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IN THE SUPREME COURT OF THE STATE OF IDAHO

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 Docket No. 44925-2017

(Ada County Case No. CV-OC-2016-12289)

RESPONDENTS' BRIEF

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada.
Honorable Lynn G. Norton, District Judge, Presiding

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I. STATEMENT OF CASE

A. Nature of the Case.

This case started with the Respondents' John S. Kirby and Vicki L. Kirby ("Kirbys") verified complaint for trespass, nuisance, negligence, and injunctive relief filed against the Appellants' Mark Scotton and Dawn Scotton ("Scottons"). The Scottons control an irrigation easement over their land that for years has continually flooded the Kirbys' neighboring land with excess water. After numerous attempts to get the Scottons to dig a simple ditch on their property to prevent further flooding, the Kirbys were forced to file suit. Then, the Scottons and their attorney failed to answer the complaint for 72 days after it was due, even after receiving written notice of intent to take default, and in fact engaged in three months of delay that the District Court found amounted to "dilatory conduct." The District Court entered default, had a hearing on damages, denied the Scottons' motion to set aside the default, and entered a default judgment.

B. Course of proceedings in District Court

The Kirbys' complaint was filed on July 8, 2016. (R. 2, 7). The Scottons were served on August 31, 2016. (R. 2). No answer or notice of appearance was filed by the deadline under I.R.C.P. 12. (R. 2). The Kirbys moved for entry of default and a default judgment on October 24, 2016. (R. 2). The District Court ultimately entered default on November 18, 2016. (R. 3, 19).

The Scottons filed an answer on December 1, 2016 and then moved to set aside the entry of default. (R. 3) The District Court held a hearing on default damages on December 15, 2016, but held the decision in abeyance until it could decide the Scottons' motion to set aside the entry

of default. (R. 3, 69). On January 19, 2017, the Court heard that motion and issued a written *Order Denying Set Aside of Default* denying the motion to set aside default on February 21, 2017. (R. 4, 81-83). On the same day, the Court entered a Memorandum Decision and Order on Default Damages and entered a Final Judgment awarding the Kirbys $10,952.23, and other relief. (R. 4, 69, 76).

C. Statement of Facts

The Scottons' recitation of the facts leading up to the entry of default glosses over key events and ignores what the District Court correctly found was "dilatory conduct."

The complaint in this case was filed on July 8, 2016. (R. 2, 7). On July 14th, 2016 Kirbys' counsel sent a copy of the Complaint along with an acceptance of service to Trevor Hart. (R. 54). Mr. Hart had previously communicated with the Kirbys' counsel on behalf of the Scottons regarding the underlying dispute. (R. 34). Mr. Hart never confirmed his representation by returning a signed acceptance of service. (R. 54). After no return of the acceptance of service, the Kirbys had the Scottons personally served with the complaint on August 31, 2016. (R. 54).

After service of the complaint, the Scottons never filed an answer, nor did Mr. Hart or any other attorney file a notice of appearance on behalf of the Scottons. (R. 2-3). After waiting 24 days, the Kirbys filed a motion for entry of default and sent the default filings directly to the Scottons as no confirmation from Mr. Hart had been received that he was in fact representing the Scottons in the case. (R. 17-18). In response to that motion, Mr. Hart emailed the Kirbys' counsel on October 27, 2016 and requested the motion for default be withdrawn. (R. 51). Kirbys' counsel agreed and gave notice to Mr. Hart, in writing, that he had until November 4, 2016 to file

an answer. (R. 58). That same day her office emailed the clerk of the District Court. (R. 59). That email, on which Mr. Hart was copied, stated: "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." (R. 59).

On November 4, 2016, no answer being received, despite the one week written notice given Mr. Hart, Scottons' counsel's office contacted the clerk of the District Court indicating the desire to proceed with the default and inquiring about the procedure for renewing the request for default, specifically if she would need to "refile" the documents. (R. 60). The clerk indicated the previous documents would be provided to the District Court. (R. 60). Default was ultimately entered on November 18, 2016. (R. 19).

From July 14 to August 31, 2016, Scottons' counsel failed to return a signed acceptance of service. From August 31, 2016 onwards, Scottons knew they had been personally served and had to answer the Complaint, yet no notice of appearance or answer was filed. From October 24th, 2016 onwards, Scottons' counsel was aware the Kirbys were seeking default, yet filed no notice of appearance or answer. On October 27th, 2016, Scottons' counsel was given one weeks' notice of intent to take default. (R. 58, 59). Yet, it was not until after default was entered on November 18, 2016 that an answer was filed. Even then, the answer was not filed until December 1, 2016, 72 days after an answer was due.

II. ADDITIONAL ISSUE ON APPEAL

As an additional issue on appeal, the Kirbys request their attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 and I.A.R. 41. This is more fully discussed in Section IV.D below.

III. STANDARD OF REVIEW

On appeal, this Court reviews a trial court's denial of a motion to set aside an entry of default for an abuse of discretion. *McGloon v. Gwynn*, 140 Idaho 727, 729, 100 P.3d 621, 623 (2004) (citing *McFarland v. Curtis*, 123 Idaho 931, 933, 854 P.2d 274, 276 (Ct. App. 1993)); *see also AgStar Financial Services, ACA v. Gordon Paving Co., Inc.*, 161 Idaho 817, 391 P.3d 1287 (2017). Such a denial will not be reversed on appeal unless an abuse of discretion clearly appears. *Id.* "The power of a trial court to grant or deny relief under Rule 55(c) is discretionary." *Id.* (citing *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992)). "Where the trial court makes factual findings that are not clearly erroneous, applies correct criteria pursuant to I.R.C.P. 55(c) to those facts, and makes a logical conclusion, the court will have acted within its discretion." *Id*.

IV. ARGUMENT

A. The District Court did not Abuse its Discretion in Denying the Scottons' Motion to Set Aside Entry of Default

The District Court acted well within its discretion in denying the Scottons' motion to set aside entry of default and its decision should be affirmed. The District Court reviewed the procedural history of the case, the Scottons' motion to set aside the default and briefs in support and opposition, and all the affidavits, took the matter under advisement, and issued a written

decision denying the motion to set aside the entry of default. That decision stated and applied the correct legal standards. The Scottons have not demonstrated any of the factual findings were clearly erroneous and have failed to meet their burden.

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). One of the requirements of showing good cause is that the party asking the Court to set aside default must also plead facts with particularity, which, if established, would constitute a defense to the action. *Bach v. Miller*, 148 Idaho 549, 224 P.3d 1138 (2010); *Dorion v. Keane*, 153 Idaho 371, 283 P.3d 118 (Ct. App. 2012) (citing *Idaho State Police ex rel. Russell v. Parcel I: Lot 2 in Block 3*, 144 Idaho 60, 63, 156 P.3d 561, 546 (2007)). "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). "[T]he 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).'" *Dorion*, 153 Idaho at 375, 283 P.3d at 122 (quoting *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993)).

The Court of Appeals has also ruled that whether the default was willful or whether setting it aside would be prejudicial to the opposing party are "[o]ther primary considerations" in the good cause analysis. *Dorion*, 153 Idaho at 374, 283 P.3d at 121. "The weight that a court assigns both to the conduct of a party, when that conduct leads to entry of default, and to the prejudice that would result to the opposing party if the default were set aside, is left to the discretion of the trial court." *Id.* at 375, 283 P.3d at 122.

1. **The District Court correctly entered default based upon the Scottons' dilatory conduct**

The District Court found that the Scottons did not make a showing of "good cause" needed to set aside the entry of default and that Scottons' conduct in failing to respond to the complaint was dilatory. (R. 82). The District Court concluded that the delay "amounted to dilatory conduct for more than three months." (R. 83). The District Court found that the Scottons failed "to accept service through their attorney, file a notice of appearance, motion to extend time to answer, or answer between July 19, 2016 and November 4, 2016." (R. 82). The District Court found that "[t]he 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." (R. 82-83).

These findings are amply supported by the record. The District Court summarized what occurred in its decision:

> 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.

(R. 82).

The record contains substantial evidence of a desire to simply delay the case as long as possible. Over four months elapsed from the time Mr. Hart was provided the complaint with an acceptance of service, (R. 34), to the time he filed an answer on behalf of the Scottons (thirteen days after entry of default). (R. 21). Even after being personally served, the Scottons failed to file a notice of appearance or answer with the Court for over three months. (R. 2-3).

Although the District Court entered default largely because of the Scottons' dilatory conduct, the Scottons argue on appeal that the District Court "did not consider willfulness in denying Scottons' motion." (Appellants' Br. at 6). Instead, according to the Scottons, the District Court "ruled that Scottons' mere tardiness created a lack of good cause to set aside the default." (Appellants' Br. at 6-7).

First, that is a gross mischaracterization of the District Court's *Order Denying Set Aside of Default*. Rather, the Court's *Order* recounted in detail the repeated failure of the Scottons to act diligently in response to the Kirbys' lawsuit. (R. 82-83). Nowhere did the Court hold the problem was one of mere tardiness. The District Court found a pattern of unexcused delay in answering the complaint that amounted to "dilatory conduct." (R. 82-83). That conclusion is indistinguishable from a finding that the failure to answer was willful. The plain meaning of "dilatory" is "designed or tending to cause delay." Black's Law Dictionary (10th ed. 2014),

dilatory (giving as an example of how "dilatory" is used in a sentence: "the judge's opinion criticized the lawyer's persistent dilatory tactics").

Second, in support of their argument, the Scottons cite several federal cases that are factually far afield from what occurred in this case. In *Gov't Emps. Ins. Co. v. Right Solution Med. Supply, Inc.,* No. 12 Civ 0908, 2012 WL 6617422, at *3 (E.D.N.Y. Dec. 19, 2012) (unreported), the plaintiff obtained entry of default against one defendant one day after the deadline for an answer, and two days after the deadline for the other defendant. The court understandably held "mere tardiness in meeting a court deadline does not establish a willful default." In *AIP Asset Mgmt. Inc. v. Ascension Tech. Grp. Ltd.*, No. 16 CIV. 9181 (LLS), 2017 WL 448963, at *1 (S.D.N.Y. Jan. 19, 2017), the plaintiff obtained entry of default within days of an answer being due, after defendants' counsel had filed a notice of appearance *and* had requested an extension of time to respond to the complaint. In *Moreno-Godoy v. Gallet Dreyer & Berkey, LLP*, No. 14 CIV. 7082 PAE, 2015 WL 5737565, at *9 (S.D.N.Y. Sept. 30, 2015) (unreported), the defendant did not answer, but never received any notice of intent to take default, and failed to appear because he believed a co-defendant was representing his interests.

None of these cases have facts that resemble what occurred here. Even after being personally served, the Scottons failed to file a notice of appearance or answer with the Court for over three months. (R. 2-3). There was no rush to the courthouse to obtain a default. The Scottons were served with the default filings, given more time to answer, yet still failed to do so. The facts substantially support the District Court's conclusion that the Defendants had failed to show the requisite "good cause" in failing to timely answer the complaint.

2. The Scottons were provided a weeks' written notice of intent to take default, yet still failed to answer the complaint

Further, the Scottons failed to file an answer or notice of appearance even after being given notice of Kirbys' intent to seek a default. The District Court specifically noted that "On October 27, 2016, counsel for the Defendants admits he was aware of the default application but, still, nothing was filed with the court." (R. 82). Scottons' counsel was specifically given written notice via emails on October 27, 2016 that absent an answer filed by November 4th, default would be sought. (R. 58, 59). The District Court acknowledged this one-week notice when it found that the Defendants had failed 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." (R. 82). Scottons' counsel does not deny he received the notice. (R. 27). Yet, still no answer or notice of appearance was filed in the time given by Kirbys' counsel, which exceeded the three days required by the Rule. (R. 2-3). In fact, default was not entered for 22 days after the Scottons' counsel was informed in writing he had a week to file an answer. (R. 19).

Idaho Rule of Civil Procedure 55(a)(1) states that "if a party has appeared in the action, that party must be served with 3 days' written notice of the application for entry of default before default may be entered." I.R.C.P. 55(a) (1). "[T]he appearance required to trigger the three-day notice requirement has been broadly defined, and is not limited to a formal court appearance." *Meyers v. Hansen*, 148 Idaho 283, 288, 221 P.3d 81, 86 (2009). "A defendant who merely 'indicates an intent to defend against the action' can benefit from the notice requirement. *Id.* (quoting *Catledge v. Transport Tire Co.*, 107 Idaho 602, 606, 691 P.2d 1217, 1221 (1984)). To

constitute an appearance, the "defendant's actions 'must be responsive to plaintiff's formal [c]ourt action,' so it is insufficient to simply be interested in the dispute or to communicate to the plaintiff an unwillingness to comply with the requested relief." *Id.* (quoting *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam) (holding that there has not been an appearance merely because the plaintiff knew the defendant intended to resist the suit); *see also Ellis v. Ellis*, 118 Idaho 468, 472, 797 P.2d 868, 872 (Ct. App.1990) (finding that the defendant had not appeared when he rejected the petitioner's divorce settlement proposal); *Olson v. Kirkham*, 111 Idaho 34, 36, 720 P.2d 217, 219 (Ct. App.1986) (finding that preliminary settlement discussions between the parties were not an appearance).

The Rule does not require any specific form of written notice of intent to seek default. Under the analogous federal rule requiring written notice of an application for default judgment, "notice of an application for the entry of a default judgment need not be in any particular form. The major consideration is that the party is made aware that a default judgment may be entered against him." 10A Fed. Prac. & Proc. Civ. § 2687 (4th ed.). A court is within its discretion to enter default and a default judgment where a party has received at least three days' notice of intent to take default yet failed to answer, and showed no meritorious defense. *See Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). "The purpose of requiring notice only when the defendant has entered an appearance is to protect plaintiffs in instances 'when the adversary process has been halted because of an essentially unresponsive party.'" *Meyers v. Hansen*, 148 Idaho 283, 288, 221 P.3d 81, 86 (2009) (quoting *Newbold v. Arvidson*, 105 Idaho 663, 665, 672

P.2d 231, 233 (1983), *disapproved of on other grounds by Shelton v. Diamond Intern. Corp.*, 108 Idaho 935, 703 P.2d 699 (1985)).

In *Reeves v. Wisenor*, this Court affirmed a trial court's decision to deny relief from a default judgment where the defendant had retained an attorney and had engaged in settlement discussions with the plaintiff's counsel. 102 Idaho 271, 271, 629 P.2d 667, 678 (1981). Yet, after being provided a week's notice of intent to take default, defendant failed to appear at the default hearing. *Id.* The trial court entered default and default judgment. *Id.* This Court affirmed. *Id.* at 273, 629 P.2d at 669.

Just like the defendant in *Reeves*, the Scottons failed to act diligently when being given notice of an application for default. Even assuming for argument's sake that the Scottons appeared in the action under a broad construction of "appearance," the Scottons had ample notice of the Kirbys' intent to press for a default if their complaint was unanswered. Kirbys' counsel agreed and told Mr. Hart, in writing, that he had until November 4, 2016 to file an answer. (R. 58). It is undisputed that the Scottons' counsel and the Scottons personally knew of the Kirbys' intent to take default well in advance of the District Court's actual entry of default. (R. 27, 58, 59).

It is patently unfair for the Scottons to fail to act diligently in response to the lawsuit but then accuse the Kirbys of sharp dealing in simply trying to move forward with a lawsuit. Further, if Mr. Hart desired to represent the Scottons in this case and make clear the Scottons intended to defend, all he had to do was file a notice of appearance or return the acceptance of service. Now with this appeal, just the issue of default is being litigated some fifteen months after the filing of

the lawsuit. The Scottons had obligations to act diligently and promptly and failed to do so, and despite having full notice of the Kirbys' intent to seek default, failed to comply with the applicable procedural rules.

B. The Kirbys would be Prejudiced if Entry of Default were Set Aside

The Scottons argue the District Court failed to address the issue of prejudice when rendering its decision. The Scottons further assert that the only prejudice at issue here would have been a short delay caused by their untimely filing of their answer.

First, the fact that the District Court did not expressly address the prejudice to the Kirbys is not reversible error. The Scottons do not cite any case, and the Kirbys are not aware of any, where this Court has required trial courts to expressly make a finding of prejudice in ruling on a motion to set aside a default. Rather, the weight assigned to factors such as the defaulted party's conduct or the prejudice to the other party are left to the discretion of the trial court. *See Dorion*, 153 Idaho at 374, 283 P.3d at 121.

Second, this argument could be made in many cases involving defaults. The Scottons ignored their obligations under the Idaho Rules of Civil Procedure. If a party who has been duly served with a Summons and Complaint fails to act diligently, that party is at risk of default. It cannot try and delay the matter, and then come into court after default and argue there would be no prejudice to simply set aside the default and allow a short time to answer. If that is the standard, there are no teeth to the various procedural rules governing appearing in an action and answering a complaint.

Third, the Scottons rely heavily on *Dorion v. Keane*, 153 Idaho 371, 283 P.3d 118 (Ct. App. 2012) to argue that the District Court erred in not considering the issue of prejudice. *Dorion* is distinguishable. In *Dorion*, the defendants initially appeared and answered the complaint, but after fourteen months their attorney withdrew. 153 Idaho at 373, 283 P.3d at 120. Their new attorney spoke to the plaintiff's attorney on August 30 (after the time had expired for the defendants to appear) and requested additional time for the defendants to decide whether to retain him as their new attorney. *Id.* On September 1, plaintiff moved for default, which the court granted on September 9. *Id.* On September 17, the defendants' attorney filed a notice of appearance and moved to set aside the default on the grounds that it was a result of a miscommunication between the attorneys. *Id.*

There is little resemblance between the facts in *Dorion* and the facts here. Here, the Scottons never appeared or answered prior to the entry of default. The case has not been litigated for fourteen months. There was no confusion caused by the withdrawal of an attorney. There was no ambiguity over whether default was being sought.

Rather, this case is about the willful neglect of obligations imposed by the rules. In *Clear Springs Trout Co. v. Anthony*, the Court upheld a default judgment where the defense counsel, who repeatedly communicated with plaintiff's counsel, had filed a motion to dismiss (rather than answer) and then withdrew the motion. 123 Idaho 141, 142-43, 845 P.2d 559, 560-61 (1992). After three weeks of inaction, plaintiff sent defendant's counsel a notice of intent take default twelve days later. 123 Idaho at 143, 845 P.2d at 561. Defendant failed to appear at the hearing

and the trial court entered default. *Id.* This Court quoted from the trial court's findings below, which stated:

> The civil rules do have meaning and it provides a mechanism to advance cases on their merits. However, when one party intentionally neglects the rules then justice demands default actions. The factual circumstances of this case require justice and justice requires the upholding of the default judgment.

123 Idaho at 144, 845 P.2d at 562.

In other words, a party must abide by its obligations under rules or risk a default. The trial court docket would grind to a halt if parties were permitted to delay matters until default is sought and then come to court and argue there would be no prejudice if they are simply now allowed to answer and defend the action. Further, the delay in this case is not inconsequential. The Scottons failed to answer the complaint until 72 days after it was due, far more time than the delay at issue in *Clear Springs*.

C. The District Court Correctly Found that the Scottons Failed to Particularly Plead a Meritorious Defense Needed to Establish "Good Cause" under Rule 55(c)

The District Court correctly found that the Scottons failed to satisfy the meritorious defense needed to establish "good cause" under Rule 55(c). The District Court found that the Scottons' answer amounted to a general denial and that the Scottons had failed to plead any defenses with particularity. (R. 82).

The Scottons' recitation of the meritorious defense requirement in *Dorion v. Keane* omits a key part of the holding. Consistent with this Court's long-standing case law, the Court of Appeals held that to establish a meritorious defense "factual details must be pled with

particularity." *Dorion v. Keane*, 153 Idaho 371, 283 P.3d 118 (App. 2012) (citing *Idaho State Police ex rel. Russell v. Parcel I: Lot 2 in Block 3*, 144 Idaho 60, 63, 156 P.3d 561, 546 (2007) and *Bach v. Miller*, 148 Idaho 549, 224 P.3d 1138 (2010) ("a party may not rely on an ordinary pleading to prove a meritorious defense"); *see also Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979), *disapproved of on other grounds by Shelton v. Diamond Intern. Corp.*, 108 Idaho 935, 703 P.2d 699 (1985), ("Once a default has been entered the pleading of defensive matter must go beyond the mere notice requirements that would be sufficient if pled before default."). "It would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy. The defense matters must be detailed." *Idaho State Police ex rel. Russell v. Parcel I: Lot 2 in Block 3*, 144 Idaho 60, 63, 156 P.3d 561, 546 (2007). "Consequently, where no meritorious defense is shown in support of a motion to set aside a default, a court does not abuse its discretion in denying the motion." *Bach v. Miller*, 148 Idaho 549, 553, 224 P.3d 1138, 1142 (2010).

Instead of correctly setting out the applicable law, the Scottons quote *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct. App. 1991) and *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (Ct. App. 2008), but those cases simply state that the meritorious defense requirement is a question of the sufficiency of the pleading, which does not require a party to prove its case, or even submit evidence. But, a party must still *plead* defenses with particularity. That was not done in this case.

Rather, the District Court correctly held that the answer was simply a general denial and general listing of affirmative defenses with little to no factual detail. The Scottons do not point to

any specific factual details in their answer that would support any defense to the underlying trespass action, much less a plausible defense. They do argue that they pleaded specific facts in support of a right to offset. However, the Scottons' answer only stated the following with respect to offset:

> 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.

(R. 23).

This "defense" consists of nothing more than bare assertions and is not pled with particularity. Without more factual information, this statement means nothing. It is a non-specific theory and reflects nothing more than the Scottons' "hope." For a defense to be pled with particularity, the pleading must set forth sufficient factual detail that, if proven, would entitle the claimant to the relief requested. No such factual detail is remotely present in Scottons' answer.

Further, this alleged "defense" is actually an unliquidated and unpled permissive counterclaim. It is not a defense to the particular action brought by the Kirbys. The meritorious defense factor is addressed to the potential windfall to the plaintiff of avoiding a determination of his case on the merits where it appears the defendant has a defense that could defeat the plaintiff's claim. The "meritorious defense" requirement is concerned with the merits of the plaintiff's claims and whether the defendant could prevail against *those claims*, not whether the defendant could assert some other unrelated counterclaim that could still be litigated in a separate lawsuit.

Here, the Scottons alleged a potential right to "offset" based on claims that are totally unrelated to the Kirbys' central claim of trespass based on overflow of water onto their property. A possible counterclaim on an unrelated matter has no bearing on the meritorious defense requirement. *See Hearst Corp. v. Keller*, 100 Idaho 10, 12, 592 P.2d 66, 68 (1979), *disapproved of on other grounds by Shelton v. Diamond Intern. Corp*., 108 Idaho 935, 703 P.2d 699 (1985), (noting the defendant had alleged as a defense a possible damage claim for breach of contract but that it could not be determined whether the alleged breach of contract would be a compulsory or permissive counterclaim); *see also Urbana College v. Conway*, 502 N.E.2d 675, 678 (Ohio Ct. App. 1985) (refusing to set aside default where defendant asserted counterclaim on an unrelated incident).

Further, there is no relevance to the fact that the District Court decided not to award all the Kirbys' damages at the hearing. The meritorious defense requirement focuses on whether factual details supporting a defense are pled with particularity. No defenses to the Kirbys damages claims were detailed by the Scottons, in their answer or otherwise. Thus, the District Court's ability under Rule 55(b)(2) to have a hearing and "determine the amount of damages" before entering a default judgment has no bearing on the meritorious defense requirement for setting aside a prior entry of default.

D. The Kirbys Should be Awarded their Attorney's Fees and Costs on Appeal

The Kirbys should be awarded their attorney's fees and costs on appeal. The standard of review on this appeal is whether an abuse of discretion "clearly appears." *McGloon v. Gwynn*, 140 Idaho 727, 729, 100 P.3d 621, 623 (2004). "Where the trial court makes factual findings that

are not clearly erroneous, applies correct criteria pursuant to I.R.C.P. 55(c) to those facts, and makes a logical conclusion, the court will have acted within its discretion." *Id.*

"An award of attorney fees on appeal is proper under I.C. § 12-121 only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation." *Doe v. Roe*, 133 Idaho 805, 810, 992 P.2d 1205, 1210 (1999). An award of attorney fees is appropriate if the law is well-settled and the appellant has made no substantial showing that the court below misapplied the law. *Hunt v. Hunt*, 137 Idaho 18, 23, 43 P.3d 777, 782 (2002). This Court recently ruled that it is frivolous and unreasonable to make a continued argument without adding any new analysis or authority or bringing into doubt the existing law to the issues raised below. *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005).

Here, the District Court's decision is supported by substantial facts in the record and is not clearly erroneous. The District Court's factual findings regarding the Scottons' dilatory conduct are supported by the record, particularly in light of the written notice of default that the Scottons' counsel received 22 days before default was actually entered. The Scottons' appeal raises no new issues but simply asks this Court to second-guess a discretionary decision by the trial court. As such, the Scottons bring this appeal frivolously, unreasonably, and without foundation. The Court should award the Kirbys their attorney's fees and costs on appeal.

V. CONCLUSION

The Kirbys respectfully request that the judgment of the District Court be affirmed.

DATED this 11th day of October, 2017.

COSHO HUMPHREY, LLP

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 11th day of October, 2017, I served two (2) true and correct copies of the foregoing RESPONDENTS' BRIEF upon the following parties via the method indicated below:

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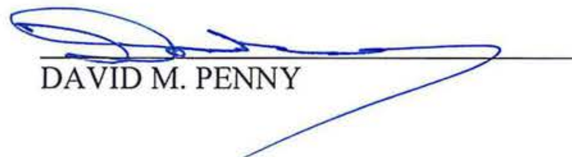

DAVID M. PENNY