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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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.	**Supreme Court No. 20150153** **(Burleigh County Case No. 08-2011-CV-2612)**

BRIEF OF APPELLEE

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

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STATEMENT OF ISSUES

[1] I. Whether the district court awarded Erickson substantive relief beyond the scope of N.D.R.Civ.P. 60.

II. Whether Erickson is attempting to relitigate claims for substantive relief.

STATEMENT OF CASE

[2] The appellee agrees with the appellant's statement of the case.

STATEMENT OF FACTS

[3] No additional facts have been presented since the opinion in Erickson v. Olsen, 2014 ND 66, 844 N.W.2d 585. As such, the appellee agrees with the general statement of facts presented by the appellant, and as presented in Erickson.

LAW AND ARGUMENT

I. Whether the district court awarded Erickson substantive relief beyond the scope of N.D.R.Civ.P. 60.

A. Standard of Review

[4] The appellee agrees with the appellant that a district court's determination of a N.D.R.Civ.P. 60(a) order is reviewed using the abuse of discretion standard. 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.

B. Law and Argument

[5] The appellants' entire argument is centered on one basic question; whether a substantive change was made, or whether the original judgment needed clarification due to a blunder in execution.

[6] It is clear that if the trial court were attempting to change its mind, the Rule 60 motion should fail. Kukla v. Kukla, 2013 ND 192, ¶ 11, 838 N.W.2d 434. On the other hand, if the trial court were attempting to "make the judgment speak the truth" the trial court's decision must be affirmed. Fargo Glass and Paint Co. V. Randall, 2004 ND 4 ¶ 5, 673 N.W.2d 261.

[7] Generally speaking, Rule 60(a) can only be used to make a judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced. Gruebele v. Gruebele, 338 N.W.2d 805 (N.D. 1983). "Rule 60(a) was not designed to affect the substantive portions of a judgment or order" and is appropriately used only to correct "irregularities which becloud but do not impugn the judgment." Id.

[8] There is no dispute as to the trial court's intent in its Memorandum Opinion dated March 12, 2013. In relation to the voided transfers of real and personal property, the

parties were to be put back to their original positions. This is specifically indicated in the previously filed briefs by both parties, and in the Court's August 21, 2014 Order (docket entry #106) which states, "Both parties have correctly interpreted this Court's intent "to put the parties back to their original positions." It is simply the petitioners' position that the estate of Clarence Erickson should be put back to its rightful position.

[9] It would have been unreasonable to interpret the Memorandum Opinion to hold the respondents would not be repaid the funds they paid for the real property. It is likewise unreasonable to interpret the Memorandum Opinion to hold the estate of Clarence Erickson should not recoup rents, mineral bonuses, etc from the use of the land by the respondents.

[10] The respondents had no problem getting reimbursed for their purchase price, but are not willing to pay a reasonable amount to use the land they wrongfully acquired.

[11] 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. Fargo Glass and Paint Co. V. Randall, 2004 ND 4 ¶ 5, 673 N.W.2d 261. The district court made 100% clear its intention in issuing the original decision. The district court has specifically stated that any omission or oversight were just that, and the court is not "changing its mind..." which would be considered a substantive change. The substance of the trial court's decision has not been altered.

[12] Both parties agree with the standard stated in Roth v. Hofer, 2006 ND 119, ¶ 9, 715 N.W.2d 149:

> 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. *See United States v. Griffin,* 782 F.2d 1393, 1397 (7th Cir.1986).

[13] The trial court makes clear in its May 15, 2015 Order that the original intent was to

put the parties back to their original positions. App. 81, ¶16.

[14] The federal courts have also looked at this issue. The district court may correct omissions so long as those corrections are limited to clarification of matters intended to be implied or subsumed by the original judgment, rather than a change of course or a modification to the intended legal effect of a judgment. Fed.Rules Civ.Proc.Rule 60(a), Garamendi v. Henin, 683 F.3d 1069 (9th Cir. 2012).

[15] It is not at all unusual for a party to a litigation to have to turn over a piece of property to another individual. For example, a spouse may needs to turn over a house, car, etc.. The ex-spouse may not know until the court has made its decision that he/she is receiving the house, car, etc.. The judgment in such a situation would simply state that the spouse is award the house... (likely subject to mortgage...). The judgment would not state that house contains plumping, a hot water heater, kitchen cabinets...

[16] If the vindictive spouse completely guts the house prior to turning it over to his ex he/she would have relief despite not having the specifics listed in the judgment. The no-good spouse was unjustly enriched by removing the items and the ex-spouse was damaged. Such is the case in the matter before the Court. The value of the estate of Clarence Erickson has been diminished by the wrongful use/acquisition of the real property.

[17] As the amendment to the judgment was solely to state specifically the trial court's intention, and not to change or modify the terms of the judgment, the trial court's order must be affirmed.

II. Erickson is not attempting to relitigate claims for substantive relief

[18] The appellee does not dispute the appellant's statements concerning the standards of the doctrine of res judicata. The appellee does not believe the doctrine is applicable to this matter. The underlying issue at hand is whether the district court correctly applied Rule

60(a).

[19] Erickson contends that a final and conclusive judgment has been issued, and the trial courts' stated intention does not cause a substantive change. As such, no new issues are being brought, and res judicata does not apply.

[20] The initial petition in this matter asked that the various transfers by declared "invalid and rescinded," and for any other relief as the court may deem necessary and proper. The respondents' response to the initial petition asks that the petition be denied, and "grant the respondents such relief as the Court deems just and proper."

[21] There was no specific request by the respondents to be repaid the purchase price of the real property if the transactions were voided. Likewise, there is no specific request for reasonable rent, etc. for the respondent's use of the property which was wrongfully acquired. It is the position of the petitioner (and also the respondent/appellant by the filing of their prior Motion to Correct Judgment), that it was always implied by both parties that if the original petition is granted that the parties need to be put back in their original positions.

[22] The November 5, 2013 Order on the respondent's Motion to Correct Judgment granted logical relief to the respondents to put them back to their original position. It was the district courts intention for this relief to be reciprocated.

[23] To put the parties back to their original position should not be an onerous task. The appellee's are attempting to profit from their conduct which was already determined to be wrongful. Should the appellees continue with their position, a Motion for Contempt will need to be filed for their failure to follow the directions of the trial court.

CONCLUSION

[24] For the foregoing reasons, Mr. Erickson respectfully requests that the Orders and Judgment be affirmed.

Respectfully submitted this _23th_ day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the _23_ day of September, 2015, the Brief of Appellee was served by first-class mail with postage prepaid, facsimile transmission or by electronic mail to all parties as follows:

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Respectfully submitted this 28th day of September, 2015.

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