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STATEMENT OF THE ISSUES

[1.] Whether the Court erred as a matter of law and/or abused its discretion on the Order issued on December 21st, 2020, when it relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the findings.

[2.] Whether the Court erred as a matter of law and/or abused its discretion when it held that the Servicemembers and Sailors Civil Relief Act does not apply to active servicemembers of the United States Military.

STATEMENT OF THE FACTS

[3.] This is an appeal from an Order by the Traill County District Court. This action was commenced on by service of the Summons and Complaint upon Defendant, Joshua Bilger (“Bilger”). [A-5]. At that time, Plaintiff, Leanne M. Hoff Bilger (“Hoff”) submitted a stipulation for the entry of judgment, signed by both parties. [A-10]. The Court made findings that Bilger was an “active duty” member of the armed forces. [A-11]. A Judgment by stipulation was entered on July 18th, 2018 by the Court. [A-23]. From the time the action was commenced until the entry of the Judgment by stipulation no affidavit of military status was filed with the court. [A-3]

[4.] On February 21st, 2020, Hoff filed an Application for Order to Show Cause alleging Bilger’s life insurance policy had lapsed due to nonpayment. [A-25]. The Application states that “[a]ttempts have been made to resolve this situation out of court. Both Leanne and her attorney have attempted to resolve this situation by contacting the companies,

Joshua’s bankruptcy trustee and Joshua himself.” Id. Hoff requested “sanctions” against Bilger and attorney fees and costs incidental to the application. Id. No affidavit of military status was filed with the court. [A-3]. No action was taken by the District Court on Hoff’s application. [A-3].

[5.] On November 15th, 2020 Bilger filed a Rule 3.2 Motion to Dismiss and Vacate the Judgment for lack of personal jurisdiction, alleging that neither party was a resident of North Dakota at the time the order was entered. [A-27]. The Plaintiff (“Hoff”) responded arguing that both parties maintained their North Dakota residency. A hearing was held on December 16th, 2020. Counsel for both parties gave arguments. Bilger argued that the Service Member’s Civil Relief Act applied because he was in active military service at the time. Hoff argued that there wasn’t a showing that Bilger was burdened, and that the “soldiers, sailors, and relief act” didn’t need to be brought up at this point, and that the question before the Court is whether or not the Court had proper jurisdiction, subject matter, and personal jurisdiction. Hoff’s position was that Bilger waived any complaint on this issue. [Transcript Pg.4, L. 12-13]. The Court made the following oral findings:

The Court had jurisdiction in this matter over both parties, personal jurisdiction. The defendant submitted to the jurisdiction of the Court the all indicia is that the parties were residents of North Dakota. The defendant was in military service and temporarily away from the state, but that there is no showing that he was claiming residency in another jurisdiction. The motion is denied. Ms. Slaathaug Moen will submit an order accordingly.

[Transcript Pg. 5, L. 3-11]. The Order was issued on December 21st, 2020. [A-29].

In its Order, the Court made the following findings:

[¶3]. The Court has both personal and subject matter jurisdiction over this matter. The parties both voluntarily submitted to the jurisdiction of the Traill County District Court. Both parties were residents of North Dakota

and were absent temporarily due to military duty assignments. The Servicemembers and Sailors Civil Relief Act does not apply. [A-29]

[6.] Bilger filed his Notice of Appeal on March 2nd, 2021. [A-31]

STANDARD OF REVIEW

[7.] A finding of fact is clearly erroneous if it is made by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the evidence, is left with a firm conviction a mistake has been made. Odegard v. Odegard, 259 N.W.2d 484. A district court's factual findings should be stated to enable this Court to understand the basis for the decision. See Marsden v. Koop, 2010 ND 196, ¶ 21, 789 N.W.2d 531.

LAW AND ARGUMENT

- a. **Whether the Court erred as a matter of law and/or abused its discretion on the Order issued on December 21st, 2020, when it relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the findings.**

[8.] Bilger challenges the "evidence" upon which the district court relied to make its factual findings. As an initial matter, the Court's finding that both parties were absent due to military duty assignments is inaccurate, misleading, and contrary to the record. There is only evidence that Bilger was absent due to active military duty, however no affidavits of military status were filed with the court. With regards to the order, the court abused its discretion by relying on hearsay to make its findings of fact. The submission of affidavits without stipulating to the admissibility of the contents or without providing subsequent testimony creates an evidentiary deficiency. O'Keeffe v. O'Keeffe, 948 N.W.2d 848 (N.D. 2020) (Justice Jenson concurring specially). Rule 801(c) of the North Dakota Rules of

Evidence provides as follows: (c) Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Rule 802 of the North Dakota Rules of Evidence provides that [h]earsay is not admissible unless any of the following provides otherwise: (a) a statute; (b) these rules; or (c) other rules prescribed by the North Dakota Supreme Court.

[9.] The Court in O'Keeffe based its Findings on inadmissible hearsay that was not admissible under a statute, the Rules of Evidence, or other rule promulgated by the North Dakota Supreme Court. Id. at ¶36 (citing Cusey v. Nagel, 2005 ND 84, 695 N.W.2d 697 ; Mehus v. Thompson, 266 N.W.2d 920, 924 (N.D. 1978)). In O'Keeffe, the Chief Justice noted that if the evidentiary deficiency had been raised, it would not have been necessary for the Court to make a determination on the substance of the appeal in order to reverse the district court's findings. Id. at ¶39.

[10.] The O'Keeffe case is similar to the case at hand, in that the Court relied on submissions filed in connection with Bilger's motion, and arguments from counsel. There was no evidence offered at the hearing. Neither party offered exhibits, affidavits or testimony. Because no evidence was received at the hearing, the findings in District Court's December 16, 2020 order were based on inadmissible hearsay which is clearly erroneous.

b. The Court erred as a matter of law in finding that the Servicemembers and Sailors Civil Relief Act does not apply to service members on active military duty.

[11.] As an initial matter, the Servicemembers Civil Relief Act of 2003 (SCRA), 50 U.S.C. App. §§501-596, signed into law on December 19, 2003 and amended December

10, 2004, completely rewrote and replaced the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940.

[12.] The SCRA applies everywhere in the United States, including the District of Columbia, and in any territory "subject to the jurisdiction of" the United States. 50 U.S.C. §3912 It applies to any civil judicial or administrative proceeding in any court or agency in any jurisdiction subject to the act. As a general rule, persons covered by the SCRA include members of the "uniformed services" found in 10 U.S.C. § 101(a)(5), which include the Army, Navy, Air Force, Marine Corps, Coast Guard, and the commissioned corps of the National Oceanic and Atmospheric Administration and the Public Health Service. Under the SCRA "military service," includes "active duty" as defined in 10 U.S.C. § 101(d)(1). "Active duty" is defined in 10 U.S.C. § 101(d)(1) as "full-time duty in the active military service of the United States ... [including] full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

[13.] Under the SCRA, in a civil proceeding the plaintiff is required to submit an affidavit stating whether or not the other party is in the military, or whether he or she is unable to ascertain such status. 50 U.S. Code §3931(b). This requirement may be satisfied by a statement, declaration, verification, or certificate, in writing, under oath. 50 U.S.C. § 3931(b)(4)(2018). Unless the affidavit states that the defendant is not in the military, the court must appoint an attorney to represent him in order to protect his legal rights and

interests before judgment is entered. Id. § 3931(b)(2)(2018). A “Judgment” includes any judgment, decree, order, or ruling, final or temporary.¹

[14.] Servicemembers may waive some of the benefits of the SCRA by agreeing to modify or terminate a contract, lease or bailment, or an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage. 50 U.S.C. § 3918. In order for the waiver to be effective, it must be executed during or after the servicemember’s period of active military service. The written agreement must specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the identity of the servicemember concerned. Congress amended the SCRA in 2004 to include two additional requirements for a waiver to be effective. Pub. L. No. 108-454, 118 Stat. 3598 (2004). The first requirement is that it must be executed separately from the legal instrument to which it applies. Id. The second is that it must be printed in at least 12-point type. Id.

[15.] The U.S. Supreme Court has held that the Act should be interpreted "with an eye friendly to those who dropped their affairs to answer their country's call." LeMaistre v. Leffers, 333 U.S. 1, 68 S. Ct. 371 (1948). With that in mind Courts interpreting the SCRA have been liberal in applying its protections where military service has materially affected a soldier’s ability to meet financial or legal obligations. If a court finds that adverse material effect is present, it will stay a proceeding. Facts supporting or rebutting the presence of material effect is essential.

¹ Pub. L. No. 108-454, 118 Stat. 3598 (2004) (the definition of the term “judgment” was added by Title VII of the Veterans Benefits Improvement Act of 2004, titled Improvements to Servicemembers Civil Relief Act).

[16.] In order to explain how this rule is applied one must look at the purpose of the rule. The premise underlying the SCRA is that a soldier should not be disadvantaged legally or financially when called to active duty. This rule serves to not only to preserve rights and property interests of servicemembers during their absence, but to remove every inhibition which would interfere with their full devotion to important tasks at hand. Solomon v. Solomon, 319 Ill. App. 618, 49 N.E.2d 807 (Ill. App. Ct. 1943); Register v. Bourguin, 14 So.2d 673 (La. 1943). The idea is to make sure that soldiers are not distracted by personal obligations or compelled to divide their allegiance while defending our country. This rule promotes military efficiency by removing mental frustration that may arise from some claim or cause of action being pressed against him at home. Shayne v. Burke, 27 So. 2d 751 (Fla. 1946); Everingham v. Stringer, 329 Ill. App. 490, 69 N.E.2d 348 (Ill. App. Ct. 1946) ; Laperouse v. Eagle Indem. Co., 12 So. 2d 680 (La. 1942) ; In re Bashor, 132 P.2d 1027 (Wash. 1943). Undue distress impairs or stymies the efficiency of a soldier. Hunt v. Jacobson, 33 N.Y.S.2d 661, 178 Misc. 201 (N.Y. Sup. Ct. 1942). People serving in our military should be freed from harassment and injury in connection with their civil affairs during their time in active service. Application of Marks, 46 N.Y.S.2d 755, 181 Misc. 497 (N.Y. Sup. Ct. 1944).

[17.] A hypothetical can serve well to understand the Act and allow one to empathize with the soldier's position. Imagine you are a forward artillery observer ("FO") in the United States Army. You are skilled not only in fire direction, but also in stealth, using a fire direction computer compiled of an engineering flat board back with a protractor and a ruler. Your calculations, if incorrect, could cause the death of soldiers and innocent bystanders. As an FO you are required to conduct special operations. While on active duty

a process server shows up and serves you with a summons. You have 21 days to respond or a default judgment will be taken against you. Confused and distracted you stop and your attention is diverted from the military operation at hand. You are now focused on defending yourself from a civil lawsuit that has threatened your property interests. Your personal obligations have now compelled you to divide your allegiance from defending your country. Not only do you fear the risks associated with active duty, but you also fear inability to defend yourself, and the loss of your liberty and property on the home front. You are no longer able to perform the tasks you were assigned to do.

[18.] The foregoing hypothetical paints a description of why the SCRA applies to active military, and how the misapplication can impact the individual soldier as a person, as well as the country who depends on him as a whole. Although, this case may provide different circumstances than what is described herein, there are no facts or evidence to determine that at this point. Because of the grave interests at stake, the SCRA authorizes the U.S. Attorney General to commence a civil action in U.S. district court for violations of the SCRA by a person who (1) engages in a pattern or practice of violating the act; or (2) engages in a violation that raises an issue of significant public importance. 50 U.S.C. § 4041. Courts may grant any appropriate equitable or declaratory relief, including monetary damages. Additionally, to vindicate the public interest, a court may assess a civil penalty up to \$55,000 for a first violation, and up to \$110,000 for subsequent violations. *Id.* In addition, persons aggrieved by a violation of the SCRA have the ability to commence a civil action in their own right. 50 U.S.C. § 4042. The court may grant appropriate equitable or declaratory relief, including monetary damages. *Id.* The court is also authorized to award the costs of the action and reasonable attorney fees to an individual who prevails in a civil

action under this section. Id. This does not preclude or limit any other remedies available under the law, including consequential or punitive damages for violations of the SCRA. 50 U.S.C. § 4043. Violations of the SCRA can have great consequences when violated.

CONCLUSION

[19.] In summary, the Servicemember's Civil Relief Act does apply to active military. Violations of the Act can cause lead to damages for which a soldier has remedies. To determine the Acts application to a case, there must be evidence in the record to form the basis of that determination. Although the protections of the Act can be waived, it must be done in accordance with the law. A prerequisite to entry of a Judgment under the Act requires a declaration of military status. If the prerequisite to entering judgment is not met the Court exceeds its jurisdiction.

[20.] In conclusion, the Appellant prays for the following relief, as follows:

- a. To dismiss the action for lack of jurisdiction, without prejudice;
- b. Alternatively, to Reverse Remand for further proceedings to allow the Court to hear additional evidence and to make findings based on evidence and the law;
- c. For reasonable damages, attorney fees and costs; and
- d. For any further relief the Court deems appropriate.

CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated this 24th day of May, 2021.

/s/ Kristin Overboe

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ATTORNEY'S CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Leanne M. Hoff Bilger vs. Joshua E. Bilger

**ND Supreme Court Case No. 20210072
District Court Case No. 49-2018-DM-00030**

1. I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
On the 24th day of May, 2021, I sent by electronic mail a true and correct copy of the following:

- 1. Appellant's Brief;**
- 2. Appellant's Appendix**
- 3. Certificate of Service**

2. Copies of the foregoing were sent by E-MAIL/Electronic Service to the following addresses:

Ashley R. Heitkamp
ashley@nilsonbrandlaw.com

Lynn Slaathaug Moen
lynn@nilsonbrandlaw.com

3. To the best of my knowledge, the above listed email address is the actual address of the party intended to be served or her attorney.
4. Dated this 24th day of May, 2021.

PER N.D.R. Civ. P. 5(f)

/s/ Kristin A. Overboe

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