

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0159

PERKINS FAMILY HOLDINGS, LLC,

Plaintiff-Appellant,

vs.

THE TILE GUYS, LLC, and
MARSHAL RAY BUTTERFIELD,

Defendants-Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of the Eleventh Judicial District
of the State of Montana, In and for the County of Flathead,
Before the Honorable Heidi Ulbright

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STATEMENT OF THE ISSUE

The district court manifestly abused its discretion when it allowed Perkins Family Holdings, LLC's motion for relief from the district court's order setting aside the entry of default against Defendants-Appellees The Tile Guys, LLC and Marshal Ray Butterfield to be deemed denied, because the district court did not find good cause to set aside the entry of default and no evidence of good cause to set aside the entry of default exists in the record of this case.

STATEMENT OF THE CASE

On August 2, 2021, the Plaintiffs and Appellants, Perkins Family Holdings, LLC (“Perkins”) filed their Complaint alleging breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, negligent construction, unjust enrichment, violation of the Montana Consumer Protection Act (“MCPA”), unfair trade practices, and constructive fraud against Defendants and Appellees The Tile Guys, LLC and Marshall Ray Butterfield (“Butterfield”). On August 19, 2021, both Defendants Tile Guys, LLC and Marshall Ray Butterfield were properly served. See Doc. 5.

Despite notice and service of the summons, Defendants failed to appear, answer, or otherwise defend against the Complaint, and upon application of Perkins, the clerk of the district court entered Default and Default Judgement against Butterfield on September 15, 2021. See Doc. 9. Perkins was awarded Fourteen Thousand Thirteen and 07/100 Dollars (\$14,013.07) in damages, which was trebled pursuant to MCPA at Mont. Code Ann. § 30-14-133, for a total damage award of Forty-Two Thousand Thirty-Nine and 21/100 Dollars (\$42,039.21). See Doc. 9.

Thereafter, Perkins received a Writ of Execution and executed against Butterfield’s bank accounts. See Doc. 10-11. It was only after execution against Butterfield’s bank accounts that Butterfield appeared in the litigation and on November 17, 2021, Butterfield filed a Motion to Set Aside Default and Default

Judgment and Brief in Support citing to Rules 55(c) and 60(b), Montana Rules of Civil Procedure, stating that “an entry of default may be set aside by showing good cause.” See Doc. 14-15. Perkins timely responded with its Brief in Opposition to Defendant’s Motion to Set Aside Default and Default Judgment and Butterfield replied on December 07, 2021. See Doc. 16 & 18.

On December 23, 2021, the district court ordered the Default and Default Judgment be set aside and allowed Defendants to file an answer and counterclaim. See Doc. 20. The district court did not find any of Butterfield’s arguments to set aside persuasive, rather the district court sua sponte relied upon the statutory language of the MCPA and this Court’s reasoning in *Plath v. Schonrock*, 2003 MT 21, ¶ 28, 314 Mont. 101, 60 P.3d 984, specifically that the award of treble damages under the MCPA “is purely a discretionary function of the district court and such awards should be determined on a case-by-case basis.” See Doc. 20, Conclusions of Law v - vii. This led the district court to find the award of treble damages exceeded the clerk’s authority and rendered the default judgment void ab initio. See Doc. 20, CoL viii.

Having found the default judgment void as a matter of law, the district court made no findings regarding the entry of default against Butterfield but still set aside both the entry of default and default judgment.

On January 7, 2022, Perkins moved the district court for relief from its order under Rule 60(b), arguing that the district court erred as a matter of law because it failed to find good cause to set aside the entry of default and that no good cause existed for the district court to make such a finding. See Doc. 22. After the motion was fully briefed the district court did not rule on the motion and it was deemed denied pursuant to Rule 60(c)(1).

Perkins thereafter timely filed its Notice of Appeal to this Court. See Doc. 30. Perkins alleges the district court erred and manifestly abused its discretion by allowing Perkins motion for relief to be deemed denied when the district court had not made any finding of good cause to set aside the entry of default and without evidence of good cause to set aside the entry of default.

STATEMENT OF THE FACTS

The following facts were not disputed below: Perkins owns real property located at 260 McMannamy Draw, Kalispell, Montana 59901 (the “Property”). See Doc 17, Declaration of David McCauley (“Dec. McCauley”); Doc. 13 Affidavit of Marshal Butterfield (“Aff. Butterfield”), ¶ 7 Perkins paid Five Thousand Four Hundred Fifty-Six and 54/100 Dollars (\$5,456.54) to Butterfield, for tile work that was never completed. See Doc 1, Complaint and Demand for Jury Trial (“Complaint”) ¶ 12; Doc. 17, Dec. McCauley, ¶ 4. In addition, Butterfield agreed to perform drywall work which the Property was in need of. See Dec. McCauley, ¶¶

5-7; Aff. Butterfield ¶ 13. Shortly after Butterfield began work, Perkins and Butterfield had a falling out, Perkins alleges Butterfield's work was defective and Butterfield alleges there as a disagreement over payment. See Dec. McCauley, ¶¶ 7-8; Aff. Butterfield, ¶¶ 29-32. In any case, Butterfield's services were terminated prior to any tile work being completed and Perkins stopped payment on a check representing a portion of the tile deposit in the amount of Four Thousand Two Hundred Forty-Three and 57/100 Dollars (\$4,243.57). See Complaint ¶ 15; Dec. McCauley, ¶¶ 7-8; and Aff. Butterfield, ¶ 30. On November 19, 2020, Perkins issued a letter terminating Butterfield's services and demanding a refund. Aff. Butterfield, Exhibit E; Dec. McCauley, ¶ 10. Perkins demanded and Butterfield agreed to pay One Thousand Two Hundred Thirteen and 07/100 Dollars (\$1,213.07). See Complaint, ¶¶ 14-16; Dec. McCauley, ¶ 11; and Aff. Butterfield, ¶¶ 34-35. Yet, Butterfield never paid. See Aff. Butterfield, generally, and Dec. McCauley, ¶ 12.

On July 8, 2021, through counsel, Perkins sent a demand letter to Butterfield warning that further action would be taken and demanding a response within ten (10) days. See Dec. McCauley, ¶ 17. Butterfield does not acknowledge receipt of the demand letter and did not respond to it. See Dec. McCauley, ¶ 18; Aff. Butterfield, ¶ 37.

On August 2, 2021, Perkins filed his Complaint and Demand for a Jury Trial. See Complaint, Doc #01. This Court issued a Summons (Doc #02-03),

which was properly served upon Butterfield on August 19, 2021, which Butterfield acknowledges. See Certificate of Costs and Return of Service, Doc #04-05; Aff. Butterfield ¶ 37. Butterfield did not file an answer, or any motion with the Court, nor did he contact Perkins or Perkin’s counsel to request an extension of time. See Docket and Dec. McCauley, ¶ 23-24.

On September, 13, 2021, twenty five (25) days after Butterfield was served, Perkins filed a Request for Entry of Default and Default Judgment. See Doc. #06. On September 15, 2021, the district court issued its Order of Default and Default and Default Judgment. See Doc. #09. During this time, Butterfield states that he “began contacting law firms to represent me, including Frampton Purdy; Seaman Law Firm; Hinchey & Hinchey; Johnson, Berg & Saxby; and Rhodes, Siefert, Erickson,” but took no other actions. See Aff. Butterfield, ¶ 39.

On September 21, 2021, the district court issued a Writ of Execution, which Perkins used to levy upon Butterfield’s bank accounts. See Doc. #10-11.

On October 15, 2021, Glacier Bank responded they would be responding to the levy against Butterfield by sending One Thousand Six and 39/100 Dollars (\$1,006.39). See Dec. McCauley, ¶ 25. On the same day as the notice of levy, Butterfield called Perkin’s counsel, this was the first contact with Butterfield, after sending multiple letters, calls, and proper service of the Complaint and Summons. See Dec. McCauley, ¶ 26.

On November 17, 2021, Butterfield, through counsel, filed his motion to set aside default and default judgment, primarily arguing that the MCPA did not apply in this case, making the default judgment invalid. See Doc. 14-15. On December 23, 2021, after the motion to set aside was fully briefed, the district court ordered both the entry of default and default judgment be set aside. See Doc. 20.

On January 7, 2022, Perkins filed its Motion and Brief for Relief from Final Order Under 60(b)(6), Mont. R. Civ. P. alleging the district court erred by setting aside the entry of default because the district court did not find good cause to do so and no good cause exists to make such a finding. See Doc. 22. On January 11, 2022, Butterfield responded in opposition and Perkins replied on January 19, 2022. See Doc. 23 & 25. Thereafter, the district court did not rule upon the motion for relief and it was deemed denied pursuant to Rule 60(c)(1).

STANDARD OF REVIEW

The standard of review governing the Supreme Court’s scrutiny of a district court’s sitting aside a default or default judgment is whether the lower court manifestly abused its discretion in doing so. *Roberts v. Empire Fire and Marine Ins. Co.*, 278 Mont. 135, 138-39, 923 P.2d 550, 552, (1996); *Lords v. Newman*, 212 Mont. 359, 365-66, 688 P.2d 290, 293-94 (1984). A court “manifestly abuses its discretion” if it does not apply the law correctly or it erroneously assesses the facts, *Roberts v. Empire Fire and Marine Ins. Co.*, 278 Mont. 135, 140-41, 923

P.2d 5.50, 553-54 (1996) (citing with approval *United States v. Rahm*, 993 F.2d 1405, 1410 (9th Cir.1993) and *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 889 (9th Cir.1992)); see *First National Bank of Cut Bank v. Springs*, 225 Mont. 62, 65, 73 1 P.2d 332, 334 (1987).

SUMMARY OF THE ARGUMENT

Under Mont. R. Civ. P. 55(b)(2)(c), a “Court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).” These are two separate tests, one for setting aside the entry of default and a separate test under Rule 60(b) to set aside the default judgment. The district court correctly found that the default judgment was void as a matter of law; however, the district court did not find good cause to set aside the entry of default. Further, no good cause existed for the district court to set aside the entry of default and absent both a finding of good cause and the existence of good cause, the district court manifestly abused its discretion by sitting aside the entry of default, because the district court did not apply the law correctly and erroneously assessed the facts.

Montana courts have applied two different tests to determine the existence of good cause. One, is taken from *Cribb v. Matlock Communications*, quoting Moore’s Federal Practice paragraph 55.10[2]. 768 P.2d 337, 339, 236 Mont. 27, 30 (1989). The *Cribb* test consists of three elements to be proven: (1) whether the default was willful, (2) whether the plaintiff would be prejudiced if the default should be set

aside, and (3) whether the defendant has presented a meritorious defense. *Id.* Along with the *Cribb* test, Montana courts have applied a test composed of four elements that overlap with those of the *Cribb* test. The four elements require a defendant to show that (1) he proceeded with diligence to set aside the default, (2) his neglect was excusable, (3) the judgment will be injurious to the defendant if allowed to stand, and (4) he has a meritorious defense to the plaintiff's cause of action. *See State ex rel. DEQ v. Robinson*, 1998 MT 185, ¶ 15, 290 Mont. 137, 962 P.2d 1212, *citing Blume v. Metropolitan Life Ins. Co.*, 242 Mont. 465, 791 P.2d 784, 786 (1990). The defendant seeking to set aside an entry of default has the burden of proving all four elements of "good cause." *See In re Marriage of Martin*, 265 Mont. 95, 99, 874 P.2d 1219, 1222 (1994).

Here, Butterfield failed to show that the default was not willful, that he proceeded with diligence, that his neglect was excusable, that the default would be injurious to him if allowed to stand, that if default were not allowed to stand it would not be injurious to Perkins, and that he had a meritorious defense to Perkins' cause of action.

Butterfield willingly defaulted as he was properly served with summons which detailed that his failure to respond would result in default and yet, still did not respond. *See Cribb*, at 30. After willingly defaulting, Butterfield did not proceed with diligence in setting aside the default. The court examines the parties' behavior

before and after the default in determining diligence. *In re Marriage of Shannon*, 2004 MT 25, ¶ 9, 319 Mont. 357, 84 P.3d 645, 360. For instance, where a party obtained counsel and filed motions for relief from default within one week of default and process of service was questionable, this Court has upheld sitting aside the default. See *Blume v. Metropolitan Life Ins. Co.*, 242 Mont. 465, 467, 791 P.2d 784, 786 (1990). In contrast, filing a motion to set aside one week after the default was insufficient where the defaulting party was aware of the dispute and had actual notice of the filed complaint, yet took no action. *Empire Lath & Plaster v. America Cas.*, 256 Mont. 413, 413, 847 P.2d 276, 276 (1993).

Here, there is no question Butterfield had actual knowledge of the dispute and Complaint as evidenced by the Affidavit of Service (Doc. 4-5), and Butterfield's own admission that he knew of the dispute and had received the Summons and Complaint (Aff. Butterfield, ¶ 37 ("The next communication from Perkins Family Holdings, LLC, came in the form of a Summons and Complaint.")). Instead of acting diligently, Butterfield waited to act until the ramifications of the judgment were affecting his bank account.

Butterfield's neglect was not excusable as he was properly served two (one for The Tile Guys, LLC and one for Marshall, individually) summons that detailed that his failure to respond would result in default. See *Marriage of Shannon*, at ¶ 11. There was no confusion in the language of the Summons, requiring Butterfield to

“file your answer and serve a copy thereof upon the Plaintiff’s attorneys within twenty-one (21) days after the service of this Summons...” and that should Butterfield fail to appear or answer then “judgment will be taken against you by default for the relief demanded in the Complaint.” See Summons, Doc. 3-4.

Allowing the entry of default to stand would not cause prejudice or harm to Butterfield because in the lower court, Butterfield primarily took issue with the damage’s calculation not liability generally. The entry of default would establish the facts of the complaint as being true but still require the lower court to determine damages. In contrast, this Court has held excessive litigation is undoubtedly a burden on the plaintiff in many ways. *Hoff v. Lake Cnty. Abstract & Title Co.*, 2011 MT 118, ¶ 20, 360 Mont. 461, 466-67, 255 P.3d 137, 141. Finally, Butterfield has failed to assert a meritorious defense as the only defenses that they have asserted are those that retroactively argue factual issues in the case, which fails to provide good cause to set aside an entry of default. *In re Marriage of Weber*, 2004 MT 211, ¶ 26, 322 Mont. 341, 96 P.3d 716.

Finally, this Court analyzed remarkably similar facts in its memorandum opinion in *Rennick v. Sec. Mortg.*, 2000 MT 245N, ¶ 23, 2000 Mont. LEXIS 255. In *Rennick*, the Defendant failed to answer and Rennick moved for entry of default and default judgment for actual damages and for those damages to be trebled pursuant to the MCPA, the court entered judgment in the full amount requested without

conducting a hearing. *Id.*, at ¶ 4. The Defendant later moved to set aside the entry of default and default judgment, and the district court did so based upon its determination that the district court was required to conduct a hearing to award treble damages. *Id.*, at ¶ 9. As in the present case, the district court did not find good cause to set aside the entry of default, and no good cause existed in the record to do so. *Ibid.* Ultimately, this Court reversed the district court's order setting aside the entry of default and remanded for a hearing on damages. *Id.*, at ¶ 28. The Court should hold similarly in the present case, reverse the setting aside the entry of default and remand for a hearing on damages.

ARGUMENT

The district court manifestly abused its discretion by denying Perkins' motion for relief from the district court's order sitting aside the entry of default because it found no good cause to set aside the entry of default and Butterfield failed to present any facts or evidence to support a finding of good cause to set aside the entry of default.

I. The Court Made No Finding of Good Cause to Set Aside the Entry of Default

Whether a district court's findings of fact meet statutory requirements is a question of law that this Court reviews for correctness. *In re S.G.R.*, 2016 MT 70, ¶ 13, 383 Mont. 74, 368 P.3d 1180. A district court must make findings that are sufficient to permit review without speculation into a district court's reasoning. *Crowley v. Crowley*, 2014 MT 42, ¶ 26, 374 Mont. 48, 318 P.3d 1031.

The statute at issue here states that a district court may set aside an entry of default only "for good cause shown." Rule 55(c), M.R.Civ.P. Consistent with other Montana courts, this would require an application of either the *Cribb* test or the four-prong test used by the courts to find good cause to set aside an entry of default, along with findings of fact to support the district court's determination under those tests.

Here the district court did not apply any test for good cause or make any factual findings to support a finding of good cause.

The only findings relevant to a determination of good cause appear in Findings of Fact ¶¶ 2-3, where the district court found that Butterfield was properly served and failed to plead or otherwise defend the case within the time allowed by law. See Findings of Fact, Conclusions of Law and Order, Findings of Fact ¶¶ 2-3.

The district court made no findings of fact which support good cause, rather it focused on presenting the procedural history and a summary of the parties' arguments. In particular, Butterfield's argument that the MCPA could not be used to protect corporations and Perkins' counterargument to Butterfield.

Moreover, the district court's Conclusions of Law do not address good cause at all, not once. Rather, the Conclusions of Law support the district court's finding that the "default judgment is void as a matter of law, albeit for a reason different than that offered by Butterfield." Moreover, in its Conclusions of Law, the district

court does not mention the entry of default at all but focuses solely on the default judgment.

It is only in the Order which the entry of default is mentioned, when the district court granted “...Butterfield’s Motion to Set Aside Default Judgment and Entry of Default...”

In summation, the district court’s findings of fact fail to establish the statutory requirement to show good cause and are insufficient to allow this court to make such a finding without resorting to speculation. As such, the district court’s order setting aside the entry of default should be reversed.

II. Defendant Butterfield Failed to Meet Its Burden of Proving Good Cause to Set Aside Default.

To determine if good cause exists to set aside an entry of default, Montana courts have applied two different tests. The *Cribb* test consists of three elements to be proven: (1) whether the default was willful, (2) whether the plaintiff would be prejudiced if the default should be set aside, and (3) whether the defendant has presented a meritorious defense. *Id.* Alternatively, Montana courts have applied a test composed of four elements: (1) the defendant proceeded with diligence to set aside the default, (2) the defendant’s neglect was excusable, (3) the judgment will be injurious to the defendant if allowed to stand, and (4) the defendant has a meritorious defense to the plaintiff’s cause of action. See *State ex rel. DEQ v.*

Robinson, 1998 MT 185, ¶ 15, 290 Mont. 137, 962 P.2d 1212, citing *Blume v. Metropolitan Life Ins. Co.*, 242 Mont. 465, 791 P.2d 784, 786 (1990).

The elements of these two tests largely overlap and Perkins applies them together in four parts.

A. Butterfield’s Default was Willful as Butterfield Did Not Proceed with Diligence to Set Aside the Default.

A failure to respond diligently can constitute a willful default. *Hoff*, at ¶ 20. In *Hoff*, this Court upheld a finding that a failure to respond timely to a declaratory judgment constituted a willful default. at ¶ 20. In another case, this Court upheld a determination that a defendant had willfully defaulted when they failed to answer the plaintiff’s petition for declaratory judgment, after being properly served. *Essex Ins. Co. v. Jaycie, Inc.*, 2004 MT 278, ¶16, 323 Mont. 231, 99 P.3d 651, 237.

This Court has distinguished willful and non-willful default based upon notice or actual knowledge of the proceedings. *Hoff*, ¶¶ 22-25. For instance, the internal misrouting of a summons and complaint, leading to the summons and complaint reaching a decision maker late, combined with the defendant immediately moving to set aside the default, before default judgment was entered, was held to be non-willful and supported good cause. *See Crib*, at 30-31.

In assessing whether or not diligence was exercised in proceeding to set aside the default, the court looks to the conduct of the parties prior to and after the default. *See In re Marriage of Shannon*, at ¶ 9.

In *Empire Lath & Plaster, Inc. v. American Cas. Co.*, the court held that where a motion to set aside was filed one week after default and the defaulting party was aware and had actual notice of the dispute and filed complaint, yet took no action, there was an absence of diligence. *Empire Lath & Plaster v. American Cas. Co.*, 256 Mont. at 413, 847 P.2d at 276.

Here, like *Hoff*, the undisputed facts show that Butterfield was aware of the dispute, and was properly served with the Summons and Complaint, that the Summons made clear the repercussions of failing to answer the Complaint, yet Butterfield took no action. Further, similar to *Empire Lath & Plaster*,

Ultimately, Butterfield willfully ignored the Summons and Complaint and failed to act with diligence to set aside the default, and therefore there is no good cause to set aside the entry of default.

B. Butterfield's Neglect Was Not Excusable

“Excusable neglect” requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant. *See Karlen v. Evans*, 276 Mont. 181, 915 P.2d 232, 53 Mont. St. Rep. 337 (1996). Additionally, this Court has stated that notice of the result of a failure to respond weighs in favor of the defendant's neglect being inexcusable. *See Shannon*, at ¶ 11.

Again, Butterfield was properly served, and the Summons made clear the consequences of a failure to respond. Butterfield was aware of the lawsuit as

evidenced by Butterfield's statement that he attempted to contact six attorneys for potential representation. However, aside from the alleged six calls to law firms, Butterfield took no real action to answer or otherwise defend against these allegations.

Therefore, Butterfield's actions do not arise to the level of excusable neglect, and they would fail the second requirement of good cause.

C. The Default Would Not be Injurious to Butterfield if Allowed to Stand but Would be Injurious to Perkins if Not Allowed to Stand.

In district court, Butterfield's arguments focused primarily on the inapplicability of the MCPA to corporations, and the trebling of damages which arose from the MCPA. See Doc. 15, Motion to Set Aside Default and Default Judgment, generally. Allowing the entry of default to stand would allow Butterfield to argue that position regarding damages because the entry of default would not set or determine damages, as that would be done in a hearing by the district court.

In *Shannon*, the court held that a mere assertion that "obvious" injuries will result from a default being allowed to stand is not enough. at ¶ 14. Further, Butterfield had the opportunity to argue the merits of the case but failed to do so and in his sworn affidavit acknowledged that he agreed to pay a certain amount to Perkins, and then failed to follow through with that payment. Butterfield passed up the opportunity to argue the facts of this case and will not be prejudiced by entry of default.

After determining there is little or no prejudice to Butterfield, a determination regarding what prejudice will befall the plaintiff is required. In *Hoff*, the court held that where a defendant failed to answer to a petition for default, and then following judgment, petitioned to set such default aside, the plaintiff was burdened by delay, legal costs, and attorney's fees in such a way that eliminated good cause to set aside. *Id.* at ¶ 27.

Here, like in *Hoff*, Perkins has to face the delays, legal costs, and additional attorney's fees which could have been avoided had either the default stood, or Butterfield answered timely.

Allowing the entry of default will give Butterfield his day in court regarding damages while not prejudicing Perkins for Butterfield's neglect. For these reasons, the prejudice element does not support good cause to set aside the entry of default.

D. Butterfield has no Meritorious Defense

In the lower court, Butterfield put forward several alleged defenses, however all of them amount to mirror images of Perkin's complaint in an attempt to shift the blame for Butterfield's failure to defend onto Perkins. These are not satisfactory defenses. Further, Butterfield admits to having agreed to pay Perkins and to not having done so, he only disputes the amount owed.

Where a party fails to but could have submitted evidence in support of its claim or defense, that party's desire to retroactively argue a factual issue in the case

is not a sufficient reason to justify setting aside of a judgment. *See Marriage of Weber*, at ¶ 26.

Butterfield had every opportunity to present any defense he believed to meritorious but failed to do so, likely believing there would be no real impact by ignoring Perkins' Summons, and it was only after Butterfield's bank account was levied that Butterfield took any action related to this lawsuit.

Therefore, Butterfield failed to assert a meritorious defense and thus, fails the final component to determining good cause.

CONCLUSION

and

REQUEST FOR RELIEF

The district court manifestly abused its discretion by setting aside the entry of default when no factual findings supported a conclusion that good cause existed to support setting aside the entry of default, and no evidence submitted to the district would support such a finding.

The district court made no finding of fact or conclusion of law that good cause that good cause existed to set aside the entry of default, yet the district court did so anyway, this is a manifest abuse of discretion.

Moreover, no evidence on the record would support a finding of fact or conclusion of law that good cause to set aside the entry of default existed, thus acting without evidence, the district court manifestly abused its discretion. Thus, the district

court's deemed denial of Perkins' motion for relief and the district court's setting aside of the entry of default should be reversed.

WHEREFORE, the Court is respectfully requested to:

1. Reverse the district court's deemed denial of Perkins' motion for relief and the district courts' order setting aside the entry of default, entered December 23, 2021, and

2. Direct the court below to set a hearing to establish damages.

DATED this 3rd day of August, 2022.

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ Rufus I. Peace_____

Rufus I. Peace

Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I the undersigned hereby certify that the foregoing Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word is 4,637 words, excluding the caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 3rd day of August, 2022.

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ Rufus I. Peace
Rufus I. Peace
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 3rd day of August, 2022, a true and correct copy of Appellant's Opening Brief was served by U.S. Mail, postage prepaid, upon Appellee, at the address indicated below.

Joseph Nevin
3624 Green Meadow Drive
Helena, MT 59602

DATED this 3rd day of August, 2022.

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ Rufus I. Peace_____

Rufus I. Peace

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-03-2022:

Joseph R. Nevin (Attorney)
3624 Green Meadow Drive
Helena MT 59602
Representing: Marshal Ray Butterfield, The Tile Guys LLC
Service Method: eService

Electronically signed by Jane Rasmussen on behalf of Rufus I. Peace
Dated: 08-03-2022