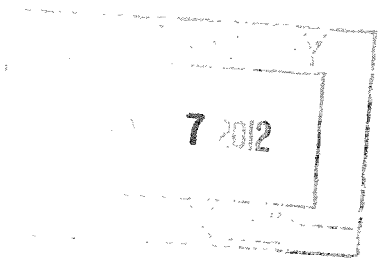
1-7-2012

Dorion v. Keane Respondent's Brief Dckt. 38519

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, LLC., an Idaho Limited Liability Company, KEANE AND CO. CONSTRUCTION, INC., an Idaho corporation, and JOHN DOES 1- 5 Defendant/Appellant.	)	38519-2011 Docket No. ~~37683-2010~~



RESPONDENT'S BRIEF

Appealed from the District Court of the Second Judicial District in the State of Idaho, In and For the County of Nez Perce

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The Honorable Jeff M. Brudie, District Judge Presiding

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I. STATEMENT OF THE CASE

The case underlying this appeal is an action by Respondent Dave Dorion (hereinafter "Dorion"), against Appellant Rick Keane and various entities (hereinafter collectively, "Keane"), for breach of contract and declaratory relief. (Complaint and Demand for Jury Trial, R. Vol. I, pp. 12-21). The parties entered a joint venture to construct a triplex airplane hangar at the Lewiston - Nez Perce County Airport, sell two units, and share the third unit. (Id. at 13-16). On the brink of completion, however, Keane excluded Dorion from the premises, and refused to pay the amount agreed upon to Dorion for labor expended in construction. In February of 2009, Dorion filed his Complaint. (Id.)

After Keane failed to appear, Dorion applied for and ultimately obtained a default on March 27, 2009. (Motion for Entry of Default, and Non-Military Affidavit, Affidavit for Default, Application for Default and Default, R. Vol. I, pp. 22-26). Keane eventually sought, and was granted relief; the first default was set aside on May 21, 2009. (Opinion and Order on Defendants' Motion to Set Aside Default, R. Vol. I, pp. 37-43). Almost immediately, and while fully aware that a claim existed relative to the third hangar unit, Keane attempted to sell that third unit; Dorion was required to seek, and was granted relief via a Temporary Restraining Order, prohibiting Keane from doing so, on October 15, 2009. (Motion for Temporary Restraining Order, R. Vol. I, pp. 49-50, First and Second Affidavits of Dave Dorion, R. Vol I, pp. 51-56, Affidavit of Robin Turner, 57-60, Affidavit of Joy Smith, R. Vol. I, pp. 61-63, Affidavit of Eldon Howard, R. Vol. I, pp. 64-67. Opinion and Order on Plaintiff's Motion for Temporary Restraining Order, R. Vol. I, pp. 68-76).

The district court vacated a May, 2010 trial setting, and on the eve of a scheduling conference

for a new trial date, Mr. Miles, Keane's counsel, requested to withdraw, based upon a breakdown in the attorney client relationship, which motion was granted on August 5, 2010. (Motion to Withdraw, R. Vol. I, pp. 81-83, Affidavit in Support of Motion to Withdraw , R. Vol. I, pp. 84-85,) Despite being served with the Order Permitting Leave to Withdraw, Keane once again failed to appear by the deadline set in the order. (Order Permitting Leave to Withdraw, Proof of Service - Order Permitting Leave to Withdraw Served by Certified Mail 8-9-10, Register of Actions, R. Vol. I, p. 6).

The district court entered a second default against Keane on September 8, 2010. (Entry of Default, Register of Actions, R. Vol. I, p. 6). On September 17, 2010, Keane filed a Second Rule 60(b) Motion, seeking to set aside the default. (Motion to Set Aside Default, Register of Actions, R. Vol. I, p. 6). Following briefing, hearing and oral argument, Keane's motion was denied, and default judgment was entered on December 29, 2010. (See Generally, Register of Actions, R. Vol. I, pp. 7-8; Opinion and Order on Defendants' Motion to Set Aside Default and Plaintiff's Motion for Entry of Judgment, R. Vol. I, pp. 86-92, Judgment, R. Vol. I, pp. 93-95).

At hearing on Keane's Second Rule 60(b) Motion, oral argument focused solely on the issues of 1) whether a misunderstanding had occurred between counsel with respect to a time period within which Keane's counsel must appear; and 2) whether Keane had a meritorious defense. Keane's counsel raised no issue or question regarding the validity of the or timeliness of the Second

Default at this hearing. (Transcript of Proceedings, Motion Hearing November 18, 2010, R. Vol. I of I).

Keane filed the present appeal on February 4, 2011, and an Amended Notice of Appeal on March 1, 2011. (Notice of Appeal, R. Vol. I, pp. 96-99; Amended Notice of Appeal, R. Vol. I, pp. 100-103). Keane also filed a Third Rule 60(b) Motion on March 21, 2011, which the district court denied on April 11, 2011. (Order Denying Defendants' Rule 60(b) Motion for Relief from Final Judgment, R. Vol. I, 108-109).

A. Procedural History and Time Line

For the Court's convenience, significant procedural facts are highlighted as follows.

DATE	DESCRIPTION
February 24, 2009	Dorion files Complaint and Demand for Jury Trial
March 27, 2009	District Court enters First Default against Keane
May 21, 2009	District Dourt grants Keane's First Rule 60(b) Motion
September 1, 2010	Dorion files Second Motion for Entry of Default. The record reflects that the Motion for Entry of Default was filed with the Court on September 1, 2010, at 4:33 p.m. (i.e. 27 minutes prior to the close of business that day).
September 8, 2010	District Court enters Second Default against Keane.
September 17, 2010	Keane files a Second Rule 60(b) Motion, styled a Motion to Set Aside Default, also filed pursuant to Rule 55(c), entered on September 8, 2010.
October 14, 2010	Dorion files a Motion for Entry of Judgment
December 29, 2010	District Court grants Dorion's Motion for Default Judgment and denies Keane's Second Rule 60(b) Motion to set aside Default.

January 14, 2011	Judgment entered against Keane.
February 4, 2011	Keane files Notice of Appeal to the Idaho State Supreme Court.
March 1, 2011	Keane files an Amended Notice of Appeal.
March 21, 2011	Keane files a Third Rule 60(b) Motion, styled Motion for Relief from Final Judgment.
April 11, 2011	District Court denies Keane's Third Rule 60(b) Motion.

II. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in denying the Keane's 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 Keane's Motion to Set Aside Default.

C. Whether Keane is entitled to attorney fees on appeal.

D. Whether Dorion is entitled to attorney fees on appeal.

III. ARGUMENT

A. Standard of Review

> A motion to set aside a default or judgment by default is addressed to the discretion of the trial court. *Marco Distributing, Inc. v. Biehl,* 97 Idaho 853, 856, 555 P.2d 393, 396 (1976). A district court's refusal to set aside a default judgment will not be disturbed on appeal, absent an abuse of that discretion. *Idaho ex rel. Russell v. Real Prop. Situated in the County of Cassia,* 144 Idaho 60, 62, 156 P.3d 561, 563 (2007). In determining whether the district court abused its discretion, this Court considers whether the trial 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.* The legal standard for a motion to set aside a default or default judgment under I.R.C.P. 55(c) is either "for good cause shown" or the grounds found in I.R.C.P. 60(b), which allows default judgment to be set aside for, among other things, mistake, inadvertence, or excusable neglect. *Id.*

Bach v. Miller, 148 Idaho 549, 552, 224 P.3d 1138, 1141 (2010). Keane has appealed the entry of default, the default judgment, and both the Second and Third Rule 60 Motions. Keane's Second Rule 60(b) Motion relied upon Subsection (1) mistake, inadvertence or excusable neglect, as well as Rule 55(c), which requires set aside upon a showing of good cause. (Opinion and Order on Defendant's Second Motion to Set Aside Default R. Vol. I p. 89).

Keane's Third Rule 60 Motion relied upon an argument that the default and default judgment entered in this matter is void. Grounds "such as the voidness of a judgment under subsection (b)(4), create a nondiscretionary entitlement to relief." Knight Ins., Inc. v. Knight, 109 Idaho 56, 59, 704 P.2d 960, 963 (Ct. App. 1985). "Where discretionary grounds are invoked, the standard of review is abuse of discretion. Where nondiscretionary grounds are asserted, the question presented is one of law upon which the appellate court exercises free review." Id.

B. The district court's Second Entry of Default was a proper exercise of discretion.

As stated, the decision to grant or deny a motion to set aside a default is within the discretion of the trial court and will not be disturbed absent a finding of an abuse of the court's discretion. Bach v. Miller, 148 Idaho at 552, 224 P.3d at 1141. A trial court acts within its discretion if (1) the court correctly understands the issue to be one of discretion; (2) the court acts within the outer

bounds of its discretion; and (3) the court reaches its decision on the motion through the exercise of reason. Id. The district court properly recognized the Second Rule 60 Motion as calling for an exercise of discretion, and properly applied the legal standard of good cause, found in Rule 55(c), in its determination not to set aside the Second Entry of Default. (Opinion and Order on Defendant's Second Motion to Set Aside Default R. Vol. I, pp. 86-91). This standard, however, does not apply to the Third Rule 60 Motion, which was filed after entry of default judgment. See McFarland v. Curtis, 123 Idaho 931, 935, 854 P.2d 274 (Ct.App.1993). In determining whether a party makes a showing sufficient to set aside entry of default, the district court, in exercising its discretion, must consider three factors. "The primary considerations are whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented." McFarland v. Curtis, 123 Idaho at 936, 854 P.2d at 279 (Ct. App. 1993) *citing* Traguth v. Zuck, 710 F.2d 90 (2d Cir.1983), *quoting* Meehan v. Snow, 652 F.2d 274, 276 (2d Cir.1981).

1. Keane has failed to show a meritorious defense.

In order to meet the requirement of showing good cause for setting aside default, a litigant is required to show that he had a meritorious defense.

> "This requirement is imposed because "[i]t would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy." *Id.* Consequently, where no meritorious defense is shown in support of a motion to set aside a default, a court does not abuse its discretion in denying the motion."

Bach v. Miller, 148 Idaho 549, 553, 224 P.3d 1138, 1142 (2010), citing Idaho ex rel. Russell v. Real Prop. Situated in the County of Cassia, 144 Idaho 60, 62, 156 P.3d 561, 563 (2007); Hearst Corp. v. Keller, 100 Idaho 10, 12, 592 P.2d 66, 68 (1979). "[A] party seeking to set aside a default judgment must show a meritorious defense going beyond the mere notice requirements which would be sufficient if pleaded before default." Herzinger v. Lockwood Corp., 109 Idaho 18, 20, 704 P.2d 350, 352 (Ct. App. 1985), citing Reeves v. Wisenor, 102 Idaho 271, 629 P.2d 667 (1981); Hearst Corp. v. Keller, 100 Idaho 10, 592 P.2d 66 (1979).

> "[P]arties moving to set aside the entry of default must also allege facts which would constitute a defense to the action. This conclusion is supported by the application of this rule in other jurisdictions as well. *See DeHoney v. Hernandez,* 122 Ariz. 367, 595 P.2d 159 (1979); *Cribb v. Matlock Communications, Inc.,* 236 Mont. 27, 768 P.2d 337 (1989); *Sealed Unit Parts Co. v. Alpha Gamma Chapter,* 99 Nev. 641, 668 P.2d 288 (1983); 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2697 (1983)."

McFarland v. Curtis, 123 Idaho 931, 934, 854 P.2d 274, 277 (Ct. App. 1993) Keane's support for his affirmative defenses appear to be limited to sparsely worded pleadings in his Answer, and a very short Affidavit, which references his alleged confusion about representation, but provides no factual detail or support to shore up his affirmative defenses. (Answer, R. Vol I, pp 44-47; Affidavit of Richard Keane, R. Vol I pp. 30-31). Keane has not ventured beyond mere notice pleading requirements in order to show a meritorious defense, and did not, at the time of moving to set aside entry of default, allege additional facts constituting a meritorious defense.

It should be born in mind that the district court had considerable opportunity to review

Dorion's factually rich and detailed affidavits from a number of witnesses in this case, upon Dorion's Motion for a Temporary Restraining Order. (See Affidavits, R. Vol I, pp 49-67). It is also noteworthy that the district court gave fair warning after Keane's first default, and pointed out that Keane's affidavit "was weak at best in presenting a meritorious defense" in its findings upon both Keane's first and second motions to set aside default. (Opinion and Order on Motion to Set Aside Default, R. Vol I, p 42, Opinion and Order on Defendant's Second Motion to Set Aside Default, R. Vol. I p. 90). Therefore, the district court did not abuse its discretion in finding that Keane had failed to show a meritorious defense.

2. Keane failed to show good cause for setting aside entry of default, because the failure to appear was willful and caused prejudice to Dorion.

The district court found in its Opinion and Order, entered on December 29, 2010, that Keane had failed to show good cause for setting aside default. (Opinion and Order on Second Motion to Set Aside Default, R. Vol. I, p. 90). The district court concluded that Keane's actions demonstrated a pattern of failing to timely appear, and asserting through new counsel, a fictitious and incredible agreement for an equally fictitious and indefinite extension of time for the new counsel to appear. While the district court did not use the word "willful" in the opinion, this characterization is easily inferred from the Opinion, which points out that Keane "has chosen instead to neglect the lawsuit," and engaged in this conduct not once, but twice, in the same case. Id. Based upon his factual findings, the district court concluded that Keane failed to show good cause to set aside the Second Entry of Default. Id.

In addition, the district court recognized prejudice to Dorion in the form of time and money spent litigating this case with no disposition, resulting from Keane's neglect to timely appear and defend. The district court stated, " 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." Id. In sum, the district court properly found that Keane failed to present a meritorious defense, and engaged in willful conduct that caused prejudice to Dorion. The district court committed no abuse of discretion, and the Entry of Default and Default Judgment should be upheld on appeal.

C. The district court's Second Entry of Default and Default Judgment does not violate Rule 11(b)(3), I.R.C.P., is not void under Rule 60(b), and should not be set aside.

Keane attempts to characterize Dorion's filing of a Motion for Default as a proceeding in violation of I.R.C.P. 11(b)(3). This rule provides in pertinent part, as follows:

> Upon the 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 20 days after service or mailing of the order of withdrawal to the party. If such party fails to file and serve an additional written appearance in the action either in person or through a newly appointed attorney 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. The attorney shall provide the last known address of the client in any notice of withdrawal.

1. The entry of default was timely.

Keane correctly points out that he is provided twenty (20) days to appear, following withdrawal of his former attorney. (Appellant's Brief, p. 5) Keane also correctly notes that Rule 6(e), I.R.C.P., provides an additional three (3) days to appear, to allow for mailing and service of the 11(b)(3) Order. (Appellant's Brief, p. 7). The Order was served upon Keane on August 9, 2010, and twenty three days later, on September 1, 2010, Dorion filed his motion for entry of default, at the close of business. Default was not entered until September 8, 2010, thirty (30) days after service of the Order upon Keane. Thereafter, Keane did not actually enter an appearance until September 17, 2010.

Keane has argued that a motion is a proceeding, within the meaning of Rule 11, I.R.C.P.. However, the filing of a motion is not a proceeding which affects the rights of a party. The granting of the motion is a proceeding which affects the rights of a party, but not the filing of the motion itself. A party's rights are not affected until the Court acts on the motion in a manner that prejudices or gives relief to a party. In this matter, the Court entered Default on September 8, 2010. September 8, 2010 was the date that a proceeding occurred which affected the rights of the Defendant; that date clearly satisfies the requirements of I.R.C.P. 11(b)(3). the Entry of Default, and the Default Judgment, later entered by this Court on January 14, 2011, is neither void not voidable, on the basis of timeliness. Keane's Rule 60(b) Motion is misplaced.

Furthermore, it must be emphasized that Keane has provided no authority to support this assertion. The Idaho Court of Appeals case Blanc v. Laritz, cited by Keane, offers no support to this

proposition. (Appellant's Brief at 10-12); 119 Idaho 359, 806 P.2d 452 (Ct.App.1991). In Laritz, meaningful proceedings occurred prior to the expiration of the twenty-three day period, but the meaningful proceeding was one that actually had an outcome and an effect upon the litigant in question: entry of default. That case actually stands for the Plaintiff's position: that the Entry of Default, and not the filing of the motion itself, is the proceeding that must comply with the requirements of I.R.C.P. 11(b)(3). See Id. at 362, 806 P.2d 452 ("Thus, since twenty-three days should have elapsed before Laritz's default was entered, the Order of October 21 is voidable under I.R.C.P. 60(b)(4)"). (Emphasis provided.).

2. The Court's second Entry of Default strictly complied with Rule 11(b)(3).

Keane points out in his Third Rule 60(b) Motion and his briefing, that strict compliance with Rule 11(b)(3) is required before a valid judgment may be entered against him. (Appellant's Brief at 12) Keane also argues that because the 11(b)(3) Order, drafted by Keane's attorney, Mr. Miles, did not include the following language, "or dismissal of the action of such party [Keane] with prejudice," that the Order did not comply with the requirements of the Rule. (Appellant's Brief at 11-12).

When Keane, the defendant in the underlying case, filed his Answer, he alleged the existence of certain affirmative defenses, but raised no counterclaims. Therefore, when his attorney withdrew, Keane was at no risk of seeing any counterclaims dismissed (with or without prejudice), because he did not have any. However, on appeal, he complains that he was not warned of a procedural consequence that he was at no risk of suffering, and which would have affected only

rights and claims which he did not have, and has not claimed.

Mr. Miles' drafting of the Order, which did not warn Keane of a procedural event that would never happen (dismissal) to rights or interests that Keane neither owned nor alleged (counterclaims in this action), did not impugn or negate the Order's strict compliance with Rule 11(b)(3). Upon his withdrawal, Mr. Miles gave notice to Keane of all possible consequences to Keane that might occur in this specific matter, should Keane fail to timely appear, such as entry of default and default judgment. Mr. Miles thus rendered strict compliance with Rule 11(b)(3).

The 11(b)(3) Order also demonstrates a careful crafting or tailoring of the Order, to the particular circumstances and parties in this case. The Supreme Court has recognized in dicta that such tailoring of the language in Rule 11(b)(3) Order is prudent and necessary. Reinwald v. Eveland, cited by Keane, points out that the language in the Rule is not the litmus test, but the tailoring of the language in the order to the specific circumstances of the client - and case- subject to the order:

> "This case demonstrates difficulties that may be encountered by the failure to craft or to tailor to the particular circumstances of a case or of the parties an order permitting the withdrawal of an attorney where a default judgment is subsequently sought."

119 Idaho 111, 113, 803 P.2d 1017, 1019 (Ct. App. 1991). Rather than blindly follow form language, Mr. Miles "crafted or tailored to the particular circumstances" of this case, and these parties, " an order permitting the withdrawal of an attorney where a default judgment [was] subsequently sought." To hold otherwise is to exalt both form - and form language - over substance.

The 11(b)(3) Order in this case is very similar to the order found by the Idaho Supreme Court to "fully [conform] with the requirements of I.R.C.P. 11(b)(3)" in Sherwood & Roberts, Inc. v. Riplinger 103 Idaho 535, 538, 650 P.2d 677, 680 (1982). That Order read as follows:

> "NOW THEREFORE, IT IS HEREBY ORDERED that ROBERT H. THOMPSON is granted leave to withdraw as attorney for the defendant(s) and shall send by certified mail a copy of this order directing the Defendant(s) to appoint another attorney to appear, or to appear in person by filing a written notice with the court stating how they will represent themselves within twenty (20) days from the date of this order. Such failure to appear in the action within twenty (20) days shall be sufficient grounds for entry of default against the defendant(s) without further notice to the defendant(s)."

Sherwood & Roberts, Inc. v. Riplinger, 103 Idaho 535, 543, 650 P.2d 677, 685 (1982). The language in the Rule 11(b)(3) Order, similarly complies with the Rule. The omission of the form language that Keane proposes should have been included, could be viewed as a red herring; it does not, and could not apply to him in this case, given the procedural status. This omission could also be viewed as a successful "crafting or tailoring" of the specific language in this order, to the specific facts, procedure and law as it presents in this case. Mr. Miles omitted language that simply did not apply to, and would not affect or prejudice Keane. The order, as drafted, strictly complies with Rule 11(b)(3), and also complies with the admonition of the Supreme Court to carefully craft and tailor just such an order.

The cases cited by Keane, which are analyzed in some detail, *infra*, are representative of cases where Rule 11(b)(3) orders failed to warn affected litigants of the very procedural consequence which they eventually suffered. In these cases, the Court found that such orders failed

to strictly comply with the Rule. As discussed, the authorities which Keane relies upon are very distinguishable from the present mater, in both fact and law.

Keane cites to Blanc v. Laritz, for the proposition that the district court failed to comply with Rule 11(b)(3), and that the default judgment is void pursuant to Rule 60(b)(4). (Appellant's Brief at 10-13); Blanc v. Laritz, 119 Idaho 359, 806 P.2d 452 (1991). In Laritz, however, two errors resulted in default being set aside. First, the 11(b)(3) order served upon appellants failed to state that failure to timely appear would result in both a default, and a default judgment. Id. at 360-362, 453-455. The exact result that the 11(b)(3) notice failed to include - the possibility of a default judgment- occurred in Lartiz. Second, as stated, *supra*, the default itself was entered before the 23 day period expired, following service upon the appellant. Id. By contrast, Keane did receive notice of the result imposed against him: a default judgment. Also by contrast, no proceedings that actually affected Keane's rights occurred for seven days after the expiration of the twenty-three (23) day period, on September 8, 2010.

Keane also cites to Berg v. Kendall, in support of his argument that strict compliance with Rule 11(b)(3) is required to obtain a valid judgment, but that issue was not actually addressed in this case. this case. See Berg v. Kendall, 147 Idaho 571, 577, 212 P.3d 1001, 1007 (2009); (Appellant's Brief at 5). In Berg, appellants did not receive timely notice of the hearing on their attorney's motion to withdraw, pursuant to Rule 11 (b), I.R.C.P. 147 Idaho 571, 577, 212 P.3d 1001, 1007 (2009). However, appellants failed to show that inadequate notice was the cause of their claimed prejudice, pursuant to Rule 61, I.R.C.P. Id. This Rule "requires that the court, at every stage of the

proceeding 'must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties'." In Laritz, the Court found the requirements of 11(b)(3) to have been strictly complied with, and thus did not reach the question of whether Rule 61 should be applied to arguments made under Rule 11(b)(3). Id. at 577-578, 1007-1008.

Knight Ins. v. Knight, also cited by Keane in support of timeliness and strict compliance arguments, is also not factually similar to the present matter. (Appellant's Brief at 10); Knight Ins., Inc. v. Knight, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985). In Knight, the appellants became confused by two different orders issued relative to their attorney's withdrawal pursuant to Rule 11(b)(3). Id. at 58, 962. One order provided for twenty days to appear, pursuant to Rule 11(b)(3), and another order provided for the appellants to assert their malpractice claim in the same action against their attorney within forty days. Id. Furthermore, the 11(b)(3) order was never reduced to writing or served upon the appellants. Id. Only the order providing for the appellants to assert their malpractice claim within forty days was reduced to writing and served upon appellants. Id. The district judge, who apparently believed that the appellants had adequate notice of the twenty day requirement to enter an appearance based solely upon his oral instructions in open court, was overturned on appeal. Id. at 59-60, 963-964.

Keane also relies upon Reinwald v. Eveland in support of his strict compliance argument. (Appellant's Brief at 12); Reinwald v. Eveland, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991). In Reinwald, the 11(b)(3) order at issue failed to set out the steps that the appellant needed to take in order to protect herself from a default judgment. Id. at 113, 109. The order in question did not

specify that the appellant must file an appearance on her own, or through an attorney, nor did it disclose the possibility of a judgment by default without further notice. Id. The Court further found the language contained within the order to be ambiguous. The appellant failed to appear, and the exact result that the 11(b)(3) order failed to give notice of - a default judgment- occurred. Id.

Similarly Keane relies upon Martinez v. Brown, in support of his strict compliance argument. (Appellant's Brief at 12); Martinez v. Brown, 144 Idaho 410, 412, 162 P.3d 789, 791 (Ct.App.2007). In Martinez, the 11(b)(3) order failed to give notice to appellant that his claim might be dismissed with prejudice, should he fail to timely appear. The exact result that the 11(b)(3) notice failed to give - a dismissal with prejudice - occurred in Martinez. Id. at 411-412, 790-791. Unlike the defendants in Reinwald and Martinez, Keane received, in his 11(b)(3) Order, advance notice of the result that was actually imposed upon him, a default judgment.

In sum, the Order in this case was carefully tailored to the specific circumstances and status of the party in question, Mr. Keane. The Order thus did not give notice to Keane of procedural consequences which posed no danger to him. The Order in this case is not analogous to the raft of cases cited by Keane, in which the orders failed to give notice of procedural consequences, that the affected litigants ultimately suffered. Rather, the Order is exemplary of what this Court in dicta, has warned counsel to do: consider the facts and circumstances in the case, rather than adhere blindly to form language, and accordingly draft a well-tailored order. Keane was well served by his counsel when the 11(b)(3) Order was drafted and served upon him. He is in no position to complain of it now.

D. The wording of the Withdrawal Order caused no prejudice to Keane, and complied with Rule 11(b)(3) and Rule 61, I.R.C.P.

As stated, *supra*, the 11(b)(3) order, drafted by Keane's attorney, strictly complied with the applicable requirements of the Rule, and is neither voidable, nor void. In addition, the form language in the Rule that was not included in this particular order relates to procedures, procedural consequences and facts that simply do not exist in this case, because they relate to the dismissal of counterclaims, and Keane raised no counterclaims.

Therefore, should the Court find that the 11(b)(3) Order somehow failed to comply with the Rule, the unanswered question of the applicability of Rule 61, I.R.C.P., in Berg v. Kendall, *supra*, may properly be addressed here. 147 Idaho at 577, 212 P.3d at 1007. Considering that the Order in question omits language from the rule that relates to facts, law and procedure not in existence, at issue or even relevant in this case, it is safe to say that Keane has failed to show "any error or defect in the proceeding, which has affected the substantial rights of the parties," per the requirements of Rule 61, I.R.C.P. In essence, the 11(b)(3) Order's language affected Keane's rights in no way, and caused absolutely no prejudice to him.

E. Keane's filing of the Third Rule 60(b) Motion was filed seven months after the Entry of Default, and was untimely.

Keane's Third Rule 60(b) Motion was untimely. It appears that Keane untimely filed the Third Rule 60(b) motion, in an attempt to raise legal arguments he neglected to timely raise in the Second Rule 60(b) Motion, within a reasonable time, or within six months following entry of

default. Rule 60(b) provides in pertinent part, as follows:

> "On 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: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court."

Keane waited more than seven months after the Second Entry of Default and over two months after the entry of Default Judgment, to file his Third Rule 60(b) motion. After Keane filed the Second Rule 60(b) Motion, the parties submitted briefing, supporting affidavits and oral argument. The Court took the matter under advisement, and issued its Opinion and Order on December 29, 2010, denying the Motion. Keane could have raised the issues contained within the Third Rule 60(b) Motion in his Second Rule 60(b) Motion, and simply failed to do so, and then failed to do so within a reasonable time following entry of default and default judgment.

> What constitutes a reasonable time depends upon the facts in each individual case. *See* 11 CHARLES ALAN WRIGHT, ARTHUR R.

> MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2866, at 382 (1995) (discussing the corresponding Federal Rule of Civil Procedure). It must appear that "the defaulting party is not guilty of indifference or unreasonable delay" and has acted "promptly and diligently in seeking relief." *Stoner v. Turner,* 73 Idaho 117, 121, 247 P.2d 469, 471 (1952). *See also Clark v. Atwood,* 112 Idaho 115, 117, 730 P.2d 1035, 1037 (Ct.App.1986). The six-month period specified in Rule 60(b) is the outermost limit, and a motion may be rejected as untimely if not made within a "reasonable time" even though the six-month period has not elapsed. 11 WRIGHT ET AL., *supra,* § 2866 at 389.

Viafax Corp. v. Stuckenbrock, 134 Idaho 65, 70-71, 995 P.2d 835, 840-41 (Ct. App. 2000). Keane has provided no credible explanation or excuse for the delayed filing of the Third Rule 60 Motion, and has simply made not showing that the late filing was reasonable. Keane's Third Rule 60(b) Motion, and the arguments raised therein, should not be considered on appeal, on the basis that they were not timely raised.

F. Keane, by failing to timely appear prior to entry of default, has abandoned his affirmative defenses.

As discussed, Keane did not timely appear following receipt of service of the Withdrawal Order. In Sherwood & Roberts, Inc. v. Riplinger, the Idaho Supreme Court considered the consequences of failing to timely appear following notice under Rule 11(b)(3). That case provides, in pertinent part, as follows:

> "n the present case, the defendant failed to file a written notice of appearance or the appointment of new counsel within the prescribed time limit. This failure to comply with I.R.C.P. 11(b)(3) justifies a presumption that he abandoned his defense...."

> "The presumption of abandonment raised by a defendant's failure to proceed in an action in accordance with court rules may be rebutted by any reasonable showing of *inability* to comply with those rules. *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers,* 357 U.S. 197, 210, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958). However, in this case the defendant made no showing of *inability* to comply with I.R.C.P. 11(b)(3). Thus, it was within the district court's power to enter a default judgment against the defendant for failure to proceed in accordance with I.R.C.P. 11(b)(3)."

Sherwood & Roberts, Inc. v. Riplinger, 103 Idaho 535, 540, 650 P.2d 677, 682 (1982). Keane did not timely appear, as required by the Rule11(b)(3) Order. Therefore, a presumption has arisen, that Keane abandoned his affirmative defenses. He did not rebut this presumption. Neither he, nor his counsel made a credible showing of an inability to comply with the Rule in his Rule 60 Motions. Keane thus failed at the district court level, to meet his burden of proof on the Second and Third Rule 60 Motions. For Keane to proceed without affirmative defenses is an idle exercise. On these further grounds, his appeal should be denied.

G. Keane is not entitled to Attorney's Fees on appeal.

Keane somewhat inexplicably argues that if he prevails on appeal, that he is entitled to attorneys fees, pursuant to I.C. 12-120(3). In support of this position, Keane relies upon Meyers v. Hansen, in which a plaintiff obtained a default judgment against defendant, and the Idaho Supreme Court determined on appeal that Plaintiff prevailed on his commercial claim, and ordered defendant to pay attorneys. Meyers v. Hansen, 148 Idaho 283, 293, 221 P.3d 81, 91 (2009). Keane's position is opposite of the appellant in Meyers in the present matter. Even if Keane prevails on every aspect

of his appeal, he has not prevailed on an underlying claim, and is thus not entitled to attorney's fees.

Keane's position in this matter is more analogous to Mackay v. Four Rivers Packing Company, in which the Idaho Supreme Court reversed summary judgment rendered in favor of an employer, but still found that the employee was not entitled to attorneys fees on appeal. 145 Idaho 408, 415, 179 P.3d 1064 (2008). This Court noted that "Mackay is the prevailing party on appeal but it remains to be seen whether he will be the prevailing party in the action, and, therefore, entitled to attorney fees under I.C. § 12–120(3)." Mackay v. Four Rivers Packing Co., 145 Idaho at 415, 179 P.3d at 1071. This appeal revolves around setting aside a default judgment. In the event that the default and default judgment is set aside, Keane would still be required to defend and litigate against Plaintiff's claims on the merits, before any determination regarding prevailment may be made with respect to the underlying transaction and claims. It "remains to be seen whether he will be the prevailing party in the action," even if he prevails on every point in this appeal. Therefore, Keane is not entitled to attorneys fees, and his request should be denied.

H. Dorion is entitled to Attorney's Fees on Appeal.

Dorion agrees, for purposes of this appeal, that the underlying suit relates to a commercial transaction, and attorney fee awards are governed by Idaho Code 12-120(3).

> "A 'commercial transaction' is defined as any transaction, except transactions for personal household purposes." *Cramer v. Slater,* 146 Idaho 868, 881, 204 P.3d 508, 521 (2009). This appeal arises from a dispute over the parties' respective rights upon termination of a joint venture, which falls under the definition of a "commercial transaction."

Vreeken v. Lockwood Eng'g, B.V., 148 Idaho 89, 111, 218 P.3d 1150, 1172 (2009). As discussed, if Keane prevails on appeal, he would still be required to prevail on the underlying suit, before an attorney fees award may be made. Conversely, should Dorion prevail on appeal, he will have prevailed on the merits of the underlying suit without further showing or proceedings.

> "Where an action is one to recover in a commercial transaction, that claim triggers the application of section 12–120(3) and the prevailing party may recover fees "regardless of the proof that the commercial transaction did in fact occur." *General Auto Parts Co., Inc. v. Genuine Parts Co.,* 132 Idaho 849, 860, 979 P.2d 1207, 1218 (1999).

Mackay v. Four Rivers Packing Co., 145 Idaho 408, 415, 179 P.3d 1064, 1071 (2008). Therefore, Dorion is entitled to attorney's fees on both the appeal, and the underlying matter, pursuant to Rule 41, I.A.R. and Idaho Code § 12-120(3), and respectfully requests an award of attorney's fees on appeal.

IV. CONCLUSION

The district court did not abuse its discretion, by denying Keane's Second and Third Rule 60(b) Motions. The district court reasonably concluded that Keane failed to show good cause for setting aside default. In addition, Keane's Third Rule 60(b) Motion has no substantive basis under Rule 60, and was untimely filed.

With respect to the substance of the Keane's argument, his contentions raised in the Third Rule 60(b) Motion are without merit. Upon the withdrawal of Keane's counsel, Mr. Miles, he strictly complied with the requirements of Rule 11(b)(3). Furthermore, Keane suffered no prejudice as a result of neither the timing of the entry of default, no any changes from the language of the

Rule, in the 11(b)(3) Order, which was tailored to the specific facts and circumstances of the underlying case.

Keane is not entitled to attorney's fees on appeal. If Keane prevails upon appeal, he has yet to prevail on the underlying action, because he has neither obtained a default, nor defended against the merits of Dorion's claims. Conversely, Dorion is entitled to attorney's fees on appeal. Dorion, should he prevail on appeal, has also obtained a default and default judgment at the district court level, and therefore has prevailed on the underlying, commercial claim.

This Court is respectfully requested to deny Keane's appeal, to deny Keane's request for attorney's fees, and is further respectfully requested to grant Dorion's request for attorney's fees.

DATED this 25th day of January, 2012.

CLARK and FEENEY, LLP

By: _____
Douglas L. Mushlitz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of January, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Todd Richardson Attorney at Law 604 6th Street Clarkston WA 99403	☒ ☐ ☐ ☐	U.S. Mail (postage prepaid) Hand Delivered Overnight Mail Telecopy (FAX)
Jeffery A. Thomson Kristina J. Wilson Elam & Burke PA P O Box 1539 Boise ID 83701	☒ ☐ ☐ ☐	U.S. Mail (postage prepaid) Hand Delivered Overnight Mail Telecopy (FAX)

Attorney for Plaintiff/Respondent.