand* temporarily remanding the case back to the district court for the limited purpose of consideration and disposition of the Olsens' Rule 60(a) *Motion to Correct Judgment*. (Appx. at 45). Prior to the hearing on the Olsens' motion, Erickson filed a *Motion to Compel Discovery with Brief* on October 4, 2013, asking the Court to

compel the Olsens to answer discovery requests, dated August 26, 2013, related to the relief sought by his Rule 60(a) counter-motion. (Docket ID # 78). The Olsens had responded to such discovery requests on October 1, 2013, objecting to such discovery as being beyond the applicable discovery deadline of October 15, 2012. (Id.); (Docket ID # 15).

[¶8] On October 7, 2013, a hearing was held before the district court to address the Olsens' Rule 60(a) *Motion to Correct Judgment*. (Appx. at 3). Based on the limited scope of the remand, the district court determined that Erickson's *Motion to Compel Discovery* was not properly before the court and that no action would be taken. (Docket ID # 79). On November 5, 2013, the district court entered an Order granting the Olsens' Rule 60(a) *Motion to Correct Judgment*. (Appx. at 46-47). An *Amended Judgment* was entered on November 5, 2013, requiring reimbursement of the purchase prices paid by Dean and Susan Olsen and Bobby and Clea Raye Olsen for the real property transactions voided by the district court. (Appx. at 48-49). Upon disposition of the Olsens' motion, this Court retained jurisdiction of the Olsens' appeal. On February 24, 2014, oral arguments were held before this Court, and on April 3, 2014, this Court concluded the district court's findings in favor of Erickson were not clearly erroneous affirming the district court's judgment. (Appx. at 50-64). This Court entered its *Judgment* on April 3, 2014.

[¶9] Following this Court's *Judgment*, Erickson filed a *Renewed Motion to Compel Discovery* and a *Renewed Motion to Correct Judgment* on July 24, 2014. (Docket ID # 92, 97). In response thereto, the Olsens filed responsive briefs opposing Erickson's renewed motions contending: (1) that the substantive relief sought by Erickson (i.e.

additional compensation for expenses and income derived from the vacated real estate transfers) was not within the purview of a Rule 60(a) motion to correct a judgment; (2) that Erickson was not entitled to the additional discovery as it was part of his improper attempt to litigate new substantive claims for relief; and (3) that Erickson had failed to request or obtain such discovery prior to trial and the applicable discovery deadline of October 15, 2012. (Docket ID # 100, 101). The Olsens further requested oral argument on Erickson's renewed motions pursuant to N.D.R.Ct. 3.2. (Id.) Despite the Olsens request for oral argument on these motions, the district court entered an *Order on Motion to Compel and Notice on Petitioner's Renewed Motion to Correct Judgment* on August 21, 2014, requiring that "all discovery concerning income generated from the transfers of real property and monies invalidated by the Court shall be completed by October 31, 2014." (Appx. at 68). The district court further permitted Erickson to contact the Court Administrator's Office to schedule and notice a hearing on his *Renewed Motion to Correct Judgment*. (Id.) Furthermore, on August 22, 2014, the district court entered an *Order to Compel Discovery* requiring the Olsens to respond to the additional discovery sought by Erickson by September 22, 2014. (Appx. at 69).

[¶10] On September 22, 2014, the Olsens submitted a *Motion to Vacate Order to Compel Discovery* on the grounds that they had been denied a hearing as requested under Rule 3.2, and that Erickson's motion should not have been deemed submitted to the court. (Docket ID # 110, 111, 115). A hearing on Erickson's *Renewed Motion to Correct Judgment* and the Olsens' *Motion to Vacate Order to Compel Discovery* was scheduled for December 1, 2014. (Docket ID # 117). However, given the substance of these competing motions, the district court advised the parties that only the *Motion to Vacate*

Order to Compel Discovery would be addressed at the December 1, 2014 hearing date. (Docket ID # 121). After the hearing and consideration of the parties' arguments, and because the district court was unclear as to the legal authority relief upon by Erickson in support of his *Renewed Motion to Correct Judgment*, the district court issued a *Notice* giving each party to submit a supplemental brief as to their respective positions, and to request further hearing if desired. (Docket ID # 122).

[¶11] After consideration of the parties' supplemental briefing, the district court entered two orders on May 15, 2015. (Appx. at 70-82). In granting the Olsen's *Motion to Vacate Order to Compel Discovery* and denying Erickson's *Motion to Compel Discovery*, the district court properly determined that Rule 60(a) does not permit Erickson to seek discovery in order to present additional evidence to the district court and that a motion to compel discovery on an underlying Rule 60(a) motion is a "fruitless endeavor." (Appx. at 73). The district court further recognized that its *Order to Compel Discovery* was made in error as Rule 60(a) does not permit a court to receive additional evidence to amend a judgment. (Id.)

[¶12] On May 15, 2015, the district court also issued a *Memorandum and Order Granting Plaintiff's Renewed Motion to Correct Judgment* pursuant to which it ordered that the Olsens shall reimburse the Estate of Clarence Erickson for any fees paid by Clarence associated with the preparation and filing of the documents transferring title to the real property, any payments received by the Olsens on any mineral interests involving said real property while the real property was in the Olsen's respective possession, and the reasonable rental value of the real property from the time of the transfer until its return to the Estate of Clarence L. Erickson. (Appx. at 75-82). Again, no evidence had

been presented by Erickson, and no findings were made by the district court, regarding such additional claims for relief. A *Second Amended Judgment* was entered on May 18, 2015. (Appx. at 83-85). The Olsens subsequently filed a *Notice of Appeal* in this matter with the Clerk of the North Dakota Supreme Court on May 20, 2015. (Appx. at 86-87).

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED IN GRATING ERICKSON'S *RENEWED MOTION TO CORRECT JUDGMENT* AND ENTERING ITS *SECOND AMENDED JUDGMENT*

A. Standard of Review.

[¶13] Upon review of a district court's granting of a motion to amend a judgment under N.D.R.Civ.P. 60(a), this Court applies an abuse of discretion standard. See Kukla v. Kukla, 2013 ND 192, ¶ 1, 838 N.W.2d 434. "A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Id. at ¶ 24. As discussed hereinafter, the district court abused its discretion in granting Erickson's *Renewed Motion to Correct Judgment* thereby awarding substantive relief beyond the scope of Rule 60(a) and for which no evidence was presented or findings made by the district court.

B. The district court abused its discretion by awarding Erickson substantive relief beyond the scope of N.D.R.Civ.P. 60(a) and for which no evidence exists in the record.

[¶14] Under Rule 60(a) of the North Dakota Rules of Civil Procedure, a district court may correct "a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Kukla v. Kukla, 2013 ND 192, ¶ 11, 838 N.W.2d 434. The full language of Rule 60(a) provides:

The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found

in a judgment, order, or other part of the record. The court may do so on motion or on its own, with notice. But after an appeal has been docketed in the Supreme Court and while it is pending, such a mistake may be corrected only with the Supreme Court's leave.

N.D.R.Civ.P. 60(a). In setting forth the standard for correcting a judgment under Rule 60(a) this Court has explained 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 & Paint Co. v. Randall, 2004 ND 4, ¶ 5, 673 N.W.2d 261 (internal citations omitted). "Rule 60(a) was not designed to affect substantive portions of a judgment or order, nor to act as a substitute for appeal." Id. "The Rule is appropriately utilized only for the correction of irregularities which becloud but do not impugn the judgment." Id. This Court has further made clear that "Rule 60(a) is not a substitute for an appeal on the merits" and is "not a vehicle for relitigating matters that have already been litigated and decided, nor to change what has been deliberately done." Id.

[¶15] In determining whether an amendment to a judgment under Rule 60(a) is proper, "[i]t must be determined whether a substantive change or amendment was made or whether the amended conclusions and judgment were in the nature of corrections." Kukla, 2013 ND 192, ¶ 11, 838 N.W.2d 434 (internal citations omitted). In this regard, this Court has previously explained the distinction between clerical and substantive amendments:

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.

Id. at ¶ 12 (citing Roth v. Hoffer, 2006 ND 119, ¶ 9, 715 N.W.2d 149). A correction under Rule 60(a) “must be based on, and must be a reflection of, the record available to the court at the time of the original judgment, not an attempt to change the original judgment after the fact.” Id. at ¶ 35 (Kapsner, J., dissenting) (citing Gruebele v. Gruebele, 338 N.W.2d 805, 811-12 (N.D.1983)). “There is no ‘clerical mistake’ in a judgment if it accurately reflects uncontroverted evidence in the proceedings.” Fargo Glass & Paint Co., 2004 ND 4, ¶ 6, 673 N.W.2d 261.

[¶16] In this case, the district court erred by amending its November 5, 2013 *Amended Judgment* to award Erickson additional relief in the form of expenses and income derived from the vacated real estate transfers for which no evidence exists in the record. The district court’s findings do not include even a passing reference to any fees paid by Clarence associated with the preparation and filing of the documents transferring title to the real property, any payments received by the Olsens on any mineral interests involving said real property while the real property was in the Olsen’s respective possession, or the reasonable rental value of the real property. (Appx. 16-35). Not only did Erickson fail to seek recovery of any such amounts, he did not present any evidence as to these matters at trial. Accordingly, based on the lack of a record as to the additional relief awarded to Erickson under the *Second Amended Judgment*, it is impossible to say that the relief awarded by the district court’s original judgment was the result of an irregularity or “clerical mistake or a mistake arising from oversight or omission” as contemplated by Rule 60(a).

[¶17] Although the district court based its decision to grant Erickson's *Renewed Motion to Correct Judgment* on its purported intent to "put the parties back to their positions at the time of the now invalidated transfers of real property" (Appx. at 81), as discussed above, there is no reference to any expenses or income derived from the vacated real estate transfers in the record upon which the district court could have based its intention to award such relief to Erickson. By way of comparison, in granting the Olsens' *Motion to Correct Judgment*, evidence had been presented at trial, and a specific finding of fact made by the district court, that Clarence had sold and transferred the parcels in question to Dean and Susan Olsen and Bobby and Clee Raye Olsen for \$200 per acre. (Appx. at 20). In that instance, the district court's failure to account for said purchase prices is specifically the type of clerical oversight which Rule 60(a) exists to correct. To the contrary, the district court's amendment to the November 5, 2013 *Amended Judgment*, is a substantive amendment as an award of compensation from the vacated real estate transactions for which no reference exists in the record is more than a mere "blunder in execution." Rather, such an amendment is the result of a decision made in hindsight by the district court to exercise its discretion in a manner different from the way it was exercised in its original determination, and is outside the scope of a permissible Rule 60(a) correction.

[¶18] As Erickson failed to present any evidence as to the reimbursements awarded by the district court, the record is silent as to any expenses or income derived from the vacated real estate transfers. Unlike the district court's *Second Amended Judgment*, the district court's November 5, 2013 *Amended Judgment* is an accurate reflection of the record available to the district court at the time of its original judgment and reflects the

evidence in these proceedings. Erickson had the opportunity to conduct discovery and present evidence as to any expenses or income derived from the real estate transactions at earlier stages in these proceeding. However, as a result of his failure to do so, he is now bound by the finality and conclusiveness of the district court's November 5, 2013 *Amended Judgment*, as previously affirmed by this Court. See Conkins v. Frandsen, 136 N.W.2d 377, 380 (N.D. 1965) (A judgment on the merits is conclusive between the parties not only as to every matter which was litigated, but also as to every matter arising out of the same cause of action which might have been litigated). To affirm the district court's *Second Amended Judgment* would impermissibly allow Erickson to utilize Rule 60(a) as a vehicle for relitigating matters that have already been litigated and decided.

II. THE DOCTRINE OF RES JUDICATA BARS ERICKSON FROM RELITIGATING CLAIMS FOR ADDITIONAL SUBSTANTIVE RELIEF.

[¶19] The doctrine of res judicata, or claim preclusion, “bars courts from relitigating claims in order to promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.” Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 10, 791 N.W.2d 33 (citing Lucas v. Porter, 2008 ND 160, ¶ 16, 755 N.W.2d 88). As previously explained by this Court:

Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory.

Id. (citing Hager v. City of Devils Lake, 2009 ND 180, ¶ 10, 773 N.W.2d 420) (emphasis added). “Under res judicata principles, it is inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings.” Id. (citing Laib v. Laib, 2010 ND 62, ¶ 10, 780 N.W.2d 660). “The applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal. Id. (citing Ungar v. North Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16).

[¶20] The district court’s November 5, 2013 *Amended Judgment*, as affirmed on appeal by this Court in Erickson v. Olsen, 2014 ND 66, 844 N.W.2d 585, is final and conclusive as to all claims between the parties, including Erickson’s subsequent claims for expenses and income derived from the vacated real estate transfers which could have been raised and determined, but were not. *See* Missouri Breaks, LLC, 2010 ND 221, ¶ 10, 791 N.W.2d 33 (Res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to the parties and their privies in all other actions); *see also* Conkins, 136 N.W.2d 377, 380 (N.D. 1965) (A judgment on the merits is conclusive between the parties not only as to every matter which was litigated, but also as to every matter arising out of the same cause of action which might have been litigated). Accordingly, the district court erred in granting Erickson’s additional claims for relief which could have been raised and decided prior to entry of the November 5, 2013 *Amended Judgment*. The *Second Amended Judgment* ordering such additional relief must be vacated accordingly.

[¶21] As discussed above, Erickson had numerous opportunities at earlier stages in these proceedings to conduct discovery and assert his claims for any fees paid by

Clarence associated with the preparation and filing of the documents transferring title to the real property, any payments received by the Olsens on any mineral interests involving said real property while the real property was in the Olsen's respective possession, and reasonable rental value of the real property. However, Erickson failed to allege such claims prior to trial and presented no evidence as to such matters at the time of trial. Erickson first raised his additional claims for relief after the district court had entered its original *Judgment* and such claims were raised in the form of a countermotion to the Olsens' *Motion to Correct Judgment*. (Docket ID # 64). Because a previous appeal had been filed, the Olsens sought a remand from this Court to permit the district court to consider their *Motion to Correct Judgment*. (Appx. at 41-42). Erickson did not seek a remand to have his countermotion considered by the district court. The district court subsequently entered its *Amended Judgment* accounting for the re-payment of the purchase prices in relation to the voided real property transfers, and this Court retained jurisdiction of the case. Again, Erickson did not seek a remand to have his countermotion considered by the district court.

[¶22] On appeal, this Court affirmed the district court. (Appx. at 50-56). Under the doctrine of res judicata, the district court's *Amended Judgment* became final and conclusive as to all claims between the parties, including Erickson's claims for expenses and income derived from the vacated real estate transfers which could have been raised and determined. Accordingly, Erickson was barred from relitigating these claims and should not have been permitted to rehash such additional claims for relief which could have been raised and considered by the district court earlier in these proceedings. To affirm the district court's *Second Amended Judgment* would fly in the face of res judicata

and the finality of judgements which exist to promote certainty, avoidance of multiple litigation, avoidance of wasteful delay and expense, and the conservation of judicial resources. The very fact that the above-captioned case is on appeal for a second time is the direct result of the district court's willingness to permit Erickson to relitigate claims for additional relief and is precisely the type of problem which res judicata is designed to prevent.

CONCLUSION

[¶23] For the reasons discussed above, the district court erred in granting Erickson's *Renewed Motion to Correct Judgment* and entering its *Second Amended Judgment*. The additional relief awarded Erickson by the district court for expenses and income derived from the vacated real estate transfers at issue is beyond the scope of Rule 60(a) correction and no evidence exists in the record to support such relief. Furthermore, under the doctrine of res judicata, the district court's November 5, 2013 *Amended Judgment*, as affirmed on appeal by this Court in Erickson v. Olsen, 2014 ND 66, 844 N.W.2d 585, is final and conclusive as to all claims between the parties, including Erickson's subsequent claims for additional relief. Accordingly, the Olsens respectfully request that this Court reverse the district court's *Second Amended Judgment*, entered May 18, 2015, and reinstate the *Amended Judgment*, dated November 5, 2013.

Dated this 31st day of August, 2015.

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CERTIFICATE OF SERVICE

[¶24] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 24th day of August and emailed to the following:

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