

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust

Timothy Betz,	Respondent and Appellee	}	
		}	Supreme Court Case No.
v.		}	20210144
		}	
Emelia A. Hirsch, aka Emelia Hirsch, aka		}	Burleigh County
Emilia Hirsch, Carolyn Twite and Duane Hirsch,	Petitioners and Appellees	}	South Central Judicial District
		}	Case No. 08-03-C-2228
and		}	
Marlene Betz,	Interested Party and Appellee	}	
and		}	
Allen Betz,	Interested Party and Appellant	}	

**Appeal from the March 17, 2021 Order and
Reissued January 31, 2020 Order**

APPELLANT'S REPLY BRIEF

Allen Betz
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Burnsville, MN 55337
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Appellant

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LAW AND ARGUMENT

I. Standard of Review.

[¶1] 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.

[¶2] Questions of law are fully reviewable on appeal. Kienzle v. Selensky, 2007 ND 167, 9, 740 N. W.2d 393. Interpretation of a statute is a question of law fully reviewable on appeal.

[¶3] Pryatel v. T.E., 2007 ND 166, 7, 740 N.W.2d 100. The primary objective in interpreting a statute is to determine the legislature's intent. *Id.*

[¶4] Questions of law are reviewed by the North Dakota Supreme Court de nova, while a clearly erroneous standard exists for factual findings and matter of law in this case.

II. The issues raised in this appeal are “not” precluded as a matter of law.

[¶5] The July 16, 2008 Order cannot be a valid Final Judgement. The Court made five (5) major errors in this case prior to entering its July 16, 2008 Order.

1. The principles of res judicata prevented the Court from re-litigating the September 7, 2005 order for reformation of the irrevocable trust.
2. As a Matter of Law, N.D.C.C. § 59-19-02 (2) (c) prevented the Court's application of N.D.C.C. § 59-12-15 in this matter, as the case had been proceeding prior to August 1, 2007.
3. Finality of Judgment precluded the District Court's attempt to modify or change the previously recognized judgement of Findings of Fact, Conclusions of Law, Judgement or Order. The finality of the judgments precluded the District Court from modifying or changing its own January 11, 2005 Order, September 7, 2005 Order and May 2, 2008 Order without any due process. The District Court's July 16, 2008 order would void the Finality of the Judgements.
4. The Court erred as the July 16, 2008 order takes my 1/13th share of the Irrevocable Trust and my Monies.
5. The Trustee failed to file the Federal and State Irrevocable Trust 2007 income tax return.

[¶6] Carolyn and Duane make it sound as if there had been no other final judgements for reformation of the irrevocable trust issued in this case. Carolyn and Duane as well as the Court fail to realize that the September 7, 2005 order for reformation of the irrevocable trust had been in effect for almost three (3) years before the Court entered the July 16, 2008 order for reformation of the irrevocable trust.

[¶7] Carolyn and Duane as co-trustees of the irrevocable trust submitted their application for reformation of the irrevocable trust and plan for distribution of the irrevocable trust assets in 2005. (A at 56). The Court reformed the irrevocable trust and ordered liquidation of all of the irrevocable trust assets by December 31, 2007. Ignoring these facts, Carolyn and Duane ask the Court to again reform the irrevocable trust. Almost three (3) years later in 2008 Carolyn and Duane make virtually the same arguments.

[¶8] It is fitting that Carolyn and Duane’s own words be used against them, quoting [¶9] of the Appellees Brief as it relates to the September 7, 2005 irrevocable trust reformation order. (A at 87). Carolyn and Duane wanted the irrevocable trust reformed in 2005 which the Court granted.

“[¶9] “Under the doctrine of res judicata, a valid, existing final judgment from a court of competent jurisdiction is **conclusive** on the parties . . . in all other actions with regard to the issues raised, or those that could have been raised, and determined therein.” Glass v. Glass, 2018 ND 14, ¶ 5, 906 N.W.2d 81 (quoting Jundt v. Jurassic Res. Dev., N. Am., L.L.C., 2004 ND 65, ¶ 6, 677 N.W.2d 209). Principles of res judicata **prevents courts** from **re-litigating claims** that were raised or could have been raised “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.”

[¶9] The principles of res judicata prevented the Court from re-litigating the reformation of the Emelia Hirsch, June 9, 1994, Irrevocable Trust. The Court's Final Judgement entered on September 7, 2005 resolved all of the issues relating to the reformation the irrevocable trust and the irrevocable trust assets. The Court was mandated to dismiss Carolyn and Duane's 2008 Motion for Reformation of the Irrevocable Trust as required by the principles of res judicata.

[¶10] As a Matter of Law, N.D.C.C. § 59-19-02 (2) (c) prevented the Court's application of N.D.C.C. § 59-12-15 in this matter, as the case had been proceeding prior to August 1, 2007.

[¶11] Finality of Judgment precluded the District Court's attempt to modify or change the previously recognized judgement of Findings of Fact, Conclusions of Law, Judgement or Order. The finality of the judgments precluded the District Court from modifying or changing its own January 11, 2005 Order, September 7, 2005 Order and May 2, 2008 Order without any due process. The District Court's July 16, 2008 order would void the finality of the judgement in the Court's previous judgements or orders.

[¶12] The District Court Judge cannot alter its prior order without compliance with due process of law pursuant to N.D.R.Civ.P. 60, and other applicable law.

[¶13] The Court did not require Carolyn and Duane to adhere to N.D.R.Civ.P. Rule 60 to allow for due process in this case. Carolyn and Duane never challenged the January 11, 2005 (A at 53) or September 7, 2005 (A at 87) final judgements.

[¶14] The Court ordered distribution of my 1/13th share of the irrevocable trust assets to me as the January 11, 2005 (A at 53) and September 7, 2005 (A at 87) Final Judgements required. The Court did not resolve the issue that the irrevocable trust assets had not been liquidated and distributed to me by the December 31, 2007 deadline. I am a beneficiary of the Emelia Hirsch, June 9, 1994, Irrevocable Trust. At the January 3, 2005 hearing my attorney Mr. Ruff proved that

I was entitled to my 1/13th share of the irrevocable trust. Quote from the January 11, 2005 order, (A at 53), “There was no evidence presented which would provide a basis for the Court to do anything but order distribution in this matter.” The July 16, 2008 order did not change these facts or final judgements. The trustee listed all of the irrevocable trust assets in his 2007 Irrevocable Trust Trustee Annual Report & Accounting. (A at 94). The Court confirmed and approved the listing of the irrevocable trust assets in its May 2, 2008 order. (A at 120).

[¶15] The Court did not resolve the 2007 irrevocable trust income tax return filing requirement to file the 2007 income tax return. The trustee filed his 2007 Irrevocable Trust Trustee Annual Report & Accounting (A at 94) and Motion to approve the 2007 Irrevocable Trust Trustee Annual Report & Accounting (A at 107). The Court confirmed and approved the 2007 Irrevocable Trust Trustee Annual Report & Accounting on May 2, 2008. (A at 120). The Irrevocable Trust has never filed its 2007 income tax return. There is no dispute that my 1/13th share of the irrevocable trust earned income as my attorney Mr. Ruff did not object to the 2007 Irrevocable Trust Trustee Annual Report & Accounting at the May 2, 2008 hearing.

[¶16] Mr. Wagner, the trustee submitted his Trustee's Final Report & Accounting, dated September 19, 2008, (A at 122), the trustee tells the Court and beneficiaries that “The tax return for 2007 has not been filed.

[¶17] I and my family are aligned in this matter. Each one of us has a vested interest in this matter as the Court had already ruled on our individual 1/13th share of the Emelia Hirsch June 9, 1994, Irrevocable Trust assets. As I told the Court in my March 18, 2021 letter, (A at 140), I am not Timothy Betz or Marlene Betz and I did not take up the mantle (acting in concert with Marlene and Tim) in their continued attempts to re-litigate matters. I represent myself alone in this matter for my 1/13th share of the Emelia Hirsch June 9, 1994, Irrevocable Trust assets.

[¶18] The Court entered two (2) reformation orders in this case with only one (1) being a final judgement and covered under the principles of res judicata that would be the September 7, 2005 Reformation of the Trust Order, (A at 87), not the July 16, 2008 “nunc pro tunc” Order. (A at 121). The record in this case is clear that not one beneficiary or trustee appealed the September 7, 2005 Reformation of the Trust Order, while the July 16, 2008 “nunc pro tunc” Order has been contested and appealed since the Court entered the order. It is noted that the record also shows it was Carolyn and Duane’s request to reform the irrevocable trust in 2005 and it was their September 7, 2005 Reformation of the Trust Order that they have never disputed.

[¶19] As far as this Court affirming the July 16, 2008 order goes in the Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225. The North Dakota Supreme Court's opinion is not the final word on this case because their opinion was not based on the facts of the case nor was the decision on the merits. Instead, the Court decided the case based on an appellant court technicality, i.e. raising an issue for the first time on appeal is not allowable in an appellant court.

CONCLUSION

[¶20] 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.

[¶21] The January 11, 2005 and September 7, 2005 final orders were relied upon to be final judgements. The Court had ordered that I was entitled to my 1/13th share of the irrevocable trust and ordered distribution. The Court ordered the reformation of the irrevocable trust on

September 7, 2005. (A at 87). The Court also ordered how and when I would receive my 1/13th share of the irrevocable trust.

[¶22] The principles of res judicata prevented the Court from re-litigating the reformation of the Emelia Hirsch, June 9, 1994, Irrevocable Trust. The Court's Final Judgement entered on September 7, 2005 resolved all of the issues relating to the reformation the irrevocable trust and the irrevocable trust assets. (A at 87).

[¶23] N.D.C.C. § 59-19-02 (2) (c) prevented the Court's application of N.D.C.C. § 59-12-15 in this matter, as the case had been proceeding prior to August 1, 2007.

[¶24] The Court abused its discretion and erred in this matter which warrants the July 16, 2008 order being vacated.

Dated this 29th day of June, 2021.

/S/ Allen Betz
Allen Betz

Certificate of Compliance

[¶25] The Appellant Reply Brief that I submit, I hereby certify, that this document complies with the page limitation and has 9 pages in the document.

/S/ Allen Betz
Allen Betz

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Betz
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(952) 892-3251
Appellant

Supreme Court No. 20210144
District Court
Burleigh Co. Case No. 08-03-C-2228

In the Matter of the Emelia Hirsch June 9, 1994, Irrevocable Trust

Appeal from March 17, 2021 Order and
Reissued January 31, 2020 Order
South Central Judicial District Court,
Honorable Bobbi Weiler, Presiding

AFFIDAIT OF SERVICE

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 29th day of June, 2021, I served copies of the following:

APPELLANT'S REPLY BRIEF

By placing true copies in postage paid envelopes addressed to the persons named below, at the addresses stated below which are the last known addresses of the addressees, and by depositing said envelopes in the United States mail, Burnsville, Minnesota;

Sheldon Smith: via e-mail only - ssmith@smithporsborg.com

Marlene Betz: via e-mail only - famassist@aol.com

Timothy Betz: via e-mail only - tbetz@embarqmail.com

I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this declaration is executed on the 29th day of June, 2021.

/S/ Allen Betz
Allen Betz