

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AMCO BUILDERS & DEVELOPERS, INC.,

Plaintiff/Counterdefendant-  
Appellee,

V

TEAM ACE JOINT VENTURE,

Defendant/Counterplaintiff/Cross-  
Defendant,

and

HARTFORD FIRE INSURANCE COMPANY,

Defendant/Cross-Defendant,

and

TEAM CONTRACTING, INC., AMERICAN  
CONSTRUCTION & ENERGY, AND JARVIS  
PAINTING, INC.,

Defendants,

and

ACME DEMOLITION/INTERVALE JOINT  
VENTURE,

Defendant-Appellant,

and

INTERVALE EXCAVATING & DEMOLITION,  
INC.,

Defendant/Cross-Defendant-  
Appellant,

UNPUBLISHED  
November 2, 2001

No. 221513  
Wayne Circuit Court  
LC No. 97-709362-CK

And

LEROY LOVE, d/b/a ACME DEMOLITION  
COMPANY,

Defendant/Counterplaintiff/Cross-  
Plaintiff.

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Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

This action involves claims for breach of contract and tortious interference with a contractual relationship arising out of a construction project for the City of Detroit. Defendants-Appellants Acme Demolition/Intervale Joint Venture and Intervale Excavating & Demolition, Inc. (hereinafter referred to as “defendants”) appeal as of right from the trial court’s entry of a default against them and entry of a default judgment against Intervale Excavating for \$595,606.15, less any setoff for amounts recovered by plaintiff from defendant Team Ace Joint Venture.<sup>1</sup> We reverse and remand.

On November 23, 1998 a settlement conference was held in this matter. At that time, plaintiff informed the trial court that due to defendants’ lack of cooperation, plaintiff had been unsuccessful in its attempts to take the deposition of Clarence Carson, a principal of Intervale Excavating & Demotion, Inc. The trial court entered an order compelling defendants to produce Carson for deposition within thirty days. The order provided that failure to produce Carson for deposition would subject defendants to a motion for a default judgment.

Defendants failed to comply with the trial court’s order. On December 23, 1998, plaintiff filed a motion for entry of default. At the hearing on the motion, defense counsel Alex Miller stated that he had been unable to reach Carson due to the holidays and to Miller’s son’s illness. Miller acknowledged that he had “not participated” in discovery and admitted “not having been available to properly represent” defendants. He assured the court that communications with his clients had been restored. The court granted the motion for default and ordered a hearing on the issue of damages. The court’s order of default was entered January 27, 1999.

Defendants moved to set aside the default. In support of their motion, defendants submitted the affidavit of Carson attesting to facts supporting a meritorious defense. On March 12, 1999, the trial court conducted a hearing on defendants’ motion. Miller assumed

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<sup>1</sup> This appeal concerns only plaintiff and defendants Intervale Excavating & Demotion, Inc. and Acme Demolition/Intervale Joint Venture as a result of settlements by other parties.

responsibility for the delay and stated that defendants were not at fault. The court found that defendants had not demonstrated good cause to set aside the default and denied the motion.

The court ordered an evidentiary hearing on the issue of damages. Miller moved for an adjournment, which the court denied. The hearing was conducted in Miller's absence and the trial court entered a default judgment in favor of plaintiff on March 18, 1999.

Defendants retained new counsel and moved to set aside the default and default judgment. Defendants maintained that their failure to comply with the court's order to produce Carson for deposition was due solely to the fact that Carson had been unaware that the court had ordered his production for deposition. Defendants attached to their motion the affidavit of Carson, in which he attested that he was never notified that he was to appear for deposition. Carson stated that prior to April 14, 1999, he had no knowledge that a default and a default judgment had been entered, and he was unaware of the underlying circumstances that led to the entry of default. Defendants also attached the affidavit of Miller explaining the demands of his son's medical condition. Defendants urged the court to set aside the default judgment because this was not a situation where the parties had flagrantly or intentionally ignored the court's order. The court denied the motion to set aside the default judgment because Miller had earlier agreed to produce Carson for deposition.

On appeal, defendants challenge the trial court's entry of the default judgment as well as the trial court's denial of their motion to set aside the default and default judgment. We review a trial court's decision to enter a default or default judgment, as well as its ruling on a motion to set aside a default or default judgment, for an abuse of discretion. *Barclay v Crown Building and Development, Inc*, 241 Mich App 639, 642, 651; 617 NW2d 373 (2000). After reviewing the record, we reverse on the ground that the trial court abused its discretion in refusing to set aside the default judgment.

MCR 2.603(D)(1) provides that a motion to set aside a default or a default judgment shall be granted only upon a showing of good cause and filing of an affidavit of facts demonstrating a meritorious defense. *Zaiter v Riverfront Complex*, 463 Mich 544, 551; 620 NW2d 646 (2001); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223; 600 NW2d 638 (1999).<sup>2</sup> In this case, plaintiff did not challenge defendants' affidavit of meritorious defense. The parties address only the "good cause" requirement for setting aside a default judgment. To show "good cause," a party may establish "(1) a substantial irregularity or defect in the proceeding upon which the default is based," or "(2) a reasonable excuse for failure to comply with the requirements that created the default[.]" *Id.* at 233.

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<sup>2</sup> In addition to MCR 2.603(D), a court may grant relief from judgment of default pursuant to MCR 2.612 for "any other reason justifying relief from the operation of the judgment." MCR 2.612(C)(1)(f); MCR 2.603(D)(3); *Alken-Ziegler, supra* at 234 n 7. We recognize that defendants' motion was filed pursuant to MCR 2.612(C)(1)(f). However, the court denied the motion for lack of good cause, and our Supreme Court has stated that the language in MCR 2.612(C)(1)(f) "should not be read to obliterate the analysis" under MCR 2.603(D)(1). *Alken-Ziegler, supra* at 234 n 7.

As a general proposition, an attorney's negligence is attributable to the client and does not normally constitute grounds for setting aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995), citing *White v Sadler*, 350 Mich 511, 525; 87 NW2d 192 (1957). In circumstances where the attorney's conduct rises to the level of abandonment of the representation, his conduct is not imputed to the client. See *White, supra* at 523-524. We conclude that such circumstances exist in this case.

It is clear from a review of the record that Miller's care for his son seriously interfered with his representation of defendants. Carson's affidavit indicates the extent to which the representation was compromised. Miller failed to apprise Carson that the trial court's November 23, 1998 order compelled his deposition within thirty days. Further, Miller failed to notify Carson that a default and default judgment were entered as a result of defendants' failure to produce Carson for deposition. Miller's affidavit regarding the demands of his son's medical condition lends credence to defendants' argument.

In light of Carson's affidavit as well as Miller's representations to the court regarding his failure to participate and his unavailability to properly represent his clients, we conclude that Miller's lack of attention to this case exceeded neglect and constituted an abandonment of the representation. As such, it may not be imputed to defendants. *White, supra* at 522-524. See *Pascoe, supra* at 298-301. Miller's abandonment of this case constitutes a reasonable excuse for defendants' failure to comply with the requirements that caused the default judgment to enter. *Alken-Ziegler, supra* at 223, 233. Because plaintiffs did not offer any evidence to contradict Carson's affidavit, we conclude that the trial court abused its discretion in denying defendants' motion to set aside the default judgment for failure to demonstrate good cause.<sup>3</sup>

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Michael J. Talbot

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<sup>3</sup> Plaintiff argued below and now argues on appeal that defendants advanced the same arguments as in their opposition to the entry of default and offered no new grounds to warrant setting aside the default judgment. Plaintiff's argument ignores Carson's affidavit regarding Miller's failure to notify him that his deposition was compelled, which was offered for the first time with defendants' motion to set aside the default judgment.