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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 No. 44925

REPLY BRIEF

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

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The Honorable Lynn G. Norton, District Judge, Presiding

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A. The Court Abused Its Discretion By Refusing To Set Aside The Default On Grounds Scottons Created A Lengthy Delay.

Kirbys omit and misrepresent material facts pertaining to the delays and communications (or rather miscommunication) between counsel which led to this appeal. Most significantly, Kirbys suggest Scottons never confirmed they were represented by counsel and Scottons inexcusably failed to file an answer for 72 days. *Respondents' Brief* at 1-2.

To the contrary, Kirbys' previous counsel ("Thompson") was informed in writing in May 2016 that Scottons are represented in this matter and expressly dispute Kirbys' claims. In particular, Scottons expressly deny that their irrigation water floods Kirbys' property or has caused Kirbys to suffer any damages. Moreover, Scottons' attorney advised Thompson in writing that Scottons believed the matter was resolved. R. Vo1. I, p. 34. In July 2016, Thompson stated she was going on vacation, would not require an Answer to be filed at that time, and promised she would give notice to Scottons' counsel before taking further action in the matter after her return, *Id.* Thus Thompson knew and acknowledged that Scottons are represented in this matter.

Thompson broke her promise. Instead, in violation of I.R.P.C. 4.2, she communicated with Scottons personally, serving them with a copy of the Summons and Complaint on or about August 31, 2016 without notice to their attorney. Scottons of course were already aware of the lawsuit and did not communicate with their counsel that they had received another copy of the Complaint. *Id.* at 58 (wherein Thompson acknowledges "Clearly they did not contact you with the Complaint" [when Scottons were served on August 31, 2016]). Scottons' counsel heard nothing about the case for three and a half months, from July 13, 2016 until about October 26, 2016 and believed, as

Scottons had informed him, that the matter was resolved and the case would eventually be dismissed for inactivity.

Oddly, just before withdrawing the application for default in late October 2016, Thompson sent Scottons' counsel an e-mail in which she made several material misrepresentations, including: (1) "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 e-mail)," (2) After numerous attempts to get return of service documents from your office, and confirming that the Scotton's (sic) had done nothing to fix the problem . . . ," and (3) Had you or your office responded to our requests . . . we would not have had to serve the documents a second time." *Id.* p. 58. These statements are patently false and directly contradicted by affidavit of Scottons' counsel, as there was no communication between counsel from July 13, 2016 until October 27, 2016. *Id*. p. 34.

Unfortunately, counsel for Scottons was not aware of Thompson's tendency toward prevarication and pseudology. Thompson has been sanctioned by the United States Bankruptcy Court for the District of Idaho for willful violation of the automatic stay, in part because the court — of which she is an officer and to which she owes a duty of candor — was persuaded her testimony suffered from a truth deficit:

> Obviously, ***Thompson's version of the facts is fraught with problems***. . . . Thompson testified that when she became aware of Debtor's bankruptcy filing, she called the state court clerk the same day. The clerk informed her that Thompson's letter had been received and was being processed. It is highly doubtful that Thompson's letter to the judge was mailed and received by the state court on the same day.

In re Urwin, No. 09-01921-JDP, 2010 WL 457737, at *5 (Bankr. D. Idaho Feb. 2, 2010) (emphasis supplied).

Nothing in the record or in Kirbys' brief suggests that Scottons were wilfully avoiding appearing in court. To the contrary, the Court can take judicial notice of Scottons' active participation in the case below since November 2016, well before default judgment was entered. They have since successfully defended Kirbys' motions for attorney's fees, injunctive relief, and contempt. Indeed, the fact that default was entered at all has more to do with Thompson being a fabulist and equivocator than any willful act or delay by Scottons.

Under such circumstances, where most of the delay and confusion was caused by Thompson, and in the absence of a lengthy, willful, delay by Scottons resulting in prejudice to the Kirbys, the district court abused its discretion by refusing to set aside the default.

B. Scottons Demonstrated An Intent To Defend.

Kirbys acknowledge that "a defendant who merely indicates an intent to defend against the action can benefit from the notice requirement (of Rule 55)." *Respondents' Brief* at 5 (quoting *Catledge v. Transport Tire Co.*, 107 Idaho 602, 606, 691 P.2d 1217, 1221 (1984). At the very least, counsel for Scottons indicated such an intent by e-mail dated October 26, 2016. They were entitled to service of a new application for entry of default or a notice of intent to take default after the previous application was withdrawn in late October 2016. Refusal to set aside a default that was entered without such notice was also an abuse of discretion.

Kirbys' reliance upon *Reeves v. Wisenor* is misplaced. There, this Court affirmed an order denying a motion to set aside a ***default judgment*** which was based on mistake, inadvertence, and excusable neglect. This is an appeal of an order denying a motion to set aside the entry of ***default***, which only requires the showing of good cause. The distinction is material and the latter standard is lower. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993).

In ruling on a motion to set aside a default, the court must consider whether the defendant's actions are culpable. See, e.g., *Yan v. Gen. Pot, Inc.*, 78 F. Supp. 3d 997 (N.D. Cal. 2015):

> The Ninth Circuit Court has "typically held that a defendant's conduct was culpable for purposes of the [good cause] factors where there is ***no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond***." Thus, "a defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." In this context, "intentionally" means that ***"a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decision-making, or otherwise manipulate the legal process.' "***

Id. at 1004 (emphasis supplied) (citations omitted).

Here, Scottons are not culpable. There was no showing of bad faith, such as an intention to take advantage of the Kirbys or interfere with judicial decision making or otherwise manipulate the legal process. Rather, there is an alternative and much better explanation for the default — the above-referenced statements, broken promises, and prevarication by Thompson — which is inconsistent with a deliberate, willful, or bad faith failure to respond. Under such circumstances, the trial court abused its discretion in denying Scottons' motion.

C. Kirbys Argument Regarding Prejudice Fails.

Kirbys argue they would have been prejudiced if default had been set aside, *Respondents' Brief* at 12, but they do not identify what that prejudice would be. Rather, they argue without citing any authority that a trial court acts within its discretion when it ignores the issue of prejudice, thereby tacitly assessing it no weight at all.

To the contrary, there is "'an extensive line of decisions' holding . . . Rule 55 ***must*** be

"liberally construed in order to provide relief from the onerous consequences of defaults and default judgments." *E.g., Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987) (emphasis supplied) (quoting *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir.1969) and reversing an order denying a motion to set aside a default and holding that: (1) an abuse of discretion in refusing to set aside a default judgment 'need not be glaring to justify reversal' and (2) the trial court abused its discretion where no prejudice was found, there was a delay of only a few months, and the delay was caused by counsel, not the defendant).

"To determine if the non-defaulting party was prejudiced, courts examine whether the delay: (a) made it impossible for the non-defaulting party to present some of its evidence; (b) made it more difficult for the non-defaulting party to proceed with trial; (c) hampered the non-defaulting party's ability to complete discovery; and (d) was used by the defaulting party to collude or commit a fraud. Courts give the most weight to the first two factors." *Burton v. The TJX Companies, Inc.*, No. 3:07-CV-760, 2008 WL 1944033, at *4 (E.D. Va. May 1, 2008).

It is impossible for a court to construe an issue or factor in favor of a party where the court does not consider the issue at all. Here, the trial court did not consider the factor of prejudice and Kirbys have shown none. Scottons did not make it any more difficult for Kirbys to present evidence, conduct discovery or proceed to trial, and there is no evidence that any delay was used by Scottons to collude or commit fraud. Mere delay alone does not constitute prejudice and, in any event, the record does not show an intentional delay by Scottons themselves. Instead, Scottons' counsel chose poorly in relying on Thompson's statements and promises and trying to persuade Thompson to play by the rules. A party should not be penalized by a default judgment for his attorney's errors. *Burton v. The TJX Companies, Inc.*, supra, at *4.

D. Scottons Pleaded Meritorious Defenses.

Kirbys misplace their reliance upon and misstate the holding in *Hearst Corp. v. Keller*. That case was an appeal of an order denying a motion to set aside a default judgment. There, no answer or counterclaim was ever filed and the defendant did not deny the averments in the Complaint. The defendant did allege a potential breach of contact claim against the plaintiff by way of affidavit. Here, an answer was filed, containing denials, several affirmative defenses, and a defense of offset all of which could have served as complete defenses.

While general denials may not always rise to the level of specificity sufficient to set aside a default, the trial court certainly must consider the claims in the complaint. Here, Kirbys' Complaint averred that Scottons' irrigation water repeatedly flooded their land and caused damages. Scottons denied that averment in their Answer. If the evidence at trial indicates that Scottons' irrigation water did not repeatedly flood and cause damage to Kirbys' property, then Scottons' denial would constitute a complete defense. A more verbose defense would be no more meritorious than the denial.

In any event, a single meritorious defense is sufficient to set aside a default. *E.g.*, *Cuevas v. Barraza*, 146 Idaho 511, 518, 198 P.3d 740, 747 (Ct. App. 2008) (holding that averments of a breach of contract defense were sufficient to set aside default judgment on a quiet title action). Scottons have pleaded several defenses, including a right of offset resulting from Kirbys' wrongful conduct, wherein Scottons pleaded in particular that Mr. Kirby was wrongfully discharging his firearms in the direction of Scottons' home. R. Vol. I, p. 3. The Court can take judicial notice that defense has proven to be meritorious, as Mr. Kirby later pleaded guilty in Ada County, case no. CR01-17-13294 to a criminal charge stemming from his repeated shooting at Scottons' property. Even if Scottons'

irrigation wastewater were damaging Kirbys' property, Scottons could not be reasonably expected to remedy the situation when Kirby was periodically shooting in their direction. The district court did not consider Scottons' defenses or construe this issue in their favor in reaching its decision and thereby committed reversible error.

E. Kirbys Are Not Entitled To Attorney's Fees On Appeal.

Kirbys argue they are entitled to a fee award on appeal pursuant to Idaho Code § 12-121. Such an award is only made where the respondent prevails on appeal and the appellate court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. If there is "at least one legitimate issue presented, attorney fees may not be awarded" under I.C. § 12–121, even if the party that does not prevail on appeal "has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 933, 277 P.3d 374, 380 (2012).

Scottons have presented several legitimate issues, including the issues identified in their initial brief, whether the trial court can assign a weight of zero to any of the Rule 55(c) factors, and whether the trial court erred by not construing the facts and pleadings liberally in favor of the Scottons. Kirbys's suggestion that Scottons' appeal is wholly frivolous, unreasonable, and without foundation is without merit.

CONCLUSION

The trial court committed reversible error by not applying the standards of Rule 55(c) and construing the facts and pleadings in favor of Scottons. Kirbys' arguments to the contrary are without merit. Accordingly, Scottons ask the Court to reverse the district court's entry of default and default judgment and to remand the case to be litigated on the merits.

Respectfully submitted this 1st day of November 2017.

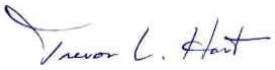
PERRY LAW, P.C.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of November 2017, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

David M. Penny Cosho Humphrey, LLP 1501 S. Tyrell Lane Boise, ID 83706	__ X X	U.S. Mail Hand Delivery Via e-mail: dpenny@cosholaw.com



Trevor L. Hart