STATE OF MICHIGAN

COURT OF APPEALS

DAN HERREMA and JOY HERREMA,

Plaintiffs/Counterdefendants,

v

PATRICIA REAGAN, FREDERICK M. VINCENT, SR., M.D., JERIANN BORK HOLLEMAN, STEVE BORKOWSKI, JUDY GOLCZYNSKI, ALBERT BORKOWSKI, JR., UNKNOWN HEIRS/DEVISEES OF ALYCE M. BORKOWSKI, UNKNOWN HEIRS/DEVISEES OF OTIS BAKER, and UNKNOWN HEIRS/DEVISEES OF NELL BAKER,

Defendants,

and

MELISSA O'BRIEN,

Intervenor/Counterplaintiff-Appellee,

and

JOSEPH O'BRIEN,

Counterdefendant-Appellant.

UNPUBLISHED
August 1, 2024

No. 364951
Kent Circuit Court
LC No. 20-003051-CH

Before: N. P. HOOD, P.J., and MURRAY and MALDONADO, JJ.

N. P. HOOD, P.J. (*dissenting*).

I respectfully dissent. Counterdefendant-appellant, Joseph O'Brien, appeals by right the trial court's order quieting title in favor of intervenor/counterplaintiff-appellee, Melissa O'Brien. On appeal, Joseph challenges the trial court's amended opinion and order, following a hearing on remand, denying his motion to set aside the default and default judgment underlying the trial

court's order quieting title in favor of Melissa. I would reverse and remand for the reasons stated below.

I. BACKGROUND

The majority opinion accurately describes the factual and procedural background of this case. Critically, this is a quiet-title action involving real property located at 1100 McReynolds Avenue in Grand Rapids, Michigan. In 1977, brothers Joseph and John O'Brien (Melissa's father) purchased the McReynolds property on a land contract. Melissa claims that in 1983, John bought Joseph's interest in the McReynolds property for $8,000. Years later, in December 2017, John gifted the McReynolds property to Melissa via a lady bird deed, retaining a life estate for himself. John died the following day.

In 2019, Melissa entered into a land contract to sell the McReynolds property to plaintiffs Dan and Joy Herrema. There were, however, gaps in the chain of title, so the Herremas filed a quiet-title action in April 2020 seeking to quiet title in their favor.

Relevant to this appeal, Melissa intervened in the quiet-title action and filed a countercomplaint against Joseph, seeking to quiet title in her name. Melissa alleged that John purchased Joseph's interest in the McReynolds property in 1983, as evidenced by a carbon copy of a money order for $8,000. Melissa claimed that Joseph vacated the McReynolds property in the early 1980s, and only she and John had lived on the property since that time. Melissa also alleged that the statute of limitations barred Joseph's claim of interest in the property and requested that the trial court declare her the sole record titleholder.

On January 27, 2021, Joseph's attorney, Joseph R. Gillard, III, was hospitalized with a severe kidney infection that left him septic and "extremely ill."[1] According to Gillard, the hospital released him on February 2, 2021, and he was "under specific Doctor's orders to be at home and to recuperate over the next 7 to 14 days." He noted he was "under high doses of prescribed medications" and was "semi-ambulatory" during his recovery.

On February 18, 2021, Melissa obtained entry of default against Joseph on the basis of his failure to answer the countercomplaint. Joseph answered the countercomplaint the following day. Gillard claimed that he filed Joseph's answer and forwarded it to Melissa's attorney "immediately" upon returning to work. Relevant here, Joseph denied that John bought his interest in the McReynolds property, that he vacated the property in the early 1980s, that Melissa's interest in the property was superior to his own, and that the statute of limitations barred his claim of interest in the property. Joseph also asserted several affirmative defenses, including that the statute of frauds barred Melissa's claim.

In April 2021, Melissa moved for entry of default judgment and an order quieting title in her favor. Joseph responded to Melissa's motion the following month. Joseph denied that John paid him for his interest in the property, noted that his answer was late by only four days because Gillard was hospitalized, and contended that the court clerk mistakenly entered the default after

[1] On Joseph's behalf, Gillard filed an answer to the Herremas' complaint on January 25, 2021.

Joseph answered the countercomplaint. After a hearing, the trial court entered a default judgment and an order quieting title to the property in Melissa's name in fee simple.

In May 2021, Joseph moved to set aside the default and default judgment. Noting the standard for such a motion, Joseph relied on Gillard's hospitalization and recuperation to establish good cause. For his meritorious defense, Joseph asserted that he never received payment for his interest in the McReynolds property and challenged Melissa's reliance on the money order, including that he never negotiated or cashed the money order. Joseph asserted that, under the statute of frauds, the money order could not transfer title to real property because such a transfer "require[d] a writing such as [a] deed."

Melissa responded to Joseph's motion later that same month. She argued that Joseph failed to show good cause to set aside the default and default judgment. She asserted that, during the time that he was recuperating from home, Gillard participated in other court proceedings and filed pleadings in other cases, contradicting his assertion that he was too sick to work. Melissa also noted that Joseph's answer to the countercomplaint was dated January 26, 2021, demonstrating that Gillard drafted the document before his hospitalization. She argued that if Gillard could participate in hearings and file pleadings in other cases, there was no reason he was unable to file "an already drafted and signed" answer.

In June 2021, the trial court held a hearing on Joseph's motion to set aside the default and default judgment. After the parties' arguments, the trial court denied Joseph's motion. Relying on Gillard's participation in other court proceedings before entry of the default, the court found that Joseph had not shown good cause to set aside the default or default judgment. The trial court did not analyze the meritorious-defense prong, though it also stated that even if it did find good cause to set aside the default and default judgment, it did not "find that a meritorious defense was stated either . . . ." The court entered an order denying Joseph's motion on June 23, 2021.

In a later appeal of that order, this Court entered a peremptory order vacating the trial court's order denying Joseph's motion to set aside the default and default judgment. *Herrema v Reagan*, unpublished order of the Court of Appeals, entered March 14, 2022 (Docket No. 358907). This Court explained that the trial court abused its discretion in concluding that Joseph failed to show good cause to set aside the default and default judgment "by failing to operate in the correct legal framework and to consider the totality of the circumstances as described in *Shawl v Spence Bros, Inc*, 280 Mich App 213, 237-239; 760 NW2d 674 (2008)." *Id*. We instructed the trial court on remand to consider and weigh the *Shawl* factors "and place its good-cause determination on the record." *Id*. We also stated, citing *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 390; 808 NW2d 511 (2011), that, "[a]s necessary, the trial court shall consider whether [Joseph] has a meritorious defense." *Id*.

In January 2023, the trial court held the remand hearing on Joseph's motion to set aside the default and default judgment. After the parties' arguments, the trial court found that the good-cause factors weighed in favor of denying Joseph's motion. The court again declined to consider Joseph's meritorious defense—the statute of frauds—because it found no good cause. It noted, however, that "the defense, as described by the defendant [sic: counterdefendant] in their affidavit, is not necessarily an absolute defense to this particular claim." The court indicated there were "other issues that apply other than this money order," including questions of who possessed,

maintained, paid taxes on, and lived at the property. Despite these questions, the court stated it was "not going to consider the defense altogether or in any more detail" because it found no "good cause to not file this answer prior to this default or default judgment being entered."

After the hearing, the trial court issued an amended opinion regarding Joseph's motion to set aside the default and default judgment. After recounting this Court's remand order and outlining the *Shawl* factors, the trial court again found that Joseph had failed to establish good cause for setting aside the default and default judgment and denied his motion, stating:

> In applying the *Shawl* factors to Counter-Defendant, (1) he missed the filing deadline; (2) he filed his Answer four days late; (3) he filed his Motion to Set Aside the Default Judgment on May 18, 2021, four days after Default Judgment was entered; (4) there was no defective process or notice; (5) Counsel for Counter-Defendant claims he went to the emergency room on January 26, 2021 and was subsequently admitted to the hospital for four days, but was back to work before the Answer was due and apparently forgot to file it (this is despite having prepared the answer on January 25, 2021 [sic: January 26, 2021][)]; (6) counsel's late filing was not knowing nor intentional; (7) non-applicable; (8)[] there is no ongoing liability; (9) non-applicable.
>
> In applying these factors to the totality of the circumstances, this Court does not find good cause exists pursuant to MCR 2.603(D)(1) to support Counter-Defendant's Motion to Set Aside Default and Default Judgment. Therefore, this Court declines to consider any meritorious defenses. Furthermore, the only meritorious defense claimed by Counter-Defendant is not absolute.

This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision on a motion to set aside a default or default judgment. *Tindle v Legend Health, PLLC*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 360861); slip op at 2. A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id*. at ___; slip op at 2. There is a general policy in this state against setting aside properly-entered defaults and default judgments. *Id*. at ___; slip op at 2. " 'A trial court necessarily abuses its discretion when it makes an error of law.' " *Id*. at ___; slip op at 2, quoting *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). And to the extent review of this issue requires construction and interpretation of court rules, this Court does so de novo. *Tindle*, ___ Mich App at ___; slip op at 2.

III. GOOD CAUSE FOR SETTING ASIDE DEFAULT AND DEFAULT JUDGMENT

Joseph argues that the trial court abused its discretion when it concluded that he had not established good cause to set aside the default and default judgment. I agree.

Under MCR 2.603(A)(1), a default must be entered against a party if that party "has failed to plead or otherwise defend as provided by these rules . . . ." Once a court enters a default, a defaulted party cannot proceed with the action unless the default is set aside in accordance with

MCR 2.603(D) or MCR 2.612. MCR 2.603(A)(3). MCR 2.603(D)(1) states, in relevant part: "A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and a statement of facts showing a meritorious defense . . . is filed."

The good-cause and meritorious-defense requirements are separate and "analytically different concepts." *Tindle*, ___ Mich App at ___; slip op at 2, citing *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000) (quotation marks omitted). "[A] party must show both in order to prevail on a motion to aside a default judgment." *Tindle*, ___ Mich App at ___; slip op at 2, citing *Barclay*, 241 Mich App at 653 (quotation marks omitted). Though a party must satisfy both requirements, the trial court "should base the final result on the totality of the circumstances." *Huntington Nat'l Bank*, 292 Mich App at 390, quoting *Shawl*, 280 Mich App at 237. And although these are separate requirements, there is some interplay between the two concepts: when a meritorious defense is strong, a lesser showing of good cause is necessary to prevent manifest injustice. See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999). Manifest injustice is not, however, "a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense." *Barclay*, 241 Mich App at 653. It is instead "the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Alken-Ziegler, Inc*, 461 Mich at 233. A defendant has the burden of demonstrating good cause and a meritorious defense. *Tindle*, ___ Mich App at ___; slip op at 2.

Good cause may be shown by "(1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default." *Tindle*, ___ Mich App at ___; slip op at 3. In the good-cause context, "[a] party is responsible for any action or inaction by the party or the party's agent." *Alken-Ziegler, Inc*, 461 Mich at 224. An attorney's negligence does not normally justify setting aside a default judgment. *Park v Am Cas Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). Courts should consider the following factors when determining whether good cause exists:

> (1) whether the party completely failed to respond or simply missed the deadline to file;
>
> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
>
> (4) whether there was defective process or notice;
>
> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);

(8) whether the default judgment results in an ongoing liability (as with paternity or child support); and

(9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238.]

This is list is nonexhaustive and nonexclusive. *Id*. at 239.

The trial court abused its discretion in finding that Joseph failed to establish good cause to set aside the default and default judgment. The trial court's findings do not detail the weight it assigned each factor and its analysis of the most contentious (fifth) factor—the circumstances behind the failure to file timely—was unreasonable in light of all of the circumstances surrounding Gillard's illness. The first and second factors are whether a party completely fails to respond or "simply missed the deadline to file," and, if a deadline is simply missed, how long after the deadline the filing happened. *Shawl*, 280 Mich App at 238. *Shawl* suggests that missing the deadline to file, as opposed to not filing at all, and filing the answer shortly after missing the deadline, weighs in favor of setting aside a default or default judgment. See *id*. Here, Gillard simply missed the filing deadline by four days. The third factor also supports setting aside the default and default judgment. The trial court entered the default judgment on May 14, 2021, and Joseph moved to set aside the default judgment on May 18, 2021, four days later. The court found there was no defective process or notice (the fourth factor); Joseph does not challenge this finding on appeal and essentially concedes its accuracy.

The parties and trial court spent the most time addressing the fifth factor. At the remand hearing, the trial court recounted that Gillard had prepared the answer before his hospitalization, finding that "all he had to do was send it in, and apparently he forgot is the only thing I can think of." The court noted that Gillard worked on other matters after his release from the hospital and found that although Gillard claimed others (his secretary) submitted documents to the court for him, there was "no reason why someone else couldn't have had that answer provided to the court as well." But at the early June 2021 hearing on the motion to set aside, Gillard indicated that he was "responsible for filing [his] own papers" and "dropp[ed] them off at court" himself once he finished them. He also indicated that "people don't mess with [his] papers." And although Melissa and the trial court focused on the filings submitted in other cases and his appearances on Zoom, Gillard further indicated at the June 4, 2021 hearing that those were new landlord-tenant matters "prepared for [him] by [his] secretary" and [a]ll [he] did was sign them."

I also question the trial court's finding at the January 20, 2023 hearing that Gillard had finished drafting the answer on January 26, 2021. The court focused on the fact that because the answer was dated January 26, 2021, it was seemingly finished or "prepared" as of that date. Aside from being a possible placeholder date that Gillard failed to change before his final submission, the fact he may have completed a draft of the answer on January 26, 2021, does not necessarily mean the answer was in final form on that date. Joseph had, after all, just been served the countercomplaint on January 25, 2021.

Regarding the sixth factor, the trial court found that the late filing was not knowing or intentional. Joseph does not dispute this finding on appeal and Melissa does not address it either way. This factor weighs in favor of setting aside the default and default judgment.

The trial court found the seventh factor—the size of the judgment and the amount of costs due—inapplicable. Although there is no money judgment, as Joseph argues on appeal, the *impact* of the default judgment affects his potential interest in real property. So, although this factor may not apply perfectly to the facts of this case, the list of factors generally is nonexhaustive and nonexclusive. *Shawl*, 280 Mich App at 239. The trial court therefore should have considered the effect the judgment had on Joseph's interest in unique real property, i.e., the McReynolds property. Its failure to do so constitutes an abuse of discretion. Joseph does not challenge the trial court's findings related to factors eight (no ongoing liability) and nine (inapplicable because no insurers involved).

Most critically, the trial court failed to explain how it weighed the various factors. Though "it is within the trial court's discretion to determine how much weight any single factor should receive," *Shawl*, 280 Mich App at 239, the trial court's decision does not explain how it weighed the various factors; it simply noted the applicable factors and summarized facts relevant to those factors. The trial court appears to have given significant weight to the fifth factor (the circumstances behind the failure to file timely), as that factor's analysis has the most detail of any of the other eight in the trial court's amended opinion. But it does not explain how the other factors weigh in relation to that factor and whether those that seemingly weigh in favor of setting aside the default and default judgment outweigh the fifth factor. That is, the trial court did not actually *evaluate* the totality of the circumstances. This failure constitutes an abuse of discretion.

IV. MERITORIOUS DEFENSE

Joseph also argues that the trial court abused its discretion when it declined to consider his meritorious defense. He contends that the trial court should have considered his defense when it evaluated the totality of the circumstances for whether to set aside the default and default judgment, as instructed by this Court in its remand order. I agree.

MCR 2.603(D)(1) requires a defendant to "execute an affidavit in support of their proposed meritorious defense." *Tindle*, ___ Mich App at ___; slip op at 6. The affidavit "inform[s] the trial court whether the defaulted defendant has a meritorious defense to the action." *Id*. at ___; slip op at 6 (quotation marks and citation omitted). It "requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit." *Id*. at ___; slip op at 6 (quotation marks and citation omitted).

Shawl provided a nonexhaustive list of factors for courts to consider when determining whether a defendant has a meritorious defense:

> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible. [*Shawl*, 280 Mich App at 238.]

As noted earlier, although good cause and the meritorious defense are separate requirements and a party must establish both to prevail on a motion to set aside, *Tindle*, ___ Mich App at ___; slip op at 2, there is some interplay between the two concepts in that when a meritorious defense is strong, a lesser showing of good cause is necessary to prevent manifest injustice, see *Alken-Ziegler, Inc*, 461 Mich at 233-234. The *Alken-Ziegler* Court stated:

> When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Id.*]

This interplay and the potential for a lesser showing of good cause requires at least *addressing* the meritorious defense at the same time as good cause. On the record at the remand hearing, the trial court declined to consider Joseph's meritorious defense because it found no good cause. Under *Alken-Ziegler*, this was improper. See *id.* The trial court should have evaluated the strength of the meritorious defense to determine whether it necessitated a lesser showing of good cause. This is consistent with the principle that evaluation of the good-cause and meritorious-defense requirements be done in consideration of the totality of the circumstances. See *Huntington Nat'l Bank*, 292 Mich App at 390.

Although the trial court briefly discussed the meritorious defense and stated it was "not necessarily an absolute defense to this particular claim," it went on to state that "other issues" applied (like who possessed, maintained, paid taxes, and had lived on the property) and indicated it would not "consider the defense altogether or in any more detail . . . ." In its amended opinion and order, the trial court "decline[d] to consider any meritorious defenses" because it found no good cause existed, but stated that "the only meritorious defense claimed by Counter-Defendant is not absolute." This finding by the trial court was erroneous for two reasons. First, as stated, under *Alken-Ziegler*, 461 Mich at 233-234, the trial court should have evaluated the strength of the meritorious defense to determine whether it required a lesser showing of good cause.[2] Second, the trial court's finding that the meritorious defense (the statute of frauds) "is not absolute" is conclusory and provides no basis for appellate review. I would therefore reverse the trial court's decision and remand for it to reconsider this issue. I would also direct the trial court to determine whether the strength of the meritorious defense lessens the showing needed for good cause. See *id.*

V. CONCLUSION

With respect to good cause, the trial court abused its discretion because it failed to explain how the good-cause factors weighed against one another, i.e., it failed to evaluate the totality of

[2] This Court's remand order in Docket No. 358907 referenced this Court's decision in *Huntington*, 292 Mich App at 390. A page later (*Huntington*, 292 Mich App at 391), this Court provided the same language from *Alken-Ziegler*, 461 Mich at 233-234.

the circumstances. Regarding the meritorious defense, the trial court should have evaluated the strength of Joseph's meritorious defense to determine whether it lessened the showing necessary for good cause, and, in doing so, it should have provided more than a conclusory statement regarding the absoluteness of the defense. I would reverse and remand for further proceedings.

/s/ Noah P. Hood