DA 21-0103

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 272N

IN RE THE MARRIAGE OF:

NIKKI FAYE WAITE,

Petitioner and Appellant,

v.

BRYCE ELLIS WAITE,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DR-99-577
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nikki Faye Waite, Self-Represented, Florence, Montana

For Appellee:

Ryan A. Phelan, Christian Samson & Baskett, PLLC, Missoula, Montana

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Submitted on Briefs: September 22, 2021

Decided: October 19, 2021

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Nikki Waite (Nikki) appeals the Fourth Judicial District Court's denial of her motion to set aside the District Court's order granting termination of Bryce Waite's (Bryce) maintenance obligation to Nikki. We affirm.

¶3 Nikki and Bryce married in 1992. They had one child together, who is now an adult. In 1999, Nikki filed for dissolution of the marriage. The District Court issued its findings of fact, conclusions of law, and order dissolving the marriage in 2002. The District Court found that Nikki's only income at the time was $592 monthly in Social Security disability benefits, due to injuries sustained in an accident that precluded her from working. The District Court ordered Bryce to pay Nikki $700 per month in spousal support. The District Court expressly noted the spousal support was subject to future modification in accordance with § 40-4-208(2), MCA. At some point in 2008, the parties orally agreed to modify the spousal support obligation so that Bryce would pay Nikki $350 monthly. Nikki sought to enforce the original $700 monthly obligation in 2020, prompting Bryce to file a motion to terminate the support obligation on November 19, 2020. Bryce argued that circumstances had significantly changed and rendered the original obligation unconscionable. The District Court's Order (the Order)

granted Bryce's motion on December 30, 2020, the same day Nikki filed her response to the motion. In response to the Order, Nikki filed a motion seeking to set aside the Order on January 11, 2021. The District Court denied Nikki's motion on February 3, 2021.[1] Nikki appeals.

¶4 Nikki raises twenty-two issues on appeal, several of which are not appropriately before this Court. We restate the issue ripe for review as follows:

> *Did the District Court abuse its discretion when it denied Nikki's motion to set aside the District Court's Order granting Bryce's motion to modify his spousal maintenance obligation?*[2]

¶5 Our review of a district court's ruling on a Rule 60(b), M. R. Civ. P., motion for relief from judgment depends on whether the motion was granted and judgment set aside. *Bahm v. Southworth*, 2000 MT 244, ¶ 4, 301 Mont. 434, 10 P.3d 99. When a district court refuses to set aside a default judgment, the proper standard of review is that a slight abuse of discretion will warrant reversal. *Tschida v. Rowe*, 2003 MT 192, ¶ 7, 316 Mont. 503, 74 P.3d 1043. The party seeking to set aside a default judgment has the burden of proof. *Tschida*, ¶ 7 (citations omitted).

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[1] Nikki filed a second motion to set aside the District Court's Order without the District Court's leave. The District Court denied this motion and ordered it struck from the record on February 25.

[2] Much of Nikki's briefing focuses on the District Court's Order, and Nikki expressly argues that she is appealing the Order in her response brief. However, in civil cases, appeals must be entered within 30 days of the entry of judgment. M. R. App. P. 4(5)(a)(i). The District Court's order granting Bryce's motion was entered on December 30, 2020. Nikki's notice of appeal was filed on March 3, 2021. Moreover, Nikki's notice indicated she was appealing the District Court's order denying her motion to set aside. Accordingly, our analysis focuses on the order denying her motion to set aside.

¶6 To determine whether the District Court abused its discretion in failing to set aside the default judgment, we first assess the circumstances under which the judgment was entered. The District Court granted Bryce's motion on December 30, 2020, after receiving no objection or response from Nikki. Nikki argued that she was out of state and did not receive Bryce's motion until December 23, 2020, and the time for her response should have started on that date.

¶7 Several procedural rules apply here. Upon the filing of a motion, Montana Uniform District Court Rule (MUDCR) 2(b) requires an opposing party to file an answer brief in response to the motion within fourteen days. Failure to respond may subject the motion to summary judgment, and an opposing party's failure to respond shall be deemed an admission the motion is well taken. MUDCR 2(c). M. R. Civ. P. 5(b)(2)(C) provides that papers may be served by mail to a party's last known address, and that service is complete upon mailing. M. R. Civ. P. 6 provides that the day of the event requiring a response is excluded when computing time for motions. The Rule additionally provides that "every day, including intermediate Saturdays, Sundays, and legal holidays" counts. M. R. Civ. P. 6(d) further provides that, when service is made under Rule 5(b)(2)(C), a party has three additional days to act or respond.

¶8 Bryce filed his motion on November 19, 2020. Under the above Rules, Nikki was required to file a response by December 7, 2020, or risk summary judgment. Nikki did not file a response until December 30, 2020, well outside the response deadline and—according to the record—after the District Court issued its Order. Nikki failed to respond in a timely manner, and the District Court used its discretion to grant Bryce's motion.

We next address whether the District Court abused its discretion by denying Nikki's motion to set aside the Order.

¶9 M. R. Civ. P. 60(b) provides a court discretion to, upon motion and just terms, provide relief from a final judgment or order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

We determine whether neglect is excusable by assessing whether the reasons given for the neglect are such that reasonable minds might differ in their conclusions concerning excusable neglect. *Myers v. All West Transp.*, 235 Mont. 233, 236, 766 P.2d 864, 866 (1988). Mistake, inadvertence, and excusable neglect require more than mere carelessness or ignorance of the law on the part of the litigant. *Karlen v. Evans*, 276 Mont. 181, 188, 915 P.2d 232, 237 (1995). Failure to appear to defend an action due to forgetfulness, the press of other business, or inattention to mail do not establish excusable neglect. *Myers*, 235 Mont. at 236, 766 P.2d at 867. We have also recognized that confusion over the Montana Rules of Civil Procedure does not constitute excusable neglect. *Dean v. Fred's Towing*, 245 Mont. 366, 370, 801 P.2d 579, 581 (1990) (refusing to set aside a default judgment because the debtor mistakenly believed a letter he sent to opposing counsel sufficed as his answer).

¶10 Nikki's motion did not allege inadvertence, surprise, new evidence, fraud, a void judgment, or a satisfied judgment.[3] Her motion contended that she was out of town and did not receive Bryce's motion in the mail until December 23, 2020. Her motion further contended that she believed Bryce was required to serve the motion by certified mail. Accordingly, we construe her grounds to set aside the Order as mistake or excusable neglect. However, as in *Myers*, Nikki's inattention to her mail does not constitute excusable neglect, nor does Nikki's mistaken belief that Bryce was required to serve the motion by certified mail. M. R. Civ. P. 5(b)(2)(C) allows service by mail but does not require a party to use certified mail. Moreover, even if a party were required to serve motions by certified mail, that would not change the fact that Nikki failed to respond to Bryce's motion until after the District Court had ruled. After reviewing the record and Nikki's arguments, we cannot say Nikki met her burden of establishing excusable neglect or mistake. The District Court did not abuse its discretion when it denied Nikki's motion to set aside the maintenance modification.

¶11 We recognize Nikki represented herself before both this Court and the District Court, and we generally afford pro se litigants a certain amount of latitude. *Greenup v. Russell*, 2000 MT 154, ¶ 15, 300 Mont. 136, 3 P.3d 124. However, this latitude may not extend so far as to prejudice the other party, "and it is reasonable to

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[3] Nikki appears to argue, on appeal, that her second motion to set aside presented new evidence, that Bryce committed fraud, and that the District Court's Order "cannot be 'carried out,'" which we construe as an argument the District Court's Order was void. However, her first motion to set aside did not raise these allegations, and "[i]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 37, 321 Mont. 364, 91 P.3d 569.

expect all litigants, including those acting pro se, to adhere to procedural rules." *Greenup*, ¶ 15. Nikki failed to do so, and the District Court properly denied her motion to set aside. Accordingly, we are left with no record upon which to review the merits of the District Court's Order. The District Court's Order is affirmed.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

Justice

We concur:

Justices