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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

A.R. Audit Services, Inc.,	)	
	)	
Plaintiff/Appellee.	)	
	)	
v.	)	**Supreme Court No. 20200064**
	)	**Cass County**
Tahnee Young,	)	**Civil No. 09-2019-CV-03270**
	)	
	)	
	)	**ORAL ARGUMENT WAIVED**
Defendant/ Appellant.	)	

Appeal from the District Court's Order Denying Rule 60(b) Motion for Relief from Summary Judgment
The District Court for the East Central Judicial District, County of Cass,
The Honorable Judge Steven L. Marquart, presiding

BRIEF OF APPELLEE A.R. AUDIT SERVICES, INC.

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STATEMENT OF ISSUE

[¶0]

I. Whether the district court properly denied Appellant's Rule 60(b)(1) motion to set aside judgment.

STATEMENT OF CASE

[¶1] This appeal stems from A.R. Audit's (hereinafter "AR) collection efforts upon Tahnee Young (hereinafter "Young") for unpaid medical bills from original creditor Sanford Health. Young mailed a "*Response to Plaintiff's Complaint*" dated May 3, 2019. Appellant's Appendix ("App.") at 7. AR moved for summary judgment on September 19, 2019, serving its motion upon Young and filing said motion with the district court. (Docket Nos. 5-11). Young mailed AR a Motion to Dismiss on October 15, 2019. (Docket No. 16). *Id.* Young's *Brief* did not raise any genuine disputes of material fact, which AR demonstrated in its *Reply Brief* in support of summary judgment. App. at 13-16. The *Findings of Fact, Conclusion of Law, and Order for Judgment* were signed on November 15, 2019 and the *Judgment* was entered in favor of AR on December 4, 2019. App. at 8-10.

[¶2] On November 20, 2019, Young served a Rule 60 *Motion to for Relief from Judgment*, specifically citing subsection (b)(1) (Docket No. 21-25). The district court issued its *Order Denying Defendant's Motion to Vacate* on January 16, 2020. *Id.* at 39. On March 4, 2020, Young appealed to this Court. App. at 11-12. AR requests the district court's order be affirmed.

STATEMENT OF FACTS

[¶3] Young and her minor child received medical services and/ or supplies on numerous occasions in the year 2016. App. at 5, App. at 13-15, App. at 16-31. After Sanford's unsuccessful efforts in attempting to get these bills paid by Young, it assigned the debt to AR with two documents titled "Verification of Amount Due and Assignment" ("hereinafter "Assignments") signed by an employee/ representative of Sanford Health. App. at 13-14. The principal amount of the debt at the time was $9, 143.53, which was contained in both the Assignments and a notarized Affidavit from a representative of AR. App. at 13-16. The lawsuit was initiated by service of *Summons and Complaint* on April 20, 2019. App. at 3-6; (Docket No. 1-3). Young mailed a "*Response to Plaintiff's Complaint*" dated May 3, 2019, which contained general denials and/ or assertions of lack of knowledge; she did not file this document with the district court. App. at 7.

[¶4] On September 19, 2019, AR moved for summary judgment, serving its motion upon Young and filing said motion with the district court. (Docket Nos. 5-11).[1] AR did not schedule a hearing on the matter. AR asserted there were no genuine disputes of material fact that Young was indebted to AR for the unpaid medical services and/ or supplies she received from original creditor Sanford. *Id.*; *Id.* at 13-16. In support of its *Motion*, AR presented 1) the Assignments from Sanford Health, which assigned the debt to AR; 2) the notarized Affidavit of an AR representative, demonstrating the same; and 3) the itemizations that Young received years prior. *Id.* at 13-31. In what is assumed to be

[1] For sake of clarity, Plaintiff's opening brief for Summary Judgment and associated filings are labeled incorrectly on the District Court Docket as Default Judgment, rather than as "Summary" Judgment. The actual filings do indicate the motion is for summary judgment. See Docket Nos. 5-8.

her response to AR's summary judgment motion, Young served but did not file a Motion to Dismiss and a supporting brief on October 15, 2019. (Docket No. 16). Young's *Brief* doubled as a "brief" in opposition of AR's summary judgment. (Docket No. 16). In that *Brief*, Young "denies that she owes the Plaintiff any money. Because she owes no money to the Plaintiff the case should be Dismissed"; Young did not attach any documents or exhibits to that *Brief* and she did not schedule a hearing with the district court, although she requested oral argument in the unfiled brief. *Id.* Although AR did not consider Young's *Brief* to be a technical response to its summary judgment *Motion*, AR nevertheless filed and served its *Reply Brief*. *Id.* at 14-17. AR attached Young's Motion to Dismiss and corresponding documents as an exhibit to its *Reply Brief*, demonstrating Young failed to properly respond to the summary judgment claims/ failed to raise any genuine disputes of material fact that would preclude summary judgment. *Id*. The *Findings of Fact, Conclusion of Law, and Order for Judgment* were signed by the district court on November 15, 2019. App. at 8. On December 4, 2019, *Judgment* was entered in favor of AR and against Young in the principal amount of $9, 143.53 plus statutory interest and costs. App. at 8-10. A *Notice of Entry of Judgment* was served upon Young on December 13, 2019. (Docket Nos. 30-31).

[¶5] A few days after the *Findings* were signed by the Court, Young filed and served her Rule 60 *Motion for Relief from Judgment* **under Section (b)(1)**. *Id.* at 21-25. For the first time during this lawsuit, Young scheduled a hearing with the Court, including a *Notice of Hearing* with her Rule 60 *Motion*. *Id.* at 23. Relevant to this Appeal is the contents of Young's supporting Rule 60 *Brief*, wherein she asserted she "has information in which will have this case Dismissed and therefore, respectfully reserves all rights to be

heard and present this information at the time of hearing in the matter between the Plaintiff and the Defendant". *Id.* at 24. Young additionally stated in her *Brief* that she had "requested the hearing in to this matter. Which the Plaintiff and the Court had mistakenly had not addressed"; Young indicates this hearing was requested in her "answer to Plaintiff's Complaint". *Id.* AR filed an *Answer Brief* in response to Young's Rule 60 *Motion*. App. at 26-28. At the rescheduled January 7, 2020 Rule 60 *Motion* hearing, Young raised, **for the first time**, that some of the itemizations list a "Minot address" and that she allegedly has never lived in Minot. App. at 32-38. The district court denied Young's Rule 60 *Motion*. (Docket No. 39). Young filed her *Notice of Appeal* on March 4, 2020. App. at 11. In her *Notice*, she cited she was appealing the "final judgment/ order entered on January 16, 2020" (the Rule 60 *Order Denying Defendant's Motion to Vacate*) *Id.*; (*See* Docket No. 39). In Young's Appendix to her Appellant Brief, however, she attaches the Summary Judgment and corresponding *Findings*, as well as the transcript from the Rule 60 hearing. App. at 8-10, 32-38.

[¶6] The district court properly concluded Young's disregard and neglect of the legal process was not excusable neglect and had failed to establish extraordinary circumstances necessary to set aside *Judgment*. *Id.* at ¶ 10. The district court noted Young's failure to raise issues until the Rule 60 hearing and her failure in general to present any factual disputes. *Id.* at ¶ 9. The district court also concluded Young's argument regarding alleged meritorious defenses did not apply, and even if it did, Young failed to demonstrate a meritorious defense sufficient to set aside the *Judgment*. *Id.* at ¶ 10. The district court's decision is well-reasoned, follows the law, and is not an abuse of discretion. Accordingly, the district court's order should be affirmed.

LAW AND ARGUMENT

I. THE ISSUES RAISED IN YOUNG'S APPEAL ARE NOT PROPERLY BEFORE THIS COURT.

A. Young Is Barred From Raising New Issues on Appeal that She Failed to Raise at the District Court Level.

[¶7] Young now claims, *for the first time on appeal*, that the Affidavit by Randy Lang and the Sanford Assignments are both inadmissible, and that accordingly every statement in those documents is hearsay and cannot be relied upon. *Brief of Appellant* at 4-16, 23-28. However, this Court has made clear that a party may not raise an issue for the first time on appeal. *First Nat'l Bank & Trust Co. of Williston v. Jacobsen*, 431 N.W.2d 284, 286 (N.D. 1988) (citing *Spier v. Power Concrete, Inc.,* 304 N.W.2d 68 (N.D.1981)). Accordingly, these issues are not properly before the Court on appeal and Young is precluded from raising those issues.

[¶8] There is ample authority from this Court that generally a party may **not** raise an issue for the first time on appeal. *Farmers Union Oil Co. of New England v. Maixner*, 376 N.W.2d 43, 46 (N.D. 1985); *Andersen v. Teamsters Local 116 Bldg. Club, Inc.,* 347 N.W.2d 309, 313 (N.D. 1984); *Towne v. Sautter,* 326 N.W.2d 694, 697 (N.D. 1982); *Allen v. Kleven,* 306 N.W.2d 629, 633 (N.D. 1981); *Moran v. Moran,* 200 N.W.2d 263, 270 (N.D. 1972). "Neither, on appeal, should we allow the introduction of new issues not presented to the trial court." *Bettger v. Bettger*, 280 N.W.2d 915, 918 (N.D. 1979) (citing *City of Wahpeton v. Drake-Henne, Inc*., 228 N.W.2d 324 (N.D. 1975); *Schnell v. Schnell*, 252 N.W.2d 14 (N.D. 1977). "We have **repeatedly** said that issues not raised or presented to the trial court are not ripe for resolution by this Court if raised for the first time on appeal. *This Court, on appeal, does not try new issues or act as a trial court*, but

rather reviews the actions of the trial court." *Kilzer v. Binstock*, 339 N.W.2d 569, 572 (N.D. 1983) (citing *Mattis v. Mattis,* 274 N.W.2d 201 (N.D.1979)) (emphasis added). An exception this Court has made to its holding is where a party, on appeal, expands on an argument for a general defense it already raised at the district court level. *Maixner*, 376 N.W.2d at 46 (This Court's analysis in considering an appeal on a new issue: "[i]n the lower court, Maixner's defense of lack of consideration was based upon his contention that there was no forbearance on behalf of Farmer's Union. On appeal, Maixner seems to have broadened his argument to assert that if the guarantee provided for consideration at the time of its execution, Farmers Union failed to perform by not forbearing a reasonable period of time and thus, the consideration became inadequate).

[¶9] The issues regarding the admissibility of Sanford's assignments and Randy Lang's affidavit, as well questions regarding the financial responsibility screening, all could have easily been raised at the district court level; yet, Young failed to raise these issues **until** her appeal. Young effectively had two opportunities to address these issues: when AR moved for summary judgment and when Young herself moved to vacate the judgment. Still, Young made the decision to only raise the issue of the Minot address at the motion to vacate hearing. Furthermore, as explained below, the standard of review for a motion to vacate a summary judgment is abuse of discretion. *Carroll v. Carroll*, 2017 ND 73, ¶ 8, 892 N.W.2d 173. It makes little to no sense for this Court to analyze whether the district court abused its discretion when it was not even given the issues/ arguments in the first place. Under this Court's precedent, Young is now barred from raising the issues in her brief regarding the assignments, affidavit, and financial responsibility screening.

B. In the Alternative, Young Waived Her Right to Object to the New Issues She Raised on Appeal.

[¶10] Again, Young did not raise the issues of inadmissibility of the Sanford assignments and the AR affidavit, or the "lack" of evidence of financial responsibility screening at the district court level. Even if this Court were to determine these new issues are properly before it, Young's appellant brief was completely devoid of any statutory authority or case law on the reason these documents are inadmissible. Regardless, the law provides that Young waived her right to object to these documents when she failed to contest them when they were first presented to the district court at the summary judgment stage.

[¶11] First, this Court has held that a party waives an issue by not providing supporting argument or citations to relevant authorities. *Olander Contracting Co. v. Gail Wachter Invs.,* 2002 ND 65, ¶ 27, 643 N.W.2d 29; *Molitor v. Molitor,* 2006 ND 163, ¶ 11, 718 N.W.2d 13. "We will not review on appeal an issue not fully briefed and argued." *Vann. v. Vann*, 2009 ND 18, ¶ 41, 767 N.W. 2d 855. None of Young's arguments cite case law or statutory authority, and her pro se status does not alleviate her of this requirement. *See Hildebrand v. Stolz*, 2016 ND 225, ¶ 7, 888 N.W.2d 197. Young simply makes multiple statements about what she believes should be contained in an assignment of debt and an affidavit, without any authority on those requirements. *Brief of Appellant*, at ¶¶ 4-16. Although Young did not fully brief these issues, Young waived any rights she had to object to this evidence. "While a court may generally consider only materials which would be admissible or usable at trial—**unsworn, uncertified, or otherwise inadmissible documents may be considered by the court making a summary judgment determination if no timely objection is** made." *Hadland v. Schroeder*, 326

N.W.2d 709, 714 (N.D. 1982) citing N.D.R.Ev. 103(a)(1) (emphasis added). In *Hadland*, this Court addressed the issue of whether, under Rule 56(e), N.D.R.Civ.P., the district court properly considered the unsworn and uncertified letters of two doctors, attached to affidavits of the parties, in making its summary judgment determination. 326 N.W.2d at 714. Because neither party objected to the attachment of the unsworn or uncertified letter to the other party's affidavit, this Court held the "district court could properly consider the letters of Dr. Doce and Dr. Johnsrude in ruling on the motion for summary judgment." *Id.* Here, Young had an opportunity to respond to the motion for summary judgment and object to the Assignments and Affidavit but failed to do so. Young instead chose to move to dismiss and in her summary judgment "response" brief, asserted she did not owe any money. However, simply asserting she was not liable for the debt did not meet that requirement. Summarily, the uncontested Assignments and Affidavit of Randy Lang were properly reviewed by the district court.

II. STANDARD OF REVIEW

[¶12] The standard of review on a motion to vacate is as follows:

> 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.' " We have explained that under Rule 60(b) "[w]e do not determine whether the court was substantively correct in entering the judgment from which relief is sought, but determine only whether the court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established."

Carroll, 2017 ND at ¶ 8 (internal quotations and citations omitted). "A district 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*." *Riak v. State*,

2015 ND 120, ¶ 14, 863 N.W.2d 894 (emphasis added). An abuse of discretion by the trial court is never assumed." *Key Energy Servs, LLC v. Ewing Construction Co., Inc.,* 2018 ND 121, ¶ 13, 911 N.W.2d 319.

> This Court has previously stated there should generally be greater liberty in granting motions under N.D.R.Civ.P. 60(b) when the matter involves a default judgment rather than a judgment following a full trial on the merits. However, a Rule 60(b) motion is not a substitute for appeal and should not be used to relieve a party from free, calculated and deliberate choices he or she has made. 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. A defendant's own errors will not always constitute proper grounds for relief from a default judgment. Rather, the applicable standard under N.D.R.Civ.P. 60(b)(i) to relieve a party from a judgment is whether there was "mistake, inadvertence, surprise, or excusable neglect."

Id. at ¶ 13 (quoting *Monster Heavy Haulers, LLC v. Goliath Energy Servs, LLC*, 2016 ND 176, ¶ 10, 883 N.W.2d 917) (internal quotations and citations omitted). "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*, 2017 ND at ¶ 8 (internal quotations and citations omitted).

[¶13] The instant case involves a summary judgment rather than a default judgment. This Court has previously indicated that when a party has summary judgment entered against it, that party's obligation is to timely appeal from summary judgment and not wait to file a Rule 60(b) motion. *Federal Land Bank of St. Paul v. Bagge*, 394 N.W.2d 694, 696 (N.D. 1986) (if the defendant "objected to the summary judgment, they should have timely appealed form that judgment instead of waiting nearly a year and using a 60(b) motion as a substitute for appeal"). Consequently, ***"[a]n appeal from a trial court's refusal to vacate an order under Rule 60(b), N.D.R.Civ.P., does not permit the***

appellant to attack the underlying order from which an appeal could have been, but was not, brought." *Matter of Hirsch*, 2017 ND 291, ¶ 13, 904 N.W.2d 740 (quoting *Sturdevant v. SAE Warehouse, Inc.*, 310 N.W.2d 749, 752 (N.D. 1981)) (emphasis added). Accordingly, the appeal in this case does not involve the merits of the summary judgment, but rather, whether Young is entitled to relief under Rule 60(b). Nevertheless, A.R. Audit wholly believes summary judgment was proper.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION.

[¶14] Young's *Notice of Appeal* was for the "final judgment/ order entered on January 16, 2020", which was the *Order* denying her motion to vacate. (Docket Nos. 39, 41). Young's motion to vacate at the district court was made pursuant to N.D.R.Civ.P. 60(b)(1). (*See* Docket No. 21-24). That subsection of the Rule states "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. N.D.R.Civ.P. 60(b). Under 60(b)(1), '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.'" *Palmer v. State*, 2012 ND 237, ¶ 7, 824 N.W.2d 406 (quoting *Am. Bank Ctr. v. Schuh*, 2010 ND 124, ¶ 9, 784 N.W.2d 468) see also *Carroll v. Carroll*, 2017 ND 73, ¶ 8, 892 N.W.2d 173 (quoting *Knutson v. Knutson*, 2002 ND 29, ¶ 7, 639 N.W.2d 495) ("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."). "The moving party must show 'why he was justified in failing to avoid the mistake or inadvertence.'" Id. (quoting *Am. Bank Ctr*., 2010 ND at ¶

10). "**A Rule 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices**." *Follman v. Upper Valley Special Educ. Unit*, 2000 ND 72, ¶ 11, 609 N.W.2d 90; see *Key Energy Sers*, 2018 ND at ¶ 13 (emphasis added). "A party has a duty to protect his own interests, and a **party's mere misjudgment or careless failure to evaluate** is not sufficient to establish grounds for relief." Id. (citing *Follman*, 2000 ND at ¶ 11 (emphasis added). Importantly, a "self-represented party 'should not be treated differently nor allowed any more or any less consideration than parties represented by counsel.'" *Hildebrand*, 2016 ND at ¶ 7 (quoting *Horace Farmers Elevator Co. v. Brakke*, 383 N.W.2d 838, 840 (N.D. 1986)).

A. The District Court Did Not Abuse its Discretion in Finding Young Had Not Established Mistake, Inadvertence, Surprise, or Excusable Neglect.

[¶15] Young failed to provide competent admissible evidence in both her "response" to summary judgment and in response to her Rule 60(b)(1) Motion. Even more importantly, in Young's Rule 60 brief, she chose to only address what she viewed as the district court's apparent "failure" to schedule a hearing for her, also adding she would have "information in which will have this case dismissed". (Docket No. 24, ¶ 5). It was not until the hearing that she asserted the debt was not hers because some of the itemizations contained a "Minot Address".[2] App. at 36. Young provided nothing in support, nor did she provide authority on the relevance of such a statement to the summary judgment. Consequently, the district court did not abuse its discretion in finding a lack of mistake, inadvertence, surprise, or excusable neglect.

[2] Appellant/ Defendant Tahnee Young may be referenced with a different last name in certain exhibits because her last name was changed at least once between the time she received the subject medical services until the summary judgment. Young has not contested this fact.

[¶16] From a review of the record, it is clear Young simply ignored her options and rights under the law until it was too late. First, Young failed to respond to the merits of AR's summary judgment motion, other than with a blanket statement that she does not owe the money claimed. (Docket No. 16, at ¶ 2). Next, Young imprudently (and against the procedural and evidentiary rules of this State) withheld information until the Rule 60 hearing, which she scheduled herself with the court. (Docket No. 24, at ¶ 5). When the hearing finally arrived, Young's "evidence" in support of her motion was a verbal statement that she had never lived in Minot, which meant to her the debt was not hers. App. at 36-37. Ultimately, Young failed to provide any substantial evidence until this appeal. Young cannot blame her shortcomings on the fact that no hearing was scheduled until her Rule 60 motion. It is unclear how the district court should have known to allow for/ schedule a hearing when Young failed to file both her "answer" and Motion to Dismiss, as well as failed to schedule a hearing herself. Although Young did write a "request" for a hearing in her Motion to Dismiss, she **again** failed to file this document with the district court. In fact, AR was the party who later filed her motion.[3] (Docket No. 16). The district court is not a mind reader, and Young's failure to schedule a hearing on her dismissal motion was particularly surprising given Young's history with North Dakota courts. Young made clear from her Rule 60 motion that she was aware she was supposed to schedule a hearing. Specifically, Young cited North Dakota Rules of Court, 3.2, which states "[t]he party requesting oral argument must secure a time for the argument and serve notice upon all other parties . . . [i]f the party requesting oral

[3] AR filed Young's Motion to Dismiss as an exhibit to its summary judgment reply brief to demonstrate she did not respond to the merits of its summary judgment motion

argument fails within 14 days of the request to secure a time for the argument, the request is waived . . . ". N.D.R.Ct.3.2(a)(3). It is apparent that Young is more seasoned in law than the average lay person. Notably, a cursory review of Odyssey informs that Young has in fact filed and served motions/ responses to motions in other cases as a pro se plaintiff/ defendant. [4] Young knew what Rule to cite, yet neglected the very text of that Rule and now conveniently claims she was not given her day in court. Even if the aforementioned were not true, Young is not to be given any special leniency as a pro se litigant. *See* Hildebrand, 2016 ND at ¶ 7. Accordingly, Young waived any right she had to an oral argument on her Motion to Dismiss.

[¶17] In any event, this Court has made clear that "[a] simple disregard of legal process is, of course, not excusable neglect under the rule." *State v. $33,000.00 U.S. Currency*, 2008 ND 96, ¶ 14, 748 N.W.2d 420. In *Royal Industries v. Haugen*, this Court determined the district court was within its discretion in denying a motion to vacate when a party "assumed' that a matter would have been disposed of in bankruptcy court and that he "felt" that the court would not allow judgment against him." 409 N.W.2d 636, 638 (N.D. 1987). "The district court determined the defendants' disregard and neglect of the legal process was not excusable neglect. Although the defendants there were not

[4] Moreover, as explained in AR's *Answer Brief in Opposition to Defendant's Motion for Relief from Judgment*, Young is more than familiar with the process of scheduling a hearing and filing documents with the district court. (Docket No. 24, at ¶ 5). In a past case, Tahnee Young filed and served a Motion for Summary Judgment and a Notice of Hearing on said Motion upon the opposing party's attorney. [Doc. ID. 9, Doc. ID. 10, *Red River Collections, Inc. v. Tahnee Young*, Case No. 09-2018-CV-02298.] In another case, Tahnee Young opened a civil case with a *Notice of Filing*, as well as filed and served a Motion for Default Judgment and a Notice of Hearing on Motion for Default Judgment upon the opposing party's attorney [Doc. ID. 4-7, Doc. ID. 10-121 *James Young, Tahnee Young v. The Money Source Inc*., Case No. 09-2019-CV-00562.]

represented by counsel before the summary judgment was entered, their disregard of the legal process is not entitled to any different treatment because of their self-represented status and their claims about confusion and a mistaken belief that there was no need to respond to the summary judgment motion. *See Hildebrand*, 2016 ND at ¶ 7. Alternatively, situations where courts grant relief for mistake, inadvertence, or excusable neglect under Rule 60(b) are more pronounced. For example, this Court concluded in *CUNA* that the trial court did not err in granting CUNA's Rule 60(b) motion for relief from summary judgment wherein CUNA's counsel could demonstrate he served a response and cross motion for summary judgment in a foreclosure action upon the homeowners, but realized upon receiving the dismissal order that the answer brief was somehow inadvertently not filed. *CUNA Mortg. v. Aafedt*, 459 N.W.2d 801, 803 (N.D. 1990). This Court noted, "CUNA's failure to timely respond was the result of lawyer error, **which we are reluctant to attribute to a client who has not been personally negligent**." *Id.* (emphasis added).

[¶18] Like in *Haugen*, Young made similar statements on her "feelings" toward what she thought she could do under the law. For example, Young made statements at the Rule 60 hearing that she was "trying to understand and interpret the laws" herself, and that she was under the "assumption" a hearing would have been scheduled after she denied the allegations in the *Complaint*. App. at 34. She also stated, "you try to work your way around the court because not everybody can afford an attorney. So I do understand that I'm filing based on what I think knowledge is, and that's not always correct." App. at 37. Young's statements demonstrate her apparent lack of understanding of the law, which does not constitute excusable neglect under Rule 60(b)(1). Unlike in *CUNA*, Young's

failure to file her documents, schedule a hearing, and respond to the merits of the summary judgment motion were no one's fault but her own. If lack of understanding of the legal process was considered excusable neglect under Rule 60(b), every defendant would be filing motions to vacate in order to delay the inevitable. Again, it was Young's burden to establish why she was justified in failing to avoid the mistake or inadvertence. *Palmer*, 2012 ND at ¶ 7. She had a duty to protect her own interests, and her "mere misjudgment or careless failure to evaluate is not sufficient to establish grounds for relief." *Id.* Young chose to take on the burden of being her own attorney and it is clear Young failed to adequately represent herself. Young even admits her neglect was inexcusable. *See* App. at 34 (testifying "**I know it's not an excuse**. But because of the first response that I did, I thought that we would still have a hearing regarding that). Accordingly, the Court did not abuse its discretion in its determination that Defendant demonstrated a disregard for the legal process, which is not a sufficient ground to vacate a judgment. (Docket No. 39). See *State v. $33,000.00 U.S. Currency*, 2008 ND 96, ¶ 14, 748 N.W.2d 420.

B. The District Court Did Not Err In Its Findings on the Meritorious Defense Element.

[¶19] Although Young does not directly assert she had a meritorious defense, she somewhat implied it at the Rule 60 hearing wherein she stated this debt was not hers because some of the itemizations had a Minot address. App. at 35-36. However, a meritorious defense is a ground to vacate a *default* judgment, not a *summary* judgment, which the district court noted in its *Order*. *State by and through Workforce Safety and Ins. v. Eight Ball Trucking, Inc.*, 2019 ND 102, ¶ 9, 925 N.W. 2d 411 (citing *Throndset v. L.L.S.*, 485 N.W.2d 775, 778-79 (N.D. 1992) (quoting *CUNA Mortgage v. Aafedt*, 459

N.W.2d 801, 803 (N.D. 1990)). Notwithstanding the inapplicability to summary judgment, the district court concluded Young did not establish any claimed meritorious defense given the evidence she presented.

[¶20] Here, the judgment was based on a properly filed and served summary judgment motion. "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no disputed issues of material fact or inferences to be drawn from the undisputed facts, or if resolving disputed facts would not alter the results." *Horob v. Farm Credit Services of N.D.*, 2010 ND 6, ¶ 11, 777 N.W.2d 611. "The party resisting the motion may not simply rely upon the pleadings. Nor may the opposing party rely upon unsupported, conclusory allegations. The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact". *Palmer v. 999 Que, Inc.*, 2016 ND 17, ¶¶ 5-7, 874 N.W.2d 803 (emphasis added) (citing *Iglehart v. Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343 (quoting *Anderson v. Meyer Broad. Co.*, 2001 ND 125, ¶ 14, 630 N.W.2d 46)). The *Judgment* was issued based on the *Findings of Fact and Conclusions of Law* after reviewing the evidence submitted. App. At 8; (Docket No. 4-17). Specifically, AR demonstrated the unpaid medical debt incurred by Young and her family, her minor child, were assigned from original creditor Sanford Health and that AR was to collect upon the principal amount of $9, 143.53. App. at 13-16. Young, on the other hand, made general conclusory statements in a brief about not owing the money and about not getting a hearing scheduled from her "answer". (Docket. No. 16). Ultimately, Young did not provide evidence that she did not owe the debt in question. There were no disputed facts and the *Judgment* issued by the district court was a resolution of the controversy between

the parties on the merits. Thus, as held by the district court, any arguments regarding meritorious defense do not apply in this case. (Docket No. 39, at ¶ 10).

[¶21] Even so, the district court held that even if the meritorious defense argument were applicable to summary judgment, Young had not produced any evidence at the Motion hearing or demonstrated the existence of a meritorious defense. (Docket No. 30, at ¶ 10). "[T]he party moving to set aside the judgment must not only state the basis of the meritorious defense, but must **deliver something more than 'a mere conclusory statement that such a defense exists'** and such a conclusory statement, without more 'will generally be regarded as insufficient for this purpose.'" *$33,000*, 2008 ND 96, ¶ 18, 748 N.W.2d 420 (quoting 29 A.LR. Fed. 7, at § 6(a) (1976)) (emphasis added).

> The requisite **meritorious defense** must be set forth in **sufficient detail** ... to permit the court to determine whether or not it is meritorious and sufficient. ... The allegations set forth to establish a meritorious defense, for the purpose of setting aside a default judgment, must be more than bare legal assertions; they must counter the allegations in the complaint with specific legal grounds substantiated by a basis of credible fact.

Id. Young made conclusory statements until the Rule 60 *hearing*, wherein she gave a verbal statement that she had never lived in Minot. App. 36-37. In making this statement, Young was referring to "Minot, ND 58702" located on the itemizations. Markedly, Young did not raise this issue at the district court level until the hearing on her Rule 60 motion. A Rule 60(b) motion is not an opportunity "to provide a litigant with a second chance to present new explanations, legal theories, or proof to a court." *Johnson v. Bronson,* 2013 ND 78, ¶ 34, 830 N.W.2d 595 (citations omitted). Nonetheless, this statement is ultimately irrelevant. Nowhere in the record did AR testify these itemizations were sent to Young at a Minot address. Although the itemization were not necessary in AR proving its case for purposes of summary judgment, AR provided them as an

additional piece of evidence that also showed the charges and the dates of service. Summarily, the court did not abuse its discretion in determining Young did not establish a meritorious defense to the summary judgment or any other extraordinary circumstances warranting relief from the judgment.

IV. IF THIS COURT ALTERNATIVELY CONCLUDES THAT YOUNG APPEALED THE SUMMARY JUDGMENT RATHER THAN THE MOTION TO VACATE, THIS COURT SHOULD STILL AFFIRM THE DISTRICT COURT'S RULING.

A. If It Was Young's Intent to Appeal the Summary Judgment, Young Did Not Properly Notice or Brief Her Appeal.

[¶22] Young filed her *Notice of Appeal* on March 4, 2020. App. at 11. In her *Notice*, she cited she was appealing the "final judgment/ order entered on January 16, 2020". (Docket No. 41). That specific order was the Rule 60 *Order Denying Defendant's Motion to Vacate. Id.*; (*See* Docket No. 39). In Young's Appendix to her Appellant Brief, she attaches the Summary Judgment and corresponding *Findings*, as well as the transcript from the Rule 60 hearing. App. at 8-10, 32-38. If Young was attempting to appeal the summary judgment, she did not notice or appeal this properly. This is, of course, notwithstanding the fact that Young could not raise these new issues on appeal. *See* paragraphs 7-11 of this Brief.

[¶23] Pertinent to this Appeal is Rule 3(c) of the North Dakota Rules of Appellate Procedure, which states "the notice of appeal must . . . (2) designate the judgment, order, or part thereof being appealed". Furthermore, the Appendix to the briefs, which is the Appellant's responsibility, must include, among other things, the "judgment, order, or decision in question". N.D.R.App.P. 30(a)(1)(G). Here, it is clear Young Noticed to this Court and Appellee that she was appealing the *Order* denying her Rule 60 motion to

vacate. Then, in a twist of events, Young changed her mind and it appears briefed both the summary judgment and associated *Findings* because she not only included these in her appendix, but she also included the Rule 60 transcript in her Appendix. However, the Rules are clear that you must properly notice the appeal for the order or judgment in which you are appealing. Young failed to do so and accordingly, her appeal must follow the abuse of discretion standard of review of a motion to vacate, as detailed in paragraphs 14-21 above.

B. Even under a De Novo Standard of Review, Young's Appeal Fails.

[¶24] As previously stated, Young did not properly notice an appeal or brief the summary judgment *Findings,* and in fact indicated in her *Notice of Appeal*, corresponding appendix documents, and briefing that she was actually appealing the order denying her Rule 60 motion to vacate; nevertheless, even if this Court were to conclude she did properly appeal the summary judgment, this Court should affirm the district court's granting of summary judgment to AR.

[¶25] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no disputed issues of material fact or inferences to be drawn from the undisputed facts, or if resolving disputed facts would not alter the results. *999 Que*, 2016 ND at ¶ 5 (citing *Horob,* 2010 ND at ¶ 11). The standard of review for summary judgment is well-established:

> 'The party moving for summary judgment has the burden of establishing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, this Court views the evidence in the light most favorable to the party opposing the motion, and the opposing party will be given the benefit of all favorable inferences that can reasonably be drawn from the record. On appeal, we decide 'whether the information available to the district court precluded the existence of a

> genuine issue of material fact and entitled the moving party to judgment as a matter of law.'

Id. at ¶ 12 (quoting *Schleuter v. Northern Plains Ins. Co., Inc.,* 2009 ND 171, ¶ 6, 772 N.W.2d 879). Whether a district court properly granted summary judgment is a question of law this Court reviews **de novo** on the entire record. *Horob,* at ¶ 12.

> We have stated:
>
> > 'Although the party seeking summary judgment has the burden of showing that there is no genuine issue of material fact, **the party resisting the motion may not simply rely upon the pleadings. Nor may the opposing party rely upon unsupported, conclusory allegations. The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact**.
> >
> > In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. **The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief**.'
>
> *Iglehart v. Iglehart,* 2003 ND 154, ¶ 10, 670 N.W.2d 343 (quoting *Anderson v. Meyer Broad. Co.,* 2001 ND 125, ¶ 14, 630 N.W.2d 46).

999 Que, 2016 ND 17, at ¶¶ 5–7 (emphasis added). Importantly, for an appeal from the summary judgment, Young did not raise **any** of these appeal issues at the summary judgment stage. Again, at that point in time, Young had only provided her "answer" and motion to dismiss with the summary judgment "response" brief, which included a statement about not owing the money. (Docket No. 10, Docket No.16, at pg. 3). Ultimately, Young did not once contest the Assignments or Affidavit of Randy Lang (until this appeal). Because of this, even if this Court concludes the subject Affidavit of Randy Lang and Assignments were inadmissible, Young failed to object to its admission

into evidence and accordingly, waived her right to object now. *See Hadland v. Schroeder*, 326 N.W.2d at 714.

[¶26] Consequently, at the summary judgment stage, Young only provided conclusory speculations that this debt was not hers, which is not enough to defeat a summary judgment motion. *Iglehart*, 2003 ND at ¶ 10). Young did not provide admissible evidence by affidavit or other comparable means that raised an issue of material fact. *See Frontier Fiscal Servs, LLC v. Pinky's Aggregates, Inc*., 2019 ND 147, ¶ 6, 928 N.W.2d 449. Again, the district court took into consideration the *Complaint*, the Sanford Assignment, the Affidavit of Randy Lang with AR, the affidavit of the undersigned, and the itemizations. AR provided no evidence that these itemizations were sent to Tahnee in Minot, ND, which should be obvious by the fact that no actual address is contained on these itemizations. There were no genuine disputes of material fact and Young is indebted to AR in the principal amount of $9, 143.53.

[¶27] Even if this Court reviews the Rule 60 briefs and hearing in determining whether summary judgment was properly granted, Young failed to raise disputed facts at that stage, too. Young raised the new issues on her Rule 60 motion that 1) the district court allegedly "failed" to schedule her a hearing from her unfiled answer to AR's *Complaint*; and 2) she had information to get the case dismissed. Young did not raise the issue of the "Minot, ND 58702", located on some of the itemizations, until the Rule 60 hearing. But even then, as seen above, AR has never made representations that those itemizations were sent to Minot. Regardless, "[a]n issue presented for the first time, such as on a motion to vacate a judgment under Rule 60(b)(1), N.D.R.Civ.P., is generally too late to be seriously considered to make a new rule of law or to refine an existing rule." *Bettger*,

280 N.W.2d at 918 (citing *City of Wahpeton v. Drake-Henne, Inc*., 228 N.W.2d 324 (N.D. 1975); *Schnell v. Schnell*, 252 N.W.2d 14 (N.D. 1977). Again, this Court should affirm the district court's granting of summary judgment in favor of AR.

C. Error, If Any, By the District Court was Harmless and Did not Affect Young's Substantial Rights.

[¶28] Any error upon the Court in admitting the Assignments and Affidavit into evidence is harmless error. This Court's standard for harmless error states:

> "Unless justice requires otherwise, **no error in admitting** or excluding **evidence, or any other error by the court** or a party, **is ground for** granting a new trial, for setting aside a verdict, or **for vacating**, modifying, or **otherwise disturbing a judgment or order**. *Id.* At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

N.D.R.Civ.P. 61. "This Court defines harmless error as "any error, defect, irregularity or variance which does not affect substantial rights. Stated simply, harmless error is error that is not prejudicial...." *Hamilton v. State*, 2017 ND 54, ¶ 8, 890 N.W.2d 810 (citing *State v. Acker*, 2015 ND 278, ¶ 12, 871 N.W.2d 603). Young's substantial rights were not affected here. The *erroneous admission or exclusion of an affidavit does not require the reversal of a summary judgment if the error is harmless and there is other evidence to support it*. *See Luithle v. Taverna,* 214 N.W.2d 117, 124 (N.D. 1973); S*wenson v. Raumin*, 1998 ND 150, ¶ 11, 583 N.W.2d 102 (emphasis added)**. Summary judgment should be granted 'if the pleadings,** depositions, answers to interrogatories, and **admissions on file, together with the affidavits**, if any, **show that there is no genuine issue as to any material fact** and that any party is entitled to a judgment as a matter of law.' *Luithle*, 214 N.W.2d at ¶ 121 (emphasis added). Taking the un-notarized Assignments out of the equation, upon reviewing this case for summary judgment, the

Court reviewed the pleadings, (including the *Complaint*, which discussed the assignments from Sanford Health to AR), the sworn Affidavit of Randy Lang, an Affidavit of the undersigned, a letter from the undersigned to Young stating how much was owed, and the itemizations. At that point in the case, Young had not provided any evidence, other than statements in an unfiled brief that "she does not owe the money", and she did not object to any of AR's evidence. If again, reviewing the evidence from the Rule 60 Motion, Young only made a general statement that she never lived in Minot, which she obtained from some of the itemizations that say "Minot, ND 58702". However, AR never testified or provided evidence that these itemizations were sent to Young in Minot, ND; this should be obvious by the fact that no actual address is contained on these itemizations. App. at 16-31. Consequently, the district court's error, if any, was harmless and did not affect Young's substantive rights. Justice does not require this order/ judgment to be disturbed.

CONCLUSION

[¶29] For all the foregoing reasons, Appellee respectfully requests that the Supreme Court AFFIRM the District Court's Findings and Judgment.

Dated this 28th day of May, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

A.R. Audit Services, Inc.,	)	
	)	
Plaintiff/Appellee.	)	
	)	
v.	)	**Supreme Court No. 20200064**
	)	**Cass County**
Tahnee Young,	)	**Civil No. 09-2019-CV-03270**
	)	
	)	
	)	**CERTIFICATE OF COMPLIANCE**
Defendant/ Appellant.	)	

[¶1] The undersigned certifies pursuant, in compliance with N.D. R. App. P. 32(e), that the above Brief of Plaintiff and Appellee A. R. Audit Services, Inc. complies with the page limitations set forth in Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the total number of pages in the Brief of Plaintiff and Appellee A.R. Audit Services, Inc., excluding the certificate of service, totals 30 pages.

Dated this 28th day of May, 2020.

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IN THE SUPREME COURT

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	)	
Plaintiff/Appellee.	)	
	)	
v.	)	**Supreme Court No. 20200064**
	)	**Cass County**
Tahnee Young,	)	**Civil No. 09-2019-CV-03270**
	)	
	)	
	)	**CERTIFICATE OF SERVICE**
Defendant/ Appellant.	)	

[¶1] I hereby certify that on May 28, 2020, a true and correct copy of the foregoing BRIEF OF APPELLEE A.R. AUDIT SERVICES, INC. and CERTIFICATE OF COMPLIANCE were filed by electronic means with the Supreme Court at supclerkofcourt@ndcourts.gov and served on the pro se Defendant/ Appellant Tahnee Young at her known email address of tahneehiggins@hotmail.com.

Dated this 28th day of May, 2020.

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