DEC 28 1977
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

PEGGY ELLEN THORNE, Conservator of MICHAEL L. MERKLIN;	)	Filed December 28, 1977
Appellee,	)	
vs.	)	308 / 2-59665
MICHAEL WILLIAM FISCH, and DEBORAH KAY FISCH, a/k/a DEBORAH KAY ELWELL,	)	
Appellants.	)	

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Defendant appeals trial court's denial of her motion under rule 236 to set aside default - Reversed and remanded.

Robert L. Fanter and David L. Phipps, of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, for Appellee.

Leslie Babich, of Allen, Babich and Bennett, Des Moines, for Appellants.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Deborah Kay Fisch, also known as Deborah Kay Elweli, appeals the trial court's order overruling her motion to set aside a default judgment entered against her and defendant Michael William Fisch in the amount of $300,000. Neither defendant appeared nor answered in an action commenced by plaintiff Peggy Ellen Thorne, as conservator for her son Michael Merklin, for damages for injuries sustained by Merklin in an automobile-motorcycle accident. Defendant asserts the trial court abused its discretion in overruling her motion when the testimony established she was not the driver of the automobile at the time of the accident as alleged in the petition and that her codefendant had advised her he would take care of everything.

Michael Fisch and Deborah Fisch (a/k/a Elwell) were husband and wife at the time of the accident. Both defendants were in the automobile which was allegedly being driven by Michael. As a result of the severe injuries sustained by Michael Merklin, his mother, as conservator, commenced this action against defendants praying for $1,500,000 in damages. The petition alleged that Deborah was driving the automobile which struck Merklin's motorcycle.

Upon being served with the original notice, Deborah called Michael, who at that time was her former husband, and he advised her that the part of the petition which alleged she was the driver was a mistake and that his attorney was handling or would handle the matter. Deborah also attempted to call plaintiff's attorney, but he was out of the office at the time. Later that evening, Deborah's common-law husband, Andrew Meadows, called Michael Fisch to inquire the meaning of the petition and what should be done to straighten out what defense Deborah should have. Michael Fisch again stated it was a mistake and he would take care of it.

Neither defendant appeared nor answered and subsequently a default judgment was entered for $300,000. Pursuant to rule 236, Rules of Civil Procedure, Deborah filed a motion to set aside default on the fifty-ninth day after judgment was entered. Deborah asserted she was neither the owner nor operator and that her codefendant had promised to take care of the matter. In overruling Deborah's motion the trial court found there was no showing of good cause, mistake,

inadvertance or excusable neglect under rule 236, R.C.P., and concluded a showing of confusion and uncertainty by one who was served with proper notice was not sufficient to permit or require the granting of such motion. Defendant then appealed.

Rule 236, R.C.P. provides,

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

The present rule 236 dealing with the setting aside of default is more liberal than the former statute on the subject. Davis v. Glade, 257 Iowa 540, 133 N.W.2d 683 (1965). Moreover, the supreme court has shown more reluctance to find an abuse of discretion where the judgment has been set aside than where relief has been denied. Oldis v. John Deere Waterloo Tractor Works Inc., 259 Iowa 1111, 147 N.W.2d 200 (1966). Recently, the court observed it had been liberal in affirming determination of default-voiding mistake, inadvertence and excusable neglect in rule 236 appeals. Rath v. Sholty, 199 N.W.2d 333 (Iowa 1972).

The purpose of rule 236 is to allow a determination of litigation on the merits as opposed to an ex parte adjudication when the absence of an opposing litigant is due to his nonprejudicial inadvertence or excusable mistake. Hansman v. Gute, 215 N.W.2d 339 (Iowa 1974).

In Hobbs v. Martin Marietta Company, 257 Iowa 124, 131 N.W.2d 772 (1964), the defendants sent the original notice by mail to its insurer which failed to appear. Although the notice arrived it was not delivered to the person who usually handled defendants' business. A refusal to set aside the default was reversed, the court finding a good faith intent to defend. The good cause requirement was met by showing loss of the papers in transit due to mistake, inadvertence or excusable neglect. Similarly, in Hannan v. Bowles Watch Band Company, 180 N.W.2d 221 (Iowa 1970), the trial court set aside a default due to another insurer mix-up and failure to appear. The decision was affirmed on the basis of excusable neglect.

A default judgment was set aside in Paige v. City of Chariton, 252 N.W.2d

433 (Iowa 1977). The court found surprise and excusable neglect where plaintiff's counsel misled defendants into believing the case was proceeding to trial.

In the final analysis the issue must be decided on the facts of the individual case. Precedents are of little value as there is much difference in the facts in the various cases. Flexsteel Ind., Inc. v. Morbern Ind. Ltd., 239 N.W.2d 593 (Iowa 1976). Since "good cause" does not exist without a defense, a prima facie showing of a meritorious defense must be made. This does not mean one guaranteed to previal at trial. 239 N.W.2d at 599.

In the case at bar, defendant asserts she did not own nor drive the car involved in the accident. If these facts are established, the defense is meritorious and plaintiff has no case. Cf. Davis v. Glade, 257 Iowa 540, 133 N.W.2d 683 (1965). Defendant, though believing she could not be rightly named as the driver, did not ignore the notice but made attempts to straighten the matter out by contacting her former husband and trying to contact plaintiff's lawyer. She understood and relied on her former husband's statement that it was a mistake and he would take care of it. Good cause was legally established to set aside the default as to defendant Debra K. Fisch, a/k/a Elwell, for mistake or excusable neglect.

With directions to proceed in accordance with the rules of civil procedure, the case is reversed and remanded.