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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, ex rel, B.T.S., minor child, by and through Amy Salter Plaintiffs and Appellees, vs. Tyler Vetter, Defendant and Appellant.	Supreme Court No. 20230031 Burleigh County District Court Case No. 08-2013-DM-00240

Appeal from the Fifth Amended Judgment

Dated December 30, 2022

District Court, Burleigh County, North Dakota
The Honorable James Hill, Presiding

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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1) I. Statement of Issues

2) Did the lower court err in deciding it had authority under N.D.R.Civ.P. Rule 60(a) to partially vacate a judgment?

3) If the lower court did have the authority to partially vacate a judgment under Rule 60(a) did the lower court mistakenly apply recent case law to its decision?

4) II. Statement of the Case

5) This is an appeal from a Fifth Amended Judgment. (R179). The appellant (hereinafter "Tyler," "Defendant" or "Mr. Vetter") is appealing the lower court's decision to invoke Rule 60(a) to partially vacate a judgment and he is appealing the court's application of case law to its decision that vacating the decision was somehow required. The Fifth Amended Judgment vacated a portion of the Fourth Amended Judgment that required the appellee (hereinafter "Amy," "Plaintiff," or "Ms. Salter". (R179:11:¶45).

6) The Fourth Amended Judgment was entered on August 15, 2022 (R:159). This judgment was never appealed. The notice of entry of judgment for the Fourth Amended Judgment was filed and served on August 17, 2022 (R:160 and R: 161). The Court then made its Order Pursuant to Rule 60(a) N.D.R.Civ.P. To Correct Judgment and Order Denying Motion for Contempt Directed at Plaintiff Salter dated December 5, 2022 (R:175). The Fifth Amended Judgment was then filed and signed. Tyler timely filed a notice of appeal and ordered a transcript in this matter. Tyler now appeals the judgment in this matter.

7) **III. Facts of the Case**

8) The lower court did lay out most of the procedural history in this matter in its Order Pursuant to Rule 60(a) N.D.R.Civ.P. To Correct Judgment and Order Denying Motion for Contempt Directed at Plaintiff Salter dated December 5, 2022 (R:175). There is a companion case between Amy Salter and Tyler Vetter that deals with the residential responsibility for the minor child of the parties, B.S. Case No. 08-10-C-02928. Child support was established in this case initially and then Mr. Vetter instituted the action to establish residential responsibility in Case No. 08-10-C-02928.

9) Tyler was awarded residential responsibility for B.T.S. in an *ex parte* Interim Order signed January 11, 2022. (R:149 in Case No. 08-10-C-02928) The *ex parte* interim order was continued and Tyler has exercised primary residential responsibility over the child since January 11, 2022. (R:175:6:¶24). At the same time that Mr. Vetter made a motion to amend primary residential responsibility, he mistakenly filed a motion to amend child support in that case. The motion to amend child support should have been filed in this case and a motion to amend child support and for relief from judgment under N.D.R.Civ.P. Rule 60 was filed on May 24, 2022.

10) On May 18, 2022, in its Memorandum, Findings of Fact, Conclusions of Law, and Order for Amended Judgment Modifying Residential Responsibility (R:219 in Case No. 08-10-C-02928]) and Court Ordered Parenting Plan (R:220) in

Case No. 08-10-C-02928, the Court determined that the temporary grant of primary residential responsibility to the defendant would be made permanent.

11) The clerk of court entered the Fourth Amended Judgment in this matter following an August 2, 2022 Order Amending Child Support and Granting Relief from Third Amended Judgment. (R:156). On October 19, 2022, Defendant Tyler Vetter moved the Court for an Order holding Amy Salter in contempt for her failure to repay to him child support of $2,930 he had paid to her for the months of January through May 2022 as she was directed to do in ¶ 5 of the Fourth Amended Judgment. The Court issued an Order to Show Cause directed at Amy Salter on November 1, 2022. (R:169) The order for reimbursement of child support by Amy Salter to Tyler Vetter was the sole issue in the Order to Show Cause. No other motions were pending before the Court. The hearing took place on November 16, 2022. Tyler Vetter appeared with his attorney, Justin Hager, Bismarck, ND. Amy Salter appeared and represented herself. (R:1-2: ¶3-¶5)

12) At the hearing, the Court indicated to the parties that it wanted to raise the issue of the effect of Hamburger v. Hamburger on the Fourth Amended Judgment. (R:189:5) (R:189:36). At no point did the Court put the parties on notice that it was planning on invoking Rule 60(a) to vacate a portion of the Fourth Amended Judgment. The lower court only indicated that it wanted a brief on the effect that the Hamburger decision had on the Fourth Amended Judgment.

13) The Court allowed the parties to brief the issue it laid out. Mr. Hager did file a brief (R:173). As this Court can see there was never any briefing of

whether or not a lower court would have authority to vacate a judgment under Rule 60(a). If the Court had actually provided such notice, much of the case law that is found in this brief would have been in that brief.

14) Without a motion and without adequate notice, the Court entered its current Order that led to the Fifth Amended Judgment in this matter. Tyler now appeals the court's decision and the Fifth Amended Judgment. He asks for a full reversal of the Fifth Amended Judgment and reinstatement of the Fourth Amended Judgment.

15) **IV. Statement Regarding Oral Argument**: Tyler would ask for oral argument. Oral argument allows the Supreme Court to gain a better understanding of the issues presented. It also sometimes forces the other party to make concessions that affect the Supreme Court's Ruling. These concessions rarely come out in briefs.

16)**V. Standards of Review:**

17) The abuse of discretion standard applies to Rule 60(a) determinations. Erickson v. Olsen, 2016 ND 33, ¶11, 875 N.W.2d 535. An abuse of discretion occurs when the court acts in an arbitrary, unreasonable, or unconscionable manner, when its decision is not the product of a rational mental process leading to a reasoned decision, or when it misinterprets or misapplies the law. Woodward v. Woodward, 2009 ND 214, ¶ 6, 776 N.W.2d 567

18) **VI. Law and Argument**

19) **A.** The lower court erred in determining that Rule 60(a) allowed a lower court the ability to vacate an unappealed judgment.

20) This Court has examined a lower court's limited ability to invoke Rule 60(a). Under N.D.R.Civ.P. 60(a), 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." In Kukla v. Kukla, 2013 ND 192, ¶¶ 11–12, 838 N.W.2d 434, this Court described standards for applying N.D.R.Civ.P. 60(a):

> "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]." ' " *United States v. Stuart,* 392 F.2d 60, 62 (3d Cir.1968). The problem is essentially one of characterization. *Kelley v. Bank [Bldg. & Equip. Corp. of Am.*], 453 F.2d 774, 778 (10th Cir.1972). 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." *Kelley, supra.*
>
> '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.' (Citations, footnote omitted.) *Gruebele v. Gruebele,* 338 N.W.2d 805, 811–12 (N.D.1983) ; *see also Volk v. Volk,* 435 N.W.2d 690, 692 (N.D.1989). *Fargo Glass & Paint [Co. v. Randall,* 2004 ND 4], at ¶ 5[, 673 N.W.2d 261] quoting *First W. Bank v. Wickman,* 513 N.W.2d 62, 64 (N.D.1994). Thus, "[a] court may correct, [under] Rule 60(a), errors created by oversight or omission that cause the judgment to fail to reflect what was intended at time of trial." *Gruebele,* 338 N.W.2d at 811.

In considering federal case law interpreting F.R.Civ.P. 60, from which N.D.R.Civ.P. 60 was adopted, we have said "typical" clerical mistakes include transcription and mathematical errors, but "the federal rule authorizes a district court to correct ambiguities and errors of omission or oversight to clarify and reflect the court's intent when the initial judgment was entered." *Roth v. Hoffer,* 2006 ND 119, ¶ 9, 715 N.W.2d 149. We further discussed distinguishing between clerical and substantive mistakes: "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,* at ¶ 9 (quoting *Blanton v. Anzalone,* 813 F.2d 1574, 1577 n. 2 (9th Cir.1987)). This Court has also expressed its "preference for the use of the N.D.R.Civ.P. 60(b) procedure for relief from judgment, rather than the Rule 60(a) procedure, when a party seeks to change a previously entered judgment." *Fargo Glass & Paint Co.,* 2004 ND 4, ¶ 7, 673 N.W.2d 261.

21) This standard was again reiterated in Erickson v. Olsen, 2016 ND 33, ¶9, 875 N.W.2d 535 where this Court stated, "Our decisions have consistently recognized that N.D.R.Civ.P. 60(a) is not a substitute for an appeal and is not a vehicle to make substantive changes to a judgment."

22) Under the case law, it would appear pretty clearly that the lower court abused its discretion in determining Rule 60(a) gave it the authority to make the change it did in this case. The Fourth Amended Judgment was never appealed in this matter. The time for any appeal had long since passed when the lower court made its decision.

23) Under the Court's analysis, a lower court may not use rule 60(a) to make substantive changes to a judgment. The case law also points out that issues that cannot be corrected by Rule 60(a) are those "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."

24) In the case at hand, that is exactly what happened here. The lower court decided to change its mind because it believed a legal mistake had been made and it wanted to exercise its discretion in a different way than the way it had originally decided. This is exactly the type of decision that cannot be made through Rule 60(a). According to the case law, this Court should determine that the lower court abused its discretion and reverse the Fifth Amended Judgment while reinstating the Fourth Amended Judgment.

25) **B.** Even if the lower court had authority to vacate the Fourth Amended Judgment through Rule 60(a), lower court did not provide proper notice as required by the rule.

26) Although this issue is likely going to be moot because of the Court's primary decision on the first issue, the Court should also examine if Rule 60(a) was even properly followed by the lower court. The lower court cites the proper language of Rule 60(a) in its order. (R:175:4:¶14). In that same paragraph the court states that it did "notice the parties at the November 16, 2022 hearing that it believed the Supreme Court decision in Hamburger v. Hamburger prohibited retroactive modifications of child support under most circumstances and requested briefing on that issue." The lower court is absolutely correct in stating that it requested briefing. However, the court did not at any point indicate or put the parties on notice that it was intending to invoke Rule 60(a).

27) It is clear that notice is required by the rule even if a judge decides to invoke Rule 60(a) on its own. A lower court can invoke Rule 60(a), but it must

provide notice to the parties prior to doing so. There was never any notice that would give either party even an inkling that the court was planning on doing what it did in this case.

28) If the court had properly noticed its intention to invoke Rule 60(a), the above case law would have certainly been pointed out to the judge. Perhaps, this whole appeal could have been avoided if proper notice had been given. However, since the court did not even properly follow Rule 60(a), this Court should determine that an abuse of discretion certainly occurred in this matter.

29) **C.** Even if the lower court had authority to vacate the Fourth Amended Judgment through Rule 60(a), the lower court's application of case law in this matter was reversible error.

30) The lower court indicated to the parties that it was concerned about the impact of Hamburger v. Hamburger, 2022 ND 154 (N.D. 2022). In briefing the matter, the lower court correctly pointed out that the defendant asserted the Hamburger decision "did not really change the landscape of child support actions." (R:173:¶3). The rest of that paragraph in the defendant's brief, clearly provided context for this statement. The brief stated, that Hamburger reiterated that the only way to get relief from a vested child support obligation in a judgment is by seeking relief through Rule 60(b).

31) The Court then goes on to cite ¶18 of the Hamburger decision. This is exactly what the defendant was attempting to relay to the lower court. The Hamburger decision did not overturn Brakke v. Brakke, 525 N.W.2d 687, 689-90

(N.D. 1994). In the defendant's brief requesting relief from the Third Amended Judgment, the defendant points out the same language from Brakke. The defendant's brief pointed out that the only way to get relief from the judgment was through Rule 60, which is why the defendant made a motion under that rule.

32) In granting the original relief, the lower court specifically found it was granting relief under Rule 60(b). (R:159:¶4). In deciding that it was going to overturn its own decision, the lower court merely stated that the prongs of Brakke had not been met in this case. The lower court does not make any findings to suggest why Rule 60(b) would not apply to this matter. It does not make any analysis about Rule 60 really at all. The lower court just gets caught up in the language of 'retroactive modification of child support.'

33) The bottom line is that Hamburger does not in any way overturn Brakke. Thus, the case law remains unchanged in that if a litigant wishes to seek relief from a child support obligation in a judgment they must do so under Rule 60 and as laid out in Brakke. The lower court in Hamburger simply did not grant Mr. Hamburger's Rule 60 motion. The Supreme Court did not find an abuse of discretion in the Court's decision. In this sense, the Hamburger decision did not change the landscape at all on this issue and Brakke is still controlling case law.

34) In the case at hand, there were more than enough reasons to grant the defendant relief under Rule 60(b). As pointed out in post-hearing briefing that the Court requested:

"First, Tyler actually made the appropriate motion to modify child support back in January. However, he brought it in the residential responsibility case and not the actual child support case. This matter has the issue of child support bifurcated from the issue of residential responsibility. Therefore, the motion that Tyler did make needed to be filed into this case rather than the residential responsibility case. The parties were the same and even the judge assigned is the same in both cases. This was a matter of mistake, however, when analyzing whether or not to afford relief under Rule 60, that is exactly the type of information the Court can consider.

Amy Salter was put on notice that Tyler was seeking to amend child support as of January 2022. Even if the correct motion was made in the wrong case, Amy still received notice of it, she knew it was going to come up as an issue, and she knew that she was receiving child support for a child that did not live with her.

Further, the change of residential responsibility was actually made effective in January of 2022. It was at that time that there was an actual order placing the child primarily with Tyler. He had also by that time made his motion for a change of primary residential responsibility, which Brakke points out is a requirement for a Court to engage in the Rule 60 analysis (e.g. did the moving party make a timely motion to amend residential responsibility). Tyler certainly met this prong.

Next, we have circumstances that became aware to the Court prior to its order in this matter that also justified granting relief. The Court found out that Amy was dishonest about receiving child support. She indicated in the primary residential responsibility case that she was not receiving child support and there was a hold on it. Prior to the hearing in the child support case, Amy received a child support ledger showing her testimony to be false. At the child support hearing, she indicated that she checked her checkbook and she was receiving child support. Amy has a history of remembering the truth only when she is openly confronted with evidence, and she has a history of trying to hide the truth whenever she can.

At the hearing on the OTSC she once again tried to spin a story about not knowing she was receiving child support from January until May of 2022 until she was asked point blank about her prior testimony. Her credibility with the Court should be next to zero at this time.

The Court was aware then that she received the amount of $2,930 from January to May in child support. The Court was aware that she did not have residential responsibility of the child as there was an actual Interim Order that modified the same that became permanent. The Court was aware that she did not use any of the money to support the minor child. She was not paying any child support and the Court did not order to pay

any child support during this time. The Order only made her pay back what she was not entitled to receive in the first place.

35) Even if the Fourth Amended Judgment had been properly appealed, it is unlikely the Court would have found an abuse of discretion in the lower court's granting of Rule 60 relief. There was mistake and inadvertence in this matter. Mr. Vetter did timely file for a motion to amend child support. He did so on January 4, 2022. The only problem is due to the cases never being consolidated; the motion was filed in the wrong case. Mr. Vetter was granted primary residential responsibility on January 11, 2022, and Amy exercised no visitation from that point until the court made the decision permanent. She provided no care for the child; she provided no support. She lied about getting the money to the court.

36) There would have been more than enough reasons for a reviewing court to determine that there was no abuse of discretion in affording Rule 60 relief. It is unclear why the lower court determined that the prongs of Brakke were not met. However, what is clear is that the lower court misapplied the law in stating that Hamburger somehow required the lower court to overturn its previous decision. That is simply not a correct application of the case law. As the lower court misapplied the case law in this matter, the Court should also reverse the Fifth Amended Judgment and reinstate the Fourth Amended Judgment.

37) **VII. Conclusion**

38) For all the foregoing reasons, this Court should reverse the Fifth Amended Judgment and reinstate the Fourth Amended Judgment. The lower

court's decision to invoke Rule 60(a) in this matter cannot be supported by existing case law. As such, the lower court misapplied the law and abused its discretion. Further, this Court could also reverse as the lower court did not properly follow Rule 60(a) in providing notice, nor did the Court properly apply case law in this matter.

39) Dated this 26th day of April, 2023.

/s/ Justin D. Hager

Respectfully Submitted By
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CERTIFICATE OF SERVICE

40) I hereby certify that a true and correct copy of the Brief of Appellant were served electronically through the Supreme Court's electronic filing system on the 26th day of April 2023, to Steven Glenn Podoll at the following email address: bismarckcse@nd.gov.

41) Additionally, I certify that a true and correct copy of the Brief of Appellant was served on Amy Salter pursuant to Rule 5(b)(3)(C) on April 26, 2023 as all documents were mailed with postage duly prepaid to Amy Salter and addressed as follows: Amy Salter, 4202 Shoal Loop SE, Apt. #211, Mandan, ND

58554. Such address is the last known physical address of said plaintiff and appellee and said person is believed to be representing herself pro se at this time

/s/ Justin D. Hager

Attorney for Tyler Vetter Appellant

Certificate of Compliance

42) I hereby certify that this document complies with the type-volume limitation specified in N.D.R.App.P. Rule 32. This document uses a font of Times New Roman 13 font size. The brief does not exceed 38 pages for a principal brief as there are 18 total pages in the Appellant's Brief including all cover pages, table of authorities and table of contents.

/s/ Justin D. Hager

Attorney for Tyler Vetter, Appellant