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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DENA DAVIS and **TIM DAVIS,**	)	
Plaintiffs-Appellees,	)	Filed October 22, 1986 326
vs.	)	
WELLING USED CARS, INC.,	)	6-242 85-1337
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. CL059-34745) - Joel D. Novak, Judge.

The defendant appeals from the district court's refusal to set aside a default judgment under Iowa R. Civ. P. 236. **AFFIRMED.**

Phil Watson of Watson & Peterson, P.C., Des Moines, for defendant-appellant.

Charles R. Turner, Des Moines, for plaintiffs-appellees.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

The defendant, Welling Used Cars, Inc., appeals from the district court's order overruling defendant's motion to set aside a default judgment pursuant to Iowa Rule of Civil Procedure 236. The defendant contends that the district court erred in holding that the defendant had failed to show good cause for setting aside a default judgment. We affirm.

The plaintiff Dena Davis was injured when she stepped into a hole on the defendant's used-car lot. Dena Davis and her husband later sued the defendant. The defendant's general manager asserts that he told the defendant's insurance agent of the suit and expected the defendant's insurer to provide a defense. However, no timely answer or appearance was filed on behalf of the defendant. The district court therefore entered a default judgment for the Davises.

The defendant then filed a motion to set aside the default pursuant to Iowa Rule of Civil Procedure 236. The defendant alleged that because it had notified its insurance agent of the lawsuit and had relied on its insurer to provide a defense, the entry of the default judgment had resulted from mistake or excusable neglect within the meaning of rule 236.

After a hearing, the district court refused to set aside the default judgment. The district court found that the defendant had not notified its insurance agent of the lawsuit until substantially after the end of the twenty-day period provided in Iowa Rule of Civil Procedure 53 for filing an answer or other response. Because of this delay, the district court held the defendant had not met its burden to establish good cause to set aside the default judgment under rule 236.

The defendant has appealed from the district court's refusal to set aside the default decree. The defendant contends that the entry of the default judgment resulted from mistake or excusable neglect. The defendant also contends the evidence does not support the district court's finding that the defendant

failed to notify its insurance agent of the lawsuit until after the end of the twenty-day period for filing an answer or other response. In the alternative, the defendant argues that such a delay in notifying the insurance agency, even if established, should not defeat its request to have the default judgment set aside.

Our scope of review is the correction of errors at law. Iowa R. App. P. 4. The district court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We review the evidence in a light most favorable to the trial court's ruling and will not interfere with the court's ruling in the absence of an abuse of discretion. Sher v. Burche, 353 N.W.2d 859, 862 (Iowa Ct. App. 1984).

The defendant on appeal contends that his failure to respond to plaintiff's petition pursuant to the twenty-day period provided in Iowa Rule of Civil Procedure 53 resulted from mistake or excusable neglect. Defendant maintains that it informed its insurance agent of plaintiffs' lawsuit well within the time limit of Rule of Civil Procedure 53 and that it therefore assumed that the insurance company would assume responsibility for its defense. Defendant contends that it was not until it received the order of default judgment that it realized the insurance company had not proceeded with the defense. We disagree.

Iowa Rule of Civil Procedure 236 provides that:

> 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 purpose of rule 236 in providing for a procedure to set aside a default judgment for good cause is to allow a determination of a controversy on its merits

rather than on the basis of nonprejudicial inadvertence or mistake. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). The Iowa Supreme Court has defined good cause as:

> a sound, effective, truthful reason, something more than an excuse, a plea, an apology, an extenuation or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence, want of ordinary care or attention, or to his carelessness or inattention. The movant must affirmatively show he intended to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so.

The burden of proof is on the party moving to set aside a default judgment. Id. A trial court has broad discretion in determining whether to set aside a default judgment, and its ruling will stand absent a showing of an abuse of discretion. Easton v. Crystal River Resources, Inc., 360 N.W.2d 138, 139 (Iowa Ct. App. 1984).

Defendant's president and general manager, Mike Sullivan, testified at the hearing that he had sent his insurance agent the original notice of plaintiffs' lawsuit two or three weeks after he received it in early December 1984, or roughly the first weeks in January. Sullivan testified that it was at this time that he assumed that the insurance company would be handling his defense. Sullivan therefore contends that he notified his insurance agent well within the twenty-day rule of Iowa Rule of Civil Procedure 53 and that any negligence on the part of his insurer in failing to answer plaintiffs' petition should not be imputed to the defendant. The record, however, reveals that Sullivan was completely unsure as to exactly when he first notified his insurance agent and sent the original notice of plaintiffs' petition. On cross-examination, Sullivan testified as follows:

> Q. When you received the lawsuit papers there was an original notice on the front, wasn't there? Was there a document that informed you that you had twenty

days to file a pleading or did you read them? A. I read them, but I don't honestly remember. Those papers were all turned over to the insurance agent.

Q. Okay. If I understood your testimony, you said something about when you did send the papers over you also sent this default judgment with them; is that correct? A. That's true. I sent everything.

Q. And are you aware of the fact that the default judgment in this case was entered on February 20, 1985? A. That's possible.

Q. Okay. And that would have been about two and a half months after you were served; isn't that right? A. That could be. I'm not sure.

Q. And you're saying that may have been the first time that you would have sent this lawsuit over to your insurance carrier; is that right? A. That, again, is possible. I don't remember.

Q. Okay. You can't come down to any sort of timeframe as to when you sent these papers to your insurance carrier, can you? A. I can't honestly tell you that, no.

Q. Could have been—even been in March of '85, couldn't it? A. I don't believe so.

Q. Okay. But you're—but its your testimony that when you did send the original lawsuit papers you sent the papers notifying you of the default judgment at the same time; isn't that right? A. I honestly don't know. I do know that I sent all the paperwork to him. I don't remember, I really don't.

Q. I believe earlier you said that "I didn't—just send the lawsuit. I sent the lawsuit and the other papers notifying me of the default at the same time." A. I may have. I can't argue that.

Q. You would admit that the default judgment was rendered on February 20th. You couldn't have sent the original lawsuit to the carrier before then if you sent them all at once, could you? A. I would agree with that.

Upon a review of the entire record, we believe that the defendant failed in meeting its burden of proof and that the trial court was correct in overruling the motion to set aside the default judgment. There is substantial evidence in the record to show that defendant's failure to answer plaintiffs' petition within the twenty-day rule was not due to mistake, inadvertence, surprise, or excusable neglect. Rather, Sullivan's testimony reveals that the failure to answer was due to his own carelessness and inattention. The record contains substantial

evidence that the defendant did not notify the insurance carrier until sometime after February 20, 1985. Additional support for this finding is found in Defendant's Exhibit A, a letter dated June 4, 1985, from defendant's insurance carrier to the defendant, wherein the insurance company states that it received the motion for default judgment and order, dated January 28, 1985, just prior to the sending of said letter. We also note that at no time did the insurance agent testify as to how soon after defendant received plaintiffs' petition he was contacted and notified of the pending suit. Additionally, the defendant was notified in the January 28, 1985, order granting default that a hearing on damages was scheduled for May 30, 1985, but that neither defendant nor anyone else appeared on defendant's behalf. We therefore hold that the trial court was correct in holding that the defendant had failed to meet its burden of showing good cause to set aside the default judgment and that the trial court did not abuse its discretion in overruling defendant's motion.

AFFIRMED.