

3-14-2017

Kirby v. Scotton Clerk's Record Dckt. 44925

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN S. KIRBY and VICKI L. KIRBY,
husband and wife,

Supreme Court Case No. 44925

Plaintiffs-Respondents,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants-Appellants.

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE LYNN G. NORTON

MARK B. PERRY

KRISTEN R. THOMPSON

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

MERIDIAN, IDAHO

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2016-12289

John S Kirby, Vicki L Kirby
vs.
Mark Scotton, Dawn Scotton

§
§
§
§

Location: **Ada County District Court**
Judicial Officer: **Norton, Lynn G.**
Filed on: **07/08/2016**

CASE INFORMATION

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

DATE	CASE ASSIGNMENT
------	-----------------



Current Case Assignment

Case Number	CV-OC-2016-12289
Court	Ada County District Court
Date Assigned	07/08/2016
Judicial Officer	Norton, Lynn G.


PARTY INFORMATION


		<i>Lead Attorneys</i>
Plaintiff	Kirby, John S	Thompson, Kristen Ruth <i>Retained</i> 208-888-7278(W)
	Kirby, Vicki L	Thompson, Kristen Ruth <i>Retained</i> 208-888-7278(W)
Defendant	Scotton, Dawn	Hart, Trevor L. <i>Retained</i> 208-338-1001(W)
	Scotton, Mark	Hart, Trevor L. <i>Retained</i> 208-338-1001(W)


DATE	EVENTS & ORDERS OF THE COURT	INDEX
------	------------------------------	-------


07/08/2016	New Case Filed Other Claims <i>New Case Filed - Other Claims</i>	
07/08/2016	Complaint Filed <i>Complaint Filed</i>	
07/08/2016	Summons Filed <i>Summons Filed</i>	
07/08/2016	Summons Scotton, Mark Served: 04/25/2017 Scotton, Dawn Served: 04/25/2017	
09/26/2016	 Affidavit of Service <i>(2) 8.31.16</i>	
10/24/2016	 Motion for Entry of Default <i>Motion for Entry of Default</i>	


ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2016-12289


10/24/2016  Affidavit
Affidavit of Kristen R. Thompson


11/18/2016  Order for Entry of Default


11/21/2016  Notice
Notice of Hearing 12/15/16 @ 2:45pm


12/01/2016  Answer
Answer - (Hart for Defendants)


12/06/2016  Motion
Motion to Set Aside Default


12/06/2016  Affidavit
Affidavit of Trevor L. Hart


12/06/2016  Notice
Notice of Hearing 12/15/16 @ 2:45pm


12/06/2016  Motion
Motion to Set Aside Default

12/06/2016  Motion
Motion to Shorten Time and Continue Hearing


12/06/2016  Affidavit
Affidavit of Trevor L. Hart


12/14/2016  Memorandum
Memorandum in Support of Retainer of Default Judgment as Entered


12/14/2016  Affidavit
Affidavit of John S. Kirby Re: Submission of Damages


12/14/2016  Affidavit
Second Affidavit of Kristen R Thompson

12/15/2016 **Default Hearing (2:45 PM) (Judicial Officer: Norton, Lynn G.)**


12/15/2016  Court Minutes

12/15/2016  Exhibit List/Log


12/20/2016  Amended
Notice of Hearing (1/12/17 at 330pm)


01/09/2017  Memorandum
Reply Memorandum in Support of Motion to Set Aside Default


ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2016-12289


01/11/2017  Notice of Hearing
Amended Notice of Hearing

01/19/2017 **Motion to Set Aside Default (3:30 PM)** (Judicial Officer: Norton, Lynn G.)
01/12/2017 Continued to 01/19/2017 - Cont - Illness or family emergency - Kirby, John S


01/19/2017  Court Minutes


02/01/2017  Order
Denying Motion to Set Aside Default and Striking Answer


02/21/2017  Memorandum
Decision and Order on Default Damages

02/21/2017  Default Judgment
(Final) - \$11230.73


02/21/2017 **Default Judgment** (Judicial Officer: Norton, Lynn G.)
Monetary/Property Award
In Favor Of: Kirby, John S; Kirby, Vicki L
Against: Scotton, Mark; Scotton, Dawn
Entered Date: 02/21/2017
Current Judgment Status:
Status: Active
Status Date: 02/21/2017
Monetary Award:
Amount: \$11,230.73


03/03/2017  Memorandum
Memorandum of Attorney's Fees and Costs and Supporting Affidavit


03/07/2017  Memorandum
Second Memorandum in Support of Attorney's Fees & Costs and Labor Costs


03/14/2017  Notice of Appeal


03/14/2017 Appeal Filed in Supreme Court

03/17/2017  Motion
To Disallow Attorney Fees


03/17/2017  Notice of Hearing
(4/6/17 at 245 pm)


03/30/2017  Response
Plaintiffs' Response to Motion to Disallow Attorney's Fees


03/30/2017  Affidavit
Third Affidavit of Kristen R. Thompson

04/05/2017  Motion
Motion for Order of Contempt and Award of Damages


ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2016-12289


04/05/2017  Memorandum
Memorandum in Support of Motion for Order of Contempt and Award of Damages


04/05/2017  Affidavit
Affidavit in Support of Motion for Order of Contempt and Award of Damages


04/05/2017  Motion
Motion to Shorten Time


04/06/2017 **Motion Hearing - Civil (2:45 PM) (Judicial Officer: Norton, Lynn G.)**
Disallow attorney fees


04/06/2017  Court Minutes


04/10/2017  Notice of Hearing
(4/27/17 at 245 pm)


04/11/2017  Motion
Motion for Temporary Restraining Order Against Defendants and Gene Morrison as Water Rotation Manager


04/11/2017  Memorandum In Support of Motion
For Temporary Restraining Order Against Defendants and Gene Morrison as Water Rotation Manager


04/11/2017  Affidavit
Third Affidavit of Kristen R Thompson in Support of Motion for Temporary Restraining Order Against Defendants and Gene Morrison as Water Rotation Manager


04/13/2017  Notice of Hearing
(4/27/17 at 245 pm)


04/13/2017  Affidavit
Affidavit in Support of Writ of Execution


04/14/2017  Temporary Restraining Order Issued

04/17/2017  Writ Issued
Ada County - postage paid

04/20/2017  Memorandum
Memorandum of Opposition to Plaintiff's Motions for for Temporary Restraining Order and Contempt











04/20/2017  Affidavit
Affidavit of Mark Scotton

04/25/2017  Reply
Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for TRO and Contempt

04/25/2017  Affidavit

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2016-12289

Third Affidavit of John S Kirby

04/25/2017	 Affidavit <i>Fourth Affidavit of Kristen R Thompson</i>
04/26/2017	 Affidavit of Service <i>4/25/17 Gene Morrison</i>
04/26/2017	 Affidavit of Service <i>4/25/17 Dawn Scotton</i>
04/26/2017	 Affidavit of Service <i>4/25/17 Mark Scotton</i>
04/27/2017	Motion for Contempt (2:45 PM) (Judicial Officer: Norton, Lynn G.) <i>And Award Damages</i>
04/27/2017	Temporary Restraining Order (3:00 PM) (Judicial Officer: Norton, Lynn G.)
04/27/2017	 Court Minutes
04/27/2017	 Bond Posted - Surety <i>Attachment Bond/Merchants Bonding Company/Bond # ID 4790/\$2000.00</i>
05/11/2017	 Memorandum of Costs & Attorney Fees
05/12/2017	 Order <i>Denying Attorney's Fees</i>
05/16/2017	 Amended <i>Amended Memorandum of Costs and Affidavit of Attorney's Fees</i>
07/07/2017	 Order <i>Denying Attorney's Fees</i>

DATE

FINANCIAL INFORMATION

Attorney of Record Hart, Trevor L.	
Total Charges	229.00
Total Payments and Credits	229.00
Balance Due as of 7/10/2017	0.00
Defendant Scotton, Mark	
Total Charges	136.00
Total Payments and Credits	136.00
Balance Due as of 7/10/2017	0.00
Plaintiff Kirby, John S	
Total Charges	233.00
Total Payments and Credits	233.00
Balance Due as of 7/10/2017	0.00

JUL 08 2016

CHRISTOPHER D. RICH, Clerk
By AUSTIN LOWE
DEPUTY

Kristen R. Thompson
THOMPSON LAW FIRM
78 SW Fifth Avenue, Suite 2
Meridian, Idaho 83642
Telephone Number: (208) 888-7278
Facsimile Number: (208) 888-7296
I.S.B. #4033

Attorneys for Plaintiffs

IN THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,
husband and wife,

Plaintiffs,

vs.

MARK SCOTTON AND DAWN SCOTTON,
husband and wife,

Defendants.

Case No. **CV 0C 1612289**

COMPLAINT FOR TRESPASS,
NUISANCE, NEGLIGENCE, AND
INJUNCTIVE RELIEF

Fee category: A
Fee: \$221.00

COMES NOW, the Plaintiffs, JOHN S. KIRBY and VICKI L. KIRBY, husband and wife,
by and through their attorney of record, Kristen R. Thompson, of THOMPSON LAW FIRM, and
brings this Complaint for Trespass, Nuisance, Negligence, and Injunctive Relief against the above-
named Defendants.

I. STATEMENT OF THE CASE

After four years of broken promises from the Scotttons, Mr. and Mrs. Kirby are forced to
ask this court to order the Scotttons to create a simple drainage ditch at a cost that is less than this
filing fee. Despite customary practices, Idaho law, and common sense, the Scotttons have refused

A

repeated demands to manage their irrigation water in a manner that does not trespass onto their neighbors' property bringing noxious weeds and debris harming Plaintiffs' property and spurring resentment from all adjoining neighbors.

II. JURISDICTION AND VENUE

1) Plaintiffs own and occupy real property in Ada County, Idaho, commonly referred to as 1880 W. Hubbard Rd., Kuna, Idaho, 83634.

2) Defendants own and occupy real property in Ada County, Idaho, commonly referred to as 1800 W. Hubbard Rd., Kuna, Idaho, 83634.

3) Plaintiffs' and Defendants' respective properties adjoin and share a common divide.

4) Therefore, because the parties reside in and this action occurred solely within Ada County, Idaho, this Court has jurisdiction.

III. FACTS GIVING RISE TO THIS ACTION

5) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

6) Plaintiffs obtained their property in October of 2007. This property includes several acres that are utilized for agricultural and livestock purposes. Specifically, Plaintiffs utilize portions of their shared-border with Defendants as a pasture for their horses. Plaintiffs property is marked with no trespassing signs.

7) Plaintiffs obtain water via an easement across the Defendants property where there is a buried pipeline. This water flows onto Plaintiffs' property. The excess water flows out into a drainage ditch via Plaintiffs' ditch along their border on the opposite side of Defendants' property.

8) Defendants likewise utilize their property for farming operations that naturally require water, irrigation systems, and irrigation access.

IV. DAMAGE AND INTERFERENCE WITH PLAINTIFFS' REAL AND PERSONAL PROPERTY

9) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

10) Defendants' irrigation practices regularly result in their irrigation water flooding onto Plaintiffs' property, turning their horse pasture into a muddy mess, and bringing with it weeds, seeds, and other waste products from the Defendants' property, onto the Plaintiffs' property. The seeds then populate the Plaintiffs' property requiring Plaintiffs to engage in extensive and time-consuming weed-control operations.

11) Plaintiffs' horses regularly utilize the property that becomes flooded with Defendants' water. In doing so, the horses become extremely muddy. When the Plaintiffs then ride their horses, they must clean mud from the horses and from themselves.

12) Constant exposure to wet and muddy conditions is unhealthy for the horses.

V. PLAINTIFFS' ATTEMPTS TO RESOLVE THIS ISSUE PRIOR TO INITIATING THIS ACTION

13) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

14) Defendants' practices described above have been ongoing since at least early 2013. On July 31, 2014, Plaintiffs' former counsel sent the Defendants a cease and desist letter that described the Defendants' irrigation practices, the harm caused, and requested that Defendants take action to prevent Defendants' wastewater from flowing onto Plaintiffs' property.

15) Defendants' conduct has likewise created tensions and resentment with other neighbors. On July 10, 2015, Gene Morrison, the local water rotation-person and Defendants' neighbor on the opposite side of their property from Plaintiffs, informed Defendants that their failure to prevent their ditch from overflowing would result in their being taken out of the irrigation water rotation.

16) Plaintiffs' counsel sent the Defendants a letter on September 11, 2015, restating the issues set forth above and demanding that Defendants construct a viable wastewater ditch that would prevent flooding onto Plaintiffs' property.

17) Defendants have failed to take any meaningful steps to prevent flooding and harm to Plaintiffs' property. Defendants have not dug a simple drainage ditch along their side of the shared-border to prevent their excess water from crossing onto Plaintiffs' property. In short, there is nothing preventing Defendants from turning on their water and causing Plaintiffs further harm.

18) Therefore, Plaintiffs are left to seek redress from the courts in an effort to prevent the continued damage to their property.

VI. CLAIMS FOR DAMAGES

A. Plaintiffs' First Claim for Relief: Trespass Under Idaho Code § 6-202

19) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

20) Defendants' failure to properly irrigate and maintain their water systems causes flooding on Plaintiffs' property. Further, the weeds and other matter that Defendants' water brings from Defendants' property onto Plaintiffs' property must be addressed by the Plaintiffs.

21) As a direct and proximate result of Defendants' conduct, Defendants' irrigation water trespasses on Plaintiffs' property causing damage to the horse pasture and horses.

22) This wastewater populates Plaintiffs' property with debris and seeds that, in turn, require Plaintiffs to engage in costly weed control they would not otherwise be required to address.

23) Because Defendants have known of their misconduct, known of the trespass, and have refused to take any meaningful steps to remedy these issues, their conduct is "willful and intentional" for purposes of Idaho Code § 6-202.

24) Plaintiffs are entitled to the relief set forth in Idaho Code § 6-202 to include compensatory damages in an amount to be determined at trial, and trebled per statute.

B. Plaintiffs' Second Claim for Relief: Common Law Trespass

25) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

26) In addition to, or in the alternative, Plaintiffs are entitled to relief pursuant to Common Law Trespass.

27) Defendants' actions in causing their excess irrigation water to flood onto Plaintiffs' property, bringing with it debris, resulting in foreseeable harm to Plaintiffs' property.

28) Therefore, Plaintiffs are entitled to relief pursuant to Common Law Trespass in an amount to be determined at trial.

C. Plaintiffs' Third Claim for Relief: Nuisance

29) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

30) Defendants, by permitting their excess irrigation water to enter onto Plaintiffs' property requires Plaintiffs to engage in cleanup operations. The floodwater creates significant mud in Plaintiffs' horse pasture requiring Plaintiffs to take additional actions in order to ride their

horses. These additional actions are a substantial impairment to the use and enjoyment to the Plaintiffs' property and their horses.

31) Defendants' conduct is unreasonable because they need only dig a simple and inexpensive ditch along their shared-border to direct their excess water into a proper drainage ditch.

32) Because Defendants' conduct unreasonably obstructs Plaintiffs' free use of their land, Plaintiffs are therefore entitled to relief for all damages in an amount to be determined at trial.

D. Plaintiffs' Fourth Claim for Relief: Negligence

33) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

34) Defendants owe a duty to utilize and maintain their property in a manner that does not damage or cause harm to others. Defendants breach this duty to Plaintiffs each time their irrigation water floods Plaintiffs' property and causes the harm previously described.

35) Plaintiffs are therefore entitled to relief for all damages in an amount to be determined at trial.

E. Plaintiffs' Fifth Claim for Relief: Negligence *Per Se*

36) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

37) In addition to, or in the alternative, Plaintiffs are entitled to relief pursuant to a theory of Negligence *per se*.

38) Idaho Code §§ 42-1202, -1203, and -1204—individually and as a whole—imposes a duty upon Defendants to exercise a standard of care in how they utilize and manage their irrigation water.

39) For the reasons set forth above, Defendants have breached their statutory duty of care which is the direct and proximate cause of Plaintiffs' damages.

40) Plaintiffs are therefore entitled to relief for all damages in an amount to be determined at trial.

VII. PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF

41) Plaintiffs hereby incorporate by reference each paragraph above as though fully set forth herein.

42) The legal theories set forth above demonstrate that Plaintiffs are entitled to relief for Defendants' continued trespasses onto Plaintiffs' property. There are no complex matters of law or fact. Defendants have taken no steps to prevent their water from trespassing onto Plaintiffs' property.

43) Defendants have taken no action to prevent their excess water from damaging Plaintiffs' property. Therefore, Plaintiffs are entitled to injunctive relief to prevent future trespasses arising from Defendants' acts, omission, or mismanagement of their irrigation water and the ditch at issue.

VIII. DEMAND FOR JURY TRIAL

Pursuant to Idaho Rules of Civil Procedure 38(c), Plaintiffs demand a trial by jury.

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/


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WHEREFORE, Plaintiffs pray for judgment of this Court against Defendants as follows:

1. That Plaintiffs be entitled to recover all actual damages, consequential damages, and any other relief permissible under Plaintiffs' claims for relief for trespass, nuisance, negligence, and injunctive relief;
2. That Plaintiffs be entitled to treble damages for statutory trespass pursuant to Idaho Code § 6-202;
3. That Defendants be ordered to take whatever actions necessary to ensure that they do not cause any future trespass onto Plaintiffs' property, including digging a simple water carrying ditch.
4. That Defendants be ordered to pay all reasonable costs and attorney's fees pursuant to Idaho Code §§ 6-202, 12-120, 12-121, and IRCP 54.
5. That Defendants be ordered to pay all pre judgment interest on the entire judgment, at the statutory rate for judgments in the state of Idaho, in an amount to be proven at trial; and
6. For any other such relief provided by law or as this Court deems just and proper.

DATED This 30th day of June 2016.

THOMPSON LAW FIRM
Attorneys for Plaintiffs



KRISTEN R. THOMPSON

Kristen R. Thompson
THOMPSON LAW FIRM
78 SW Fifth Avenue, Suite 2
Meridian, Idaho 83642
Telephone Number: (208) 888-7278
Facsimile Number: (208) 888-7296
I.S.B. #4033

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

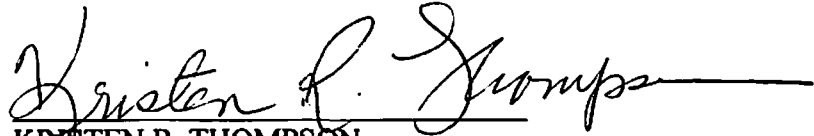
JOHN S. KIRBY AND VICKI L. KIRBY,)	
husband and wife,)	
)	Case No. CV OC 1612289
Plaintiffs,)	
)	MOTION FOR ENTRY OF DEFAULT
vs.)	
)	
MARK SCOTTON AND DAWN SCOTTON,)	
husband and wife,)	
)	
Defendants.)	
_____)	

COMES NOW, the Plaintiffs, JOHN S. KIRBY and VICKI L. KIRBY, husband and wife, by and through their attorney of record, Kristen R. Thompson, of THOMPSON LAW FIRM, and hereby moves the Court to enter default against the Defendants herein on the grounds that the Defendants have been served with copies of the Summons and Complaint in this action, but have failed to answer the Complaint within the twenty-day period, as provided by statute.

This motion is made and based upon the Affidavit filed herewith and upon the papers, records and files in this action.

DATED This 24 day of October 2016.

THOMPSON LAW FIRM
Attorneys for Plaintiffs



KRISTEN R. THOMPSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of October 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Mark and Dawn Scotton
1800 W. Hubbard Road
Kuna, ID 83634

U.S. Mail, postage prepaid
 Hand Delivery
 Electronic Delivery


Ronna Jones
Legal Secretary

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,)	
husband and wife,)	
)	Case No. CV OC 1612289
Plaintiffs,)	
)	ORDER FOR ENTRY OF DEFAULT
vs.)	
)	
MARK SCOTTON AND DAWN SCOTTON,)	
husband and wife,)	
)	
Defendants.)	
_____)	

Defendants in the above-entitled action having failed to appear within the twenty-day (20) notice of time to appear and plead to Plaintiffs' Complaint during the time allowed, and the time for answering having elapsed from the date of service of Summons and Complaint in this action, and it appearing from the affidavit filed in this matter on October 24, 2016, that, to the best knowledge of the Plaintiffs, Defendants are not members of the Armed Forces of the United States, Defendants are of the age of majority and to the best belief of Plaintiffs, Defendants are mentally competent.

IT IS HEREBY ORDERED that the default of Defendants herein be entered.

Signed: 11/17/2016 04:48 PM
 DATED This _____ day of _____ 2016.

Lynn G. Norton

 LYNN G. NORTON
 District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Kristen R. Thompson
THOMPSON LAW FIRM
78 SW 5TH Avenue, Suite 2
Meridian, ID 83642
rjones@thompsonlawfirm.legal

U.S. Mail, postage prepaid
 Hand Delivery
 Electronic Delivery

Mark and Dawn Scotton
1800 W. Hubbard Road
Kuna, ID 83634

U.S. Mail, postage prepaid
 Hand Delivery
 Electronic Delivery

CHRISTOPHER RICH
Clerk of the Court

By: *Jamie Korse*
Deputy Clerk



Mark B. Perry, ISB #3345
Trevor L. Hart, ISB #5805
PERRY LAW, P.C.
2627 West Idaho Street
P.O. Box 637
Boise, Idaho 83701-0637
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
PL File No. 4202.043
tlh@perrylawpc.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKY L.
KIRBY, husband and wife

Plaintiffs,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants.

Case No. CV-OC-1612289

ANSWER

COME NOW Defendants, by and through undersigned counsel, and as and for an Answer to Plaintiffs' Complaint, admit, deny, and affirmatively aver as follows:

FIRST DEFENSE

1. The Complaint fails to state a claim upon which relief can be granted.

ANSWER — 1

tlh | 4344.001 | answer -- scotton.wpd | 12012016

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SECOND DEFENSE

2. Defendants deny all averments in the Complaint not specifically admitted herein.
3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 1 of the Complaint and therefore deny the same.
4. Defendants admit the averments in paragraphs 2 through 4 of the Complaint.
5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6 of the Complaint and therefore deny the same.
6. With respect to the averments in paragraph 7 of the Complaint, Defendants admit that Plaintiffs obtain their water via a buried pipeline which runs across Defendants' property. Defendants deny the remaining averments in paragraph 7 of the Complaint.
7. Defendants admit the averments in paragraph 8 of the Complaint.
8. With respect to the averments in paragraph 16 of the Complaint, Defendants admit only that Plaintiffs' counsel sent them a letter in September 2015 and that the letter speaks for itself.

THIRD DEFENSE

9. The Complaint and each and every cause of action therein are barred by Plaintiffs' contributory or comparative responsibility.

FOURTH DEFENSE

10. The Complaint and each and every cause of action therein are barred by estoppel.

FIFTH DEFENSE

11. The Complaint and each and every cause of action averred therein are barred by waiver.

SIXTH DEFENSE

12. Plaintiffs' damages, if any, are the result of Plaintiffs' own conduct.

SEVENTH DEFENSE

13. Plaintiffs have failed to mitigate their damages, if any.

EIGHTH DEFENSE

14. The Complaint and each and every cause of action therein are barred by the doctrine of unclean hands.

NINTH DEFENSE

15. Some or all of Plaintiffs' causes of action are barred by release.

TENTH DEFENSE

16. Plaintiffs' damages, if any, are subject to Defendants' right of offset resulting from Plaintiffs' wrongful conduct, including trespass, nuisance, and intentional infliction of emotional distress, caused by Plaintiffs' discharging their firearms in the direction of Defendants' home.

ATTORNEY'S FEES

17. Defendants have retained attorneys to defend them in this action, and have incurred and will incur reasonable attorney fees herein.

18. This action has been brought frivolously, unreasonably, and without foundation. Defendants are entitled to recover their costs and reasonable attorney fees pursuant to Idaho Code § 12-121 and Rules 54(d)(1) and 54(e)(1) of the Idaho Rules of Civil Procedure.

WHEREFORE, Defendants pray for relief as follows:

1. That the Complaint be dismissed with prejudice and that Plaintiffs take nothing thereby;
2. For costs and reasonable attorney's fees incurred in defending this action, pursuant to Idaho Code § 12-121 and Rules 54(d)(1) and 54(e)(1) of the Idaho Rules of Civil Procedure; and
3. For such other and further relief as to the Court may seem just.

Dated this 1st day of December 2016.

Perry Law, P.C.



By: Trevor L. Hart - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2016, served a true and correct copy of the foregoing document upon the following persons by electronic service, addressed as follows:

Kristin R. Thompson
Thompson Law Firm
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
rjones@thompsonlawfirm.legal



Trevor L. Hart

Mark B. Perry, ISB #3345
Trevor L. Hart, ISB #5805
PERRY LAW, P.C.
2627 West Idaho Street
P.O. Box 637
Boise, Idaho 83701-0637
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
PL File No. 4202.043
tlh@perrylawpc.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKY L.
KIRBY, husband and wife

Plaintiffs,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants.

Case No. CV-OC-1612289

MOTION TO SET ASIDE DEFAULT

COME NOW Defendants (“Scotttons”) by and through counsel of record, and pursuant to Rule 55(c) of the Idaho Rules of Civil Procedure, move the Court for an order setting aside the entry of default against them.

Good cause exists for setting aside the entry of default, as follows:

MOTION TO SET ASIDE DEFAULT — 1

tlh | 4202.043 | motion to set aside default.wpd | 12062016

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1. Counsel for Plaintiffs (“Kirbys”) received written notice, prior to the filing of the Complaint in this action, that Scottons are represented by undersigned counsel and that they dispute the same averments of fact which Kirbys now make in the Complaint. *Affidavit of Trevor L. Hart* at ¶ 2, Exhibit A.

2. On or about July 13, 2016, counsel communicated by telephone. Undersigned counsel stated that Scottons had informed him they had resolved the claims raised in Kirbys’ Complaint. Counsel for Kirbys stated she was about to go on vacation, would be out of the office for an extended period of time, would discuss the matter with Kirbys upon her return, and would not take further action without notice to Scottons’ counsel. *Id.* at ¶ 3.

3. On or about October 24, 2016, Kirbys applied for a default judgment without notice to Scottons’ counsel, in violation of Rule 55(a)(1) of the Idaho Rules of Civil Procedure. Counsel for Kirbys sent notice of that application to Scottons directly without the knowledge or consent of Scottons’ counsel and, in so doing, both broke her promise and violated Rule 4.2 of the Idaho Rules of Professional Conduct.

4. On October 27, 2016, counsel for Scottons contacted counsel for Kirbys by telephone to inquire why Kirbys had not given notice of intent to take default. *Id.* at ¶ 5.

5. By e-mail that same morning, counsel for Kirbys advised the Court that: (a) Kirbys’ application was withdrawn, (b) the parties were in negotiations, and (c) if an Answer were not filed in the near future, Kirbys would “refile [their] Motion for Default.” *Id.* at ¶ 6, Exhibit B.

6. Kirbys in fact did not resume negotiations with Scottons, did not give notice of their intent to take default, and did not refile a motion for default. Instead, their counsel sent notice of a

hearing on their damages directly to Scottons. In doing so, counsel both broke a written promise and violated Rule 4.2 of the Idaho Rules of Professional Conduct.

7. Kirbys have filed an Answer in which they assert several meritorious defenses.

8. The rules of civil procedure are designed to facilitate settlement and adjudication on the merits. Idaho courts prefer an adjudication on the merits over one by default. *Idaho Prod. Credit Ass'n v. Gneiting*, 109 Idaho 493, 495, 708 P.2d 898, 900 (1985).

9. If the default is not set aside, the Court would be inviting counsel to avoid communicating with each other, and to ignore and violate rules of procedure and professional conduct.

10. Counsel owe a duty of candor to the Court and a duty of fairness to opposing counsel under the Idaho Rules of Professional Conduct. Both the Court and counsel for Scottons ought to be able to rely on the oral and written promises made by counsel for Kirbys.

11. Kirbys are equitably estopped from taking default.

This motion is based upon the pleadings and documents on file herein and the affidavit filed herewith.

Oral argument is requested.

Dated this 6th day of January 2016.

PERRY LAW, P.C.



By: _____
Trevor L. Hart - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2016, served a true and correct copy of the foregoing document upon the following persons by electronic service, addressed as follows:

Kristen R. Thompson
Thompson Law Firm
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
kthompson@thompsonlawfirm.legal



Trevor L. Hart

Mark B. Perry, ISB #3345
Trevor L. Hart, ISB #5805
PERRY LAW, P.C.
2627 West Idaho Street
P.O. Box 637
Boise, Idaho 83701-0637
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
PL File No. 4202.043
tlh@perrylawpc.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKY L.
KIRBY, husband and wife

Plaintiffs,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants.

Case No. CV-OC-1612289

**MOTION TO CONTINUE HEARING
AND TO SHORTEN TIME**

Idaho R. Civ. P. 7(b)(3)

COME NOW Defendants (“Scottons”), by and through counsel of record, and pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure, move the Court for an order continuing Plaintiffs’ (“Kirbys”) damages hearing, and shortening time for notice of hearing on Scottons’ Motion to Set Aside Default and Motion to Continue Hearing, such that notice served upon

counsel for Kirbys by electronic service on December 6, 2016 will be deemed sufficient notice to Kirbys of a hearing scheduled for December 15, 2016 at 2:45 p.m.

Grounds exists to shorten time because a hearing is already set in this matter for that date and time. If the Court grants Scotttons' Motion to Set Aside Default, then the need for a damages hearing would be obviated. Even if the Court denies Scotttons' Motion to Set Aside Default, Kirbys will not be prejudiced by a continuation of their hearing to the Court's next available date.

This motion is made and supported by the pleadings and documents on file herein, together with the motion to set aside default and affidavit submitted therewith.

Oral argument is requested.

Dated this 6th day of January 2016.

PERRY LAW, P.C.



By: Trevor L. Hart - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

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Kristen R. Thompson
Thompson Law Firm
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
kthompson@thompsonlawfirm.legal



Trevor L. Hart

1. I am an attorney of record for Defendants in these proceedings. I am over the age of 18 and am competent to testify regarding the facts set forth in this affidavit, and I make this affidavit on personal knowledge.

2. On May 26, 2016, I sent a letter to counsel for Kirbys to inform them that my office represents Scottons in connection with the irrigation dispute which is now the subject of Kirbys' Complaint. A true and correct copy of that letter, in which Scottons expressly deny that their irrigation water floods Kirbys' property or that they have caused Kirbys any damages, is attached hereto as **Exhibit A**.

3. On or about July 13, 2016, after discussing the matter with my clients, I spoke with counsel for Kirbys by telephone. I informed counsel that Scottons told me they believed the irrigation dispute had been recently resolved and that litigation was not going to be necessary. Counsel for Kirbys told me she was about to go on vacation, would be out of the office for an extended period of time, would discuss the matter with her clients upon her return, and Kirbys would not take further action without notice to me. *Id.* at ¶ 3.

4. I was not served with Kirbys' application for default judgment which was filed on or about October 24, 2016.

5. On October 27, 2016, I contacted counsel for Kirbys by telephone to inquire why counsel had not contacted me previously to let me know the matter had not been resolved and why I had not been given notice of Kirbys' intent to take default.

6. By e-mail that same morning, counsel for Kirbys advised the Court that: (a) Kirbys' application was withdrawn, (b) the parties were in negotiations, and (c) if an Answer were not filed in the near future, Kirbys would "refile [their] Motion for Default." A true and correct copy of that e-mail is attached hereto as **Exhibit B**.

7. I did not hear again from counsel for Kirbys. Instead, my clients contacted me by e-mail on November 30, asking whether I had received notice of next week's damages hearing in this matter, and asking why Kirbys were communicating with them directly instead of through me.

8. In my opinion, Scottons have several meritorious defenses to Kirbys' Complaint.

9. I have not worked with Kirbys' counsel before this case; however, in 18 years of practicing law, I have developed a good working relationship with many members of the Idaho bar. Not once have I encountered a situation such as this, where opposing counsel repeatedly and intentionally: (a) avoids communicating with me to resolve our clients' dispute, (b) breaks oral and written promises to notify me before taking further action in the case, and (c) elects to send notices to my clients directly in a deliberate effort to obtain a judgment by default against my clients without my knowledge.

10. In my opinion, counsel's conduct not only invokes equitable estoppel, it constitutes a violation of counsel's duties under the Idaho Rules of Professional Conduct.

11. Further your affiant sayeth naught.



Trevor Hart

SUBSCRIBED AND SWORN TO before me this 6th day of December 2016.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My commission expires: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2016, served a true and correct copy of the foregoing document upon the following persons by electronic service, addressed as follows:

Kristen R. Thompson
Thompson Law Firm
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
kthompson@thompsonlawfirm.legal



Trevor L. Hart

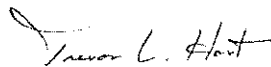
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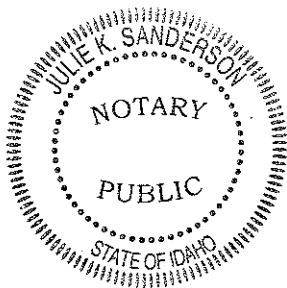
10. In my opinion, counsel's conduct not only invokes equitable estoppel, it constitutes a violation of counsel's duties under the Idaho Rules of Professional Conduct.

11. Further your affiant sayeth naught.



Trevor Hart

SUBSCRIBED AND SWORN TO before me this 6th day of December 2016.



NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

My commission expires: 1.11.19

PERRY LAW, P.C.

2627 West Idaho Street
Post Office Box 637
Boise, Idaho 83701
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
E-mail: info@perrylawpc.com
Website: <http://perrylawpc.com/>

Mark B. Perry
Trevor L. Hart

of counsel
J. Michael Kulchak
Shane K. Warner

With Attorneys Licensed to Practice
in ID, AZ, OR, WA and FL

May 26, 2016

Via Facsimile No. (208) 888-7296

Kristen R. Thompson
Thompson Law Firm
55 SW Fifth Avenue, Suite 150
Meridian, ID 83642 -8638

**RE: Kirby et al. v. Scotton
PL File No. 4202.043**

Dear Ms. Thompson:

This office represents Mark and Dawn Scotton in connection with the irrigation dispute among the Scotttons, Sam and Vicki Kirby, and Gene Morrison. I am in receipt of your letter of September 11, 2015. After you sent that letter, your clients (illegally) locked the headgate as your letter stated they would. The police were summoned and the responding officer instructed your clients to remove the lock.

Mr. and Mrs. Scotton deny that their irrigation water "continually" comes off their property and floods their neighbors' property. In fact, at the instruction of Mr. Kirby, Mr. Morrison has illegally blocked Scotttons' access to their irrigation water again this spring. The Scotttons haven't even been able to irrigate yet this year and their hay crop is being damaged as a result of your clients' wrongful conduct.

The Scotttons also deny that they caused Mr. Morrison's ditch to overflow as described in your letter. To the contrary, when the ditch rider came to look at that problem last year, it was determined that Mr. Morrison's ditch was the cause, and he has since fixed it. If Mr. Morrison had properly cared for his portion of the ditch, it would not have overflowed.

The Scotttons are satisfied that their irrigation water has not caused any damage and does not pose any threat to your clients' property. If your clients are concerned about a potential threat, they can build a berm on their side of the property line as a safeguard against flooding. What they may not do is continue to block the Scotttons' use of their irrigation water.

Mr. Kirby in particular has a history of threatening and harassing the Scotttons. That needs to stop. If Mr. Kirby has a property or irrigation dispute with the Scotttons in the future,

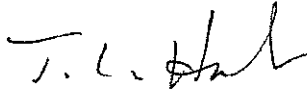
000038
EXHIBIT A

please have him express the nature and details of any such dispute in writing, directed to my office. I think it is in the best interest of both our clients if Mr. Kirby does not communicate his complaints verbally to the Scottons.

If either Mr. or Mrs. Kirby or Mr. Morrison chooses again to deny the Scottons their irrigation water, the Scottons may seek any and all remedies available to them under Idaho law, including but not limited to the filing of a lawsuit for equitable relief and for damages to recover for loss of their hay crop. I trust that will not be necessary and you will use your good offices to persuade your clients to cooperate and behave as good neighbors.

Feel free to contact me if you wish to discuss this further.

Very truly yours,



Trevor L. Hart

/tlh

cc: client

 *** TX REPORT ***

TRANSMISSION OK

TX/RX NO	3009
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DESTINATION ID	
ST. TIME	25/05 15:14
TIME USE	00'31
PAGES SENT	2
RESULT	OK

PERRY LAW, P.C.

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 Post Office Box 637
 Boise, Idaho 83701
 Telephone: (208) 338-1001
 Facsimile: (208) 338-8400
 E-mail: info@perrylawpc.com
 Website: <http://perrylawpc.com/>

Mark B. Perry
 Trevor L. Hart

of counsel
 J. Michael Kulchak
 Shane K. Warner

With Attorneys Licensed to Practice
 in ID, AZ, OR, WA and FL

May 26, 2016

Via Facsimile No. (208) 888-7296

Kristen R. Thompson
 Thompson Law Firm
 55 SW Fifth Avenue, Suite 150
 Meridian, ID 83642 -8638

**RE: Kirby et al. v. Scotton
 PL File No. 4202.043**

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000040

Trevor Hart

From: Ronna Jones [rjones@thompsonlawfirm.legal]
Sent: Thursday, October 27, 2016 9:36 AM
To: jkorsen@adaweb.net
Cc: Kristen Thompson; Trevor Hart
Subject: Important Update on CV OC 1612289

Janine,

Please withdraw our Motion for Entry of Default against Mr. and Mrs. Scotton. We are in negotiation to secure an answer to our complaint. The answer will be filed next week sometime or if not we will refile our Motion for Entry of Default.

Thank you,

Ronna L. Jones
Thompson Law Firm
78 SW 5th Ave, Suite 2
Meridian, Idaho 83642
Office: (208) 888-7278
Fax: (208) 888-7296
Cell: (208) 850-5595
RJones@thompsonlawfirm.legal

This message and any files attached hereto are intended strictly for the use of the intended addressee and may contain information that is PRIVILEGED AND CONFIDENTIAL. If you are not the intended recipient, and have received this communication in error, please delete all electronic copies of this message and any attached files, destroy any hard copies in existence, and notify me immediately.

Kristen R. Thompson
THOMPSON LAW FIRM
78 SW Fifth Avenue, Suite 2
Meridian, Idaho 83642
Telephone Number: (208) 888-7278
Facsimile Number: (208) 888-7296
I.S.B. #4033

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,)
husband and wife,)

Plaintiffs,)

vs.)

MARK SCOTTON AND DAWN SCOTTON,)
husband and wife,)

Defendants.)

Case No. CV OC 1612289

MEMORANDUM IN SUPPORT
OF RETAINER OF DEFAULT
JUDGMENT AS ENTERED

COMES NOW, the Plaintiffs, JOHN S. KIRBY and VICKI L. KIRBY, husband and wife, by and through their attorney of record, Kristen R. Thompson, of THOMPSON LAW FIRM, and hereby provides the following information to the court relative to the Order for Entry of Default that has been entered by this honorable court. Plaintiffs' counsel provides her affidavit outlining the dates and times of discussions between Mr. Trevor Hart, counsel for the Defendants.

I. HISTORY

The Plaintiffs made extensive and numerous requests to the neighbor, the Defendants, to stop flooding their property. Finally, Plaintiffs exercised the only option remaining, that of suing their neighbor to prevent further damages and repairs to their property. The complaint against the

Defendants for trespass and other damages was filed on July 8, 2016. Counsel for the Plaintiff personally contacted Mr. Hart who told her that he was uncertain as to whether he was representing the Defendants in this matter. As the court will see from the dates outlined in Counsel Thompson's affidavit. Ms. Thompson presented Mr. Hart with copies of the complaint and summons, and, as a precautionary action, had the complaint directly served upon Mr. and Mrs. Scotton to avoid exactly what is happening before the court today. The Defendants and Mr. Hart ignored the complaint and summons at which time counsel again contacted Mr. Hart as a professional courtesy to see if he was again representing the Defendants. Counsel asked Mr. Hart if he was representing the Defendants because of her intent to take default. I.R.C.P Rule 5(2) does not require service, but counsel did so as a professional courtesy to Mr. Hart. Counsel gave Mr. Hart a week to answer the complaint. Mr. Hart failed to do so. Plaintiffs then requested and were granted default judgment by the court. Specific dates are outlined in the Second Affidavit of Kristen R. Thompson. Mr. Hart filed his answer to the complaint 72 days after it was due. The 72 days is calculated after Defendants were served by a process server. This service was necessary as Mr. Hart, while in possession of the complaint and summons failed to return the acknowledgement of service he agreed upon.

II. DAMAGES

Mr. Hart now comes to this court suggesting that he was somehow blindsided with this information when in fact he was properly advised, his clients were properly served and informed. In the interest of justice, the Plaintiffs should be allowed the damages they seek in default. Had the Plaintiffs not filed their lawsuit against the Defendants, the Defendants never would have done anything to prevent the damages that continue to occur to the Plaintiffs' property.

Therefore, the Plaintiffs request this Honorable Court award them damages as appearing

in the Affidavit of John S. Kirby. (See Exhibit 1 – Affidavit of John S. Kirby with Presentation of Damages Calculation), and most importantly that the Court direct the Defendants to put a drainage ditch on their property between the Defendants’ parcel and the Plaintiffs’ parcel as soon as possible. Because of the continual need of the Plaintiffs to bring this matter before the court and to now deal with Mr. Hart and his untruthful statements, Plaintiffs ask for fees and costs for providing the court with Mr. Kirby’s affidavit and this Memorandum in Support of the Default Judgment as Entered. Counsel requests this Honorable Court also provide additional damages as appropriate for having to bring to the Court the frivolous attempt by Mr. Hart to overturn the default as entered. (IC § 12-120, 12-121, I.R.C.P Rule 54, and I.C. § 6-202)

III. FAILURE TO FOLLOW I.R.C.P RULE 7(3)(A) and 7(3)(B)

Mr. Hart failed to provide adequate notice to Plaintiffs’ counsel of his intent to request a hearing on his Motion to Set Aside Default. Counsel for the Plaintiffs has not had adequate time to prepare for any hearing proposed by Mr. Hart in conjunction with hearing any motion to set aside default at the same time that damages for the default as entered would be heard. (I.R.C.P. 7(3)(A)) Therefore, Plaintiffs in this matter urgently request this court reject hearing the Defendants’ Motion to Set Aside Default and conclude this matter by awarding damages as outlined in the Affidavit of John S. Kirby as attached to this memorandum. (See Exhibit 1)

IV. CONCLUSION

In summary, the Plaintiffs, after extensive and numerous requests to their neighbor to stop flooding their property, finally were given the only option of suing their neighbors to prevent further damage and necessary repairs. The complaint against the Defendants for trespass and other damages was filed on July 8, 2016. Counsel for the Plaintiffs personally contacted Mr. Hart who told her that he was uncertain as to whether he was representing the Scottons in this matter.

Therefore, Plaintiffs' counsel provided Mr. Hart with copies of the complaint and summons and had the complaint and summons served directly upon the Defendants. The Defendants ignored the summons and complaint at which time counsel for the Plaintiffs again contacted Mr. Hart. She asked Mr. Hart if he was indeed representing them because of her intent to take default and gave Mr. Hart until the following week to answer the complaint. He failed to do so, and counsel for the Plaintiffs requested that the court sign the default. Mr. Hart now comes to this court suggesting that he somehow was blindsided with this information when in fact he was properly advised, his clients were properly informed.

Mr. Hart filed his incomplete answer 72 days after it was required. In the interest of justice, the Plaintiffs should be allowed their damages in seeking default. Had they not filed this lawsuit, Mr. and Mrs. Scotton never would have done anything to prevent damages that were occurring to Mr. and Mrs. Kirby's property. Therefore, the Plaintiffs request this Honorable Court award them the damages appearing in the Affidavit of John S. Kirby at Exhibit 1, attorney's fees and costs, and that this court require the Defendants to put a drainage ditch into the property between the Scotton parcel and the Kirby parcel as soon as possible.

DATED This 14th day of December 2016.

THOMPSON LAW FIRM
Attorneys for Plaintiffs

/s/ Kristen R. Thompson
KRISTEN R. THOMPSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Trevor L. Hart
PERRY LAW, P.C.
PO Box 637
Boise, ID 83701
tlh@perrylawpc.com

U.S. Mail, postage prepaid
 Hand Delivery
 Efile Electronic Delivery

Mark and Dawn Scotton
1800 W. Hubbard Road
Kuna, ID 83634

U.S. Mail, postage prepaid
 Hand Delivery
 Electronic Delivery

/s/ Ronna L. Jones
RONNA L. JONES

Kristen R. Thompson
THOMPSON LAW FIRM
 78 SW Fifth Avenue, Suite 2
 Meridian, Idaho 83642
 Telephone Number: (208) 888-7278
 Facsimile Number: (208) 888-7296
 I.S.B. #4033

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,)
 husband and wife,)
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 Plaintiffs,)
)
 vs.)
)
 MARK SCOTTON AND DAWN SCOTTON,)
 husband and wife,)
)
 Defendants.)

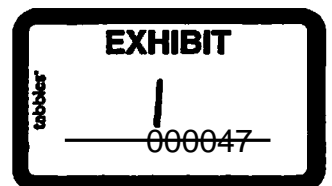
Case No. CV OC 1612289

AFFIDAVIT OF JOHN S. KIRBY
 RE: SUBMISSION OF DAMAGES

STATE OF IDAHO)
) ss.
 County of Ada)

JOHN S. KIRBY, being first duly sworn, deposes and states as follows:

1. I am the Plaintiff in the above referenced case.
2. I have calculated to the best of my ability the costs and expenses for correction of damages caused by the Defendants in this matter.
3. These damages are outlined for the court based upon actual payment of invoices and fair and just estimate of labor costs to spray weeds, prep and plant pasture grass, and to install

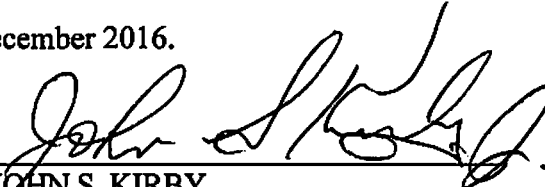


irrigation.

4. These damage calculations are submitted to the court for payment by the Defendants under the Order for Entry of Default entered by the court on November 17, 2016.

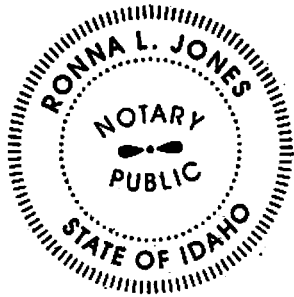
FURTHER AFFIANT SAYETH NAUGHT.

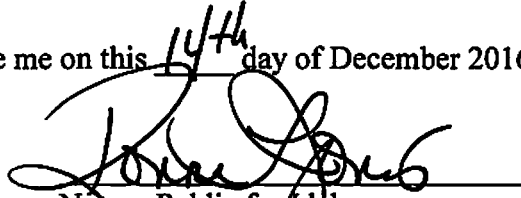
DATED This 14 day of December 2016.



JOHN S. KIRBY

SUBSCRIBED AND SWORN to before me on this 14th day of December 2016.

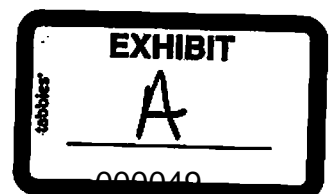




Notary Public for Idaho
Residing at: Boise
My Commission Expires: 12/18/19

Damage Calculations:

Expenses to put the pasture and irrigation in to keep the weeds from growing on our property. This was done as Ada County Weed Control said this is the only way to try and keep the weeds from growing and spreading on our property.	\$ 7,762.77
Labor for Greg Galger to run the backhoe to install the pipe and make weld the water distributions boxes	\$ 650.00
Rental cost for large equipment to prep the acreage for planting and irrigation	\$ 1,800.00
Cost to finish up the irrigation	\$ 259.78
Cost for Simplot to analysis the soil	\$ 60.00
Cost of round up and 24D to spray on the weeds	\$ 419.68
Labor for John & Vicki to spray weeds, prep and plant the pasture grass and to install irrigation	<u>\$ 4,275.00</u>
	\$15,227.23
	<u> x 3</u>
Sub-total	\$45,681.69
Attorney's Fees & Costs thru 11/30/16	\$ 5,540.70
Filing Fees	\$ 221.00
Process Service Fees	\$ 57.50
Total Costs	<u>\$51,500.89</u>

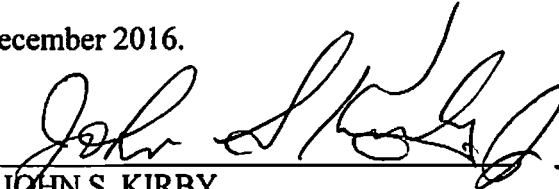


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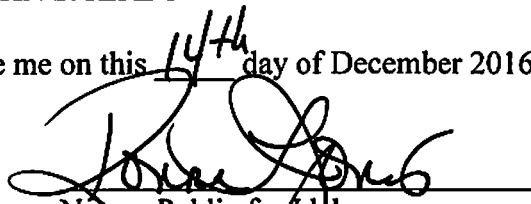
FURTHER AFFIANT SAYETH NAUGHT.

DATED This 14 day of December 2016.

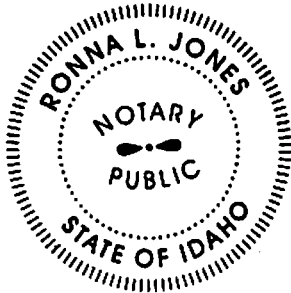


JOHN S. KIRBY

SUBSCRIBED AND SWORN to before me on this 14th day of December 2016.

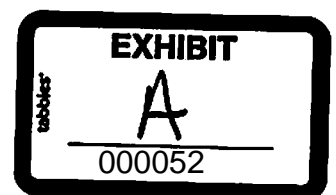


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that she has not upheld. Counselor for the Plaintiffs is disturbed and insulted by these false and untruthful representations made by Mr. Hart in his affidavit filed December 6, 2016.

4. Mr. Hart had the complaint in his possession on July 14, 2016 and still I had no confirmation of his representation. On July 14th, my assistant, Ms. Jones, delivered the Complaint and Summons to his office along with a prepared Acceptance of Service for his signature. Mr. Hart never completed the acceptance confirming his representation.

5. As there was no confirmation of his representation, I choose to have his clients personally served with the complaint and summons on August 31, 2016.

6. On October 24, 2016, we filed our Motion for Entry of Default and provided our notice via the certificate of service directly to the Defendants.

7. On October 26, 2016, I received an email from Trevor Hart. **(Exhibit 1 - Mr. Hart's email)**

8. On October 27, 2016, I spoke with Trevor Hart. I asked Mr. Hart if he was representing the Defendants. I was told that he would have to contact the Defendants to determine what if any representation he would be affording them. I indicated to him that he should contact me as soon as possible and that were he not to contact me within one week I would be seeking a default judgment.

9. My telephone call with Mr. Hart was October 27, 2016. I waited to confirm the intent to take default for one week, October 27th through November 3rd which is the period of time I told Mr. Hart I would wait before seeking to formalize the default as filed. **(Exhibit 2 – Email to Mr. Hart and Email to Judge's Clerk)**

10. As of November 4, 2016, no answer to our complaint had been filed.

11. I waited, at the request of Mr. Hart, until November 4th when we requested the judge's clerk to proceed with the default action, having heard absolutely nothing from Mr. Hart or from his clients. **(Exhibit 3 – Email to Judge's Clerk)**

12. On November 17, 2016, the court signed an Order for Entry of Default and requested a hearing to specifically assign damages. Still I had heard nothing from Mr. Hart and to my knowledge he did not represent the Defendants.

13. On December 2, 2016 Mr. Hart emails with a request to set aside default. Mr. Hart had had ample opportunity to deal with the default from October 27th until December 2nd. **(Exhibit 4 – Email from Mr. Hart)**

14. The Court set the hearing on damages only for December 15, 2016.

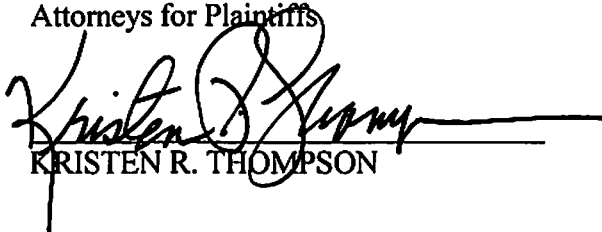
15. On December 1, 2016 Mr. Hart filed an answer. Counting from the service on the Defendants, the answer is 72 days late and the answer fails to address the issues as presented in the complaint.

16. On December 6, 2016 Mr. Hart then filed a Motion to Set Aside Default. In the Motion to Set Aside Default several items are listed that are contrary to the facts and contrary to the emails as received by Plaintiffs' counsel from Mr. Hart and appear as exhibits to this affidavit.

FURTHER AFFIANT SAYETH NAUGHT.

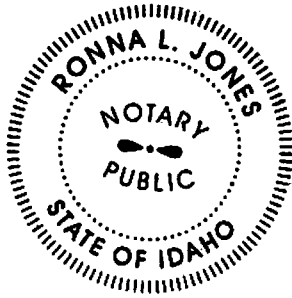
DATED This 14th day of December 2016.

THOMPSON LAW FIRM
Attorneys for Plaintiffs



KRISTEN R. THOMPSON

SUBSCRIBED AND SWORN to before me on this 14th day of December 2016.



Ronna L. Jones
Notary Public for Idaho
Residing at: Boise
My Commission Expires: 12/18/19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Trevor L. Hart
PERRY LAW, P.C.
PO Box 637
Boise, ID 83701
tlh@perrylawpc.com

U.S. Mail, postage prepaid
 Hand Delivery
 Efile Electronic Delivery

Mark and Dawn Scotton
1800 W. Hubbard Road
Kuna, ID 83634

U.S. Mail, postage prepaid
 Hand Delivery
 Electronic Delivery

/s/ Ronna L. Jones
RONNA L. JONES

Ronna Jones

From: Trevor Hart <tlh@perrylawpc.com>
Sent: Wednesday, October 26, 2016 3:22 PM
To: Ronna Jones
Cc: Trixy Wade
Subject: Kirby v. Scotton

Kristen:

Dawn Scotton just e-mailed me to say the Kirbys are proceeding to take default judgment against them.

When you and I last spoke about this file in July, you were about to leave on vacation. I mentioned that the Scottons had advised me they had done as Kirbys had asked and created a barrier to make sure their irrigation water would not flood Kirbys' property. We agreed that (a) you would contact your clients upon your return and get back to me, and (b) Kirbys would not require an answer at that time. I believe I still have the summons, complaint, and unsigned acceptance of service here at my office.

I have not heard from you or Scottons since July and assumed the matter had been resolved. I trust your communication with my clients directly was an oversight. Please contact me to discuss.

Best regards,

Trevor L. Hart
Perry Law, P.C.
2627 West Idaho Street
Boise, ID 83702
Tel: (208) 338-1001
Fax: (208) 338-8400
tlh@perrylawpc.com



Kristen Thompson

Sent: Thursday, October 27, 2016 8:43 AM
To: tlh@perylawpc.com
Subject: Kirby v. Scotton

Mr. Hart:

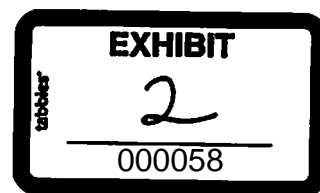
You were contacted by my office and advised that nothing had changed on the property and that we needed to proceed with the action. (telephone call and email) After numerous attempts to get return of service documents from your office, and confirming that the Scotton's had done nothing to fix the problem they were served with the complaint and summons by an appropriate process server. Had you or your office responded to our requests for confirmation of service we would not have had to serve the documents a second time.

I have not had any contact, inadvertently or otherwise, with your clients. I have visited the property, walked the property line and personally viewed the issues and can confirm your clients have done nothing to fix the problem. The Scottons have had possession of the complaint well over the required time to answer the complaint. Clearly, they did not contact you with the complaint, did nothing to address the problems they were causing their neighbor, and did nothing to resolve the matter. Therefore, one can only presume that they are not taking this matter seriously enough to resolve the problem.

To again resolve this matter, please have your clients answer the complaint no later than Friday, November 4th

Kristen R. Thompson, Esq.
Senior Counsel
Thompson Law Firm
78 SW Fifth Avenue- Suite 2
Meridian, Idaho 83642
208-888-7278
208-888-7296 (fax)

=====
=====



Ronna Jones

From: Janine Korsen <dckorsjp@adaweb.net>
Sent: Thursday, October 27, 2016 9:54 AM
To: Ronna Jones
Subject: RE: Important Update on CV OC 1612289

Ok, thanks!

From: Ronna Jones [mailto:rjones@thompsonlawfirm.legal]
Sent: Thursday, October 27, 2016 9:36 AM
To: Janine Korsen
Cc: Kristen Thompson; tlh@perrylawpc.com
Subject: [EXTERNAL] Important Update on CV OC 1612289

Janine,

Please withdraw our Motion for Entry of Default against Mr. and Mrs. Scotton. We are in negotiation to secure an answer to our complaint. The answer will be filed next week sometime or if not we will refile our Motion for Entry of Default.

Thank you,

Ronna L. Jones
Thompson Law Firm
78 SW 5th Ave, Suite 2
Meridian, Idaho 83642
Office: (208) 888-7278
Fax: (208) 888-7296
Cell: (208) 850-5595
RJones@thompsonlawfirm.legal

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Ronna Jones

From: Janine Korsen <dckorsjp@adaweb.net>
Sent: Friday, November 04, 2016 10:37 AM
To: Ronna Jones
Cc: Kristen Thompson
Subject: RE: Important Update on CV OC 1612289

I think I can just provide them to the Judge.

From: Ronna Jones [mailto:rjones@thompsonlawfirm.legal]
Sent: Friday, November 04, 2016 10:36 AM
To: Janine Korsen
Cc: Kristen Thompson
Subject: [EXTERNAL] RE: Important Update on CV OC 1612289

Janine,

Ms. Thompson would like to move forward on the default judgment. Do I need to "refile" my documents or my I just request that they be provided to the Judge?

Thank you,

Ronna L. Jones
Thompson Law Firm
78 SW 5th Ave, Suite 2
Meridian, Idaho 83642
Office: (208) 888-7278
Fax: (208) 888-7296
Cell: (208) 850-5595
RJones@thompsonlawfirm.legal

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Ronna Jones

From: Kristen Thompson
Sent: Sunday, December 04, 2016 12:52 PM
To: tlh@perrylaw.pc
Cc: Ronna Jones
Subject: RE: Kirby v. Scotton | CV OC 1612289 | PL File No. 4202.043

I will check with my client on Monday after I review your answer. Your client could save lot of hassle if they just fix the problem and dig a ditch to get rid of the water. I am not certain that there is any other reasonable answer?

Thank you.

Kris Thompson
Kristen R. Thompson, Esq.
Senior Counsel
Thompson Law Firm
78 SW Fifth Avenue- Suite 2
Meridian, Idaho 83642
208-888-7278
208-888-7296 (fax)

From: Ronna Jones
Sent: Friday, December 2, 2016 10:00 AM
To: Kristen Thompson <kthompson@thompsonlawfirm.legal>
Subject: Fwd: Kirby v. Scotton | CV OC 1612289 | PL File No. 4202.043

Sent from my Verizon 4G LTE smartphone

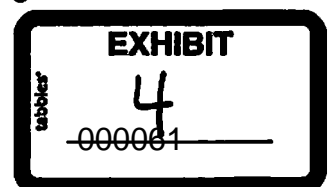
----- Original message -----

From: Trevor Hart <tlh@perrylawpc.com>
Date: 12/2/16 9:48 AM (GMT-07:00)
To: Ronna Jones <rjones@thompsonlawfirm.legal>
Cc: Dawn Scotton <dawnscotton5@yahoo.com>
Subject: FW: Kirby v. Scotton | CV OC 1612289 | PL File No. 4202.043

Kristen:

Please confirm Kirbys will stipulate to set aside the default and vacate the damages hearing.

Very truly yours,



Trevor Hart

From: Janine Korsen [<mailto:dckorsjp@adaweb.net>]
Sent: Thursday, December 01, 2016 3:10 PM
To: Trevor Hart; Ronna Jones
Cc: Trixy Wade; Kim Sanderson; Mark Perry
Subject: RE: Kirby v. Scotton | CV OC 1612289 | PL File No. 4202.043

I received a message to go ahead with the default so I sent it back to Judge Norton's queue and she signed it. That is why it was entered. Judge Norton requested the hearing on the damages portion.

From: Trevor Hart [<mailto:tlh@perrylawpc.com>]
Sent: Thursday, December 01, 2016 2:59 PM
To: Ronna Jones
Cc: Janine Korsen; Trixy Wade; Kim Sanderson; Mark Perry
Subject: [EXTERNAL] Kirby v. Scotton | CV OC 1612289 | PL File No. 4202.043

Kristen:

It appears the Kirbys' motion for entry of default was not withdrawn and default was entered contrary to your request to the clerk (below) and contrary to our understanding. Notice of intent to take default was never served on my office.

I have filed an answer. Please confirm you will stipulate to set aside the default and vacate the damages hearing. I will prepare a stipulation and order.

Thank you for your cooperation. I look forward to working with you to resolve our clients' dispute.

Very truly yours,

Trevor L. Hart
Perry Law, P.C.
2627 West Idaho Street
Boise, ID 83702
Tel: (208) 338-1001
Fax: (208) 338-8400
tlh@perrylawpc.com

From: Ronna Jones [<mailto:rjones@thompsonlawfirm.legal>]
Sent: Thursday, October 27, 2016 9:36 AM
To:
Cc: Kristen Thompson; Trevor Hart
Subject: Important Update on CV OC 1612289

Janine,

Please withdraw our Motion for Entry of Default against Mr. and Mrs. Scotton. We are in negotiation to secure an answer to our complaint. The answer will be filed next week sometime or if not we will refile our Motion for Entry of Default.

Thank you,

Ronna L. Jones
Thompson Law Firm
78 SW 5th Ave, Suite 2
Meridian, Idaho 83642
Office: (208) 888-7278
Fax: (208) 888-7296
Cell: (208) 850-5595
RJones@thompsonlawfirm.legal

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Mark B. Perry, ISB #3345
Trevor L. Hart, ISB #5805
PERRY LAW, P.C.
2627 West Idaho Street
P.O. Box 637
Boise, Idaho 83701-0637
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
PL File No. 4202.043
tlh@perrylawpc.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKY L.
KIRBY, husband and wife

Plaintiffs,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants.

Case No. CV-OC-2016-12289

**REPLY MEMORANDUM IN
SUPPORT OF MOTION TO SET
ASIDE DEFAULT**

I.

INTRODUCTION

Plaintiffs (“Kirbys”) have opposed the motion of Defendants (“Scottons”) to set aside the entry of default against them. Kirbys’ memorandum does not cite any authority in support of

their position that default ought not to be set aside. This memorandum is submitted in reply. For the following reasons, Scotttons ask the Court to grant their motion and set aside the default so the parties' claims may be decided on the merits.

II.

STANDARD OF ADJUDICATION

The Idaho Rules of Civil Procedure provides that “the court may set aside an entry of default for good cause.” I.R.C.P. 55(c). The required *good cause* showing to set aside a default under Rule 55(c) is “lower or more lenient than that required to set aside a default judgment” under Rule 60(b). *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 2681–2702 (1983)). This more lenient approach in setting aside a default, as opposed to a default judgment, is consistent with an application of the policy that cases should be decided on their merits. *Dorion v. Keane*, 153 Idaho 371, 375, 283 P.3d 118, 122 (Ct. App. 2012).

Still, the decision to grant a motion to set aside a default is left to the court's discretion. *McGloob v. Gwynn*, 140 Idaho 727, 729, 100 P.3d 621, 623 (2004); *McFarland v. Curtis*, 123 Idaho at 933, 854 P.2d at 276. The primary factors to be considered by the court are “whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented.” *Id.* at 936, 854 P.2d at 279. Another factor to be considered is the adequacy or lack of notice to the defendant. *E.g., Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987) (affirming a district court's denial of an application for default where there is a question over the adequacy of notice and “the net result” of the

parties' communication — or lack thereof — “was confusion over the pendency of th[e] proceedings”).

III.

ARGUMENT

Scottons' failure to file an Answer previously was not willful but was instead the result of a miscommunication between counsel. At least one e-mail from Kirbys' counsel to Scottons' counsel was misaddressed. *See* Exhibit 4 to counsel's affidavit. Perhaps others were as well. In any event, it is clear from the affidavits on file that there was at a minimum miscommunication between counsel as to whether Kirbys were proceeding with the lawsuit and whether and when they intended to seek a default judgment.

To prevail in opposing a motion to set aside a default, the plaintiff must show substantial prejudice. *Dorion v. Keane*, 153 Idaho at 376, 283 P.3d at 123. A short delay in filing an answer is insufficient prejudice. *Id.* Here, an Answer was filed the day after Scottons' counsel received notice of the default. Kirbys have not argued or demonstrated that they would suffer any prejudice other than a short delay if the default is set aside.

As for meritorious defenses, Scottons have submitted an Answer which raises several affirmative defenses in addition to a general denial of the averments in Kirbys' Complaint. One of Scottons' defenses is a right of offset. In the event Scottons' motion to set aside is granted, they intend to file an Amended Answer and Counterclaim in which they will assert claims for trespass and nuisance, among others. Scottons are satisfied that even if Kirbys were to prevail

on their claims, their damages would be more than offset by the damages which Kirbys have caused Scottons.

Finally, as is set forth in Scottons' motion, they were not provided with notice of Kirbys' intent to take a default judgment, notwithstanding (a) the notice required under the rules of civil procedure and (b) opposing counsel's promise to give notice before seeking a default. Absent any showing of willfulness or prejudice, and because Scottons have meritorious defenses and were not given adequate notice, good cause exists to set the default aside.

IV.

CONCLUSION

Scottons have demonstrated good cause. Moreover, it is the policy of Idaho courts to favor resolution of cases on their merits. For these reasons, and to avoid establishing a policy which would encourage counsel to communicate less, rather than more, Scottons ask the Court to exercise its discretion by setting aside the default and allowing them to litigate the parties' claims on the merits.

Respectfully submitted this 9th day of January 2017.

PERRY LAW, P.C.



By: Trevor L. Hart - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 9, 2017, I served a true and correct copy of the foregoing document upon the following persons by electronic service, addressed as follows:

Kristen R. Thompson
Thompson Law Firm
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
kthompson@thompsonlawfirm.legal



Trevor L. Hart

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,

Plaintiffs,

vs.

MARK SCOTTON AND DAWN SCOTTON;

Defendants.

Case No. CV-OC-2016012289

MEMORANDUM DECISION AND
ORDER ON DEFAULT DAMAGES

This cause came before the Court for a hearing on default damages on December 15, 2016. The decision of the court on damages was held in abeyance until the court heard and denied a Motion to Set Aside Default on January 19, 2017.

Pursuant to Idaho Rule of Civil Procedure Rule 55(b), the Plaintiffs filed a Motion for Entry of Default on October 24, 2016 with supporting Affidavit of Kristen R. Thompson. Upon considering the application for default and that the Defendants had failed to plead or otherwise defend this action, the court entered a Default on November 18, 2016. A hearing on default damages was noticed the hearing for December 15, 2016.

This matter came before the court on December 15, 2016 for a hearing on default damages requested in the Complaint for Trespass, Nuisance, Negligence and Injunctive Relief filed July 8, 2016. The Plaintiff's counsel, Kristen Thompson, appeared along with the Plaintiffs. Plaintiffs' counsel offered into evidence an Affidavit of John S. Kirby but did not offer any additional evidence or testimony.

The verified complaint alleges that the Defendants own real property at 1800 W. Hubbard Road, Kuna, Idaho that adjoins Plaintiffs property at 1880 W. Hubbard Road. Where the properties adjoin, the Defendants pasture horses. The verified complaint alleges in paragraph 7, "Plaintiffs obtain water via an easement across the Defendants property where there is a buried pipeline. The water flows onto Plaintiffs' property. The excess water flows out into a drainage ditch via Plaintiffs' ditch along their border on the opposite side of Defendants' property." Complaint ¶7. There is no other information in the matters filed about the ownership or easement for that ditch except in paragraph 15 where it mentions the Defendants could be taken out of the irrigation water rotation. Along that property border, water from the Defendants' property overflows and flows onto Plaintiffs' land. This is a regular occurrence due to Defendants' irrigation practices which causes mud in Plaintiffs' pasture and on their horses, and increases weed-control operations on Plaintiffs land because of weeds and seeds carried in the trespassing water.

Idaho Code § 6-202 states:

Any person who, without permission of the owner, or the owner's agent, willfully and intentionally enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; or who willfully and intentionally cuts down or carries off any wood or underwood, tree or timber, or girdles, or otherwise willfully and intentionally injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor or fifty dollars (\$50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails. Provided however, the owner or

operator of any right-of-way or easement for any ditch, canal or other conduit governed by the provisions of chapter 11 or chapter 12, title 42, Idaho Code, who is found in violation of this section shall be liable only for actual damages and not for any treble damages or attorney fees otherwise provided for under this section.

In the Affidavit of John S. Kirby, Mr. Kirby proved damages of \$10,952.23 caused by the trespass of water, weeds, and seeds, and expended in efforts to mitigate the damage caused by the trespass. The Plaintiffs failed to prove that they are entitled to damages of \$4,275.00 for the cost of their own labor since no information was provided as to the hours of labor involved, which of the Plaintiffs performed that labor and when, or the rate at which they felt their labor should be compensated. The claim for \$4,275.00 is speculative and unsupported in the matters filed before this court.

Although the Plaintiffs established trespass pursuant to Idaho Code § 6-202 by the overflow of water outside the ditch easement, the question becomes whether they are entitled to treble damages for this count. The statute in this case provides for treble damages if “any person” enters land posted as “no trespassing,” or if anyone intentionally cuts down or injures timber on the land. The verified allegation is that the trespass in this case was water overflowing from an easement for an irrigation ditch on Defendant’s land caused by Defendants’ irrigation practices. Idaho Code § 6-202 specifically states that “the owner or operator of any right-of-way or easement for any ditch, canal or other conduit governed by the provisions of chapter 11 or chapter 12, title 42, Idaho Code, who is found in violation of this section shall be liable only for actual damages and not for any treble damages or attorney fees otherwise provided for under this section.”

Idaho Code § 42-1102 defines the owners of land and rights of way involved in irrigation and drainage. That statute provides in part, that owners and claimants to land “must keep such ditch, canal or other conduit in good repair, and *are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof*, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.” (emphasis added). Since default has been entered, the Defendants are prohibited from showing any damage was unavoidable. Idaho Code § 42-1202 requires, “The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water.”

Based upon the allegations in the complaint and the court’s reading of Idaho Code §§ 6-202, 42-1102, and 42-1202, the Defendants own or control an irrigation easement which is the sole basis alleged for the damages under this count. As such, Idaho Code § 6-202 limits damages to only actual damages, which are not trebled, and does not permit the recovery of attorney fees on this count.

Attorney Fees and Costs

The Plaintiffs requested costs in the amount of \$278.50. The court finds the Plaintiffs to be the prevailing party and that they are entitled to costs of \$278.50 as a matter of right.

The Plaintiffs also requested attorney fees of \$5,540.70. The basis for the claims in the Complaint are trespass under Idaho Code § 6-202; common law trespass; nuisance; negligence; and negligence per se pursuant to Idaho Code §§ 42-1202, 1203 and 1204. The Plaintiffs request attorney fees in the Complaint pursuant to Idaho Code §§ 6-202, 12-120, 12-121, and Idaho Rule of Civil Procedure (IRCP) 54. No amount certain of attorney fees in case of default was included in the prayer for relief in this Complaint.

A. Idaho Code § 12-120

Pursuant to IRCP 54, attorney fees under Idaho Code § 12-120 are not available on default.

B. Idaho Code § 6-202

Pursuant to Idaho Rule of Civil Procedure 54(e)(4)(B), when attorney fees are requested pursuant to a contract or a statute other than Idaho Code 12-121 in a judgment by default, the amount of attorney fees in the event of default must be included in the prayer of relief in the complaint and cannot exceed that amount. Idaho Code § 6-202 is a statute other than Idaho Code § 12-121 and no amount of attorney fees is specified in the prayer of relief, so attorney fees cannot be awarded under Idaho Code § 6-202. Additionally, as stated in the court's analysis above, the Defendants' ownership of the ditch limits recovery under this statute to exclude attorney fees.

C. Idaho Code § 12-121 and IRCP 54

Idaho Code § 12-121 provides in part, "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties...." IRCP 54(e)(2) then states, "Attorney fees under Idaho Code Section 12-121 may be awarded by the court

only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award. No attorney fees may be awarded pursuant to Idaho Code Section 12-121 on a default judgment.” Therefore, attorney fees cannot be awarded under Idaho Code § 12-121 at this time.¹

D. IRCP 54(e)(3)

I.R.C.P. 54(e)(3) sets forth the factors a court must consider in award of reasonable attorney fees pursuant to IRCP 54. I.R.C.P. 54(d)(4) requires a party to file a memorandum of costs within not later than fourteen days following entry of judgment. Attached to the Affidavit of John Kirby filed December 14, 2016, there is a line stating, “Attorney’s Fees and Costs thru 11/30/16 \$5,540.70.” No other declaration, affidavit, or memorandum of costs related to a description of attorney fees or what that amount represents has been filed. The verified complaint alleges involvement of attorney(s) in this matter since July 31, 2014. However, the verified complaint was not filed until July 8, 2016. Rule 3(b) states: “A civil action must be commenced by filing a complaint, petition or application, with the court.” I.R.C.P. (3)(b), effective 7/1/16. A civil trial or proceeding only occurs after the filing of a complaint, petition, or application with the court.²

The court does not have sufficient evidence to award attorney fees based on the matters filed to date and will not award attorney fees in this default judgment although

¹ While this court recognizes that the Idaho Supreme Court has overturned this language in Rule 54 effective March 1, 2017 in *Hoffer v. Shappard*, __ Idaho __, 380 P.3d 681 (2016), the effective date of the Supreme Court’s ruling has not yet passed as of the date of this decision.

² *Sanders v. Board of Trustees of the Mt. Home School Dist. No. 193*, 156 Idaho 269 (2014) addressed pre-petition arbitration costs under I.C. § 12-101. However, the language that “a civil trial or proceeding under I.C. § 12-101 only occurs after a party files a complaint, petition, or application with the court...” is instructive in this case.


the Plaintiff can still file a conforming memorandum of costs within fourteen days of the entry of this judgment.

CONCLUSION

After review of the evidence presented at and after the hearing, the court enters Judgment by Default in favor of the Plaintiffs on all counts in the complaint and against all defendants, jointly and severally.

- (1) Plaintiffs are awarded the sum of **\$10,952.23** for damages for the Second, Third, and Fourth Claim of Relief with the same damages attributed to each count;
- (2) Plaintiffs are awarded the sum of **\$278.50** for costs as a matter of right.
- (3) Plaintiffs may submit a conforming memorandum of attorney fees within fourteen days of entry of judgment.
- (4) Pursuant to the Plaintiff's claim for injunctive relief, Defendants, jointly and severally, are enjoined from permitting water from the Defendants property to flow onto the Plaintiffs property. The Defendants must dig a ditch or water retrieval system to prevent the overflow of excess water onto the Plaintiffs property and such work shall be completed no later than the 1st day of April, 2017.
- (5) The total amount of this judgment awarded to Plaintiffs is the sum of **\$11,230.73**.

Dated Signed: 2/21/2017 11:00 AM



Lynn G. Norton
District Judge

cc: Kristen Thompson - emailed Feb. 21, 2017
Trevor Hart - emailed Feb. 21, 2017

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,

Plaintiffs,
vs.
MARK SCOTTON AND DAWN SCOTTON;

Defendants.

Case No. CV-OC-2016-12289

FINAL DEFAULT JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

- 1) Plaintiffs are awarded the sum of **\$10,952.23** for damages for the Second, Third, and Fourth Claim of Relief with the same damages attributed to each count;
- 2) Plaintiffs are awarded the sum of **\$278.50** for costs as a matter of right.
- 3) Declaratory judgment is entered.
- 4) The total amount of this judgment awarded to Plaintiffs is the sum of **\$11,230.73**.

ORDERED Signed: 2/21/2017 11:00 AM

Lynn G. Norton

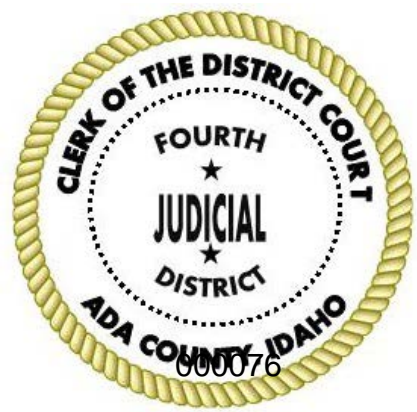
Lynn G. Norton
District Judge

I hereby certify that on February 21, 2017, I emailed a copy of the above document to:

Kristen Thompson - kthompson@thompsonlawfirm.legal
Trevor Hart - tlh@perrylawpc.com

Jamie Kosen

Deputy Clerk



ORIGINAL

Mark B. Perry - ISB #3345
Trevor L. Hart - ISB #5805
Perry Law, P.C.
2627 West Idaho Street
P.O. Box 637
Boise, Idaho 83701
Telephone: (208) 338-1001
Facsimile: (208) 338-8400
mbp@perrylawpc.com
tlh@perrylawpc.com

Attorneys for Appellants

NO. _____ FILED _____
A.M. _____ P.M. 148

MAR 14 2017

CHRISTOPHER D. RICH, Clerk
By JACOB BATEMAN
DEPUTY

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKY L. KIRBY,
husband and wife,

Plaintiffs,

vs.

MARK SCOTTON and DAWN SCOTTON,
husband and wife,

Defendants.

MARK SCOTTON and DAWN SCOTTON,
husband and wife,

Appellants,

vs.

JOHN S. KIRBY and VICKY L. KIRBY,
husband and wife,

Respondents.

CASE NO. CV-OC-2016-12289

NOTICE OF APPEAL

TO: JOHN S. KIRBY and VICKY L. KIRBY, husband and wife, and their attorney, Kristen R. Thompson, 78 SW Fifth Ave., Suite 2, Meridian, ID 83642; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. Mark Scotton and Dawn Scotton, husband and wife, appeal against the above named respondents to the Supreme Court of the State of Idaho from:

- A. The Order Denying Motion to Set Aside Default and Striking Answer which was entered in the above entitled action on the 1st day of February 2017, Honorable Judge Lynn G. Norton presiding; and
- B. The Final Default Judgment which was entered on the 21st day of February 2017, Honorable Judge Lynn G. Norton presiding.

2. Appellants have a right to appeal to the Idaho Supreme Court, and the Orders described above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

3. Following is a preliminary statement of the issues on appeal which Appellants intend to assert in the appeal (provided, any such list of issues on appeal shall not prevent the Appellants from asserting other issues on appeal). The issues presented on appeal are:

- A. Whether the district court erred in denying Defendants' Motion To Set Aside Default without considering whether the default was willful, whether setting aside the default would cause substantial prejudice the opponent, and whether a meritorious defense had been presented; and
- B. Whether the district court erred in finding that Defendants' Answer was in the form of a general denial and did not plead defenses with particularity and detail, when the Answer enumerated eight separate affirmative defenses; and
- C. Whether the district court erred in denying Defendants' Motion To Set Aside Default solely on grounds of delay.

4. Has an order been entered sealing all or any portion of the record? No-not applicable.

5. (a) Is a reporter's transcript requested? Yes.

(b) Appellants request that their copy of the transcript be provided in electronic format.

6. Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28(b), I.A.R.:

- A. The clerk's standard record enumerated in Rule 28(b), I.A.R.;
 - B. Motion for Entry of Default;
 - C. Order for Entry of Default;
 - D. Answer;
 - E. Motion to Set Aside Default;
 - F. Motion to Continue Hearing and to Shorten Time;
 - G. Affidavit of Trevor L. Hart;
 - H. Memorandum in Support of Retainer of Default Judgment as Entered;
 - I. Second Affidavit of Kristen R. Thompson;
 - J. Affidavit of John S. Kirby Re: Submission of Damages; and
 - K. Reply Memorandum In Support of Motion to Set Aside Default;
7. I certify that:
- (a) A copy of this Amended Notice of Appeal has been served on the reporter.
 - (b) The clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.
 - (c) The estimated fee for preparation of the clerk's record has been paid.
 - (d) All appellate filing fees have been paid.
 - (e) Service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

Dated this 14th day of March 2017.

PERRY LAW, P.C.

By: 

Trevor L. Hart - Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

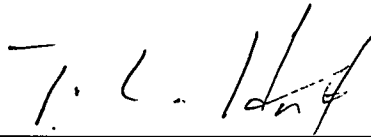
I HEREBY CERTIFY that on this 14th day of March 2017, I caused a true and correct copy of the above and foregoing Notice of Appeal to be served upon the following persons in the manner indicated below:

Kristen R. Thompson
78 SW Fifth Ave., Suite 2
Meridian, ID 83642
Attorney for Plaintiffs

U.S. Mail
 Hand Delivery
 kthompson@thompsonlawfirm.legal

Penny Tardiff
Court Reporter
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

U.S. Mail
 Hand Delivery
 Ptardiff@adaweb.net



Trevor L. Hart

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,

Plaintiffs,

vs.

MARK SCOTTON AND DAWN
SCOTTON;

Defendants.

Case No. CV-OC-2016-12289

ORDER DENYING MOTION TO SET
ASIDE DEFAULT AND STRIKING
ANSWER

The Defendant's motion to set aside default came before the court for hearing on January 19, 2017.

LEGAL STANDARD

Under Idaho Rule of Civil Procedure 55(c), "The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." I.R.C.P. 55(c), Jul.1, 2016. One of the requirements of showing good cause is that the party asking the Court to set aside default must also plead facts which, if established, would constitute a defense to the action. *Idaho State Police ex rel. Russell v. Real Property Situated in County of Cassia*, 144 Idaho 60, 62–63, 156 P.3d 561, 563–564; see also *Bach v. Miller*, 148 Idaho 549, 553, 224 P.3d 1138, 1142 (2010). However, it is important to note that the party seeking to set aside default is "not required to present evidence in order to have the default judgment set aside." *Russell*, 144 Idaho at 63, 156 P.3d at 564. Instead, "[t]he meritorious defense requirement is a pleading requirement, not a burden of proof." *Id.*

“Because judgments by default are not favored, a trial court should grant relief in doubtful cases in order to decide the case on the merits.” *Jonsson v. Oxborrow*, 141 Idaho 635, 638, 115 P.3d 726, 729 (2005). Finally, “[a] motion to set aside a default or judgment by default is addressed to the discretion of the trial court.” *Bach*, 148 Idaho at 552, 224 P.3d at 1141.

ANALYSIS

The Defendants have not established good cause for failing to answer or file a notice of appearance in a timely manner. Defense counsel sent a letter to Plaintiffs’ counsel in May 2016. Counsel for the Plaintiffs had a conversation with the attorney believed to be the counsel for the Defendants on July 13, 2016. The Complaint was delivered to that attorney for the Defendants about July 14, 2016 but the acceptance of service was not signed by defense counsel. No answer was filed pursuant to Idaho Rule of Civil Procedure 12 and no notice of general or special appearance was filed under Rule 4.1. While counsel for the plaintiffs and defendants may have engaged in settlement discussions at that time, nothing was ever filed with the court. Then, the Complaint was served on the Scottons on August 31, 2016—well after the time Plaintiff’s counsel would have returned from vacation. Still, after formal service no answer was filed pursuant to Idaho Rule of Civil Procedure 12 and no notice of general or special appearance was filed under Rule 4.1. No motion to extend time to answer was filed. The application for default was filed October 24, 2016. On October 27, 2016, counsel for the Defendants admits he was aware of the default application but, still, nothing was filed with the court. The court entered default on November 17, 2016. The Defendants then filed an untimely answer on December 1, 2016 and a Motion to Set Aside the Default on December 6, 2016. The Answer is more of a general denial and does not plead with particularity and detail the defenses.

In reviewing the information before the Court in this proceeding, the court denies the motion to set aside the default because there has not been a showing of good cause by the Defendants for failing to accept service through their attorney, to file a notice of appearance, motion to extend time to answer, or answer between July 19, 2016 and November 4, 2016. The Defendants had repeated opportunities to accept service or appear in this litigation over an extended period of time. The delay is beyond

just engaging in settlement negotiations and amounts to dilatory conduct for more than three months. Having not shown good cause for failing to appear and not having pled particularly a meritorious defense, the court finds that setting aside the default is inappropriate given the circumstances in this case, even knowing that defaults are not favored.


CONCLUSION

The Court denies the request to set aside the Order of Default.

The Defendant's untimely Answer is stricken from the record.

Default Judgment will be entered against the Defendants based upon the evidentiary hearing held on December 15, 2016.

ORDERED Signed: 2/1/2017 09:03 AM



Lynn G. Norton
District Judge

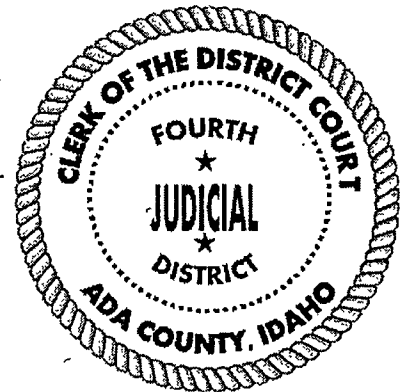
I hereby certify that on February 1, 2017, I emailed a copy of the above document to:

Kristen Thompson
kthompson@thompsonlawfirm.legal

Trevor Hart
th@perrylawpc.com



Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY AND VICKI L. KIRBY,

Plaintiffs,

vs.

MARK SCOTTON AND DAWN SCOTTON;

Defendants.

Case No. CV-OC-2016-12289

FINAL DEFAULT JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

- 1) Plaintiffs are awarded the sum of **\$10,952.23** for damages for the Second, Third, and Fourth Claim of Relief with the same damages attributed to each count;
- 2) Plaintiffs are awarded the sum of **\$278.50** for costs as a matter of right.
- 3) Declaratory judgment is entered.
- 4) The total amount of this judgment awarded to Plaintiffs is the sum of **\$11,230.73**.

ORDERED Signed: 2/21/2017 11:00 AM



Lynn G. Norton
District Judge

I hereby certify that on February 21, 2017, I emailed a copy of the above document to:

Kristen Thompson - kthompson@thompsonlawfirm.legal
Trevor Hart - tlh@perrylawpc.com

Jamie Kowen
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKI L. KIRBY,
husband and wife,

Plaintiffs-Respondents,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants-Appellants.

Supreme Court Case No. 44925

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 10th day of July, 2017.

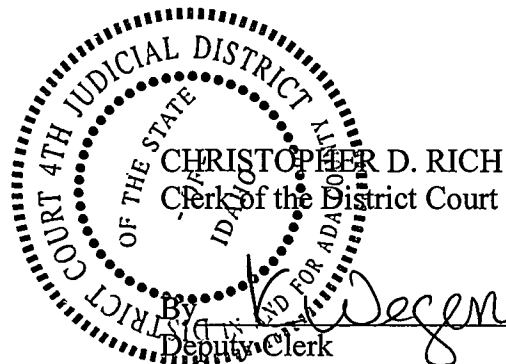


EXHIBIT LIST

Lynn Norton
Judge

Janine Korsen
Clerk

Page 1 of 1Page

Date December 15, 2016

Disposition Hearing on Default Damages

Case No. CVOC16-12289

JOHN S. KIRBY AND VICKI L. KIRBY

Kristen R. Thompson
Thompson Law Firm

Vs.

MARK SCOTTON AND DAWN SCOTTON

Trevor L. Hart
Perry Law, P.C.

By	No.	Description	Status
Plaintiff	A	Affidavit of John S. Kirby	Admitted 12-15-2016
Plaintiff	B	2nd Affidavit of Kristen Thompson	Admitted 12-15-2016

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKI L. KIRBY,
husband and wife,

Plaintiffs-Respondents,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants-Appellants.

Supreme Court Case No. 44925

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

MARK B. PERRY

ATTORNEY FOR APPELLANT

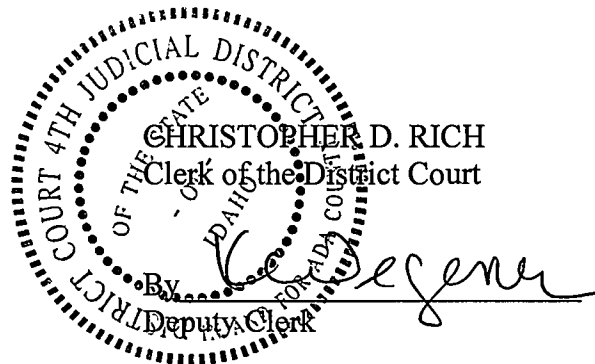
BOISE, IDAHO

KRISTEN R. THOMPSON

ATTORNEY FOR RESPONDENT

MERIDIAN, IDAHO

Date of Service: JUL 10 2017



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN S. KIRBY and VICKI L. KIRBY,
husband and wife,

Plaintiffs-Respondents,

vs.

MARK SCOTTON and DAWN
SCOTTON, husband and wife,

Defendants-Appellants.

Supreme Court Case No. 44925

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 14th day of March, 2017.

