**IN THE COURT OF APPEALS OF IOWA**

No. 2-1116 / 12-0151
Filed February 13, 2013

**ROGER HALVORSON AND CONSTANCE HALVORSON,**
Plaintiffs-Appellees,

**vs.**

**ALLEN BENTLEY AND DIXIE BENTLEY,**
Defendants-Appellants,

**KERNDT BROTHERS SAVINGS BANK,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Clayton County, John J. Bauercamper, Judge.

Defendants Allen and Dixie Bentley appeal the district court's ruling on a motion to set aside a default judgment. **REVERSED AND REMANDED.**

Anne E.H. Loomis of Allen, Vernon & Hoskins, P.L.C., McGregor, for appellants.

Alan T. Heavens of McClean, Heavens & Vorwald Law Offices, Elkader, for Halvorson appellees.

James A. Garrett of Jacobson, Bristol, Garrett & Swartz, Wukon, and Dennis G. Larson of Larson Law Office, Decorah, for Bank appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

We must decide whether the district court erred in denying a motion to set aside a default judgment.

## *I. Background Proceedings*

Plaintiffs Roger and Constance Halvorson sued neighboring property owners Allen and Dixie Bentley. They sought a declaratory judgment on "the nature and scope" of an easement running in favor of the Bentleys, as well as the "size and dimensions" of the easement.[1]

The Halvorsons served the Bentleys with the original notice and petition on November 27, 2011. The Bentleys did not serve and thereafter file a motion or answer to the petition within twenty days, as required by Iowa Rule of Civil Procedure 1.303(1).

On December 20, 2011, the Halvorsons sent the Bentleys and their attorney a ten-day notice of intent to file a written application for default. *See* Iowa R. Civ. P. 1.971(1) ("A default is defined as a failure "to serve and, within a reasonable time thereafter, file a motion or answer . . . ."). The Bentleys served an answer and counterclaims ten days later. Meanwhile, on December 28, 2011, the Halvorsons filed an application for default judgment, which the district court granted.

The Bentleys moved to set aside the default judgment. The district court denied the motion and the Bentleys sought an interlocutory appeal. The

[1] They also raised a claim of negligence against the bank that sold them the lot. The bank filed an appellee's brief in the matter which mirrors the brief filed by the Halvorsons. Because the real bone of contention is between the Halvorsons and Bentleys, we will refer to the Halvorsons throughout the opinion.

supreme court granted the application and transferred the case to this court for disposition.

### *II. Scope of Review*

We review the district court's denial of the Bentleys' motion to set aside the default judgment. Rulings on motions to set aside default judgments under the grounds set forth in Iowa Rule of Civil Procedure 1.977 ("mistake, inadvertence, surprise, excusable neglect or unavoidable casualty") are reviewed for an abuse of discretion. *Brandenburg v*. *Feterl Mfg*. *Co*., 603 N.W.2d 580, 584 (Iowa 1999). The Bentleys do not rely on those grounds; they assert that the Halvorsons failed to comply with the requirements for entry of a default judgment set forth in Iowa Rule of Civil Procedure 1.972. *See Dolezal v*. *Bockes*, 602 N.W.2d 348, 353 (Iowa 1999) (stating predecessor to rule 1.977 was "not an appropriate method of correcting" an irregularity involving "the court's entry of a default and a default judgment contrary to a rule of civil procedure"). This argument is reviewed for errors of law. *Id.* at 352 (stating non-compliance with requirements of predecessor to rule 1.972 left district court "without authority to enter the order of default"); *accord Baltzley v*. *Sullins*, 641 N.W.2d 791, 794 (Iowa 2002) (reviewing claimed non-compliance with predecessor to rule 1.972 on error). The fact that the Bentleys raised the claimed noncompliance with rule 1.972 in a motion to set aside the default judgment rather than in a direct appeal from the default judgment ruling does not transform our standard of review to a review for an abuse of discretion.

***III. Analysis***

Iowa Rule of Civil Procedure 1.972(2) states, in relevant part: "No default shall be entered unless the application contains a certification that written notice of intention to file the written application for default was given after the default occurred and at least ten days prior to the filing of the written application for default."

The Bentleys argue that the Halvorsons "should have waited for the ten days to expire prior to filing their application for judgment by default" and because they did not, their application for judgment by default "should have been overruled" as a matter of law. We agree.

Rule 1.972(2) "plainly provides that 'no default shall be entered' unless the *ten*-day notice is given *before* the application for default is filed." *Dolezal*, 602 N.W.2d at 352 (quoting the predecessor to rule 1.972(2)) (emphasis added). The Halvorsons gave their ten-day notice eight days before filing their motion for default judgment. Their premature motion contravened an express requirement of rule 1.972(2).

Rule 1.972(2) also requires that an application for default contain "a certification that written notice of intention to file the written application for default was given after the default occurred and at least ten days prior to the filing of the written application for default." The Halvorsons' motion for default judgment did not contain this certification, nor could it have, as the Halvorsons did not comply with the ten-day rule. Again, their failure to include a certification contravened an express requirement of rule 1.972.

We acknowledge that the Halvorsons did not flaunt the rule; they operated under the assumption that they would be in compliance as long as the district court ruled on their application after the ten-day period expired.[2] The rule, however, places the onus of implementing the ten-day requirement on the filing party rather than the court.

We also acknowledge some facial appeal to the Halvorsons' argument that the cited requirements only apply to defaults entered by the clerk of court rather than the district court. *See* Iowa R. Civ. P. 1.972(1) (outlining the process for entry of defaults and providing in relevant part: "[T]he clerk shall enter that party's default in accordance with the procedures set forth in this rule without any order of court. *All other defaults shall be entered by the court*." (emphasis added)). If the language of the rule were viewed in isolation, that argument might hold sway. But, as the supreme court explained in *Baltzley*, "The provision for entry of defaults by the clerk was obviously designed to expedite default-judgment entries, not to frustrate them. Construing [rule 1.972] to prohibit judges from exercising concurrent authority to enter default judgments would frustrate the purpose of the rule." 641 N.W.2d at 793. The court proceeded to apply the requirements of rule 1.972(2) to a court-imposed default. *Id.* at 792.

We conclude the district court was without authority to deny the Bentleys' motion to set aside the default judgment. *See Dolezal*, 602 N.W.2d at 352. We reverse and remand for further proceedings.

**REVERSED AND REMANDED.**

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[2] Their motion requested that "a default judgment be granted *on the next court service day*, as the time to respond to the Plaintiff's petition *will have expired.*"