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FEBRUARY 17, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Regan Whitebull	)	
Appellee,	)	
	)	Supreme Court No. 20210316
vs.	)	
	)	District Ct. No. 08-2018-DM-00550
Braden Allery	)	
	)	
Appellant.	)	

ON APPEAL FROM AN ORDER DENYING APPELANT'S RULE 60B
MOTION DATED OCTOBER 28, 2021.
IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH, NORTH DAKOTA
THE HONORABLE DAVID REICH, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶ 1] I. Whether the district court erred in denying Appellant's motion for relief under N.D.R.Civ.P. 60(b)(1) when the Appellant failed to inform the court of a difference in address by filing a response to a motion.

[¶ 2] II. Whether the district court erred in denying Appellant's motion for relief under N.D.R.Civ.P. 60(b)(3) when the Appellant failed to raise the issue to the district court and failed to show that opposing counsel engaged in misconduct by not updating the court with Appellant's new address.

[¶ 3] III. Whether the district court erred in denying Appellant's motion for relief under N.D.R.Civ.P. 60(b)(6) when the Appellant failed to show extraordinary circumstances and failed to show that Appellant was still entitled to adjudication on the merits.

STATEMENT OF THE CASE

[¶ 4] Appellee, Regan Whitebull (Whitebull), filed a motion to modify a previous order concerning parental rights. Index #27. On March 16, 2021, the sheriff's office personally served Appellant, Branden Allery (Allery), with a true and correct copy of the motion. Index #31. Allery did not file a response to the motion. Appellant's Appendix (AA) at 19 ¶ 2. On April 6, 2021 and again on April 21, 2021, notices of an evidentiary hearing were mailed to Allery's last known mailing address on record at the district court. Index #33-35. The notices were not returned to the court as undeliverable. AA at 16 ¶ 2. Allery did not appear for the evidentiary hearing. AA at 20 ¶ 4. The court found that Allery defaulted and granted Whitebull's motion to modify. Index #41. Allery then filed a motion for relief, arguing that there was excusable neglect under N.D.R.Civ.P. 60(b)(1) or, in the alternative, that public policy favored adjudication on the merits under N.D.R.Civ.P. 60(b)(6). AA at 10-12. After a hearing on Allery's motion for relief, the district court denied the motion. Index #54-55.

STATEMENT OF THE FACTS

[¶ 5] On October 14, 2019, a judgment was entered awarding Whitebull and Allery equal residential responsibility and joint decision-making responsibility over their minor children. Index #22. Whitebull filed a motion to modify the judgement on February 25, 2021, requesting that the court grant her primary residential responsibility. Index #27. Whitebull's attorney served Allery through the Mountrail County Sheriff's Office with a true and correct copy of the motion to modify, the brief in support of the motion to modify, and Whitebull's affidavit on March 16, 2021. Index #31. Allery did not file a response to the motion within 14 days of service. AA at 19 ¶ 2.

[¶ 6] The district court ordered an evidentiary hearing on the motion to modify and on April 6, 2021, and April 21, 2021, notices of the hearing were mailed to Allery's last known mailing address on record with the district court. Index #33-35. The notices were not returned to the court as undeliverable. AA at 16 ¶ 2. Whitebull appeared for the evidentiary hearing on May 10, 2021 and presented testimony in support of the motion to modify, but Allery did not appear for the evidentiary hearing. AA at 20 ¶ 4. The court found that Allery defaulted and granted Whitebull's motion to modify. Index #41. On June 4, 2021, Allery filed a motion for relief, arguing excusable neglect under N.D.R.Civ.P. 60(b)(1), or in the alternative, public policy favoring adjudication on the merits, apparently under N.D.R.Civ.P. 60(b)(6). AA at 10-12. A hearing was held to argue the Allery's Motion for Relief and the district court ultimately denied the motion on October 28, 2021. AA at 19-25.

STANDARD OF REVIEW

[¶ 7] "Under N.D.R.Civ.P. 60(b), a motion to vacate a judgment 'lies with the sound discretion of the trial court, and its decision whether to vacate the judgment will not be disturbed on appeal unless the court has abused its discretion.'" Carroll v. Carroll, 892 N.W.2d 173, 176 (N.D. 2017) (quoting Hildebrand v. Stolz, 888 N.W.2d 197, 200 (N.D. 2016)). The Supreme Court does not "'determine whether the court was substantively correct in entering the judgment from which relief is sought, but [it] determine[s] only whether the court abused its discretion *in ruling that sufficient grounds* for disturbing the finality of the judgment *were not established*.'" Carroll, 892 N.W.2d at 176 (quoting Vann v. Vann, 767 N.W.2d 855 (N.D. 2009)) (emphasis added). "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Hoffarth v. Hoffarth, 949 N.W.2d 824, 828 (quoting Rebel v. Rebel, 837 N.W.2d 351 (N.D. 2013)). "An abuse of discretion by the district court is never assumed and must be affirmatively established [by the moving party and the Supreme Court of North Dakota] will not overturn a court's decision merely because it is not the one it would have made had it been deciding the motion." Bickler v. Happy House Movers, L.L.P., 915 N.W.2d 690, 694 (N.D. 2018).

LAW AND ARGUMENT

[¶ 8] **I. The district court did not abuse its discretion by denying Appellant's 60(b)(1) motion because Appellant did not establish sufficient grounds for excusable neglect when he was put on notice of Appellee's motion and disregarded legal processes by not proactively updating his address with the court.**

[¶ 9] Under N.D.R.Civ.P. 60(b)(1), a district court may grant relief for mistake, inadvertence, surprise, or excusable neglect. "The Eighth Circuit Court of Appeals has

interpreted 'excusable neglect' to mean a 'good faith and some reasonable basis for noncompliance with the rules.'" Leftbear v. State, 727 N.W.2d 252, 255 (N.D. 2007) (quoting Ivy v. Kimbrough, 115 F.3d 550, 552 (8th Cir. 1997)). "In most instances, ignorance of the rules, or mistakes construing the rules, are insufficient to establish excusable neglect." Id. (citing Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 403 (8th Cir. 2000)). Additionally, "[a] simple disregard of legal processes is, of course, not excusable neglect under the rule." Royal Industrial Inc. v. Haugen, 409 N.W.2d 636, 638 (N.D. 1987) (citing Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981)).

[¶ 10] In Royal Industrial, a pro-se party who failed to respond to a legal filing attempted to argue excusable neglect by claiming that when they received notice of the legal filing, they assumed things would be handled. Affirming the lower court's decision, this Court pointed out that the pro-se party had not sought counsel even though the legal filing sought judgment that was not in their favor, and that the appellant based their failure to act on mere assumptions that everything would be handled. Like Royal Industrial, Allery was pro-se when he received notice of the motion to modify, Allery failed to seek the advice of legal counsel even though the motion to modify was not in his favor, and Allery failed to act because of mere assumptions that the court would handle everything regarding his personal address.

[¶ 11] Allery erroneously assumes that the clerk of court should have known his address because it appears on the Sheriff's return of service. However, the district court refutes this idea by rationally reasoning that the clerk of court couldn't have known it was Allery's residential address because the Sheriff's return only states where service occurred and does not distinguish whether it is a residence, a business, or any other noteworthy place. The district court correctly applies the law by pointing out that it is not within the duties of the clerk of court to investigate changes in Allery's address. See N.D.R.App.P 45. For these reasons, the Supreme Court must affirm the district court's decision and find that the district court did not abuse its discretion when it found that Allery had not provided sufficient evidence to establish excusable neglect.

[¶ 12] **II. The District Court did not abuse its discretion in denying Appellant's 60(B)(3) motion because Appellant did not raise this argument with the district court and because the Appellant has not offered sufficient evidence to demonstrate**

that Appellee engaged in misconduct when the Appellee is not obligated to update the Appellant's address with the court.

[¶ 13] Under N.D.R.Civ.P. 60(b), a district court may grant relief for . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party. "'A party may not raise an issue or contention that was not previously raised or considered in the lower court for the first time on appeal.'" Schiele v. Schiele, 865 N.W.2d 433, 439 (N.D. 2015) (quoting S.H.B. v. T.A.H., 2010 ND 149, ¶ 12, 786 N.W.2d 706). "'If a party fails to properly raise an issue or argument before the trial court, the party is precluded from raising that issue or argument on appeal.'" Id.

[¶ 14] Here, the district court acknowledged that Allery only raised arguments under 60(b)(1) and in the alternative 60(b)(6). Because Allery did not raise arguments under 60(b)(3), this Court must find that Allery is precluded from raising a 60(b)(3) argument for the first time on appeal.

[¶ 15] Even if this Court determines that Allery's 60(b)(3) argument was raised with the district court, Allery fails to establish sufficient evidence of misconduct by opposing counsel for the following reason. Without citing any admissions in the record, Allery makes conclusory statements that Whitebull's attorney conceded to having actual knowledge that Allery resided at a different address. See AA at 5 ¶ 10; See also AA at 9 ¶ 18. To the contrary, Whitebull's attorney stated in the 60b hearing that "it is not the moving party's responsibility to serve the notice of the hearing; so whether or not Ms. Whitebull knew the exact address of where he resided is irrelevant." Index 54 hearing transcript. Whitebull's attorney maintains that she did know Allery's exact address and that is why she sought the assistance of the sheriffs office. Additionally, the rules of civil procedure, the model rules of professional conduct, and the rules of appellate procedure do not impose the burden of updating a party's address on opposing counsel. Whitebull and her attorney have maintained an accurate and current address with the district court. As this Court has stated, "[a] self-represented party 'should not be treated differently nor allowed any more or any less consideration than parties represented by counsel.'" Hildebrand, 888 N.W.2d at 200 (citing Horace Farmers Elevator Co. v. Brakke, 383 N.W.2d 838, 840 (N.D. 1986)).

[¶ 16] Furthermore, Whitebull's attorney did not mail the notices at issue. The clerk of court mailed the notices at issue based on the last known address on file with the court in accordance with N.D.R.Civ.P 5(3)(c) and these notices did not return the court as undeliverable to put the court on notice that the address was incorrect. As the district court explained, there was no way for the clerk of court to know that the address on the sheriff's return was wrong and the issue would've easily been avoided if Allery had chosen to act. "[A] Rule 60(b) motion . . . should not be used to relieve a party from free, calculated and deliberate choices he or she has made." Bickler, 915 N.W.2d at 694. Allery improperly asserts that the district court's longstanding practice of having each party keep an updated record of their respective address promotes absurd and unjust results. The alternative of having the clerk of court investigate every party's address would place an unnecessary burden on the district court's resources and slow the legal process.

[¶ 17] **II. The District Court did not abuse its discretion in denying Appellant's 60(B)(6) motion because Appellant did not provide sufficient evidence showing there was an extraordinary circumstance and because the issue was determined on the merits.**

[¶ 18] Under N.D.R.Civ.P. 60(b), a district court may grant relief for . . . (6) any other reason that justifies relief. "'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.'" Carroll, 892 N.W.2d at 176 (quoting Knutson v. Knutson, 2002 ND 29, ¶ 7, 639 N.W.2d 495).

[¶ 19] Here, Allery has offered no evidence of an extraordinary circumstance that made him unable to update his address with the court. Allery only argues that he did not know even about the date of the hearing even though there were methods for Allery to avail himself with to ensure that his address was correct, for example, filing a response to the motion as part of the legal process. Allery reveals that he was able to call the clerk of court and speak with them after the hearing had concluded, yet Allery did not attempt to communicate with the clerk of court when he was served and put on notice of a motion to modify. Allery reveals that he was able to write a letter to the district court judge, yet

Allery did not attempt to communicate with the district court judge when he was served and put on notice of a motion to modify. Allery eventually sought counsel after the hearing had concluded, yet Allery did not seek counsel or advice when when he was served and put on notice of a motion to modify. Therefore this Court must find that Allery has not offered sufficient evidence showing that the district court erred in finding that there was no extraordinary circumstance in this case because Allery had the means to prevent the problem but freely chose to do nothing and wait on others to act on his behalf.

[¶ 20] Allery notes that responding to a motion is not required, but Allery fails to acknowledge the discretionary consequences for "[i]f a party against whom a judgment for affirmative relief is sought has *failed to plead* or otherwise appear . . . the court may direct the clerk to enter an appropriate default judgment." N.D.R.Civ.P 55(a) (emphasis added). Allery goes on to argue that public policy supports adjudication on the merits, but pursuant to N.D.R.Ct 32(a)(1) and N.D.R.Ct 32(c), the opposing party must be given 14 days after service to file an answer brief and failure to file a brief by the opposing party may be deemed an admission that the motion is meritorious. Here, Allery concedes that he did not file a response and therefore the district court was well within its discretion to deem the motion meritorious. Additionally, in Hildebrand, when a party failed to appear at a proceeding, but the opposing party did appear and offer testimony, this Court affirmed the lower court's findings that a default judgement was proper and on the merits. Like Hildebrand, Allery failed to appear at the evidentiary hearing, but Whitebull did appear and provide testimony in support of her position. Therefore, this Court must find that Allery has not offered sufficient evidence showing that the district court erred in finding that there doesn't need to be further adjudication on the merits because the judgement here was based on the merits of Whitebull's testimony since Allery failed to respond and failed to appear.

CONCLUSION

[¶ 21] The district court did not abuse its discretion in denying Allery's 60b motion for relief because Allery did not provide a sufficient basis for relief under 60(b)(1) because disregarding procedure when it was his responsibility to ensure his address was up to date

with the district court is not excusable neglect. Allery did not provide a sufficient basis for relief under 60(b)(3) misconduct by opposing counsel because Allery did not raise this argument with the court and Whitebull's attorney is not obligated to update Allery's address with the court. Allery did not provide a sufficient basis for relief under 60(b)(6) because Allery did not have any extraordinary circumstances and the judgement was based on the merits. Appellee respectfully requests this Court AFFIRM the judgment of the Burleigh County District Court issued on October 28, 2021.

Dated this ___ day of February, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Regan Whitebull, and the author of the Response to the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the brief does not contain more than 38 pages.

Dated this ___ day of February, 2021.

DELORME LAW OFFICE, PLLC

/s/ Breanna K. Delorme

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State of North Dakota **In District Court** **County of Burleigh**

Braden Allery, Plaintiff, vs. Regan Whitebull, Defendant.	File No.: 08-2018-DM-00550 Docket No.: 20210316 **CERTIFICATE OF** **SERVICE**

[1] I, **Breanna Delorme**, do hereby certify that on the 17th day of February, 2022, I served a true and correct copy of the following document(s):

1. **Brief of Appellee**

in PDF format emailed to the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and courtesy copies were emailed to the following:

Mr. Kyle Craige
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Dated this 17th day of February, 2022.

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State of North Dakota **In District Court** **County of Burleigh**

Braden Allery, Plaintiff, vs. Regan Whitebull, Defendant.	File No.: 08-2018-DM-00550 Docket No.: 20210316 **CERTIFICATE OF** **SERVICE**

[1] I, **Breanna Delorme**, do hereby certify that on the 21st day of February, 2022, I served a true and correct copy of the following document(s):

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