

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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Leanne M. Hoff Bilger,

Plaintiff and Appellee,

v.

Joshua E. Bilger,

Defendant and Appellant.

**Supreme Ct No. 20210072**

Dist. Ct. No. 49-2018-DM-00030

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BRIEF OF APPELLEE

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On Appeal from the Order Denying Defendant's  
Motion to Dismiss and Vacate entered December 21, 2020  
Traill County District Court  
East Central Judicial District  
Honorable Frank Racek

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## STATEMENT OF THE ISSUES

1. The Appellant's Statement of Issue alleging the District Court erred as a matter of law and/or abused its discretion on the Order denying Defendant's Motion to Dismiss and Vacate when it relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the findings is waived; however, even if this issue was considered, the District Court did not abuse its discretion when it denied Defendant's Motion to Dismiss and Vacate.
2. The District Court did not err in finding that the Servicemembers Civil Relief Act does not apply to the Defendant/Appellant.

## STATEMENT OF THE CASE

[¶2] This is an appeal from the Traill County Order Denying Motion to Dismiss and Vacate, entered December 21, 2020, regarding an action for Legal Separation. Appellant’s App. at 3. Appellant, Joshua Bilger (“Joshua”) signed an Admission of Service on July 16, 2018. Id. at 9. Joshua and Plaintiff, Leanne Hoff Bilger (“Leanne”) signed a Settlement Agreement on July 16, 2018. Id. at 17. The Court entered its Order for Judgment on July 18, 2018. Id. at 22. Judgment for a Permanent Decree of Legal Separation was entered by the Clerk of Court Traill County on July 18, 2018. Id. at 24.

[¶3] Joshua filed a Motion to Dismiss and Vacate on November 15, 2020, for lack of personal jurisdiction and lack of jurisdiction. Id. at 27. A hearing was held on December 16, 2020, at which time Joshua raised the issue of the Servicemembers Civil Relief Act. Tr. of Mot. Hr’g at 2:25-3:13. On December 21, 2020, the Court issued its Order Denying Motion to Dismiss and Vacate finding that the Court had both personal and subject matter jurisdiction over the matter and that the Servicemembers Civil Relief Act does not apply. Appellant’s App. at 29.

## STATEMENT OF THE FACTS

[¶4] The parties entered into a stipulated agreement for a decree of legal separation. Appellant's App. at 10-17. Neither party was represented by counsel. Id. They used boilerplate fillable forms off the North Dakota Supreme Court website. Aff. of Leanne Hoff Bilger in Supp. of Resp. to Mot. to Vacate ¶ 3, Doc. Id #29. Joshua was a member of the armed forces at the time of the parties' separation. Appellant's App. at 11.

[¶5] Joshua and Leanne were married in 2004 in Fargo, North Dakota. Id. at 5. Joshua enlisted in the U.S. Navy in April 2007 in Fargo, North Dakota. Aff. of Leanne Hoff Bilger in Supp. of Resp. to Mot. to Vacate ¶ 4, Doc. Id #29. Throughout Joshua's various assignments, he has continued to maintain North Dakota residency. Id. at ¶¶ 4-7. He has a North Dakota Driver's License and pays North Dakota State Income Tax. Id.

[¶6] The District Court properly considered all of these facts in its determination to deny Joshua's Motion to Dismiss and Vacate.

## LAW AND ARGUMENT

### **A. Standard of Review.**

[¶7] “In reviewing a trial court’s denial of a motion under N.D.R. Civ.P. 60(b) to set aside a regularly entered judgment, we do not determine whether the trial court was substantively correct in entering the judgment from which relief is sought, but determine only if the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established.” Terry v. Terry, 2002 ND 2, ¶ 4, 638 N.W.2d 11, 13. “The trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner.” Id. “A trial court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied on are stated and considered together for the purpose of achieving a reasoned and reasonable determination.” Id.

[¶8] The standard of review for determination of whether the District Court erred in denying Joshua’s Motion to Dismiss or Vacate is abuse of discretion.

### **B. The Appellant’s Statement of Issue alleging the District Court erred as a matter of law and/or abused its discretion on the Order denying Defendant’s Motion to Dismiss and Vacate when it relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the findings is waived; however, even if this issue was considered, the District Court did not abuse its discretion when it denied Defendant’s Motion to Dismiss and Vacate.**

1. Appellant has waived the issue that the court relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the findings.

[¶9] Joshua asserts in his Statement of Issue that the District Court erred as a matter of law and/or abused its discretion on the Order denying Defendant’s Motion to Dismiss and Vacate when it relied upon submissions without stipulating to the admissibility of the contents or without providing subsequent testimony to support the

findings. However, this issue cannot be considered on appeal as Joshua failed to object to the district court's procedure.

[¶10] This Court has long held that an effective appeal of any issue must be appropriately raised in the trial court in order for the court to intelligently rule on it. State v. Thomas, 2020 ND 30, ¶ 12, 938 N.W.2d 897 (citations omitted). Further, a "failure to object at trial acts as a waiver of the claim of error." Id.

[¶11] A party may not later take advantage of irregularities that occur during a trial unless the party objects at the time they occur, allowing the court to take appropriate action, if possible, to remedy any prejudice that may result. State v. Lee, 2004 ND 176, ¶ 10, 687 N.W.2d 237 (citations omitted). "The initiative is placed on the party, not on the judge," to object to offered evidence. Id. "Thus, a party who fails to timely object to admission of offered evidence may not challenge its admission on appeal[.]" State v. Tresenriter, 2012 ND 240, ¶ 9, 823 N.W.2d 774.

[¶12] Joshua failed to object to the trial court's consideration and acceptance of the parties' respective affidavits and exhibits. Tr. of Mot. Hr'g at 2:16-17, 2:25-3:5. He further made no offer of proof in the trial court and, in fact informs the court that he has "nothing further." Id. at 3:12-13.

[¶13] Joshua's failure to object at trial has waived any claim of error regarding the trial court's motion hearing procedure.

2. The District Court did not abuse its discretion by not taking testimony at the motion hearing.

[¶14] Joshua asserts that the District Court abused its discretion by relying on "hearsay" to make its findings of fact. Joshua brought his motion pursuant to Rule 3.2 of the N.D.R.Ct. Subdivision (b) of Rule 3.2 provides:



**(b) Court Hearing.** The court may hear oral argument on any motion. If permitted by the court, a hearing may be held using contemporaneous audio or audiovisual transmission by reliable electronic means. After reviewing the parties' submissions, the court may require oral argument and may allow or require evidence on a motion.

N.D.R.Ct. 3.2(b)

[¶15] Further, subdivision (b) of Rule 43 of the N.D.R.Civ.P. specifically addresses motion practice. Rule 43(b) provides: “(b) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on declarations or may hear it wholly or partly on oral testimony or on depositions.” N.D.R.Civ.P. 43.

[¶16] The District Court properly allowed oral argument after review of submissions pursuant to Rule 3.2(b) of the N.D.R.Ct. and Rule 43(b) of the N.D.R.Civ.P. The court did not err by not taking testimony.

**C. The District Court did not err in finding that the Servicemembers Civil Relief Act does not apply to the Defendant/Appellant.**

[¶17] Joshua asserts the court erred in finding he was not entitled to relief under the Servicemembers Civil Relief Act (SCRA). However, Joshua signed an Admission of Service and voluntarily entered into a Settlement Agreement to resolve the issues around his legal separation. Appellant’s App. at 9, 10-17.

[¶18] The SCRA “applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter. This chapter does not apply to criminal proceedings.” 50 U.S.C. § 3912. Its purpose is “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. § 3902.

[¶19] The SCRA is “to protect persons in the military service from having default judgments entered against them without their knowledge.” Title Guarantee & Tr. Co. v. Duffy, 46 N.Y.S.2d 441, 443 (App. Div. 1944). A defendant who enters an appearance is not entitled to the benefit of the Acts. Id. In this case, Joshua made an appearance by entering into the Settlement Agreement with Leanne.

[¶20] However, the defendant who has notice may be entitled to a stay of proceedings.

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix] unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.”

Catlin v. Catlin, 494 N.W.2d 581, 584 (N.D. 1992) (citing 50 U.S.C. App. § 521).

[T]he Act vests discretion in trial courts to grant or deny a stay of the proceedings, depending upon whether or not the serviceman's ability to prosecute or defend the action is ‘materially affected’ by reason of his military service. This necessarily involves an element of prejudice, which is essential to the granting of a stay. In this latter regard, the courts have considered and weighed the nature of the case, the issues involved, the extent to which his rights may or may not be ‘materially affected’ by his absence, his availability at trial And the diligence with which he takes advantage of the opportunities to preserve his rights that might have been afforded him during the course of the litigation, in determining whether or not he will be prejudiced by the denial of a stay.

Robbins v. Robbins, 193 So. 2d 471, 473 (Fla. Dist. Ct. App. 1967) (citations omitted).

“The United States Supreme Court has noted that the Act does not *automatically* require a stay upon a mere showing that the defendant was engaged in military service.” Catlin v. Catlin, 494 N.W.2d 581, 584 (N.D. 1992) (citations omitted).

[¶21] Joshua signed an Admission of Service and entered into a Settlement Agreement *pro se*. He did not request a stay of the proceedings and a judgment was not entered by default. He did not object to the process and procedure of his legal separation until 2 ½ years later.

[¶22] Even if the court were to find that the district court should have *sua sponte* stayed proceedings because Joshua was an active duty servicemember, Joshua has not demonstrated any material way in which his rights were affected. Joshua's affidavit only addressed issues of jurisdiction, which he does not take up on appeal. Aff. of Joshua Bilger, Doc. Id # 24.

[¶23] Joshua is not entitled to relief under the SCRA as he made an appearance and has not demonstrated any material way in which his rights were affected.

#### CONCLUSION

[¶24] Leanne respectfully requests this Court affirm the District Court's decision and deny Joshua his requested relief.

Dated this 22nd day of June, 2021.

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CERTIFICATE OF COMPLIANCE

[¶25] The undersigned, as attorney for the Plaintiff-Appellee in the above matter, hereby certifies, in compliance with Rule 32 of the N. D. R.App. P., that the above brief was prepared with proportionally spaced, 12-point font typespace, and the total number of words in the above Brief, excluding the table of contents, table of authorities and signature block, certificate of service and this certificate of compliance, totals 1,954 words.

Dated this 22<sup>nd</sup> day of June, 2021.

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**ATTORNEY'S DECLARATION OF SERVICE BY EMAIL**

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¶1 I, Lynn Slaathaug Moen, hereby declare that on June 22, 2021, the following document: Appellee's Brief was filed and served electronically via email on Attorney Kristin Overboe at [kristin@overboelaw.com](mailto:kristin@overboelaw.com).

Dated this 22<sup>nd</sup> day of June, 2021.

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