



IN THE COURT OF APPEALS OF IOWA

ALTER COMPANY, an Iowa Corporation,)

Appellee,)

Filed April 15, 1977

v.)

R. M. MOORE, d/b/a ACE
INCINERATOR COMPANY, and
MOORE ENGINEERING CO., INC.,
an Iowa Corporation,)

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2-58027

Appellants.)

Appeal from Scott District Court - James R. Havercamp and
Max R. Werling, Judges.

Appeal from trial court's refusal to set aside default
judgment and resulting damage award. Affirmed.

J. Hobart Darbyshire of Carlin & Darbyshire, of Davenport,
for appellants.

Dana Craig of Lane & Waterman, of Davenport, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and
Carter, JJ.

ALLBEE, C.J.

Defendants appeal trial court's award of \$59,749.29 damages to plaintiff following entry of default judgment. Defendants assign three errors by trial court for reversal: (1) refusal to set aside the default; (2) utilization of the wrong measure of damages; (3) exclusion of certain proffered evidence of defendants. Errors are discussed in order of assignment.

I. Refusal to set aside default.

After an evidentiary hearing on the circumstances concerning the entry of default, trial court found that defendants' failure to defend "was due to his [*sic*] negligence and want of ordinary care, to his [*sic*] carelessness and inattention". Trial court's findings of fact in a hearing of this type are entitled to the same weight as a jury verdict unless there is no factual dispute. *Flexsteel Ind. Inc. v. Morbern Ind. Ltd.*, 239 N.W.2d 593, 596 (Iowa 1976); *Hansman v. Gute*, 215 N.W.2d 339, 342 (Iowa 1974). No detailed recitation of the factual basis of this claimed error is necessary since it is apparent that defendants' failure to send the original notice to their insurer until after the statutory time for appearance had elapsed is subject to several different inferences concerning defendants' intent to defend. *See Hansman v. Gute*, *supra*. We can not say as a matter of law trial court drew the wrong inference. Defendants' complaint that trial court utilized the wrong legal standard is without merit. *See Dealers Warehouse Co. v. Wahl & Associates*, 216 N.W.2d 391, 394-395 (Iowa 1974). Trial court did not abuse its discretion in refusing to set aside the default.

II. Damages.

After an evidentiary hearing on damages at which defendants were allowed to participate, trial court rendered judgment for \$59,749.29. *Compare*, *Hansman v. Gute*, *supra* at 343-344. Plaintiff's evidence consisted of proving the original cost of the

incinerator facility, \$87,469.67, and that its value after one year of operation was zero because of its defective condition. Defendants' witness attempted to show that the defective conditions could be remedied for approximately \$30,000.

The measure of damages for breach of construction contract is set forth in *Eihausen v. Consumers, Inc.*, 209 N.W.2d 59, 61-62 (Iowa 1973). Trial court correctly refused to apply the "repair costs" as the measure of damages in the instant case. Based on substantial evidence, trial court concluded that any reconstructed facility would still be defective. Such a reconstruction would not make plaintiff whole and would result in economic waste. See 13 Am.Jur.2d, Building, Etc. Contracts, § 78 (1964); 5 Corbin on Contracts, § 1089 (1964); Restatement, Contracts, § 346 (1939), comment 1. Defendants incorrectly assume that the burden of proving economic waste is upon plaintiff. See 5 Corbin on Contracts, *supra*. Trial court properly held that the peculiar facts of this case called for utilization of the "value" rule of recovery for plaintiff's damages, particularly in view of defendants' failure to substantially perform their contractual obligations. See *Roland A. Wilson v. Forty-O-Grand Corp.* 246 N.W.2d 922, 925-926 (Iowa 1976); *Golwitzer v. Hummel*, 201 Iowa 751, 756, 206 N.W. 254 (1925).

Neither do we find the evidence of damages under the "value" rule to be insubstantial. Defendants' contention that proof of the original cost of the facility is not substantial evidence of its value is without merit. *Schiltz v. Cullen-Schiltz & Assoc. Inc.*, 228 N.W.2d 10, 18-19 (Iowa 1975); *see also*, 5 Corbin on Contracts, § 1004 (1964). Our resolution that trial court appropriately measured the damages under the common law of construction contracts renders unnecessary consideration of plaintiff's rather frivolous suggestion that Article 2 of the

Uniform Commercial Code applies to this transaction. *See* section 554.2105, The Code (1977), official comment 1; *Gable v. Silver*, 258 So.2d 11 (Fla. App. 1972).

III. Exclusion of evidence.

Lastly, defendants claim trial court committed "gross" error in excluding their proffered evidence concerning misuse of the facility upon objection by plaintiff that the evidence was immaterial since liability for the damages had already been established by default. On appeal defendants' have urged that the evidence was admissible in rebuttal since plaintiff's witnesses had testified that a reconstructed facility would still be defective. However, since this theory of limited admissibility was not presented to trial court, reversible error can not be predicated on exclusion of this evidence under this theory on appeal. *State v. Arnold*, 225 N.W.2d 120, 122 (Iowa 1975).

Nor do we agree with defendants' assertion that this evidence was admissible in its own right to show plaintiff's failure to mitigate damages. Unless failure to mitigate damages is affirmatively pled, defendants are limited in claiming plaintiff's duty to mitigate damages to circumstances shown or arising from plaintiff's evidence. *Stauter v. Walnut Grove Products*, 188 N.W.2d 305, 312 (Iowa 1971); *see also*, *Hallett Construction Co. v. Iowa State Highway Comm.*, 261 Iowa 290, 294-296, 154 N.W.2d 71 (1967). Although it is somewhat dubious whether defendants' evidence was actually attempting to show a failure to mitigate damages, it can not be fairly said that defendants' proffered evidence arose directly out of the circumstances as shown by plaintiff's evidence. Trial court did not abuse its discretion in excluding the proffered evidence.

Trial court's judgment hereby is affirmed.

SNELL, OXBERGER and CARTER, JJ., concur; DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

The last day for an Appearance was Thursday, January 10, 1974. The plaintiffs did not take a default on the following day, Friday, but waited until Monday, January 14, 1974, to enter the default. This eventually resulted in a hearing on damages and a \$60,000 judgment against the defendant.

The defendant was personally served on the 21st of December, 1973, after working hours at his place of business. The company Christmas party was in progress, and the appellant understandably laid the papers aside. He did not return to work until December 26, 1973. Mrs. Graham, his girl Friday, the office administrator in this relatively small business, had left the state for Colorado on December 23, 1973, to visit an ailing sister. She returned on January 7, 1974. During this time, the company was in the process of taking year end inventory and receiving a certified audit.

When Mrs. Graham returned from Colorado, she went through the papers and correspondence and found the notice. She immediately called the Travelers Insurance Company representative and told them about the papers which was on January 7. The insurance company was handling a lawsuit at the time against this company in Scott County, and since they paid Travelers Insurance Company some \$10,000 per year in premiums, the appellant assumed that they would be able to handle this matter for them as they were handling the other trial matter.

The defendant was out of town at the time, and assumed that Mrs. Graham had taken care of everything as was her normal practice. In this business, it required the owner of the company to leave the community to service clients. Although the appellant had a lawsuit pending, he was not experienced in litigation.

Mrs. Graham forwarded the papers to the insurance company as per instructions of the telephone call. The insurance company subsequently on January 23, 1974, notified the appellants by letter that they declined coverage. At approximately this same time, the appellant received notice that there was to be a trial on the damages and that a default had been taken. The appellant immediately called his local attorney in Waterloo, Louis Beecher, who suggested that the appellants secure local lawyers in Davenport indicating that he knew McCracken who was a member of this law firm, now representing the appellants. This was on January 25, 1974. The hearing to set aside the default was February 14, 1974 with the trial court refusing to set aside the default.

The trial court's findings of fact in a hearing of this type are entitled to the same weight as a jury verdict unless there is no factual dispute. *Flexsteel Industries, Inc. v. Morbern Industries Limited*, 239 N.W.2d 593, 596 (Iowa 1976). The appellant must show an abuse of discretion by the trial court in refusing to set aside the default. An abuse of discretion is defined in *Best v. Yerkes*, 247 Iowa 800, 815-816, 77 N.W.2d 23, 32 (1956) where it states:

"Discretion is an elastic term, and an attempt to define or classify it is a difficult undertaking. 'Abuse of discretion' does not necessarily imply a dishonest motive or act; it is not ordinarily a term of reproach. There is no hard and fast rule by which to determine whether a court has abused its discretion. It arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as 'an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'"

Obviously, this is a high standard, and the Supreme Court of this state has interpreted rule 236, Rules of Civil Procedure, very firmly in recent years. Yet, the policy has been clearly set out on interpreting rule 236, R.C.P., and rule 215.1, R.C.P.

Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 21 (Iowa 1974) where it states:

"The general policy in this jurisdiction has been to allow trial on the merits. In general, a liberal approach is taken in appeals from rulings overturning default (rule 236, R.C.P.) entered because of mistake, inadvertence and excusable neglect. In Rath v. Sholty, 199 N.W.2d at 335-337, this same liberal approach taken in regard to rule 236 appeals was considered as the approach to be followed with respect to reinstatement under rule 215.1, R.C.P., in view of the 1965 amendment."

at 22 where it states:

"The basic policy in regard to rule 236 and thus to reinstatement situations under rule 215.1 has been stated to be to use a liberal approach in order to allow trial on the merits. ...

"... 'The rule that courts favor trials on the merits should be qualified to read that courts favor *expeditious* trials on the merits, *under settled rules of procedure*. It should not be stretched to the point where a judgment will be vacated when the petitioner, through his counsel, has ignored plain mandates of the rule with ample opportunity to abide by them. To do so would be to abrogate the rule and to reward negligence or inattention.' (Emphasis in the original)"

In this instance, there was a default taken on the second day after the last appearance date, or if you accept the ruling of the trial court, which I do not, it was only seven days. No delays were asked by either party and the total liability case was concluded on November 20, 1974,

not an extraordinary length of time considering the default hearings and other matters. So there is no real extensive delay such as occurred in *Wharff v. Iowa Methodist Hospital*, 219 N.W.2d 18, 21 (Iowa 1974), which was approximately a year before the application for reinstatement was filed.

There must be a *prima facie* showing of a meritorious defense. It was unquestionably shown in this case, as acknowledged by the trial court at the default hearing, by the proper Affidavits, and the damage hearing, that would indicate that at a minimum, a *prima facie* case was made. *Hannan v. Bowles Watch Band Co.*, 180 N.W.2d 221, 224 (Iowa 1970).

The purpose of rule 236, R.C.P., is to allow determination of a controversy on its merits rather than on the basis of non prejudicial inadvertence or mistake. *Edgar v. Armored Carrier Corporation*, 256 Iowa 700, 128 N.W.2d 922 (1964).

The courts look with favor upon trials and the rights of a litigant should not be denied proper hearing by strict application of legal formality. See *Newell v. Tweed*, 241 Iowa 90, 95, 40 N.W.2d 20 (1949). See also *Hannan v. Bowles Watch Band Co.*, *supra*. *Hannan* also stated that due to varying fact situations under which excusable neglect or inadvertence has been claimed, the results of the various cases do not always appear to be consistent. This is due in a large part to the difficulty of carrying out the *spirit and the letter of the rule which is designed to relieve a litigant from the disastrous effect which is often the relatively slight non prejudicial omission*. *Hannan v. Bowles Watch Band Co.*, *supra* at 223.

There must also be shown an intent to defend, see *Dealers Warehouse Co. v. Wahl & Associates*, 216 N.W.2d 391, 395 (Iowa 1974); *Gordon v. Gordon*, 200 N.W.2d 527, 528 (Iowa 1972); *Hobbs v. Martin Marietta Co.*, 257 Iowa 124, 131 N.W.2d 772, 775, 777 (1964). Rule 236 was adopted to make a mistake inadvertence excusable neglect, etc., reason to set aside a judgment. It was intended to liberalize the rule as advisory committee said in Iowa Rules of Civil Procedure Annotated, West, vol. 3 at 455, and as *Edgar v. Armored Carrier Corporation*, 256 Iowa 700, 128 N.W.2d 922 (1964), held that no setting aside should be done where there is gross neglect or willful procrastination. A meritorious defense where there has been no prejudice to the defendant and no delay of an expeditious trial, it is a different matter, and all of these factors had been met in the instant case.

There is no indication that the appellant ignored the plain mandates in the rules as indicated in *Dealers Warehouse Co. v. Wahl & Associates*, *supra* at 395. Indeed there is every indication of a misunderstanding, accident, mistake or excusable neglect which caused this defendant to be late in getting to his attorney.

I view this case comparable to *Rath v. Sholty*, 199 N.W.2d 333, 337 (Iowa 1972) where it states:

"This court has been liberal in affirming determinations of default-voiding mistake, inadvertence, and excusable neglect in rule 236 appeals. (cites omitted) The same policy shall be followed, within the scope of our permissible review, with respect to reinstatement under the rule 215.1 amendment. In this approach we implement the general rule found in 27 C.J.S. Dismissal & Nonsuit §78, p. 491:

'A statute giving the court power to set aside dismissals

is remedial, intended to be
liberally construed and applied
to the end that meritorious
trials may be had."

I view this as an abuse of discretion as defined by
Best v. Yerkes, 247 Iowa 800, 815-816, 77 N.W.2d 23, 32
(1956) by the trial court. The record shows that the trial
court failed to properly evaluate the judicial policy of
rule 236, R.C.P., as set forth in Rath v. Sholty, 199
N.W.2d 333, 337 (Iowa 1972) and Wharff v. Iowa Methodist
Hospital, 219 N.W.2d 18, 21 (Iowa 1974) which resulted in
a harsh and unfair judgment against the appellants. There
is still some humanity in the law which permits a proper
application of rule 236, R.C.P., and still allows the phi-
losophy of the opening paragraph of Edgar v. Armored Carrier
Corporation, 256 Iowa 700, 128 N.W.2d 922 (1964) to apply
without damage to the orderly process of law.

I would reverse.