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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVE DORION

Plaintiff/Respondent,

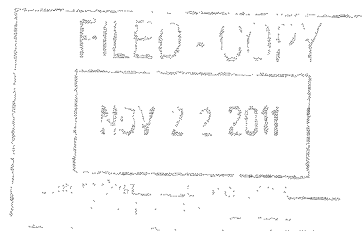
vs.

RICHARD KEANE and LISA KEANE,
husband and wife, KEANE LAND
COMPANY, PLLC, an Idaho Limited
Liability Company, KEANE AND CO.
CONSTRUCTION, INC., an Idaho
corporation, and JOHN DOES 1-5,

Defendants/Appellants.

Docket No. 38519-2011

APPELLANTS' BRIEF



**APPELLANTS' BRIEF – RICHARD KEANE and LISA KEANE, husband and wife,
KEANE LAND COMPANY, PLLC, an Idaho Limited Liability Company,
KEANE AND CO. CONSTRUCTION, INC., an Idaho corporation**

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Nez Perce
Honorable Jeff M. Brudie, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Appellants Richard and Lisa Keane, Keane Land Company, PLLC, and Keane and Co. Construction, Inc. (collectively “the Keanes”) appeal from the district court’s denial of their Motion to Set Aside Default and denial of their Rule 60(b) Motion for Relief from Final Judgment (“Rule 60(b) Motion”). On August 5, 2010, the district court entered an order permitting the Keanes’ counsel leave to withdraw, which was served on the Keanes on August 9, 2010. Respondent Dave Dorion (“Dorion”) filed a Motion for Entry of Default on September 1, 2010, before the time period required under Rule 11(b)(3) had run, and the district court granted the motion, entering default on September 8, 2010. The district court then denied both the Keanes’ Motion to Set Aside Default and Rule 60(b) Motion. The district court’s denial of the Rule 60(b) Motion, or in the alternative the Motion to Set Aside Default, should be reversed and the matter remanded.

B. Course of Proceedings

Dorion filed his Complaint and Demand for Jury Trial (“Complaint”) against the Keanes on February 24, 2009. (Complaint, R. Vol. I, pp. 12-21.) The Complaint alleged six causes of action: (1) breach of contract; (2) specific performance; (3) quantum meruit/unjust enrichment; (4) breach of covenant of good faith and fair dealing; (5) breach of fiduciary duty; and (6) declaratory judgment. (*Id.*) The district court set aside an initial entry of default following a May 14, 2009, hearing on the matter. (Opinion and Order on Motion to Set Aside Default, R. Vol. I, pp. 37-43.) The Keanes then filed their Answer to Complaint (“Answer”) on May 27, 2009, asserting the following affirmative

defenses: (1) Rule 12(b)(6) failure to state a claim for which relief may be granted; (2) Idaho Code § 9-503 Statute of Frauds; and (3) improper designation of parties. (Answer, R. Vol. I, pp. 44-48.)

The case progressed until July 27, 2010, when Manderson Miles, as attorney for the Keanes, moved to withdraw. (Motion to Withdraw, R. Vol. I, pp. 81-83.) The Order Permitting Leave to Withdraw was entered on August 5, 2010. (Motion to Augment Clerk's Record on Appeal ("Motion to Augment"), Affidavit of Mendy S. Maurer ("Maurer Aff."), Ex. 1.) On August 9, 2010, the court served upon the Keanes by certified mail the Order Permitting Leave to Withdraw. (*Id.*) Dorion then filed a Motion for Entry of Default on September 1, 2010. (Opinion and Order on Defendants' Motion to Set Aside Default, R. Vol. I, p. 88.) Entry of default was made on September 8, 2010. (*Id.*)

On September 17, 2010, Todd Richardson made an appearance on behalf of the Keanes. (*Id.*) On that same date, he moved to set aside the entry of default. (*Id.*) On December 29, 2010, the district court issued its Opinion and Order on Defendants' Motion to Set Aside Default and Plaintiff's Motion for Entry of Default Judgment, denying the Keanes' motion. (*Id.*, pp. 86-92.) On January 14, 2011, a default judgment was entered. (Judgment, R. Vol. I, pp. 93-95.) The Notice of Appeal was filed shortly thereafter, (Notice of Appeal, R. Vol. I, pp. 96-99), and an Amended Notice of Appeal was filed March 1, 2011. (Amended Notice of Appeal, R. Vol. I, pp. 100-03.)

The Keanes filed their Rule 60(b) Motion on March 21, 2011. (Register of Actions, R. Vol. I, p. 10.) Dorion filed his Memorandum in Opposition on March 31, 2011. (*Id.*) A hearing was held on the matter on April 7, 2011, at which time the district court ruled from the bench and denied the Keanes' Rule 60(b) Motion. (Motion to Augment, Tr., April 7, 2011, Hr'g.) The Order Denying

Defendant's [sic] Rule 60(b) Motion for Relief From Final Judgment was entered April 11, 2011, and, pursuant to Idaho Appellate Rule 17(e)(1)(c), is deemed included on appeal. (Order Denying Motion, R. Vol. I, pp. 108-09.)

C. Statement of Facts

The pertinent facts are those contained within the Course of Proceedings above.

ISSUES PRESENTED ON APPEAL

- A. Whether the district court erred in denying the Keanes' Rule 60(b) Motion because, as a matter of law, the default judgment was void.
- B. Whether the district court abused its discretion in denying the Keanes' Motion to Set Aside Default.
- C. Whether the Keanes are entitled to attorney fees on appeal.

ARGUMENT

The default judgment entered on January 14, 2011, is void. The Motion for Entry of Default was filed within twenty-three (23) days from the date of service of the Order Permitting Leave to Withdraw to the Keanes in contravention of Rule 11(b)(3) and Rule 6(e)(1). Rule 60(b)(4) relieves a party from the judgment when it is void. Therefore, the district court erred in failing to relieve the Keanes from that judgment pursuant to Rule 60(b)(4) so this matter could be determined on the merits.

In addition, the district court erred in failing to set aside the September 8, 2010, entry of default. The Keanes demonstrated good cause for setting aside the default and the district court abused its discretion in failing to consider the Keanes' arguments and defenses.

A. Standards of Review.

Generally, the decision to grant or deny a motion to set aside a default or judgment by default is committed to the discretion of the trial court. *Bach v. Miller*, 148 Idaho 549, 552, 224 P.3d 1138, 1141 (2010). The district court's denial of a motion to set aside a default judgment will not be disturbed on appeal, absent an abuse of that discretion. *Id.* In determining whether a court abused its discretion, the Idaho Supreme Court considers whether the district court: (1) correctly understood the issue to be one of discretion; (2) acted within the outer bounds of its discretion; and (3) reached its decision on the motion before it through the exercise of reason. *Id.*

“However, where a default and default judgment are granted based on Rule 11(b)(3) and later challenged under Rule 60(b)(4), the standard of review is de novo.” *Fisher Sys. Leasing, Inc. v. J&J Gunsmithing & Weaponry Design, Inc.*, 135 Idaho 624, 627, 21 P.3d 946, 949 (Ct. App. 2001); *see also McClure Eng'g, Inc. v. Channel 5 KIDA*, 143 Idaho 950, 953, 155 P.3d 1189, 1192 (Ct. App. 2006) (“Whether the strictures of Rule 11(b)(3) were satisfied is a question of law, and we therefore exercise de novo review.”). Furthermore, if a judgment is voidable, it will be set aside as a matter of law. *See Blanc v. Laritz*, 119 Idaho 359, 361, 806 P.2d 452, 454 (Ct. App. 1991).

Judgments by default are disfavored and “the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits.” *Nickels v. Durbano*, 118 Idaho 198, 201, 795 P.2d 903, 906 (Ct. App. 1990).

B. The District Court Erred in Denying the Keanes' Rule 60(b) Motion Because the Default Judgment was Void Pursuant to Rule (11)(b)(3).

Idaho Rule of Civil Procedure 60(b) states, in pertinent part, that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . .” I.R.C.P. 60(b)(4). This motion need only be made “within a reasonable time,” and the district court may rule upon the motion during the pendency of an appeal. *Id.*; I.A.R. 13(b)(6). When default judgment is predicated upon an erroneously entered default, the judgment is void. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985). “[S]trict compliance with Rule 11(b)(3) is required to obtain a valid judgment.” *Berg v. Kendall*, 147 Idaho 571, 577, 212 P.3d 1001, 1007 (2009). The judgment here was void because proceedings affecting the Keanes’ rights occurred within the twenty-three (23) day period proscribed in Rule 11(b)(3) and the Order Permitting Leave to Withdraw failed to comply with Rule 11(b)(3).

1. Proceedings affecting the Keanes’ rights occurred within the twenty-three (23) day period provided by Rule 11(b)(3).

Idaho Rule of Civil Procedure 11(b)(3) requires, whenever an attorney is granted leave to withdraw, “no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order of withdrawal to the party.” I.R.C.P. 11(b)(3). It is only when that party fails to file and serve an additional written appearance “within such 20 day period” that there are sufficient grounds for entry of default and default judgment. *Id.*

a. The motion filed by Dorion was a proceeding within the meaning of Rule 11(b)(3) and it affected the Keanes' rights.

As an initial matter, Rule 11(b)(3) does not limit what is proscribed during the twenty-three (23) day period to the actual granting of relief or to any other action taken by the court, as argued by Dorion in the district court. The rule says no proceedings can occur within that time frame. I.R.C.P. 11(b)(3). A motion is clearly a "proceeding." As defined in Black's Law Dictionary, a proceeding is

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
2. Any procedural means for seeking redress from a tribunal or agency.
3. An act or step that is part of a larger action.
4. The business conducted by a court or other official body; a hearing. . .

BLACK'S LAW DICTIONARY 1241 (8th ed. 2004). Black's also quotes with approval the following definition:

'Proceeding' is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.

Id. (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3-4 (2d ed. 1899)) (emphasis added). A motion is a proceeding.

The motion seeking default also affected the Keanes' rights. Rule 1(a) states that "[t]hese rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." This elevates a proceeding to a legal right. The motion seeking default was the prerequisite to entry of default and ultimately the judgment. This proceeding had the ultimate effect on the Keanes' rights – the complete dismissal of their defense, a money judgment against them, and the loss of real property. Said another way, without the motion neither the default nor the judgment would have occurred. The motion was a proceeding affecting the Keanes' rights, which occurred within the proscribed period. This makes the judgment void.

b. Rule 6(e) provides an automatic three (3) day extension to any period of time when service is completed by mail.

Rule 6(e)(1) grants additional time after any service by mail in the following manner:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

I.R.C.P. Rule 6(e)(1).¹ Here, the Keanes were required to act within twenty (20) days after the Order Permitting Leave to Withdraw was served. However, because it was served by mail the Keanes had an additional three (3) days within which no further proceedings could be had. *See* I.R.C.P. 11(b)(3);

¹ It should be noted that Rule 6(e)(1) speaks of "acts" or "proceedings" and applies to motions. *See Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (Ct. App. 1994) (motions for summary judgment); *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987) (motions for automatic disqualification). This is further evidence that a motion is a proceeding.

I.R.C.P. 6(e)(1). As will be discussed more fully below, the Motion for Entry of Default was filed within that twenty-three (23) day period, making the judgment based on that motion and default void as a matter of law.

Using a 2010 calendar, the following timeline shows that proceedings were taken which affected the rights of the Keanes within the twenty (20) plus three (3) day period within which no action should have been taken.

DATE	ACTION TAKEN
08/09/10 - Monday	Order Permitting Leave to Withdraw served by certified mail
09/01/10 - Wednesday	Dorion files Motion for Entry of Default
09/01/10 - Wednesday	At midnight, the 23 day period expired
09/02/10 - Thursday	First day any proceedings could have been taken in the action

Under the rules, and because the Order Permitting Leave to Withdraw was served by mail, the Keanes were entitled to twenty-three (23) days of no action taken. Under the rules, one begins counting the day after the action that triggered the clock to begin running. Also, the last day counted falls within the proscribed period. Here, the twenty-third (23rd) day is included as a day on which no action can be taken.

The Order Permitting Leave to Withdraw was served by mail on Monday, August 9, 2010. (See Motion to Augment, Maurer Aff., Ex. 1.) Therefore, the first day counted is Tuesday, August 10, 2010. Counting twenty-three (23) days, starting with August 10, 2010, the twenty-third (23rd) day is Wednesday, September 1, 2010, and on that day no proceedings could be had. The Motion for Entry of Default was filed on Wednesday, September 1, 2010, one day too soon.² It was filed within the proscribed period when no proceedings can be had. This was in contravention of Rule 11(b)(3). Nor can it be argued that this is a de minimus or merely technical violation. Failure to comply strictly with the requirements under Rule 11(b)(3) renders a judgment voidable under Rule 60(b)(4). *Blanc v. Laritz*, 119 Idaho 359, 362, 806 P.2d 452, 455 (Ct. App. 1991).

It should also be noted that actual receipt has been eliminated by Rule 6(e). Rule 6(e) gives an automatic three (3) day extension anytime service is completed by mail. The purpose of Rule 6(e) make this clear:

Although the Advisory Committee's Notes to the original or amended Rule 5(b) do not mention Rule 6(e), the latter rule clearly is intended to protect parties who are served with a pleading or other paper by mail from suffering a systematic diminution of their time to respond through the application of Rule 5(b), which provides that service is complete upon mailing, not receipt. The additional three days provided by Rule 6(e) to the party being served is thought to represent a reasonable transmission time, and a fair compromise between the harshness of measuring time strictly from the date of mailing and the indefiniteness of attempting to measure from the date of receipt, which in many cases would be unverifiable. . . .

² It should be noted that the twentieth (20th) day fell on Sunday, August 29, 2010. Per a literal reading of Rule 6(a), if the last day of the period falls on a Sunday it slides to the following Monday. I.R.C.P. 6(a). If one adds the three (3) days after counting twenty (20) days as required by Rule 6(a), the last day of the proscribed period falls on Thursday, September 2, 2010, and the first day any action could be taken would be Friday, September 3, 2010. Under this scenario, the Motion for Entry of Default was filed two days too soon.

WRIGHT AND MILLER, 4B FED. PRAC. AND PROC. § 1171 (3d ed.). Actual receipt is no longer relevant. It is the very uncertainty that exists in this case of trying to establish the date of actual receipt which Rule 6(e) resolves by giving everyone a consistent extra three (3) days to react.

Rule 11(b)(3) provides a readily identifiable, straightforward requirement for counsel and the courts to satisfy. Compliance with the rule obviates any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant's state of mind. An entitlement to relief [when there is strict compliance with the rule] produces consistent, predictable results, unaffected by the varying philosophies that underlie exercises of discretion by individual judges.

Knight Ins. Inc. v. Knight, 109 Idaho 56, 60, 704 P.2d 960, 964 (Ct. App. 1985). Thus, the Keanes were entitled to a full twenty-three (23) days from the date of mailing.

An Idaho case, nearly on all fours, is instructive. In *Laritz*, the defendant's attorney sought permission to withdraw. 119 Idaho at 360, 806 P.2d at 453. On September 28, 1982, the magistrate allowed the attorney to withdraw directing that the defendant be notified under Rule 11(b)(3). *Id.* A copy of the order allowing the attorney to withdraw was mailed to the defendant's last known address on September 29, 1982. *Id.* at 362, 806 P.2d at 454. The magistrate issued an order entering default on October 21, 1982 ("Order of October 21"). *Id.* at 360, 806 P.2d at 453. In a later action to recover attorney fees and costs, the defendant asserted that the Order of October 21 was procedurally invalid. *Id.* The magistrate judge ruled otherwise and judgment was entered. *Id.* at 361, 806 P.2d at 454. Ultimately, the Order of October 21 was challenged in the district court as untimely and void under Rule 60(b)(4). *Id.*

The Idaho Court of Appeals noted that upon entry of an order granting leave to an attorney to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of twenty (20) days. 119 Idaho at 362, 806 P.2d at 455. The Court of Appeals further recognized that under Rule 6(e)(1), three days are added to the twenty (20) day period specified in Rule 11(b)(3) when the order allowing withdrawal is served upon the defendant by mail. *Id.* In *Laritz*, the Order of October 21 was entered twenty-two (22) days after mailing of the withdrawal order. *Id.* “Thus, since twenty-three days should have elapsed before Laritz’[sic] default was entered, the Order of October 21 is voidable under I.R.C.P. 60(b)(4).” *Id.* In addition to an error in the wording of the order, the Court of Appeals ruled that proceedings taken within twenty-three (23) days of the withdrawal order was a failure to comply strictly with the requirements of Rule 11(b)(3), thereby rendering the default judgment voidable under Rule 60(b)(4). *Id.* The entry of judgment was reversed. *Id.*

This Idaho case supports the proposition that the Keanes should have had twenty-three (23) days of protection against any further proceedings.³ Here, there were proceedings taken within that twenty-three (23) day period. The default judgment is void as a matter of law, and the matter should be remanded for trial on the merits.

2. The Order Permitting Leave to Withdraw Failed to Comply with Rule 11(b)(3).

The district court’s Order Permitting Leave to Withdraw, to which Dorion filed his untimely Motion for Entry of Default, fails to state in its body the following: “or dismissal of the action of

³ While in *Laritz* it was the order entering default that fell within the twenty-three (23) day proscribed period, it should make no difference to the analysis that the Motion for Entry of Default was filed within the twenty-three (23) day proscribed period in the case at bar.

such party with prejudice.” (See Motion to Augment, Maurer Aff., Ex. 1.) This is a separate and distinct ground for voiding the judgment.

There must be strict compliance with Rule 11(b)(3) to obtain a valid judgment. *Martinez v. Brown*, 144 Idaho 410, 412, 162 P.3d 789, 791 (Ct. App. 2007). In *Martinez*, the district court’s order of withdrawal failed to notify Martinez that his claim could be dismissed “with prejudice” should he fail to appoint a new attorney or appear on his own behalf within the designated period. *Martinez*, 144 Idaho at 412, 162 P.3d at 791. For lack of these two words in the order of withdrawal, the Court of Appeals held that the default judgment entered against Martinez was invalid for failing to strictly satisfy the plain requirements of Rule 11(b)(3).⁴ *Id.*

In *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991), there was an appeal from an order denying a motion to set aside a default judgment. The Court of Appeals first noted that the standard of review was not discretion of the court but rather that if the judgment is voidable for failure to provide the notice required by Rule 11(b)(3) it will be set aside as a matter of law. 119 Idaho at 112, 803 P.2d at 1018. Quoting Rule 11(b)(3) the Court of Appeals specifically noted the language of the last sentence holding that it had particular significance. That sentence states:

If such party fails to file and serve an additional written appearance in the action. . . within such 20 day period, such failure shall be sufficient ground for entry of default and default judgment against such party or dismissal of the action of such party, with prejudice, without further notice, which shall be stated in the order of the court.

⁴ In the case at bar, the order omitted even more language—“or dismissal of the action of such party with prejudice.”

I.R.C.P. 11(b)(3) (emphasis added.) The Court of Appeals determined that the order did not notify the defendant that, in addition to the possible consequences of the entry of a default, a judgment by default also could be taken against him without further notice. *Reinwald*, 119 Idaho at 112, 803 P.2d at 1018. The Court of Appeals ruled that the trial court erred as a matter of law in not granting the motion to set aside the default for failure to include these words because it is strict compliance, not substantial compliance, that is required by Rule 11(b)(3). *Id.* These same words (and more) were not present in this Order Permitting Leave to Withdraw.

Under Rule 11(b)(3), any failure to comply with the specific wording of the rule makes a judgment void. There need be no showing of prejudice and it does not matter whether the proper wording would have made a difference. What matters is the requirement of strict and absolute compliance. The words missing from the district court's Order Permitting Leave to Withdraw are words that are required by the rule and their absence makes the judgment void.

Therefore, the district court erred in refusing to grant the Keanes' Rule 60(b) Motion and the default judgment entered against the Keanes on January 14, 2011, should be deemed void.

C. The District Court Abused Its Discretion in Failing to Set Aside the Default.

The district court also abused its discretion when it failed to set aside the default entered on September 8, 2010. Entry of default is appropriate only when a party "has failed to plead or otherwise defend. . . ." I.R.C.P. 55(a)(1). In moving to set aside an entry of default, the more lenient "good cause" standard is applied. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993). In determining whether "good cause" exists, there are three primary considerations: (1) whether the default was willful; (2) whether setting aside the default would

prejudice the opposing party; and (3) whether a meritorious defense has been presented. *Id.* The district court acted outside the bounds of its discretion and failed to reach its decision by an exercise of reason in denying the Keanes' September 17, 2010, Motion to Set Aside Default.

In reaching its decision in the Opinion and Order on Defendants' Motion to Set Aside Default and Plaintiff's Motion for Entry of Default Judgment ("December 29, 2010 Order"), the district court failed to find that the Keanes' conduct was willful, that Dorion would be prejudiced by setting aside the default, or that the Keanes failed to present a meritorious defense. (R. Vol. I, p. 90.) The December 29, 2010 Order is in stark contrast to the court's earlier May 21, 2009, Opinion and Order on Defendants' Motion to Set Aside Default ("May 21, 2009 Order"), in which the court analyzed each consideration and granted the motion and set aside the earlier default. (R. Vol. I, pp. 41-42.) Instead, this time the court penalized the Keanes for what it deemed "neglect[ing] the lawsuit." (R. Vol. I, p. 90.)

First, in regard to whether the Keanes had presented a meritorious defense, in the December 29, 2010 Order the district court looked to its May 21, 2009 Order where it stated that the affidavit presented in support of the Keanes' Motion to Set Aside Default "was weak at best in presenting a meritorious defense." (R. Vol. I, p. 90.) The court then stated that the affidavit filed in support of the current Motion to Set Aside Default offered no additional facts demonstrating a meritorious defense. (*Id.*) However, the court failed to consider the Keanes' Answer (filed after the earlier default proceedings), which offered additional facts demonstrating a meritorious defense. (R. Vol. I, pp. 44-48.)

Second, the court failed to consider and address the Keanes' new argument that they had been offered an extension of time by opposing counsel in which to hire a new attorney. Instead, the court based its holding on the following reasoning:

While Defendant Keane may not have understood the need to timely address the lawsuit in the beginning, it should have been blatantly apparent after the first default was entered. Instead, Defendant simply neglected the matter, not once but twice, with the consequence being entry of default. Defendant Keane's excuse was plausible once, but not twice. The lawsuit has been pending for nearly two years, during which time Plaintiff has made every effort to prosecute the matter while Defendant has failed to take the matter seriously and has chosen instead to neglect the lawsuit, addressing it only after defaults have been entered.

(R. Vol. I, p. 90.) In essence, the district court was basing its decision on credibility issues.

The court had no basis for its finding that the Keanes were "neglect[ing] the lawsuit" over the two years of its pendency, nor is such a finding a proper ground for entry of default under Rule 55(a)(1). In the May 21, 2009 Order, the district court found that "Defendant Keane's excuse" that the Keanes thought an attorney had been retained but, in fact, had not, was the basis for good cause. (R. Vol. I, pp. 41-42.) Specifically, the court found that "the failure of the Defendants to timely respond was not a willful omission" and "no prejudice would result" to Dorion by setting aside the default. (*Id.*) The court set aside the default and the Keanes then fully defended Dorion's prosecution of the case until their counsel withdrew on August 5, 2010. Instead of addressing and considering the new arguments presented by the Keanes as to why they failed to file a timely written appearance, the court seems to find that "Defendant Keane's excuse" in the September 17, 2010, Motion to Set Aside Default was the same "excuse" as that offered in the earlier Motion to Set Aside

Default. This is a clear misunderstanding of the Keanes' argument and of the bases for not timely appearing.

The court failed to address the Keanes' new argument that they were given an extension of time, failed to find that the Keanes were willful in their actions, failed to consider the meritorious defenses presented by the Keanes' Answer, and failed to address how Dorion would be prejudiced by setting aside the default. Therefore, the court abused its discretion in refusing to set aside the default so that the case could proceed on its merits.

D. The Keanes are Entitled to Attorney Fees on Appeal.

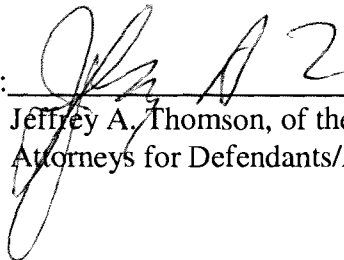
Should the Keanes prevail on appeal, they are entitled to attorney fees pursuant to I.C. § 12-120(3). The basis of Dorion's claims against the Keanes is a commercial transaction. (R. Vol. I, pp. 12-21.) "The court must always award attorney fees to the prevailing party 'in commercial transactions.'" *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 90 (2009) (quoting I.C. § 12-120(3)).

CONCLUSION

The Keanes respectfully request that this Court reverse the district court's denial of their Rule 60(b) Motion and remand so that the matter may be decided on the merits. In the alternative, the Keanes request that the Court find that the district court abused its discretion in failing to set aside the entry of default and reverse and remand for a trial on the merits.

DATED this 22 day of November, 2011.

ELAM & BURKE, P.A.

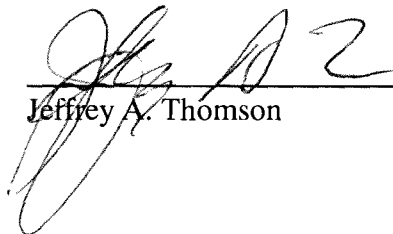
By:  _____
Jeffrey A. Thomson, of the firm
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of November, 2011, I caused a true and correct copy of the foregoing document to be served as follows:

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