20150153
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 7, 2015
STATE OF NORTH DAKOTA

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' REPLY TO APPELLEE'S 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

Sheldon A. Smith #04062
David J. Smith #06610
Tyler J. Malm #07575
SMITH BAKKE PORSBORG SCHWEIGERT ARMSTRONG
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

COURT RULES:

LAW AND ARGUMENT

[¶1] Appellants Dean Olsen, Susan Olsen, Bobby Olsen, Clee Raye Olsen, and Marion Bergquist (collectively the "Olsens") submit this Reply Brief under N.D.R.App.P. 28(d). Appellee Curtis L. Erickson ("Erickson") agreed with the Olsens' Statement of the Case and Statement of the Facts as established by their *Appellants' Brief*.

I. The district court misinterpreted and misapplied Rule 60(a) in granting Erickson's *Renewed Motion to Correct Judgment* and upon entering its *Second Amended Judgment.*

[¶2] The parties agree that an "abuse of discretion" standard of review applies to a district court's determination of a Rule 60(a) motion to amend a judgment. (*Brief of Appellee* at ¶ 4). "A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Kukla v. Kukla, 2013 ND 192, ¶ 24, 838 N.W.2d 434. In this case, the district court misinterpreted and misapplied Rule 60(a) in granting Erickson's *Renewed Motion to Correct Judgment* and entering its *Second Amended Judgment*.

[¶3] 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, 2013 ND 192, ¶ 11, 838 N.W.2d 434. "Rule 60(a) was not designed to affect substantive portions of a judgment or order, nor to act as a substitute for appeal." Fargo Glass & Paint Co. v. Randall, 2004 ND 4, ¶ 5, 673 N.W.2d 261. Accordingly, 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). 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)).

[¶4] In the *Brief of Appellee*, Erickson relies entirely on the district court's stated intention to put the parties back to their original positions regarding the voided real estate transfers at issue in this case. (*Brief of Appellee* at ¶ 8). Although the district court based its decision to grant Erickson's *Renewed Motion to Correct Judgment* on such an intent, there was insufficient evidence in the record for the district court to award the specific relief requested by Erickson in his Rule 60(a) motion. Accordingly, the additional relief awarded to Erickson was improper under Rule 60(a); it was not a correction, but a substantive change to the district court's *Amended Judgment*, dated November 5, 2013. Erickson's brief fails to acknowledge that under a Rule 60(a) motion, the district court is bound by the evidence (or as is the case here, the lack thereof) presented by the parties and available to the court at the time of the original judgment. *See* Kukla, 2013 ND 192, ¶ 35, 838 N.W.2d 434 (Kapsner, J., dissenting) (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."). Erickson's silence on these issue in this appeal speaks volumes.

[¶5] The district court misinterpreted and misapplied Rule 60(a) 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 specific language of the *Second Amended Judgment* states that:

> Dean and Susan Olsen shall reimburse the Estate of Clarence L. 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 Dean and Susan Olsen on any mineral interests involving said real property while the real property was in Dean and Susan Olsen's possession, and the reasonable rental value of the real property from the time of transfer until its return to the Estate of Clarence L. Erickson.
>
> Bobby and Clee Raye Olsen shall reimburse the Estate of Clarence L. 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 Bobby and Clee Raye Olsen on any mineral interests involving said real property while the real property was in Bobby and Clee Raye Olsen's possession, and the reasonable rental value of the real property from the time of transfer until its return to the Estate of Clarence L. Erickson.

(Appx. at 84-85 at ¶¶ 7-8).

[¶6] The district court's March 12, 2013 Memorandum and findings do not include a passing reference to any fees paid by Clarence Erickson ("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). Similarly, the trial transcript is without any exhibit, testimony, or evidence of such information. Simply put, Erickson failed to seek recovery of any such amounts and failed to present any evidence as to these matters at trial. In order for the Olsens to now satisfy the *Second Amended Judgment*, the Olsens would need to surrender an uncertain sum to the estate. This uncertainty is the precise reason why the monetary relief now sought to be included in the *Second Amended Judgment* should have been established at trial.

[¶7] Erickson argues that "[i]t 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." (*Brief of Appellee* at ¶ 9). However, 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. The same cannot be said regarding Erickson's claim for repayment of amounts for which no evidence was presented at trial or specific findings made by the district court.

[¶8] Erickson failed to present any evidence as to the reimbursements awarded by the district court and the record is silent as to any expenses or income derived from the vacated real estate transfers. 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).

[¶9] 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). 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." 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. In the present case, the district court misinterpreted and misapplied Rule 60(a) in granting Erickson's *Renewed Motion to Correct Judgment* and entering its *Second Amended Judgment*.

II. The *Amended Judgment*, dated November 5, 2013, previously affirmed on appeal is final and conclusive as to all claims between the parties.

[¶10] In response to the Olsens' second argument on appeal, that the doctrine of res judicata bars Erickson's additional claims for expenses and income derived from the vacated real estate transfers, Erickson contends that because "a final and conclusive judgment has been issued, and the trial court's stated intention does not cause a substantive change," no new claims are being brought by Erickson. (*Brief of Appellee* at ¶ 19). However, Erickson's argument misconstrues the legal ramifications of the district court's November 5, 2013 *Amended Judgment* under the doctrine of res judicata, or claim preclusion.

[¶11] "[R]es 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." Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 10, 791 N.W.2d 33 (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. "The applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal. Id.

[¶12] The district court erred in granting Erickson's claims for relief which could have been raised and decided prior to entry of the November 5, 2013 *Amended Judgment*. The 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 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; *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, Erickson was barred from relitgating 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.

[¶13] Erickson had the opportunity before trial to conduct discovery on the issues of costs and income; he did not. Erickson had the opportunity to present evidence at trial on these issues; he did not. Erickson had the opportunity to address these issues in post-trial motions; he did not. Erickson even had the opportunity to raise these issues during the first appeal; again, he did not. Now, eighteen months after this Court ruled in Erickson v. Olsen, 2014 ND 66, 844 N.W.2d 585, the Olsens find themselves subject to additional

claims for costs/income and additional (and unnecessary) expenses of litigation due to the district court's misinterpretation and misapplication of Rule 60(a) and res judicata.

CONCLUSION

[¶14] For the reasons discussed above, 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 7th day of October, 2015.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: */s/ Tyler J. Malm*
Sheldon A. Smith (Atty. ID #04062)
ssmith@smithbakke.com
David J. Smith (Atty. ID #06610)
dsmith@smithbakke.com
Tyler J. Malm (Atty. ID # 07575)
tmalm@smithbakke.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

CERTIFICATE OF SERVICE

[¶15] 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 7th day of October and emailed to the following:

Daniel J. Nagel
Kelsch, Kelsch, Ruff & Kranda
103 Collins Ave.
P.O. Box 1266
Mandan, ND 58554-7266
dnagle@kelschlaw.com

By: */s/ Tyler J. Malm*
Tyler J. Malm