

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001748-MR

MATT MERCER AND  
BARBI MERCER

APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 13-CI-00340

PRISCILLA F. BREWER AND  
BENNY R. BREWER, deceased

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: In Kentucky, default judgments are disfavored and a trial court is vested with broad discretion in its determination whether to set such a judgment aside. The issue we address in this case is whether the Pike Circuit Court erred in its decision not to set aside the default judgment granted Priscilla

Brewer against Matt and Barbi Mercer. We hold the trial court did not abuse its discretion, and therefore, affirm its judgment.

### **I. Facts and Procedural Background.**

The Mercers rented a house from Brewer and her late husband.<sup>1</sup> Brewer filed this action alleging damages to the property as a result of the Mercers' tenancy. The Mercers, through counsel, initially filed an answer to Brewer's complaint, and the matter was scheduled for a jury trial on April 30, 2014. Approximately three months prior to the scheduled trial, the Mercers' initial counsel filed a motion to withdraw, and requested the Mercers be given thirty days to secure substitute counsel. By Order entered February 10, 2014, the trial court granted the motion, cancelled the trial, and stated: "the [Mercers] shall have thirty (30) days from [February 10] to obtain new counsel or inform the Court that they are proceeding without counsel."

Two months later, the Mercers had failed to satisfy the court's order. Brewer, on April 10, filed a motion to compel the Mercers to comply with the February 10 Order or, alternatively, to strike the Mercers' answer to the complaint. On May 12, the trial court entered an Order giving the Mercers ten days to either obtain new counsel or inform the court that they were proceeding without counsel.<sup>2</sup>

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<sup>1</sup> Benny Brewer passed away during the pendency of this action. The action was properly revived in Priscilla Brewer's sole name as the sole beneficiary of Benny Brewer's estate.

<sup>2</sup> The May 12 Order recited that "the Court . . . conducted a hearing on May 9." That statement is technically true since the Order was signed in open court and a videotape of the proceeding is in the record. The Mercers did not appear to be present, but the pleadings contain a record of notice to them.

The Order warned that “[i]f neither of these takes place within ten (10) days, the Court will strike the [Mercers’] answer.”

By Order entered June 11, the trial court ordered that the Mercers’ answer be stricken as they had failed to comply with the court’s May 12 Order. The court further directed that “[t]his matter shall proceed as it would with the [Mercers] in default.” Brewer promptly moved for a default judgment, which the trial court granted by Order and Default Judgment entered June 16.

On June 26, new counsel entered his appearance on behalf of the Mercers, and simultaneously moved to set aside the default judgment, pursuant to CR<sup>3</sup> 55.02 and 60.02. The Mercers claimed they had difficulty obtaining new counsel and sought to retain, and thought they had retained, this same counsel earlier. Brewer opposed the motion, and submitted her claim for damages. On August 1, the trial court held a hearing on the motion to set aside default judgment, and motion to award damages. After taking the matter under submission, the trial court denied the motion to set aside default judgment, and entered a final judgment awarding Brewer \$9,779.03 in damages, plus her costs. This appeal follows.

## **II. Standard of Review.**

Under CR 55.02, a trial court may set aside a default judgment in accordance with CR 60.02 for “good cause shown.” “Although default judgments are not favored, trial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse.”

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<sup>3</sup> Kentucky Rules of Civil Procedure.

*Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky. App. 1988) (citing *Kidd v. B. Perini & Sons*, 313 Ky. 727, 233 S.W.2d 255 (1950)). The test for abuse of discretion “is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

### **III. Issues on Appeal.**

The Mercers argue on appeal that they have demonstrated good cause for setting aside the default judgment. Kentucky courts interpreted the “good cause” standard under CR 55.02 as requiring “the moving party to make a timely showing of the circumstances under which the default judgment was procured. Specifically, 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.” *Sunrise Turquoise, Inc. v. Chem. Design Co.*, 899 S.W.2d 856, 859 (Ky. App. 1995) (citing *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991)). Absent a showing of all three elements, the default judgment will not be set aside. *Sunrise*, 899 S.W.2d at 859.

In this case, the trial court ruled that the Mercers had failed to satisfy any of the three elements, in that their motion to set aside default judgment was devoid of any supporting documentation. While the Mercers dispute those findings, the Mercers appear to have been simply careless in permitting the case to get to point of a default judgment. They make no allegation that they did not

receive the notices from Brewer's counsel or the court; they could have simply advised the court that they intended to proceed without counsel. As noted by the trial court, mere carelessness on a party's part is an insufficient reason to set aside a default judgment. *Perry*, 812 S.W.2d at 170. We are unable to conclude that trial court erred in finding that the Mercers had failed to present a meritorious defense. Their appellate brief claims the sufficiency of their answer, prior to its being stricken, but that answer is nothing more than a bare bones denial of the complaint without any supporting material or factual claims. Finally, the trial court found that Brewer would suffer prejudice in attempting to enforce her claim since the Mercers had left Pike County and moved to Spencer County. Again, we are unable to say that the trial court erred in this finding.

#### **IV. Conclusion.**

For the foregoing reasons, the Order and Judgment of the Pike Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

LAMBERT, D., JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

LAMBERT, D., JUDGE, DISSENTING: I respectfully disagree with the majority's conclusion that the trial court did not err in concluding the Mercers did not satisfy any of the elements of CR 55.02, and consequently denying their motion to set aside the default. I therefore dissent.

Kentucky Courts have consistently met the entry of default judgments with disfavor. *Kidd v. Perini & Sons*, 233 S.W.2d 255 (Ky. 1950); *Educator & Executive Insurers, Inc. v. Moore*, 505 S.W.2d 176 (Ky. 1974); *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007). Such disfavor is evident in the broad discretion given to trial courts in motions to set aside default judgments. *Id.* The trial court nonetheless denied the Mercers' motion to set aside the default judgment it had entered against them.

However, the true error by the trial court lies in the process leading to the entry of the default judgment. The trial court, not the Mercers, created the procedural default which precipitated the default judgment when it struck the Mercers' answer from the record.

The behavior referred to by the majority as carelessness on the part of the Mercers actually presents a question as to when the attorney-client relationship existed between The Mercers and their current counsel. The Mercers believed they had retained an attorney, while that attorney did not hold that belief. Consequently, counsel failed to enter an appearance until after the trial court's deadline for doing so had lapsed. The trial court attributed this attorney's nonfeasance to his clients, and imposed a most severe sanction of striking a properly and timely filed pleading.

Applying the functionally equivalent Rule 55(c) of the Federal Rules of Civil Procedure, the Sixth Circuit previously noted, "[a] default judgment deprives the client of his day in court, and should not be used as a vehicle for

disciplining attorneys.” *Shepard Claims Service, Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 195 (6<sup>th</sup> Cir. 1986). The trial court sanctioned the clients for what is ultimately counsel’s mistake, and compounded that unjust sanction—in the face of counsel’s admission of his own potential negligence—by denying the motion by which the error could have been corrected. This series of rulings by the trial court was arbitrary, particularly given the relative ease by which default judgments may be set aside.

CR 55.02 has been interpreted together with CR 60.02 as having three requirements for a trial court set aside a default judgment. First, a valid excuse for the default must exist. Second, a meritorious defense to the underlying claim must exist. Finally, there must be a showing that the non-defaulting party would not be prejudiced by re-opening the litigation. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166 (Ky.App. 1991). Contrary to the majority’s holding, I believe each of these elements to have been satisfied.

The Mercers have a valid excuse for the default. First, as previously stated, the *trial court* created the condition of default by immediately and arbitrarily leaping to the most severe sanction of striking the Mercers’ properly filed answer. Second, also as discussed above, the Mercers acted under a good faith, but mistaken, belief that they had obtained the services of an attorney and an entry of appearance was forthcoming. Default judgment, as a sanction for a discovery violation, must rest on a finding of willfulness on the party of the party to be sanctioned. *Greathouse v. American Nat’l Bank & Trust Co.*, 796 S.W.2d

868 (Ky.App. 1990). Though the carelessness of an attorney is not sufficient to excuse the failure to file a timely response (*S.R. Blanton Dev. Inc. v. Investors Realty and Mgt. Co., Inc.*, 819 S.W.2d 727, 729 (Ky.App. 1991)), such carelessness would not be an issue but for the trial court's action in striking a properly filed pleading when other, non-fatal, sanctions were available.

Additionally, the court held in *River Trading Co, Ltd. v. High Ridge Mining, Inc.*, 179 F.R.D. 214 (E.D.Ky. 1998) that when a party's own negligence did not cause the default, the failure to timely file a pleading amounted to excusable neglect. Thus, placing trust in an attorney who later negligently failed to make a timely effort to enter an appearance constitutes excusable neglect on the part of the Mercers.

The majority holds that the Mercers' answer is insufficient to assert any meritorious defense because it simply denies the allegations without any supporting material or factual claims. The Mercers contended that the legal sufficiency of their answer had not been challenged below, and highlighted that the trial court struck the answer, not for any deficiencies, but as a sanction for failing to meet an inflexible timetable imposed by the trial court. While the sparse record does not reflect an assertion of an affirmative defense, the trial court's ruling deprived the Mercers of any opportunity to develop and argue any defense, including the insufficiency of Brewer's proof. In light of Brewer's equally unclean hands in neglecting to prosecute the claims for a period of several months, such ruling was arbitrary, and thus an abuse of discretion.



Finally, the majority emphasizes the trial court's finding that Brewer would suffer prejudice in attempting to enforce her claims following The Mercers' relocation to another county within Kentucky. However, the trial court's finding does not illustrate just how the Mercers' relocation actually caused prejudice. The circumstances actually refute that finding. The Mercers had retained counsel in Pikeville, and never demonstrated any willful failures to appear for court dates. The trial court's finding appears to be based on an unfounded assumption rather than the record. It was therefore an abuse of discretion.

For the foregoing reasons, I believe the trial court's denial of the Mercers' motion to set aside the default judgment against them to have been arbitrary and, for that reason, an abuse of discretion. Consequently, I would reverse the trial court and remand for further proceedings, allowing the Mercers to defend themselves. As such, I must respectfully dissent.

BRIEF FOR APPELLANT:

Howard Keith Hall  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Jim G. Vanover  
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