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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-23-258

JOHNNY E. BOWLES APPELLANT V. RUSTY TAYLOR D/B/A PIK-A-PART APPELLEE	Opinion Delivered May 8, 2024 APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT [NO. 36CV-20-114] HONORABLE DENNIS CHARLES SUTTERFIELD, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Johnny E. Bowles appeals two Johnson County Circuit Court orders: the July 22, 2021 order denying his motion for default judgment against appellee Rusty Taylor d/b/a Pik-A-Part (Taylor); and the June 2, 2022 order granting Taylor's motion for summary judgment. Bowles contends that the circuit court erred in finding that Taylor had demonstrated "excusable neglect" and that there were no genuine issues of material fact. We affirm.

I. *Factual and Procedural History*

On June 12, 2020, Bowles filed a complaint against Taylor and Thomas Cowell.[1] Bowles alleged that Cowell's negligent operation of his vehicle on June 13, 2017, caused a motor vehicle accident (MVA), injuring Bowles. Bowles further alleged that the vehicle that Cowell was operating at the time of the MVA was owned by Taylor, who was in the business of automobile-

[1]Cowell is not a party to this appeal.

salvage; Cowell was Taylor's agent, servant, or employee; and Taylor had negligently entrusted the vehicle to Cowell. Summonses were issued to both Cowell and Taylor. On August 5, 2020, an affidavit of service was filed reflecting that Taylor had been personally served by a process server on July 16, 2020.

On February 2, 2021, Taylor filed an answer to the complaint via counsel. He asserted that he did not own the vehicle in question. Rather, he sold it to Cowell through his automobile-salvage business "on an installment agreement with the lien retained June 17, 2016." Taylor further asserted that the State issued title to Cowell on the vehicle on January 19, 2017, and attached a copy of the title to his response. Taylor denied having engaged in any negligent conduct or having been the cause of any injury to Bowles.

On July 6, 2021, Bowles moved for default judgment (the default motion) against Taylor and Cowell, who had previously been served via a warning order but had not filed an answer or responsive pleading. Bowles alleged that Taylor had been properly served on July 17, 2020; his answer had been due on or before August 17, 2020; and Taylor's February 2, 2021 answer was untimely. Bowles requested that a default judgment be entered against both Taylor and Cowell and the circuit court set the matter for a damages hearing.

On July 15, 2021, Taylor filed a motion to dismiss (MTD), asserting that he had not been properly served. He contended that Arkansas Rule of Civil Procedure 3 provides that a civil action is commenced only by the filing of a complaint with the clerk; the papers he was served were not file-marked; and while Arkansas Rule of Civil Procedure 4 does not specify that a copy of the file-marked complaint must be served, it stands to reason that such must occur to trigger the deadline for a response. Taylor argued that since he was not served a file-marked

complaint, his answer was not untimely because the clock never began running for him to file a responsive pleading or answer. He further argued that while a default judgment had not yet been entered against him, any such motion should be denied on the basis of any of the reasons set forth in Arkansas Rule of Civil Procedure 55(c).

A hearing was held on Bowles's default motion and Taylor's MTD on July 21, 2021, at which both parties made the same arguments contained within their respective motions. The court's rulings were memorialized in a July 22, 2021 order. The order denied Bowles's default motion, the circuit court having found that Taylor's failure to respond to the complaint was due to excusable neglect since the complaint he was served was not file-marked. The order denied Taylor's MTD, the court having found that the service of process on Taylor was in substantial compliance with Arkansas Rule of Civil Procedure 4.

On January 6, 2022, Taylor filed a motion for summary judgment (MSJ) and brief in support. Attached to the MSJ was an affidavit by Taylor. Attached to the affidavit were copies of the vehicle sales contract, the vehicle title, and a garage liability insurance policy. Taylor explained that although Cowell had previously been employed by him, the employment relationship had ended years prior to the MVA. Thus, it was undisputed that Cowell was not Taylor's agent at the time of the MVA. Taylor asserted that he had sold the vehicle to Cowell a year prior to the MVA, arguing that he had no legal obligation to ensure that Cowell had either a driver's license or liability insurance on the vehicle at the time of the sale.[2] He further asserted

[2]The allegations that Cowell lacked a valid driver's license and the requisite insurance at the time of the sale were not contained in the complaint. They first appear in the record in written discovery between the parties.

that Arkansas statutes require a motor-vehicle operator to have a valid driver's license and minimum liability insurance, and case law and Arkansas Model Jury Instruction 602 stand for the proposition that every person has a right to assume that a motor-vehicle operator will use ordinary care and obey the law. Thus, he argued he was permitted to assume—at the time of the vehicle sale—that Cowell was obeying the statutes that require a motor-vehicle operator to have a valid driver's license and liability insurance. Accordingly, Taylor had no duty to confirm that Cowell was licensed or insured. Taylor's affidavit states that he is familiar with the obligations imposed on licensed automobile sellers, and he fully complied with them. He further stated that after the sale, the only interest he had in the vehicle was as a lienholder. Taylor explained that he had no reason to believe that Cowell was an incompetent or negligent driver at the time of the sale and that the insurance he carries on vehicles in his possession and control expires upon the sale of a vehicle.

On January 27, 2022, Bowles responded to the MSJ, emphasizing the standard of review and that summary judgment is an extreme remedy. Bowles argued that the cases relied on by Taylor—*Wright v. Covey*, 233 Ark. 798, 349 S.W.2d 344 (1961) and *Haynes v. Beeline Trucking, Inc.*, 80 F.3d 1235 (8th Cir. 1996)—were distinguishable. Bowles submitted two affidavits from two other car dealers, both of whom stated that as a matter of practice, they obtained proof of a valid driver's license before allowing a car to leave the lot. One of the affiants further stated that this was the accepted practice. Bowles argued that section 326 of the Patriot Act requires that a car dealer record and preserve certain information—especially on financed vehicles—including proof of the purchaser's driver's license. He argued that what the industry standard is and whether Taylor breached that standard were issues of disputed material fact.

Taylor replied to Bowles's response on January 28, 2022, asserting that summary judgment is no longer an extreme remedy and emphasizing the lack of legal authority put forth by Bowles for the purpose of establishing that Taylor had a duty to check that Cowell had a driver's license and insurance. Taylor attached section 326 of the Patriot Act that Bowles claimed was applicable and distinguished it. He further argued that the affidavits of two car dealers setting forth that they personally require proof of a driver's license neither established an industry standard, such that there was an issue of material disputed fact, nor addresses the matter of asking for proof of insurance.

On June 2, 2022, an order was entered granting the MSJ. The circuit court found that there were no issues of material fact and that the controlling question was one of law: whether Taylor had a duty to ascertain if Cowell had a driver's license and liability insurance coverage. The circuit court concluded that no such duty existed and granted summary judgment. On December 13, 2022, a default judgment was entered against Cowell for $3 million dollars. This timely appeal followed.

II. *Motion for Default Judgment*

Bowles first contends that the circuit court erred in denying his default motion and ruling that Taylor had demonstrated excusable neglect. Bowles argues that the summons Taylor received complied with Arkansas Rule of Civil Procedure 4(b), which sets forth the requirements for a valid summons. He further argues that Taylor's "layperson conclusion" that he did not believe a lawsuit had been filed against him because the complaint was not file-marked did not establish "excusable neglect."

Taylor responds that there is no evidence that the circuit court abused its discretion in denying Bowles's default motion. He argues that because Bowles had not yet obtained a judgment by default when he (Taylor) entered his appearance and served his answer to the complaint, he was not required to demonstrate mistake, excusable neglect, or fraud under Arkansas Rule of Civil Procedure 55(c). He further argues that because he did not own the vehicle at issue, having sold it to Cowell a year before the MVA, and because there was no employment relationship between him and Cowell—as set forth in his answer—the circuit court was aware that he had not personally engaged in any negligent conduct. He contends that the complaint asserted conclusions rather than facts. Taylor emphasizes that his delay in answering—171 days—was matched by Bowles's delay in moving for default judgment—154 days—and that Bowles's claims ultimately could not withstand summary judgment. Taylor also reasserts the Rules 3 and 4 arguments he made to the circuit court.

The standard by which we review the grant or denial of a motion for default judgment is whether the circuit court abused its discretion. *Bryant v. Watts*, 2024 Ark. App. 245, at 3, ___ S.W.3d ___, ___. The circuit court abuses its discretion when it acts thoughtlessly, improvidently, or without due consideration. *Nicholas v. Jones*, 2022 Ark. App. 55, at 9, 640 S.W.3d 417, 422. Default judgments are not favored by the law and should be avoided when possible. *Bryant*, 2024 Ark. App. 245, at 3, ___ S.W.3d at ___. Because of its harsh and drastic nature, which can result in the deprivation of substantial rights, a default judgment should be granted only when strictly authorized and when the party affected should clearly know he is subject to default if he does not act in a required manner. *Steward v. Kuettel*, 2014 Ark. 499, at 7, 450 S.W.3d 672, 676.

In 1990, the supreme court revised Arkansas Rule of Civil Procedure 55, reflecting a preference for deciding cases on the merits rather than on technicalities. *Bryant*, 2024 Ark. App. 245, at 3, ___ S.W.3d at ___. The revised Rule 55(c) provides that "[t]he court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (4) any other reason justifying relief from the operation of the judgment." *Id.* Subsection (c) of Rule 55 also requires that the party seeking to have the judgment set aside demonstrate a meritorious defense to the action. *Id.* The reporter's notes to Rule 55 explain that, in deciding whether to enter a default judgment, the court should consider the factors utilized by the federal courts, including whether the default is largely technical, and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in responding; and whether the court would later set aside the default judgment under Rule 55(c). Ark. R. Civ. P. 55(c) addition to reporter's notes, 1990 amend. The same considerations apply in considering whether a circuit court abused its discretion in denying a default judgment. *Bryant*, 2024 Ark. App. 245, at 4, ___ S.W.3d at ___. Whether a circuit court abused its discretion should be decided on a case-by-case basis. *Id.*

In light of the circumstances of this case, we cannot say that the circuit court abused its discretion by denying Bowles's default motion. Although the answer was filed late, Bowles has not shown how he was prejudiced by the untimely answer, and there is no indication that the untimely answer caused the case to be stalled or held up. There is no evidence that Bowles was not ready to defend the action against him or that the default judgment would not be set aside for one of the reasons enumerated in Rule 55(c). Finally, Bowles points to no authority that mandates reversal, and he presents no convincing argument. It is well established that we will

not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Steele v. Lyon*, 2015 Ark. App. 251, at 2, 460 S.W.3d 827, 830. Accordingly, we hold that the circuit court did not abuse its discretion, and we affirm the denial of Bowles's default motion.

III. *Motion for Summary Judgment*

Bowles next contends that the circuit court erred in granting Taylor's MSJ, because there were issues of material fact regarding the duty owed by a used car dealer. Bowles proceeded against Taylor under a theory of negligent entrustment, which required that he show that (1) Cowell was incompetent, inexperienced, or reckless; (2) Taylor knew or had reason to know of Cowell's conditions or proclivities; (3) there was an entrustment of the vehicle; (4) the entrustment created an appreciable risk of harm to Bowles and a relational duty on the part of Taylor; and (5) the harm to Bowles was proximately or legally caused by Taylor's negligence. *See Hall v. Gage's Powersports, Inc.*, 2022 Ark. App. 406, at 3–4, 654 S.W.3d 353, 356. To prove negligence, there must be a failure to exercise proper care in the performance of a legal duty that the defendant owed the plaintiff under the circumstances surrounding them. *Costner v. Adams*, 82 Ark. App. 148, 158, 121 S.W.3d 164, 171 (2003). The question of what duty, if any, is owed by one person to another is always a question of law. *Id.*

Bowles argues that Taylor had a duty to ensure that Cowell was a licensed driver[3] prior to selling the vehicle to him, and Taylor's failure to do so was a breach of that duty. He contends

[3]Bowles appears to have abandoned his insurance argument on appeal.

that the other car dealers' affidavits were sufficient to meet proof with proof and establish an issue of material fact as to what constituted the "industry standard." Bowles cites *Hall*, *supra*.

Summary judgment should be granted only when there are no material issues of facts to be litigated, and the moving party is entitled to judgment as a matter of law. *Hall*, 2022 Ark. App. 406, at 3, 654 S.W.3d at 356. The purpose of summary judgment is not to try the issues but to determine whether there are any issues to be tried. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate by deciding whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in the light most favorable to the nonmoving party. *Id.*

Hall does not support Bowles's position. In *Hall*, Maggie Hall, as administratrix of the estate of Brenda Dell Allbright, deceased, appealed an order granting summary judgment to Gage's Powersports, Inc. 2022 Ark. App 406, at 1, 654 S.W.3d at 355. The underlying lawsuit stemmed from Gage's sale of a motorcycle to Allbright. *Id.* at 1–2, 654 S.W.3d at 355. Shortly after the sale, Allbright was in a one-vehicle accident while operating the motorcycle and died from her injuries the next day. *Id.* at 2, 654 S.W.3d at 355. Maggie filed suit on behalf of the estate, alleging in part, a claim for negligent entrustment and asserting that Gage's employee knew or should have known that Allbright was not competent to operate a motorcycle as evidenced by the lack of a motorcycle endorsement on her driver's license and by her mental disease or defect, specifically schizophrenia. *Id.*

Gage's moved for summary judgment, arguing that it was entitled to summary judgment on the negligent-entrustment claim because Allbright was not incompetent, and even assuming she was, Gage's had no reason to suspect she was. *Id.* at 2–3, 654 S.W.3d at 356. The circuit court found that there was no genuine issue of material fact as to whether Gage's knew or had reason to know of Allbright's incompetence, inexperience, or recklessness regarding the operation of a motorcycle. *Id.* at 4, 654 S.W.3d at 356. We agreed with the circuit court and affirmed the circuit court's grant of summary judgment. *Id.* at 6, 654 S.W.3d at 357–58.

Again, it is well established that we will not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Steele*, *supra*. Moreover, the duty owed is not a question of fact but a question of law, *see Costner*, *supra*, which we cannot say was incorrectly determined by the circuit court here. Accordingly, we affirm.

Affirmed.

KLAPPENBACH and WOOD, JJ., agree.

Caddell Reynolds, by: *Matthew J. Ketcham*, for appellant.

Smith, Cohen & Horan, PLC, by: *Matthew T. Horan*; and *Everett Law Firm*, by: *John C. Everett*, for appellee.