

## ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA11-726ROSELYN G. GIRA LIVING  
REVOCABLE TRUST

APPELLANT

V.

FRANK BRYANT, ALICE BRYANT,  
AND BONNIE KELLEY

APPELLEES

Opinion Delivered November 28, 2012

APPEAL FROM THE NEWTON  
COUNTY CIRCUIT COURT  
[NO. CV-2008-54-4]HONORABLE GORDON WEBB,  
JUDGE

REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order denying and dismissing appellant's petition claiming an easement across appellees' property. Appellant argues, *inter alia*, that the trial court erred in setting aside, on grounds of excusable neglect, an earlier default judgment that had been entered in favor of appellant. We agree, and we reverse.

Default judgments are not favored in the law, and relief from a default judgment will be liberally granted when the circumstances so warrant. *Burns v. Madden*, 271 Ark. 572, 609 S.W.2d 55 (1980). Circumstances under which a default judgment may be set aside are enumerated in Ark. R. Civ. P. 55, which provides that the court may, upon motion, set aside a default judgment previously entered for enumerated reasons including mistake, inadvertence, surprise, or excusable neglect. The standard of review applicable to orders setting aside default judgments is whether the trial court abused its discretion. *Grubbs v. Hall*, 67 Ark. App. 329, 999 S.W.2d 693 (1999). We hold that the trial court in the present case

abused its discretion in setting aside the default judgment because there was no evidence to show the sort of mistake, inadvertence, surprise, or excusable neglect that would reasonably justify relief from a default judgment.

There is no question that appellees were properly served with, signed for, and read appellant's summons and complaint. In their motion, appellees Bryant asserted that the default judgment should be set aside because appellant's attorney deceived, misled, and confused them by failing to answer their questions regarding the lawsuit filed against them. The trial court found excusable neglect based on a finding that appellees Bryant were elderly, had no basic knowledge or understanding of legal procedures, were unable to obtain legal information or advice from appellant's attorney, and attempted to obtain representation under their Union Fund but the union did not provide them with counsel within the time allowed to answer under Arkansas law. However, there was nothing to show that appellees were incompetent, illiterate, or otherwise incapable of comprehending the summons that plainly informed them that a lawsuit had been filed against them and that a default judgment could be entered against them should they fail to answer by a date certain. To the contrary, the record shows that appellees had been sufficiently aware of the legalities relating to easements to purposely obstruct the claimed easement that appellant had employed for decades, and sufficiently energetic to cause a dwelling to be constructed on the claimed easement, with work continuing even after being served with a temporary restraining order.

Nor can appellant's attorney be faulted for failing to give legal advice to the appellees. In fact, the trial court expressly found that appellant's counsel fully complied with the law

regarding taking a default judgment; did not fail in his duties in any form or fashion; had no duty when contacted by appellees following proper service to provide any type of information; and that he did not commit fraud, misrepresentation, or misconduct in communicating with them.

Finally, the record does not support the trial court's finding that appellees, through no fault of their own, were unable to obtain timely representation through the United Auto Workers Legal Services Plan. Indeed, appellees' motion to set aside the default judgment frankly states that they waited several weeks before attempting to obtain legal advice from appellant's counsel, and that they sought to obtain counsel through their union plan only after repeatedly seeking to obtain legal advice from the attorney representing the opposing party. In the absence of a prior attorney-client relationship, misunderstandings about who will defend an action are not sufficient to meet the threshold requirements for setting aside a default judgment. *See CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991).

We note, however, that appellees Bryant did file an answer in this case. Although the answer was untimely and filed only after the default hearing had been held, it was filed before the default judgment was entered. This constituted an appearance in the action sufficient to allow them to present a defense on damages when the default is reinstated, *Robinson v. Robinson*, 103 Ark. App. 169, 287 S.W.3d 652 (2008), which in the present case would involve determining the precise location of the easement granted in the default judgment that

the trial court erroneously set aside. Consequently, we remand for the trial court to conduct such proceedings as are necessary to do so.

Reversed and remanded.

GLADWIN and ROBBINS, JJ., agree.

*George J. Stone*, for appellant.

*Charles W. Pearce*, for appellees.