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STATE OF MONTANA
Case Number: DA 23-0126

**IN THE SUPREME COURT OF THE STATE OF MONTANA**
**Supreme Court Cause No. DA 23-0126**

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**WAYNE W. FIBKE, SPIRITS FLORIDA, INC., JIM EDWARDS, and J.E. REAL ESTATE HOLDING, INC.,**

Plaintiffs/Appellants,

vs.

**KIP K HOLDING COMPANY, LLC, d/b/a Precious Vodka, a/k/a Precious Vodka Spirits, a Montana limited liability Company; CLIFFORD "KIP" KIMERLY, and JOHN DOES I-V,**

Defendants/Appellees.

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On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-2017-951
Before Hon. Leslie Halligan

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# ANSWER BRIEF TO APPELLANTS' OPENING BRIEF

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None

## I. Statement of the Issue Presented for Review

Appellants contend that the district court erred in setting aside the default and default judgment entered against Appellees. Appellants' statement of the issue presented fails to pinpoint the actual issue before this Court. The issue presented is more properly stated as follows:

A. Whether the district court manifestly abused its discretion in setting aside the default and default judgment.

## II. Statement of the Case

Appellees offer the following statement of the case to better explain and clarify the proceedings below.

Appellants filed a Complaint on or around September 19, 2017, alleging a breach of contract and other related claims. After years of slow-moving litigation, Appellees' counsel withdrew on or about July 11, 2022. Appellees were personally served with a Rule 10 Notice on or about September 9, 2022. Appellees began searching for counsel and retained the firm Knight & Dahood, PLLC on October 3, 2022. A Notice of Appearance was never filed by Knight & Dahood, PLLC. On October 4, 2022, Appellants moved for entry of default and default judgment. On October 11, 2022, Appellants moved for, and were granted, a status conference to be held on October 20, 2022. No minute entry exists evidencing that this conference

was ever held. However, on October 20, 2022, the district court entered the default and default judgment.

Appellees' engagement of Knight & Dahood, PLLC is evidenced by a retainer check that was deposited on October 6, 2022, correspondence between Appellees and Knight & Dahood, PLLC, and Appellees' verification. Appellees assumed their retained counsel would appear on their behalf in the case. Unfortunately, that did not occur. On or about October 21, 2022, after default and default judgment were entered, Knight & Dahood, PLLC informed Appellees of an apparent conflict of interest. On November 30, 2022, Knight & Dahood, PLLC refunded a partial retainer to Appellees. Appellees once again sought representation and on December 27, 2022, Appellees' current counsel appeared. On December 29, 2022, Appellees filed their Verified Motion to Set Aside Default, Default Judgment, and Brief in Support. Appellants filed a Response and Affidavit. After being fully briefed, the Honorable Judge Leslie Halligan was invited to assume jurisdiction, which was accepted. On January 30, 2023, the district court set aside the default and default judgment. Appellants appeal the district court's Order Setting Aside Default and Default Judgment.

## III. Statement of the Facts

This matter was filed in 2017 by Canadian citizen and Canadian corporation, Wayne W. Fibke and Spirits Florida, Inc., (hereinafter collectively "Appellants")

alleging breach of contract and other claims stemming from a contract with Appellees. (C.R. 1 and C.R. 16 (*Amended Complaint*)). Appellees answered and filed counterclaims alleging breach of contract and other claims stemming from that contract (C.R. 6 and C.R. 17). More than five years have passed, and the parties have, *inter alia*, amended pleadings, substituted counsel, and exchanged limited written discovery.

On July 11, 2022, former counsel for Appellees, J.R. Casillas and Adrienne Tranel, and the law firm of Datsopoulos, MacDonald, & Lind, P.C., filed a motion to withdraw (C.R. 47). That motion was granted the following day and Appellants were instructed to prepare and serve a Uniform District Court Rule 10 Notice (C.R. 48). On July 12, 2022, a Rule 10 Notice was filed by Appellants (C.R. 49).

On or about September 9, 2022, Appellees were personally served with the Rule 10 Notice (C.R. 50). Appellees began immediately searching for replacement counsel. (C.R. 60). In early October 2022, Appellees retained Knight & Dahood, PLLC to represent them in this matter (C.R. 60). Knight & Dahood did not file a Notice of Appearance. *See* district court docket.

On October 3, 2022, Appellees issued a check for a retainer payment of $1,500.00 to Knight & Dahood (C.R. 60 at *Exhibit A*). The following day on October 4, 2022, Plaintiffs filed a request for Entry of Default (C.R. 51). On October 6, 2022, the retainer payment was deposited by Knight & Dahood (C.R. 60 at *Exhibit B*).

On October 7, 2022, Appellants requested entry of default judgment for a sum certain (C.R. 53). Appellants also filed an affidavit in support (C.R. 54). Appellees' retainer check cleared the bank on October 7, 2022 (C.R. 60 at *Exhibit C*). Knight & Dahood still had not filed a Notice of Appearance. *See* district court docket.

On October 11, 2022, upon Appellants' motion, the district court set a status conference to be held on October 20, 2022 (C.R. 55 and C.R. 56). No minute entry exists to evidence that the status conference was held. *See* district court docket. However, on October 20, 2022, the district court entered default and default judgment against Appellees (C.R. 57 & 58). After entry of default and default judgment, on or about October 21, 2022, two weeks after depositing the retainer check, Knight & Dahood informed Appellees of an apparent conflict of interest (C.R. 60).

More than a month later, on November 30, 2022, Knight & Dahood refunded a partial retainer to Appellees again asserting the existence of a "conflict of interest" (C.R. 60 at *Exhibit D*). On December 27, 2022, present counsel for Appellees filed a Notice of Appearance (C.R. 59). On December 29, 2022, Appellees filed their Verified Motion to Set Aside Default, Default Judgment, and Brief in Support (C.R. 60). After the issue was fully briefed, the Honorable Judge Leslie Halligan assumed jurisdiction and ordered the default and default judgment be set aside on January 30, 2023 (C.R. 69). Appellants appeal the district court's order.

## IV. Standard of Review

In reviewing a decision related to a default judgment, this Court is "guided by the principle that every litigated case should be decided on its merits; judgments by default are not favored." *JAS, Inc. v. Eisele*, 2014 MT 77, ¶ 19, 374 Mont. 312, 317, 321 P.3d 113, 117. The Montana Supreme Court reviews a district court's ruling to grant a motion to set aside a default and default judgment for a manifest abuse of discretion. *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 17, 338 Mont. 423, 429, 166 P.3d 451, 456. The grant of a trial court setting aside a default judgment will *only* be set aside upon a showing of manifest abuse. *Lords v. Newman*, 212 Mont. 359, 364, 688 P.2d 290, 293 (1984) (*emphasis added*). A district court abuses its discretion when it acts arbitrarily, without employment of conscious judgment, or in excess of the bounds of reason, resulting in a substantial injustice. *Netzer Law Office, P.C. v. State*, 2022 MT 234, ¶ 9, 410 MT 513, 519, 520 P.3d 335, 340 (citing *Stand Up Mont. v. Missoula Cty. Pub. Schs.*, 2022 MT 153, ¶ 6, 409 Mont. 330, 336, 514 P.3d 1062, 1066). A district court manifestly abuses its discretion when the abuse is obvious, evident, or unmistakable. *Id.*

## V. Summary of Argument

The district court's Order setting aside the default and default judgment should be affirmed because substantial credible evidence and well established law support the district court's decision. First, the district court did not err in its ruling

because it did not find in favor of Appellees due to a lack of factual or legal justification for the default judgment. The district court found that Appellees had demonstrated the requisite *Blume* factors and those factors are the basis of the court's decision.[1] *Blume v. Metro Life Ins. Co.*, 242 Mont. 465, 791 P.2d 784 (1990), abrogated on other grounds by *JAS, Inc. v. Eisele*, 2014 MT 77, 374 Mont. 312, 321 P.3d 113.

Second, the district court did not err in evaluating the *Blume* factors and finding in favor of Appellees. Regarding the first *Blume* factor, the district court found that Appellees proceeded with diligence as they retained counsel only four (4) days after the deadline to respond to the Rule 10 Notice. Second, the district court found that Appellees established excusable neglect because their counsel failed to act beyond mere carelessness or ignorance. Third, the district court found that the judgment was injurious to Appellees because the sum of the default judgment was in excess of an amount that would "adversely affect even the biggest corporation." *Blume* at 469, 787. Fourth, the district court found that Appellees presented a meritorious defense to the claims brought by Appellants.

Finally, the district court did not manifestly abuse its discretion; the court's determination that Appellees met all *Blume* factors is not an obvious, evident, or

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[1] The requisite *Blume* factors are: 1) the party proceeded with diligence, 2) the party's neglect is excusable, 3) the judgment is injurious to the party, and 4) the party has a meritorious defense. *Blume v. Metro. Life Ins. Co*., at 467, 786.

unmistakable error outside the bounds of reason and without employment of conscious judgment. *Netzer*, ¶ 9. The district court used its inherent discretion to evaluate the evidence and arguments presented and determined that setting aside the default and default judgment and trying the case on its merits would best serve the interests of justice. Appellants fail to demonstrate a manifest abuse of discretion by the district court and absent that showing, the district court's Order must be affirmed.

## VI. Argument

### A. The district court did not err in its ruling because it did not base its decision on the lack of factual or legal justification for the default judgment.

Appellants argue that the district court manifestly abused its discretion because it *sua sponte* raised a dispositive issue not brought forth by any of the parties to the litigation. Further, Appellants believe that the district court's concern with the granting of a default judgment in this case revolves around a perceived insufficient Rule 10 Notice and failure of process related to requesting the default and default judgment in the first place. A close reading of the Order from the district court shows that Appellants have misinterpreted the district court's concern.

The district court, in its Order setting aside the default and default judgment, states, "[d]espite years of litigation, Plaintiffs appear to have received these beneficial orders by simply asking for them in motions to which Defendants did not respond" (C.R. 69 at ¶ 6). The district court is most concerned that, although

Appellees have participated in every step of litigation, as soon as they found themselves in a difficult situation without counsel, Appellants put their running shoes on. The district court recognized that Appellants have had not taken issue with slow moving litigation and that Appellees have always agreed to deadline extensions proposed by Appellants. Further, the district court recognized that Appellees missed no deadlines related to litigation and only failed to appear at a status hearing (which may or may not have actually happened) where default was entered. As the district court explained in its Order, this neglect is excusable based on the surrounding circumstances.

Appellants raise the argument that this Court has cautioned district courts generally in relation to making *sua sponte* rulings on dispositive issues based on *Spencer v. Beck* and *Davis v. State*. Appellants' position, however, is not relevant to the issue here. In *Spencer,* Spencer filed a Complaint and Demand for Jury Trial alleging negligence on the part of Beck, his court-appointed defense counsel. *Spencer v. Beck*, 2010 MT 256, ¶ 3, 358 MT 295, 296, 245 P.3d 21, 22-3. The *Spencer* district court *sua sponte* recharacterized Spencer's complaint as a postconviction relief petition. *Id.* at ¶ 5.

> …we caution courts that a sua sponte decision to raise a time bar or recharacterize a complaint for dismissal purposes invokes due process considerations. When a court is inclined to make such a dispositive ruling on an issue not raised by the parties, the court must first "afford the parties fair notice and an opportunity to present their positions before acting on its own initiative to dismiss a petition as untimely.

*Id.* at ¶ 16 (citing *Davis v. State*, 2008 MT 226, ¶ 24, 344 Mont. 300, 187 P.3d 654). Because the district court here did not *sua sponte* raise an issue related to a time bar or recharacterize a complaint for dismissal purposes, Appellants' argument falls short of persuasive. Additionally, the district court's decision here actually advances due process considerations rather than hinder those considerations. Even though it didn't occur here, district courts throughout Montana can and do raise issues *sua sponte* and have been deemed to be acting within their authority by this Court. See generally, *Lee v. Great Divide Ins. Co.*, 2008 MT 80, 342 Mont. 147, 182 P.3d 41 and, *State v. Nicholls*, 200 Mont. 144, 649 P.2d 1346 (1982))

Appellants' argument that the district court erred in raising a dispositive issue not argued by either party is invalid and irrelevant here. The only dispositive issue the district court evaluated and relied on was that which had been fully briefed by both parties: the requisite *Blume* factors. The district court's decision to set aside the default and default judgment based on Appellees' having met the *Blume* factors can only be set aside upon a showing of a manifest abuse of discretion. As a manifest abuse has not occurred, the district court's Order should be affirmed.

**B. The district court correctly determined that Appellees met and demonstrated all *Blume* factors and did not err in setting aside the default judgment.**

Appellants contend that because this case is not one of first appearance, that the Order to set aside the default and default judgment was a manifest abuse of

discretion. Appellants further argue that Appellees "appeared at the outset but then stopped participating in the litigation". *Appellants' Opening Brief*. Appellants recognize that there have been delays in litigation, namely the COVID-19 pandemic, but fail to mention that they have also not taken an active role in litigation. Although this has been a years long suit, Appellants have not taken any depositions or exchanged or requested any discovery aside from very limited initial written discovery. Until July 2022, when Appellees' counsel withdrew, both parties were participating at an equal pace in this litigation. As soon as Appellees' counsel withdrew, Appellants kicked it into high gear, so to speak. Appellees have consistently accommodated Appellants' numerous motions to continue and have not failed to appear or engage in litigation until their counsel withdrew and Appellees did not appoint new counsel within twenty-one (21) days of having received service of the Rule 10 Notice.[2] Appellees do not argue that the service of the Rule 10 Notice on September 9, 2022, is insufficient, as Appellants contend; rather, Appellees argue that the district court did not manifestly abuse its discretion in determining that all *Blume* factors were successfully demonstrated.

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[2] Appellants retained new counsel twenty-four (24) days after having been personally served with the Rule 10 Notice.

1. Appellees proceeded with diligence.

As Appellants have noted, a court may use its discretion to determine whether the defendant has proceeded with due diligence and to look at the surrounding facts and circumstances to make this determination. *Mont. Prof'l Sports, LLC v. Nat'l Indoor Football League, LLC*, 2008 MT 98, ¶ 41, 342 Mont. 292, 302, 180 P.3d 1142, 1149.

Appellees paid a retainer to new counsel twenty-four (24) days after successful service of the Rule 10 Notice. Thus, only four (4) days had passed since the deadline to appoint new counsel or appear pro se. It was not until November 30, 2022, when Knight & Dahood, PLLC returned a partial retainer amount, that Appellees became aware that they were without counsel. This was more than a month after the default judgment was entered. Defendants immediately began seeking new counsel and proceeded with diligence in retaining their current counsel.

Appellants argue that Appellees simply stopped participating in litigation and cannot claim they proceeded with diligence. Appellants also argue that Appellees failed to act diligently because Appellees failed to participate and stay apprised of their obligations relative to the pending litigation. This is incorrect. Appellees were aware that they needed to retain counsel in order to meet the upcoming deadlines set forth in the Third Amended Scheduling Order. Appellees proceeded with diligence and retained counsel long before the next deadline for action according to that

scheduling order. The only issue relative to this first *Blume* factor is whether Appellees proceeded with diligence and whether the district court appropriately used its discretion in determining that they did proceed with diligence. The district court weighed the facts and circumstances and found that Appellees proceeded with diligence. The district court's decision should remain as it did not manifestly abuse its discretion.

2. Appellees established excusable neglect.

Appellees retained counsel prior to the default and default judgment being entered against them. The default and default judgment were entered against them through "no fault of their own." *Wittich L. Firm, P.C. v. O'Connell*, 2013 MT 122, ¶ 25, 370 Mont. 103, 112, 304 P.3d 375, 382. "Excusable neglect requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney." *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 20, 367 Mont. 103, 109, 289 P.3d 174, 178 (citing *In re Marriage of Castor*, 249 Mont. 495, 499, 817 P.2d 665, 667 (1991)).

Appellants compare the situation at issue to that of *Puhto*, where Puhto purposefully and knowingly failed to appoint new counsel. *Puhto v. Smith Funeral Chapels, Inc.*, 2011 MT 279, ¶ 7, 362 Mont. 447, 449, 264 P.3d 1142, 1144. However, Appellees were diligent in obtaining new counsel and did not purposefully fail to retain counsel. Unfortunately, the counsel Appellees retained on October 3,

2022, failed in their duties so much so that the failure goes beyond mere carelessness. Appellees retained Knight & Dahood, PLLC as evidenced by the retainer check dated October 3, 2022. Had Knight & Dahood, PLLC appeared as counsel for Appellees, the default and default judgment would have likely never been entered. Ultimately, Appellees' counsel abandoned them and violated Rule 1.3 of Montana's Rules of Professional Conduct. Knight & Dahood, PLLC never appeared on their clients' behalf, failed to do a complete conflict search until almost a month after engagement, and terminated their engagement with Appellees on November 30, 2022. During the time Appellees had retained Knight & Dahood, PLLC (October 3, 2022 – November 30, 2022), the default and default judgment were entered against Appellees. Knight & Dahood, PLLC failed to act with reasonable diligence and promptness in representing Appellees.

Appellants contend that the circumstances in *Caplis* are persuasively similar to the circumstances here. In *Caplis*, the defendants failed to respond to a motion to compel discovery and had ignored all previous requests. *Caplis v. Caplis*, 2004 MT 145, ¶¶ 8-11, 321 Mont. 450, 452-4, 91 P.3d 1282, 1284-5. Here, Appellees did not fail to respond to a motion to compel discovery and, unlike *Caplis*, retained counsel who then abandoned them. Appellants fail to demonstrate that the district court manifestly abused its discretion in evaluating the evidence and determining that Appellees' neglect was excusable.

As Appellants have stated, neglect is excusable if the reasons given are such that reasonable minds might differ in their conclusions concerning excusable. *Grizzly Sec. Armored Express, Inc. v. Armored Group, LLC*, 2009 MT 396, ¶ 17, 353 Mont. 399, 402, 220 P.3d 661, 664. If reasonable minds differ, doubt should be resolved in favor of a trial on the merits. *Id.* Just so, the district court is of one mind and Appellants are of another. Here, reasonable minds do differ in their conclusions concerning what is excusable. However, because the district court has not manifestly abused its discretion, it is the only mind that matters and it determined that Appellees' neglect was excusable.

3. The judgment is injurious to Appellees.

In *Blume*, this Court found that "a judgment in excess of $185,000 adversely affects even the biggest corporation." *Blume*, at 469, 791 P.2d at 787. Here, Appellees are not a large corporation. There is no doubt that the judgment entered against Appellees, $739,738.98 plus interest, would be injurious if allowed to stand. Appellants compare the issue at hand to that in *Shannon*, where a father felt his child support payments were injurious. *In re Marriage of Shannon*, 2004 MT 25, ¶ 14, 319 Mont. 357, 361, 84 P.3d 645, 647. Here, however, Appellees are not arguing that they should not have to pay so much to care for their child, rather, they argue that because they have presented a meritorious defense and counterclaims, that allowing the default to stand would obviously be injurious.

Appellants contend that the default judgment cannot possibly be injurious to Appellees because "there is ample evidence that Kimerly defrauded Fibke and Edwards." *Appellants' Opening Brief*. Unfortunately for Appellants, without trying the case on its merits, this conclusion cannot stand. Just as easily, Appellees could conclude that their counterclaims entitle them to a significant judgment without a trial on the merits. This case has not been tried on its merits and the default judgment amount is injurious. The district court's decision should be affirmed as it did not manifestly abuse its discretion finding the default judgment of $739,738.98, plus interest, is injurious.

4. Appellees established a meritorious defense.

Alleging facts which, if proven, would provide a defense is enough for a "meritorious defense." *Cribb v. Matlock Commc'ns, Inc.*, 236 Mont. 27, 31, 768 P.2d 337, 340 (1989). Valid arguments are also sufficient to have meritorious defenses. *In re Est. of Mills*, 2015 MT 245, ¶ 20, 380 Mont. 426, 431, 354 P.3d 1271, 1275. Appellees have alleged facts which, if proven, would provide a meritorious defense. Appellees have presented defenses and counterclaims which support the fact that no breach of contract occurred on their behalf and, because this is a valid argument, have sufficiently supplied evidence of a meritorious defense.

Appellants state that a defaulted party need not demonstrate the likelihood of success related to the merits of a defense beyond a finding that a prima facie defense

exists to establish a meritorious defense as set forth in *Hoff v. Lake County Abstract & Title Co.*, 2011 MT 118, ¶ 28, 360 Mont. 461, 467, 255 P.3d 137, 142. Appellants contend, however, that there must be some greater burden to show the existence of a meritorious defense beyond the defenses raised in Appellees' Answer and Counterclaim. Appellants seem to have invented this legal standard themselves, as they fail to cite to an authority. In *Est. of Mills*, this Court found that a pro se letter to the district court arguing a lack of testamentary capacity and/or undue influence in a probate proceeding reflected evident intent to contest the will at issue and was clear evidence of a meritorious defense. *Id.*, at ¶ 20. Here, in filing their Answer and Counterclaims with the district court, Appellees have shown intent to contest the Complaint at issue and explicitly raised their defenses in their Answer. The district court acted within its authority and discretion when it found that a prima facie defense exists for Appellees.

**C. The district court did not manifestly abuse its discretion.**

"Trial courts are vested with a certain amount of discretion when they are considering a motion to set aside a default. It has been stated that these matters are within the "sound discretion" of the trial court." *Lords*, at 363, 688 P.2d at 293. Here, the district court used its vested discretion in determining whether all *Blume* factors had been appropriately met.

Throughout Appellants' Opening Brief, they contend that the district court did not conduct any evaluation of the *Blume* factors. The district court explicitly writes, "Defendants proceeded with reasonable diligence, their neglect was sufficiently excusable, they may have a meritorious defense, and the $739,738.97 (plus) amount of the default judgment is clearly injurious under the circumstances" (C.R. 69 at ¶ 7). The district court proves its evaluation of the *Blume* factors and explains that those factors having been met is sufficient to vacate the default and default judgment.

Appellants also contend throughout their argument that the district court based its decision upon the lack of a factual and legal basis for the default and default judgment in the first place. Upon a close reading of the Order, the district court does not write anything implying that its decision to vacate the default and default judgment was based on a lack of factual or legal justification. In fact, the only section of the Order which addresses the evidence is as follows: "On review of the evidence presented, the Court finds Defendants to have satisfied the elements necessary for vacation of both the default and the default judgment" (C.R. 69 at ¶ 7). Here, it is clear that the only dispositive issue the district court addressed and weighed, when it set aside the default and default judgment were the *Blume* factors.

As it is within the district court's "sound discretion" to consider and rule on a motion to set aside a default and default judgment, the district court did not manifestly abuse its discretion. *Lords*, at 363, 688 P.2d at 293. The district court did

not make an obvious, evident, or unmistakable error outside the bounds of reason and without employment of conscious judgment when it determined that the facts supported setting aside the default and default judgment levied against Appellees. In fact, the district court clearly established that it made its decision with conscious judgment of the evidence presented.

Glaringly obvious is that the district court's Order did not result in a substantial injustice, as required to find a manifest abuse of discretion. *Netzer*, at ¶ 9. Appellees, at the time the default and default judgment were entered, had not missed any deadlines or caused any undue delay of litigation. The default and default judgment were entered on October 20, 2022, and the closest upcoming deadline set forth in the Third Amended Scheduling Order was for Appellants on October 26, 2022 (C.R. 46 at ¶ 3). The October 26, 2022 deadline required Appellants to furnish names and addresses of their expert witnesses to Appellees. The district court did not manifestly abuse its discretion in setting aside the default and default judgment and this Court should affirm that ruling.

## VII. Conclusion

This Court should affirm the district court's decision to set aside the default and default judgment. The district court did not manifestly abuse its discretion. The district court did not raise a dispositive issue *sua sponte* and exclusively rely on that issue in its determination to set aside the default and default judgment. The district

court evaluated all *Blume* factors and correctly found that Appellees demonstrated reasonable diligence, excusable neglect, meritorious defenses, and that the amount of the default judgment is clearly injurious. Appellants have failed to show a manifest abuse of discretion on behalf of the district court. Appellants have not shown that the district court acted arbitrarily, without employment of conscious judgment, or in excess of the bounds of reason, resulting in a substantial injustice when it decided to set aside the default and default judgment.

For the reasons set forth herein, this Honorable Court should affirm the district court's January 30, 2023, Order.

DATED this 23rd day of August 2023.

ORR MCDONNELL LAW, PLLC

By: /s/ Gregory A. McDonnell
______________________________
Gregory A. McDonnell
*Attorney for Defendants/Appellees*

## Certificate of Compliance

Pursuant to M.R. App. P. 11(4)(e), I certify that the foregoing ANSWER BRIEF TO APPELLANTS' OPENING BRIEF is printed with a proportionately spaced Times New Roman text typeface of 14 points and is double-spaced, except for footnotes which are single-spaced in 12-point type. The page length is less than 30 pages and the word count, as calculated by Microsoft Word for Office 365, is fewer than 10,000 words, exclusive of table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 23rd day of August 2023.

ORR MCDONNELL LAW, PLLC

By: */s/ Gregory A. McDonnell*
______________________________
Gregory A. McDonnell
*Attorney for Appellees*

## **Certificate of Service**

I, the undersigned, hereby certify and affirm that a true and correct copy of the foregoing was provided at Missoula, Montana this 23rd day of August 2023 to all parties by electronic service. Each attorney of record is registered for electronic service through the Court's eService system.

ORR MCDONNELL LAW, PLLC

*/s/ Gregory A. McDonnell*
By: ___________________________
Gregory A. McDonnell
*Attorney for Appellees*

## CERTIFICATE OF SERVICE

I, Gregory A. McDonnell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-23-2023:

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Electronically signed by Katie Lilje on behalf of Gregory A. McDonnell
Dated: 08-23-2023