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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cheri Poitra, State of North Dakota,	)	
	)	
Plaintiff and Appellees,	)	
	)	
vs.	)	Supreme Court No. 20180141
	)	Sheridan Co. No. 42-2017-DM-5
Shane Martin,	)	
	)	
Defendant and Appellant,	)	

APPEAL FROM THE ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT DATED APRIL 3, 2018.

STATE OF NORTH DAKOTA APPELLEE'S BRIEF

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[2] STATEMENT OF ISSUES

[3] I. Whether the District Court erred by denying Appellant's motion for relief from judgment.

[4] STATEMENT OF THE CASE

[5] Appellant, Shane Martin (Martin), is appealing the District Court's order denying his motion for relief from the Judgment entered on February 21, 2018. (App. 28).

[6] The Bismarck Regional Child Support Unit (BRCSU) prepared a Summons and Complaint, which were filed on September 26, 2017. (Appellee's App. 4, 5). On September 19, 2017, Martin was served with the Summons and Complaint in Rolla, ND (off tribal land). (Doc. ID #4). BRCSU mailed Martin a Financial Affidavit, which he filled out and returned to BRCSU on October 8, 2017. (Doc. ID #19). Martin failed to file an answer or other responsive pleading. On November 7, 2017, the State filed a 3.2 Motion for Default Judgment, a brief in support of the motion, various exhibits, an Affidavit, a proposed Findings of Fact, Conclusions of Law, Order for Judgment, and a proposed Judgment. (App. 4, Doc. ID ##15-22). On November 8, 2017, the Notice of 3.2 Motion, which had been inadvertently left out of the previous filing, was filed, along with proof of service. (Appellee's App. 7).

[7] On November 17, 2017, Martin filed a Notice of Special Appearance, indicating that he intended to contest both subject matter and personal jurisdiction. (App. 11). Attached to the Notice of Special Appearance were the initial pleadings for his Turtle Mountain Tribal Court (Tribal Court) custody proceedings, which had been filed with the Tribal Court the same day the Notice of Special Appearance was filed with the District

Court, November 17, 2017. (App. 12). Martin filed no responsive pleadings or motions with the District Court.

[8] On November 28, 2017, the State filed State's Response to Defendant's Special Appearance with supporting documentation. (App. 15). Martin scheduled a hearing on the Notice of Special Appearance. (App. 24). On December 12, 2017, the State filed State's Objection to Hearing, asking that the hearing be dismissed. (Doc. ID #40). The hearing was held on January 11, 2018. After briefly talking to the parties, the District Court dismissed the hearing because Martin had no pending motions properly before the District Court. (Hearing Tr. 4:13-18, Jan. 11, 2018). Martin filed no responsive pleadings or motions after this hearing.

[9] On February 2, 2018, the District Court entered a Findings and Order finding that it properly had subject matter jurisdiction because paternity was not at issue; the District Court further found that it had personal jurisdiction because Martin lived off tribal land in Rolette and had other contacts with the state. To the extent the Defendant's Special Appearance could be construed as a motion to dismiss, the District Court denied Defendant's Special Appearance. (App. 25).

[10] On February 20, 2018, the District Court entered its Findings of Fact, Conclusions of Law, Order for Judgment. (Appellee's App. 9). Judgment was entered on February 21, 2018. (App. 28).

[11] On February 28, 2018, Martin filed Motion for Rule 60 Relief from Judgment and a supporting Brief. (App. 30, 32). The State filed a responsive brief resisting Martin's motion on March 13, 2018. (Doc. ID #53) A hearing was held on March 29, 2018. Because Martin had failed to file responsive pleadings or motions, his request for relief from

judgment was denied. (Hearing Tr. 5:1-6, Mar. 29, 2018). The Order Denying Motion for Relief from Judgment was entered on April 3, 2018. (App. 35). Martin appealed the April 3, 2018 Order on April 18, 2018. (App. 41).

[12] STATEMENT OF THE FACTS

[13] Cheri Poitra (Poitra) is the mother of I.R.P., born 2014. Martin is the child's father. He signed a North Dakota Acknowledgment of paternity on May 25, 2017 (see Doc. ID #18), which has the effect of a court order adjudicating him to be the father of the child. N.D.C.C. §14-20-15(1). Paternity was therefore not at issue in this case. On August 14, 2017, Poitra applied for and began receiving services from BRCSU. At that time, she was living with the child in McClusky, ND. (Doc. ID #17). Martin was living in Rolette, ND. (Doc. ID ##32, 33).

[14] Martin completed a Financial Affidavit and returned it to BRCSU on October 8, 2017. (Doc. ID #19). According to the Financial Affidavit, Martin was living in Rolette, ND and working at a school in Belcourt, ND, which is located on Turtle Mountain land. BRCSU obtained wage information from this school and Martin's other employer, the University of Mary, located in Bismarck, ND. (Doc. ID ##10, 21). BRCSU used the information in the Affidavit, along with wage information obtained from his employers, to calculate a child support obligation of $1,018.00 per month according to the North Dakota Child Support Guidelines. (App. 6). Although Martin completed a Financial Affidavit, he did not file an Answer or other responsive pleading.

[15] On November 7, 2017, the State filed its 3.2 Motion for Default Judgment noting that more than twenty-one days had passed since Martin was served and that Martin had appeared but had not filed an Answer or other responsive pleading. (App. 5). The Notice

of 3.2 Motion was inadvertently left out of the packet filed and served on November 7, 2017. It was filed and served the next day, November 8, 2017. (Doc. ID ##23, 24, Appellee's App. 7). In the Notice of 3.2 Motion, the State laid out the requirements of N.D.R.Ct. 3.2, and explained that the motion was being submitted under N.D.R.Ct. 3.2 and "failure to file briefs will be treated as your admission that the motion is meritorious." (Appellee's App. 7). The Notice of 3.2 Motion also explained, "[a]fter a written response is timely served and filed, you may request a hearing no later than seven (7) days after the expiration of the time for filing your response." (Appellee's App. 8).

[16] On November 17, 2017, Martin filed a Notice of Special Appearance, notifying the parties that "[t]he undersigned attorneys hereby enter a special appearance for [Martin] for the purpose of contesting both subject matter and personal jurisdiction." (App. 11). It went on to note that Martin, Poitra, and the child were all members of the Turtle Mountain Band of Chippewa Indians, that the child was conceived on tribal land, and that the parties had a pending action to determine parenting rights in Turtle Mountain Tribal Court. It cited N.D.C.C. §14-14.1-12 (which relates to initial child custody jurisdiction). (App. 11). Martin attached a Tribal Court Summons and Petition for Custody, which were filed November 17, 2017. (App. 12 – 14). In the Petition, Martin asserts that he is the biological father of the child and requests sole custody. (App. 13). The Notice of Special Appearance was signed by Martin's attorney. There was no accompanying affidavit or anything signed by Martin under penalty of perjury. Further, the Notice of Special Appearance included no motions, no request for action from the District Court, and no response to the allegations in the State's Complaint or Brief, other than contesting jurisdiction. (App. 11).

[17] On November 28, 2017, the State filed State's Response to Defendant's Special Appearance, along with a supporting affidavit and exhibit. (App. 15, Doc. ID ##32-33). In its response, the State discussed the jurisdictional basis for the case, explaining that Poitra lived in McClusky, ND, at the time she requested services from BRCSU and at the time she signed her Admission of Service; explaining that Martin lived in Rolette, ND; and analyzing the jurisdictional basis of the case. (App. 15). The State went on to note that Martin had made no challenges to the claims in the Complaint (other than indicating that he intended to contest personal and subject matter jurisdiction) or otherwise objected to the Motion for Default Judgment and asked that the Court find Martin in default and grant the State's requested relief. (App. 21). The State filed updated proposed findings which included a more in-depth analysis of jurisdiction. These proposed findings explained that Martin had failed to file responsive pleadings and was therefore in default. (Doc. ID #34). Martin was served with these documents on November 28, 2017. (Doc. ID #29).

[18] Martin scheduled a hearing on his Notice of Special Appearance and sent notice of the hearing to the State and Poitra. (Doc. ID ##36-37). The State objected to the hearing on the grounds that Martin had not filed a responsive pleading and there were no pending motions aside from the State's pending 3.2 Motion for Default Judgment and asked that the hearing be dismissed. (Doc. ID #40). The hearing was held on January 11, 2018.

[19] At the hearing, the District Court noted that there was no response to the State's 3.2 Motion for Default Judgment and the Court was unsure of who set the hearing and what the purpose of the hearing was. Martin's attorney, Robert Ackre, said, "I may have set the hearing, I'm not sure [. . .] my client was in receipt of some papers indicating that the State is trying to come after him for child support, so we submitted a special appearance

contesting jurisdiction." (Hearing Tr. 2:21-25, Jan. 11, 2018). After hearing from Mr. Ackre and the State's attorney, the District Court stated, "So here's the problem, a Notice of Special Appearance doesn't help me. So if you want to file a motion to challenge jurisdiction, file a motion to challenge jurisdiction and then the State will have an opportunity to respond and we'll address it." (Hearing Tr. 4:6-10, Jan. 11, 2018). After a brief interjection from Mr. Ackre, the District Court refused to entertain further comments, telling him, "[. . .] you are going to have to provide me with affidavits or testimony. I have no hearing that has been properly noticed for a motion." (Hearing Tr. 4:13-16, Jan. 11, 2018). The District Court concluded by encouraging Martin to file an appropriate motion to contest jurisdiction and, if necessary, schedule a hearing after that. (Hearing Tr. 4:19-21, Jan. 11, 2018).

[20] On February 2, 2018, the District Court entered a Findings and Order finding that it properly had subject matter and personal jurisdiction and, to the extent the Defendant's Special Appearance could be construed as a motion to dismiss, denying Defendant's Special Appearance. (App. 25).

[21] On February 20, 2018, the District Court entered its Findings of Fact, Conclusions of Law, Order for Judgment, finding that the District Court properly had jurisdiction; finding that Martin was properly served with the Summons and Complaint and had failed to file an Answer or other responsive pleading; concluding that Martin was in default; and ordering child support of $1,018.00 per month. (Appellee's App. 9). Judgment was entered on February 21, 2018. (App. 28).

[22] On February 28, 2018, Martin filed Motion for Rule 60 Relief from Judgment and a supporting brief. (App. 30, 32). The State filed a responsive brief resisting Martin's

motion on March 13, 2018. (Doc. ID #53). A hearing was held on March 29, 2018. At the hearing, Martin argued first. His attorney, Ackre, stated, "I think what we'll do is just rely on the paperwork submitted. The only thing I want to add is [. . . .] [t]he parties did appear at a previous hearing, we did file a motion [. . .]" (Hearing Tr. 2:23-25, 3:1-6, Mar. 29, 2018). In response, the District Court asked which motion he was referring to, and Attorney Ackre responded that he was referring to his Notice of Special Appearance. (Hearing Tr. 3:7-10, Mar. 29, 2018).

[23] In response, the District Court stated, "Special Appearance is not a motion, counsel, that's a notice. So what motion have you filed for the Court asking the Court to take some direction?" (Hearing Tr. 3:11-14, Mar. 29, 2018). Attorney Ackre again referred to the Special Appearance and the District Court explained that this was a notice only, giving the Court nothing of substance and failing to give the opposing parties an opportunity to respond to it. (Hearing Tr. 3:15-22, Mar. 29, 2018). After providing Mr. Ackre and the State's attorney with the opportunity to speak, the District Court rejected Martin's motion for relief from judgment, noting, "[. . .] there has been no response filed, no additional motions filed indicating what the jurisdictional issues are. You [have] got to have a motion properly before the Court, so I am not going to modify the judgment and I am denying the [N.D.R.Civ.P.] 60 Motion." (Hearing Tr. 4:13-18, Mar. 29, 2018).

[24] The Order Denying Motion for Relief from Judgment was entered on April 3, 2018. (App. 35).

[25] LAW AND ARGUMENT

[26] ISSUE I: Whether the District Court erred by denying Martin's Motion for Relief from Default Judgment.

[27] Martin's Motion for Relief from Default Judgment asked that the Court set aside the February 21, 2018 Judgment under N.D.R.Civ.P. 60(b)(4) or, alternatively, 60(b)(6). It is unclear from Martin's Appellant Brief whether he is arguing that the District Court erred in rejecting his 60(b)(4) motion, his 60(b)(6) motion, or both.

[28] N.D.R.Civ.P. 60(b) allows for relief from judgment in certain circumstances. It is a broad form of relief in which the entire judgment is set aside. "Rule 60(b) attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done, and, accordingly, the rule should be invoked only when extraordinary circumstances are present." Knutson v. Knutson, 2002 ND 29, ¶ 7, 639 N.W.2d 495 (citations omitted). As the moving party, Martin bore the burden for establishing sufficient grounds for disturbing the finality of such judgment. See Gajewski v. Bratcher, 240 N.W.2d 871, 886 (N.D. 1976).

[29] This Court reviews a District Court's determination on a N.D.R.Civ.P. 60(b)(6) motion for abuse of discretion. See Citibank v. Reitowski, 2005 ND 133, ¶6, 699 N.W.2d 851 (citing Federal Land Bank v. Lillehaugen, 370 N.W.2d 517, 518 (N.D. 1985)). A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. See id. (citing US Bank v. Arnold, 2001 ND 130, ¶21, 631 N.W.2d 150). Because decisions on the merits are favored, trial courts should be more lenient when entertaining motions to vacate default motions. See id. (citing Suburban Sales & Service, Inc. v. District Court of Ramsey County, 290 N.W.2d

247, 252 (N.D. 1980)). This Court does "not determine whether the [trial] court was substantively correct in entering the judgment from which relief is sought, but determine[s] only whether the court abused its discretion in ruling [. . .] [whether] sufficient grounds for disturbing the finality of the judgment were [. . .] established." Berry v. Berry, 2017 ND 245, ¶ 10, 903 N.W.2d 68 (quoting Knutson v. Knutson, 2002 ND 29, ¶ 7, 639 N.W.2d 495).

[30] Determinations under N.D.R.Civ.P. 60(b)(4) are not discretionary, however. If the judgment is valid, the motion must be denied; if the judgment is void, the judgment must be vacated. This Court reviews a District Court's determination on a 60(b)(4) motion on a plenary basis. See Peterson v. Jasmanka, 2014 ND 40, ¶ 10, 842 N.W.2d 920 (quoting Eggl v. Fleetguard, Inc., 1998 ND 166, ¶ 4, 583 N.W.2d 812 (citations omitted)).

[31] **This Judgment is not void or voidable under Rule 60(b)(4).**

[32] N.D.R.Civ.P. 60(b)(4) requires a District Court to set aside a void judgment. If the judgment is valid, a District Court cannot set aside the judgment under this provision. See id. The moving party bears the burden of establishing that the judgment is void. See Gajewski, 240 N.W.2d at 886. In addition, the moving party "must show sufficient grounds for disturbing the finality of the earlier judgment." State v. Peltier, 2018 ND 170, ¶ 9 (citing Roe v. Doe, 2002 ND 136, ¶ 6, 649 N.W.2d 566).

[33] Martin argued in his Motion for Rule 60 Relief that the Default Judgment was voidable because he had made an appearance and, under N.D.R.Civ.P. 55, an appearance, once made, entitles a party to eight days' notice of the intention to enter a default judgment. In support of this proposition, he cited Perdue v. Sherman, 246 N.W.2d 491, 495 (N.D. 1976). It should be noted that Martin misread Perdue, which was based on a prior version

of N.D.R.Civ.P. 55; this version of the rule did, in fact, require eight days' notice. 246 N.W.2d 491. The current version of the rule requires notice in compliance with N.D.R.Ct. 3.2(a). It is not clear from Martin's Appellant Brief whether he is renewing this argument. The State will assume for the sake of argument that he is.

[34] A default judgment is not, on its own, an invalid or void judgment. See, for example, Hatch v. Hatch, 484 N.W.2d 283 (N.D. 1992) (upholding lower court's default judgment). Rather, a default judgment entered without compliance with the relevant Rules of Court and Rules of Civil Procedure could be void or voidable. See Perdue, 246 N.W.2d at 493 ("A judgment entered without compliance with Rule 55(a) is not void, but is irregular.").

[35] Default judgments must comply with N.D.R.Civ.P. 55(a):

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the failure is shown by affidavit or otherwise, the court may direct the clerk to enter an appropriate default judgment in favor of the plaintiff [. . . .]
> (3) [. . . .] If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with a motion for judgment. Notice must be served with the motion and must comply with N.D.R.Ct. 3.2(a).

[36] Under N.D.R.Ct. 3.2(a), the moving party must serve and file notice with a motion. If oral argument has been scheduled, the notice must indicate the time of oral argument. If no oral argument has been scheduled, the notice must indicate that the motion will be decided on briefs alone unless oral argument is timely requested.

[37] Rule 3.2(a) ensures that parties receive proper notice for any motions filed. This provision does not prevent a court from entering default judgment against a party that has

made an appearance. See Perdue, 246 N.W.2d at 494. The Perdue court, in reaching its decision, quoted H.F. Livermore Corp. v. Aktiengessellschaft Gebruder Loepfe, 139 U.S.App.D.C. 256, 432 F.2d 689 (2d Cir. 1970),

> This court has been mindful of this policy in its construction of the Rules in order to afford litigants a fair opportunity to have their disputes settled by reference to the merits. Given this approach, the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party….Furthermore, the possibility of default is a deterrent to those parties who choose delay as part of their litigation strategy.

[38] This Court has repeatedly held that appearance alone is insufficient to prevent entry of default judgment. In Shull v. Walcker, the defendant failed to file an answer or other responsive pleading, but appeared at multiple hearings, including a scheduling conference, a hearing on the default motion, and the default evidentiary hearing. 2009 ND 142, 770 N.W.2d 274. This Court noted that a defendant has the obligation to timely present sufficient evidence to protect his rights. "Walcker's decision to take no action to protect his interests in the face of a lawsuit and a motion for a default judgment against him was a deliberate and free choice, and does not constitute 'exceptional circumstances' to justify relieving him from the default judgment." Id. at ¶ 15.

[39] Here, the State filed a Summons and Complaint on September 19, 2017, along with proof of service. Martin appeared by returning a Financial Affidavit to BRCSU. However, he failed to file an answer or other responsive pleading. Therefore, in November 2017, the State served and filed a Notice of 3.2 Motion, a Motion for Default Judgment and supporting documents. This Notice complied with the requirements of N.D.R.Ct. 3.2,

informing Martin that the Motion for Default Judgment was being submitted for consideration and that the motion would be heard on briefs alone unless oral argument was requested. Judgment was entered on February 21, 2018, over one hundred days after the State provided Martin with notice of its intent to seek default judgment.

[40] At the January 11, 2018 hearing, the District Court patiently explained the rules to Martin and his attorney and specifically directed them to file a motion or responsive pleading. Martin had forty days following the hearing to file a motion or responsive pleading before Judgment was finally entered on February 21, 2018. Had he wished to file a motion or brief contesting jurisdiction or anything other claims or requests contained in the Complaint, Martin had months in which to do so.

[41] Martin received adequate notice that the State was seeking default judgment and that notice complied with all relevant rules. The District Court gave him ample opportunity to file a responsive pleading or motion, and Judgment was not entered until long after the fourteen days required by Rule 3.2. Although subject matter jurisdiction may be raised at any time, Martin failed to follow the procedure for properly raising the issue (it is important to note that Martin did not raise the issue of subject matter jurisdiction in either his 60(b) motion or his Appellate Brief). Without a proper brief or motion, and without appropriate supporting evidence, the opposing parties are left without sufficient notice or opportunity to adequately respond. Martin made the choice not to file a responsive pleading or a motion to dismiss. As a result, Default Judgment was entered. Because the Judgment complied with all relevant rules of court and procedure, it was not irregular or voidable. Further, Martin, as the moving party, bears the burden of showing sufficient grounds for disturbing the finality of judgment in bringing a 60(b)(4) motion. He failed to provide any grounds

for doing so – Martin's brief and oral argument were minimal and gave the District Court no reason to overturn the judgment. The District Court correctly denied Martin's 60(b)(4) motion.

[42] **The District Court did not abuse its discretion when it denied Martin's request for relief under Rule 60(b)(6).**

[43] In his Brief in Support of Rule 60 Motion for Relief from Judgment, Martin argued that it was inappropriate for default judgment to be entered after he had appeared. See App. 34. Although his Brief was short, it appears that he was essentially arguing that fairness required the District Court to overturn the default judgment under N.D.R.Civ.P. 60(b)(6). Under N.D.R.Civ.P. 60(b)(6), a judgment may be vacated for any other reason justifying relief. However, something "extraordinary" is required to justify the vacating of a judgment under N.D.R.Civ.P. 60(b)(6). Overboe v. Odegaard, 496 N.W.2d 574, 579 (N.D. 1993). The broad language of Rule 60(b)(6) "gives the court ample power to vacate a judgment or an order whenever such action is appropriate to accomplish justice. If it is unjust that a judgment or an order be enforced, Rule 60(b)(6) does provide an avenue of escape from the judgment or order, unhampered by detailed restrictions." Galloway v. Galloway, 281 N.W.2d 804, 806 (N.D. 1979), quoting Kinsella v. Kinsella, 181 N.W.2d 764, 768 (N.D. 1970). Rule 60(b)(6) gives a court "a grand reservoir of equitable power to do justice in a particular case." Olander Contracting Co. v. Gail Wachter Investments, 2003 ND 100, ¶ 9, 663 N.W.2d 204, (quoting Compton v. Alton Steamship Co., Inc., 608 F.2d 96, 106 (4th Cir. 1979)). As noted above, the moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment and relief should

be granted only in exceptional circumstances. See Shull, 2009 ND 142, ¶ 14, citing Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

[44] While this Court has consistently favored determinations on the merits rather than by default, default judgment has explicitly been held to be a "deterrent to those parties who choose delay as part of their litigation strategies." See Perdue, 246 N.W.2d 491 (N.D. 1976) (quoting H.F. Livermore Corp. v. Aktiengessellschaft Gebruder Loepfe, 139 U.S.App.D.C. 256, 432 F.2d 689 (2d Cir. 1970)). Appearance alone is insufficient to protect a party from default judgment. See Shull, 2009 ND 142.

[45] Further, "a decision to submit only certain evidence at a stage in the proceedings generally cannot later constitute exceptional circumstances justifying relief from a judgment." Follman, 2000 ND 72, ¶ 11. In Follman, the District Court rejected a 60(b) challenge backed only by a "conclusory affidavit," following summary judgment. This Court upheld the District Court's decision, finding that Follman should have timely presented evidence in response to the opposing party's motion. See id., ¶¶ 10-12. This Court has consistently refused to allow 60(b) to be used to protect parties from their own litigation choices. See, as another example, Shull, 2009 ND 142, ¶ 15 ("Walcker's decision to take no action to protect his interests in the face of a lawsuit and a motion for a default judgment against him was a deliberate and free choice, and does not constitute "exceptional circumstances" to justify relieving him from the default judgment.").

[46] The Rules of Court and Rules of Procedure outline the process for responding to a complaint. Under N.D.R.Civ.P. 7(a), only the following pleadings are allowed: a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, and, if ordered by the

court, a reply to an answer or a third-party answer. Under N.D.R.Civ.P. 7(b), any motions made by a party must be in writing (unless made during a hearing or at trial); state the grounds for seeking the order with particularity; and state the relief sought. Under N.D.R.Civ.P. 8(b), in responding to a pleading, a party must state its defenses to each claim asserted against it and admit or deny the allegations asserted against it by an opposing party. Under N.D.R.Civ.P. 12(b), every defense to a claim for relief must be asserted in the responsive pleading. Lack of jurisdiction may be asserted in the pleading or by motion. It should be noted that N.D.R.Civ.P. 12(b) modernized the state's treatment of certain defenses or objections – under this provision, a defense or objection is not waived by joining it with one or more other defenses or objections. In other words, an assertion of lack of jurisdiction may (and should) be included in a responsive pleading with all other defenses or objections. See N.D.R.Civ.P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading [. . .] [b]ut a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction [. . . .] No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion").

[47] N.D.R.Ct. 3.2(a)(2) provides the opposing party with fourteen days to serve and file an answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court. N.D.R.Ct. 3.2(a)(2). A party who has timely served and filed a brief may request oral argument and the request must be granted under N.D.R.Ct. 3.2(a)(3). Failure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. N.D.R.Ct. 3.2(c).

[48] Here, Martin has failed to meet his burden of proof to show that there are "exceptional circumstances" justifying 60(b)(6) relief. After Martin failed to file responsive pleadings, the State filed its Motion for Default Judgment with 3.2 Notice. Even after the Motion for Default Judgment was filed, Martin failed to file responsive pleadings. N.D.R.Civ.P. 7(a) specifically lays out the types of pleadings allowed. A Notice of Special Appearance is not an allowed pleading. Further, even interpreting the rules generously, Martin's Notice of Special Appearance was one page, with no argument, no analysis, and not even a minimal effort to respond to the claims in the Complaint, as required by N.D.R.Civ.P. 8(b) and 12(b). No motions were filed. No affidavits or other evidence, aside from a copy of a Tribal Custody Petition, were filed.

[49] As outlined above, Martin had ample opportunity to file an answer, a motion, or any other responsive pleading – he even received explicit instruction from the District Court directing him to file a motion or answer. Had he wanted to challenge jurisdiction or any of the claims in the State's Complaint, he could have done so by following the relevant procedural and court rules. But a choice was made not to avail himself of the opportunity provided by the District Court. Such a choice in the face of a motion for default judgment can, unsurprisingly, lead to the entry of default judgment.

[50] Further, at no point did Martin present any reason, other than appearance, for the District Court to re-open the matter. He provided no responsive pleadings, no evidence, no affidavits, nothing which would in any way indicate that the District Court's decision in that matter was incorrect, unfair, or inappropriate. Instead, at the hearing on his 60(b) motion, Martin relied on his brief and what little had been filed with the District Court. He took no testimony, provided no evidence, and did not take advantage of oral argument.

[51] The District Court, after reviewing the record and giving Martin a full opportunity to present his case, determined that Martin had failed to meet his burden under N.D.R.Civ.P. 60(b)(6), which requires something "extraordinary" to justify the vacating of an order or judgment. While the District Court acknowledged that this Court has consistently favored determination on the merits, the District Court determined that Martin's failure to file responsive pleadings or a motion, despite multiple opportunities, did not create the "extraordinary" or "exceptional" circumstances necessary to disturb the finality of the Judgment. The District Court properly exercised its discretion in denying Martin's request for relief under Rule 60(b)(6).

[52] CONCLUSION

[53] Based on the foregoing, the State respectfully requests that this Court affirm the District Court's order denying Martin's motion for relief from judgment.

[54] Dated this 13th day of July, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cheri Poitra, State of North Dakota, Plaintiff and Appellees, vs. Shane Martin, Defendant and Appellant,	)))))))))	Supreme Court No. 20180141 Sheridan Co. No. 42-2017-DM-5

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff, State of North Dakota, in the above captioned matter, and as the author of the Appellee Brief, hereby certified, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Appellee Brief, excluding words in the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance totals 5077 words. Appellee's brief was created using Microsoft Word 2016.

[55] Dated this 13th day of July, 2018.

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CERTIFICATE OF SERVICE

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[1] I hereby certify that on the 13th day of July 2018, the following documents:

STATE OF NORTH DAKOTA APPELLEE'S BRIEF
STATE OF NORTH DAKOTA APPELLEE'S APPENDIX

Were emailed to the Clerk of the North Dakota Supreme Court @ supclerkofcourts@nd.gov and courtesy copies were emailed to the following:

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