

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1997-CA-002016-MR

THURMAN BAIRD

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE GARLAND W. HOWARD, JUDGE  
ACTION NO. 97-CI-0446

ODCH, INC., D/B/A OWENSBORO  
DAVIESS COUNTY HOSPITAL; and  
OWENSBORO MERCY HEALTH SYSTEM,  
INC.

APPELLEES

OPINION  
AFFIRMING IN PART  
REVERSING IN PART AND REMANDING

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BEFORE: GUIDUGLI, JOHNSON, and KNOPF, Judges.

KNOPF, JUDGE: The appellee, ODCH, Inc., d/b/a Owensboro Daviess County Hospital and Owensboro Mercy Health System, Inc., (the Hospital), filed a civil action against the appellant, Thurman Baird, on April 15, 1997. Summons was issued to Baird on April 24, 1997. The Hospital sought to recover payment for medical services rendered to Baird's deceased wife in the amount of \$21,098.25. Baird failed to respond to the complaint within twenty (20) days. On May 13, the twenty-first (21<sup>st</sup>) day after issuance of the summons, the Hospital filed a motion for default

judgment. The trial court granted the motion the following day, and entered a judgment in favor of the Hospital in the requested amount.

On May 16, Baird filed a motion to set aside the default judgment. An affidavit by the secretary for Baird's attorney was attached, stating that she had inadvertently neglected to note the due date for the response on counsel's calendar. In subsequent pleadings, Baird asserted that this claim had previously been presented in probate to his wife's estate, in an amount substantially less than what the Hospital now claimed. Baird also contested the amount owed to the Hospital.

On June 24, 1997, the trial court entered an order denying the motion to set aside the default judgment. On July 7, Baird filed a "motion to amend findings and to make additional findings." On July 28, 1997, following additional oral arguments on the question, the trial court entered an additional order, finding as follows:

Defendant did not show a valid excuse for default, and did not make a showing of a meritorious defense. The Court also finds that there would be prejudice to the other party in setting aside the Default judgment. The Court further finds that the filing of the motion pursuant to CR 52.02 was not filed timely since it was not filed within 10 days after entry of the judgment.

The Judge has previously ruled on these same questions in this matter, and counsel for the Defendant has made the same arguments that he made prior to the last ruling in an order issued by this Court on June 24, wherein the

Defendant's Motion to set aside the Default Judgment was Overruled. However, with the second argument presented to the Court, counsel conceded the issue of liability on the part of the Defendant, but seeks to preserve the issue of amount owed by the Defendant.

Record on Appeal [ROA], at pp. 43-44.

This appeal followed. On the preliminary issue of timeliness of the motion, the procedural posture of this case presents several issues. First, Baird filed his initial motion, pursuant to CR 55.02, two (2) days after entry of the default judgment. While his counsel made several procedural missteps and corrections, the initial motion was timely.

We interpret Baird's July 7 pleading as a motion for additional findings pursuant to CR 52.02, coupled with a motion to alter amend or vacate a default judgment pursuant to CR 59.05. Insofar as the motion sought to vacate or amend the trial court's prior order denying the motion to set aside the default judgment, we agree that the motion was neither timely nor proper. A motion pursuant to CR 55.02 effectively functions as a motion to alter, amend or vacate a judgment. Once the trial court denied his motion to set aside a default judgment, he was not entitled to a second bite at the apple under CR 59.05.

However, insofar as the pleading served as a motion for additional findings pursuant to CR 52.02, we find that the motion was timely and proper. When a court denies a motion to set aside a default judgment, the court's order should be accompanied by some articulation of the factual, legal and discretionary issues

presented. Greathouse v. American National Bank & Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990). Baird was entitled to seek more specific findings to preserve his rights on appeal.<sup>1</sup> Furthermore, considering the intervening holiday, we find that Baird filed his motion within ten (10) days from entry of the order denying his motion to set aside the default.

We now turn to the substantive issue in this appeal. Baird contends that the trial court abused its discretion when it denied his motion to set aside the default judgment. Default judgments are covered by CR 55.01, which provides, in pertinent part:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defends as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor....The motion for judgment against a party in default for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take into account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

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<sup>1</sup> In fact, in its order entered July 24, 1997, the trial court set out its reasons for denying the motion to set aside the default judgment in greater detail.

A default judgment may be set aside for good cause shown in accordance with CR 60.02. CR 55.02. Among other reasons, CR 60.02 permits relief from a judgment due to "mistake, inadvertence, surprise or excusable neglect." The law clearly disfavors default judgments. Moreover, the trial court has wide discretion to set aside a default judgment. A liberal attitude should be observed toward a timely application to set aside a default judgment, although delay in pleading without reasonable excuse cannot always be overlooked. Childress v. Childress, Ky., 335 S.W.2d 351, 354 (1960). Nonetheless, a motion to set aside a default judgment addresses itself to the sound discretion of the trial court and the exercise of that discretion will not be disturbed on appeal except for abuse. Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959).

The moving party cannot have the judgment set aside and achieve his day in court if he cannot show good cause and a meritorious defense. Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured. Green Seed Co. v. Harrison Tobacco Storage Warehouse, Inc., Ky.App., 663 S.W.2d 755, 757 (1984). To set aside a default judgment, the moving party must show:

- 1) a valid excuse for the default;
- (2) a meritorious defense to the claim;
- and (3) absence of prejudice to the non-defaulting party.

Perry v. Central Bank & Trust Co., Ky.App., 812 S.W.2d 166, 170 (1991). Absent a showing of all three (3) elements, the default judgment need not be set aside. Sunrise Turquoise, Inc.

v. Chemical Design Co. Inc., Ky.App., 899 S.W.2d 856, 859 (1995).

We take issue with the trial court's finding that the Hospital would be prejudiced by setting aside the default judgment. There was no evidence offered that the Hospital's prosecution of its claim against Baird would be prejudiced in any way. Indeed, the Hospital had previously asserted that Baird was liable, by written agreement, to reimburse it for attorney fees and expenses incurred in enforcing payment of the indebtedness. Therefore, the trial court's finding of prejudice was clearly erroneous.

Nonetheless, we must agree that Baird's counsel failed to present sufficient grounds to set aside the default judgment. Mere inattention on the part of a defendant does not constitute good cause to set aside a default judgment. Perry v. Central Bank & Trust Co., Ky.App., 812 S.W.2d 166, 170 (1991). The failure by counsel's office staff to note the due date for a responsive pleading is not a valid excuse for default. While the trial court would have been within its discretion to accept the excuse, the trial court was not required to do so.

However, we conclude that the trial court did err in refusing to allow Baird to contest the issue of damages. A defaulting party admits liability, but generally does not admit the amount of unliquidated damages. Howard v. Fountain, Ky.App., 749 S.W.2d at 690, 693 (1988). Furthermore, even when a trial court grants default judgment, the plaintiff must still prove entitlement to recover, and the amount of its damages. CR 55.01.

As the trial court pointed out, even without the default judgment, Baird has admitted liability for his wife's hospital bills. He contests only the amount of those bills. The trial court entered the default judgment based upon the allegations in the Hospital's complaint. Yet while the Hospital alleges that Baird is contractually liable for attorney's fees incurred in the collection of these bills, no such contract appears in the record. Likewise, this Court finds none of the Hospital bills in the record either. Consequently, this Court agrees with Baird that the trial court erred in denying his motion to set aside the default judgment with respect to damages. Note however, that a party in default for failure to appear shall be deemed to have waived his right to a trial by jury. CR 55.01. Therefore, the issue of the amount of damages shall be determined by the trial court.

Accordingly, the order of the Daviess Circuit Court denying Baird's motion to set aside the default judgment is affirmed, except as to the amount of damages, and this action is remanded for an evidentiary hearing to determine the amount owed by Baird.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph R. Flaherty  
Flaherty & Flaherty  
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Ronald L. Presser  
Wilson, Johnson & Presser  
Owensboro, Kentucky