

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000281-MR

DANNY L. FERRELL

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 13-CI-00923

LIBERTY MUTUAL FIRE INSURANCE  
A/S/O BRENDA PARIS

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Danny L. Ferrell brings this appeal from a January 17, 2014, Default Judgment of the Christian Circuit Court against Ferrell in the amount of \$35,000. We vacate and remand.

The procedural facts are as follows. Liberty Mutual Fire Insurance Company, a/s/o Brenda Paris (Liberty Mutual) filed a complaint against Ferrell on

August 12, 2013. The underlying allegations in the complaint arose from a traffic accident involving Paris and Ferrell on February 22, 2012, in Hopkinsville, Kentucky. Liberty Mutual, Paris's insurance carrier, paid reparation benefits to Paris and was subrogated to her claim against Ferrell.

The complaint was subsequently served upon Ferrell on December 20, 2013. On January 13, 2014, Ferrell's attorney filed in the Christian Circuit Clerk's Office a Notice of Entry of Appearance and a Motion for Extension of Time to file an answer.<sup>1</sup> Liberty Mutual filed a Motion for Default Judgment on January 16, 2014; the motion's certificate of service indicates that the motion was served by U.S. Mail upon Ferrell, and not upon his attorney, on January 13, 2014. The motions effectively passed each other through the U.S. Mail. Without ruling on the Motion for Extension of Time, the circuit court rendered a default judgment against Ferrell in the amount of \$35,000 on January 17, 2014. The default judgment read, in relevant part:

On Motion of [Liberty Mutual], it appearing to the Court that the Defendant, Danny L. Ferrell, has been duly and personally served with process and is before the Court, has failed to appear and answer to [Liberty Mutual's] Complaint herein, the time allowed by law for answering having expired, and the Court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that default of Defendant, Danny L. Ferrell, be, and the same is hereby, entered by the Court and [Liberty Mutual] is awarded a Default Judgment against Defendant, Danny L. Ferrell; the Court finds the

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<sup>1</sup> The certificate of service indicates that the Notice of Entry of Appearance and Motion for Extension of Time were also served by U.S. Mail on January 13, 2014.

allegations contained in [Liberty Mutual's] Complaint to be true; that [Liberty Mutual] recover from Defendant, Danny L. Ferrell, a sum equal to \$35,000.00 with interest thereon after the judgment is entered at the rate of twelve percent (12%) per annum until paid, and costs of this action.

The default judgment did not address Ferrell's Motion for Extension of Time to file a late answer to the complaint. This appeal follows.

Ferrell argues that the circuit court erred by rendering the default judgment. For the following reasons, we conclude that the circuit court abused its discretion by rendering the default judgment without ruling on Ferrell's Motion for Extension for Time to file a late answer or responsive pleading.

Kentucky Rules of Civil Procedure (CR) 55.01 provides, in part, that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefore." And, the granting of a default judgment is within the discretion of the circuit court and will only be disturbed on appeal for an abuse of discretion. *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686 (Ky. App. 2009). Pursuant to CR 55.02, a default judgment may be set aside for good cause shown in accordance with CR 60.02.

In the case *sub judice*, the complaint was filed on August 12, 2013, and was served upon Ferrell on December 20, 2013. Thereupon, pursuant to CR 12.01, Ferrell had twenty days from December 20, 2013, to timely file an answer, which in this case was no later than January 9, 2014. He failed to do so. But, on

January 13, 2014, Ferrell filed a Motion for Extension of Time to file an answer.<sup>2</sup>

Such motion is permitted under CR 6.02. Although Ferrell's motion only referenced it was submitted for decision under CR 78(2), the motion clearly contemplates or seeks an enlargement of time which is exclusively addressed under CR 6.02. There can be no dispute, as shown by the meager record in this case, that the circuit court never ruled on Ferrell's CR 6.02 motion to file a late answer, but rather simply rendered a default judgment for Liberty Mutual. And, the default judgment did not reference Ferrell's CR 6.02 motion. This fact is pivotal.

The circuit court's stated reason for rendering the default judgment was Ferrell's failure to timely respond or file an answer. CR 6.02 is the procedural mechanism for extending the time to do an act required by the Rules, including the filing of an answer. While the circuit court enjoys discretion when ruling upon a motion for default judgment, the circuit court is not permitted to disregard a properly filed CR 6.02 motion by rendering a default judgment while said motion was pending, as the rules plainly contemplate that such motions must be addressed, if filed before entry of a judgment. *See* CR 6.02(b). The circuit court's entry of default judgment thus constituted an abuse of discretion.

Ferrell's motion for enlargement of time to file a late answer or responsive pleading was filed after the expiration of the twenty-day period to

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<sup>2</sup> In the Motion for Extension of Time, Danny L. Ferrell specifically cited to Kentucky Rules of Civil Procedure (CR) 78(2). Under CR 78(2), a circuit court may promulgate a local rule to provide for submission and determination of a motion without an oral hearing. The Christian Circuit Court did promulgate such a rule. Under Rules of Christian Circuit Court 5, a motion may be "granted routinely by the Court ten days after filing unless a response is filed."

answer the complaint or file a responsive pleading as allowed by CR 12.01. Under CR 6.02(b), a motion for enlargement may be filed late and prior to entry of a default judgment, if one can establish that the failure to act timely in filing an answer was the result of excusable neglect. The record in this case reflects that the motion for extension was served and filed of record prior to the filing of the motion for default judgment and entry of the default judgment by the court. Accordingly, the procedural scheme of the civil rules mandates that this motion be addressed before entry of a default judgment.

Under the unique circumstances of this case, we vacate the default judgment and remand this action for the circuit court to rule upon Ferrell's Motion for Extension of Time to file a late answer under CR 6.02. As the CR 6.02 motion was filed after expiration of the time to file an answer, the circuit court must determine whether Ferrell has demonstrated "excusable neglect" for failing to timely file the answer per CR 6.02(b). If excusable neglect is established to the satisfaction of the circuit court, and the answer is permitted to be filed, then a default judgment shall not be entered. However, if excusable neglect is not established, this opinion does not address the merits of the motion for default judgment or entry thereof.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the Default Judgment of the Christian Circuit Court is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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