

IN THE MISSOURI SUPREME COURT

TERESA M. CALLAHAN,)

Respondent)

vs.)

No. SC89676

GARY W. CALLAHAN,)

Appellant)

**Appeal From The Circuit Court of The County of St. Francois
Hon. Thomas L. Ray
Associate Circuit Judge**

APPELLANT'S SUBSTITUTE BRIEF

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II. Statement of Jurisdiction

This is an appeal from a May 7, 2008 final Judgment (ASLF:6) denying a *Rule 74.05(d)* motion to set aside an October 4, 2007 default judgment (LF:12) dissolving the marriage of Appellant Gary Callahan (“Gary”) and Respondent Teresa M. Callahan (“Teresa”) entered by The Honorable Thomas L. Ray, Associate Circuit Judge, Circuit Court of The County of St. Francois, Missouri.

On November 16, 2007, Gary filed a Notice of Appeal (LF:35) from the November 5, 2007 Order denying the set aside motion.

On May 7, 2008, Gary filed a timely Notice of Appeal (ASLF:8) from the final May 7, 2008 Judgment (ASLF:6) denying the set aside motion.

This appeal was within the general appellate jurisdiction of The Missouri Court of Appeals, Eastern District, as set forth in Article V, Section 3 of The Missouri Constitution.

On September 9, 2008, The Missouri Court of Appeals, Eastern District, entered its' *Rule 84.16(b)* Per Curiam Order (Appendix A-3) affirming the trial court's denial of Gary's motion to set aside the October 4, 2007 default judgment on the ground the motion failed to sufficiently allege *Rule 74.05(d)* "good cause".

On September 18, 2008 , Gary timely filed a motion for rehearing or alternatively for transfer which was denied October 9, 2008 by The Missouri Court of Appeals, Eastern District.

On October 21, 2008, Gary filed a *Rule 83.04* motion to transfer to The Missouri Supreme Court which was sustained by this Court on November 25, 2008.

Accordingly, The Missouri Supreme Court has jurisdiction in this appeal under *Rule 83.04* and *Missouri Constitution Art. V, §10*.

III. Statement of Facts

On June 18, 2007 (LF:1), Respondent Teresa M. Callahan (“Teresa”) filed a Petition For Dissolution Of Marriage (“Dissolution Case”)(LF:4) against Appellant Gary Callahan (“Gary”) in the Circuit Court of St. Francois County, Missouri.

Gary was personally served with Petition and Summons on August 3, 2007 (LF:1).

On October 4, 2007 (LF:2), a default Judgment Of Dissolution Of Marriage (LF:12) was entered in Dissolution Case.

On November 2, 2007 (LF:23), Gary filed the following verified motion (LF:23) in Dissolution Case under *Rule 75.04(d)*, to wit :

“MOTION TO SET ASIDE DEFAULT JUDGMENT

COMES NOW Respondent Gary W. Callahan in person and by counsel James E. Pennoyer, Attorney at Law, of James E. Pennoyer, P.C. and for his Motion to Set Aside Default Judgment states to the court as follows:

1. On October 4th, 2007, the court entered its Default Judgment against Respondent.

2. Said Judgment was entered to the surprise, through inadvertence or excusable neglect of Respondent in that Petitioner and Respondent had agreed to use the same lawyer and settle their case which process Respondent

understood was ongoing. Instead Petitioner proceeded by default obtaining a judgment grossly to Petitioner's advantage and grossly harming Respondent.

3. Said judgment was obtained by fraud and misrepresentation in that Petitioner represented to Respondent that they were using the same lawyer to save money and Respondent believed that process was ongoing, that Petitioner told Respondent and his son that she was going to the doctor when in fact she was going to court to obtain the default judgment; that Petitioner had been getting all mail of the parties and destroying Respondent's mail since July of 2007.

4. Respondent further has meritorious defenses herein in that facts found by the judgment are untrue, particularly:

a. Petitioner is not permanently disabled but will be able to return to Daimler Chrysler making \$ 30,000.00 more than Respondent;

b. Petitioner should not receive any share of Respondent's retirement as she is working and able to achieve similar retirement;

c. Petitioner is not disabled;

d. Respondent has not committed marital misconduct;

e. Petitioner will have sufficient income from her employment and considering marital property to be awarded to her to meet her reasonable needs making any award of maintenance contrary to law.

5. Accompanying this Motion is Respondent's Answer to Petitioner's Petition.

WHEREFORE, Respondent prays this court make and enter its Order Setting Aside Default Judgment and for such other and further relief as to the court shall seem mete, just and proper.

Respectfully submitted,

JAMES E. PENNOYER, P.C.

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STATE OF MISSOURI)

) SS.

COUNTY OF ST. FRANCOIS)

I, Gary W. Callahan, being of lawful age, and being duly sworn, state that I have read the above and foregoing pleading and the facts and matters contained therein are true to the best of my knowledge, information and belief.

_____/S/_____

Gary W. Callahan

Subscribed and sworn to before me, a Notary Public, this 2nd day of November, 2007.

_____/S/_____

Notary Public”

Also, on November 2, 2007, Gary filed an Answer (LF:26) and motion to shorten time and notice of hearing November 5, 2007 (LF:31).

On November 5, 2007, Gary personally appeared in the trial court intending to testify at hearing (T:2-3).

At hearing, the trial court specifically denied Gary opportunity to present any evidence in support of his set aside motion, to wit :

“THE COURT: I'm not going to take any evidence at this time. I believe that the motion has to be taken on the face of the motion. So you can argue your motion, if you wish to do so.

MR. PENNOYER: Very well. Thank you, Judge.

We believe that--

THE COURT: Okay. I would appreciate succinct argument from counsel. I have read your motion. Please be seated and make your argument from there.

MR. PENNOYER: Yes, Judge.” (T:4).

No evidence was received at the hearing. After oral argument by legal counsel, the trial court denied Gary's motion to set aside the October 4, 2007 default judgment without stating the grounds for the denial (T:22; LF:23).

On November 16, 2007, Gary filed a Notice of Appeal (LF:35) from the November 2, 2007 Order. This appeal was numbered ED90556.

On April 8, 2008, Gary filed a motion to reduce the November 5, 2007 Order to final judgment (ASLF:4).

On May 7, 2008, the trial court entered Judgment (ASLF:6) making the November 5, 2007 Order final. This Judgment finally disposed of all issues between all parties in the case below.

On May 7, 2008, Gary filed a Notice of Appeal (ASLF:8) from the May 7, 2008 final Judgment. This appeal was numbered ED91302.

On May 12, 2008, Gary filed a motion to consolidate ED90556 and ED91302 which was granted by Order dated May 14, 2008. ED90556 was the "Lead Case" and ED91302 was the "Trailer Case".

On September 9, 2008, The Missouri Court of Appeals, Eastern District entered its' *Rule 84.16(b)* Per Curiam Order (Appendix A-3) affirming the trial court's denial of Gary's motion to set aside the October 4, 2007 default judgment on the ground the motion failed to sufficiently allege *Rule 74.05(d)* "good cause".

On September 18, 2008 , Gary timely filed a motion for rehearing or alternatively for transfer which was denied October 9, 2008 by The Missouri Court of Appeals, Eastern District.

On October 21, 2008, Gary filed a motion to transfer to The Missouri Supreme Court pursuant to *Rule 83.04* which was sustained by this Court on November 25, 2008.

This appeal followed.

V. Points Relied On

Point I

The trial court committed prejudicial error by entering the November 5, 2007 Order (LF:23) denying Gary Callahan’s verified Motion To Set Aside Default Judgment (LF:23) without an evidentiary hearing because Gary's set aside motion sufficiently alleged both "good cause" for being in default and a "meritorious defense" to Petition allegations thereby entitling Gary to an evidentiary hearing on the presented issues in that the motion satisfied the pleading requirements of *Rule 74.05(d)* by pleading sufficient facts (a) to *prima facie* show “good cause” for being in default, including *inter alia*, misrepresentation by Teresa Callahan to Gary Callahan at the time of filing suit that her lawyer was in fact representing both Teresa Callahan and Gary Callahan in the divorce case to settle the dispute and Gary need not take any

further action, on the day of the default hearing Teresa Callahan misrepresented she was going to see a doctor when in fact she was going to court to obtain the default judgment sought to be set aside and Teresa Callahan received and destroyed all court related mail addressed to Gary Callahan at the family home from the filing of the dissolution case up to the time of the default judgment and (b) to *prima facie* show a “meritorious defense” in the underlying marriage dissolution proceeding, including *inter alia*, that Teresa Callahan was not permanently disabled as she alleged in her dissolution Petition and as found in the Judgment of Dissolution of Marriage but was in fact able to return to Daimler Chrysler and earn wages of at least \$30,000.00 per year, that Gary Callahan did not engage in any marital misconduct as alleged in Petition and as found in the Judgment of Dissolution of Marriage and that based upon relevant stated factors Teresa Callahan was not entitled to receive either maintenance or attorney fees from Gary Callahan.

The most apposite cases are :

Bothe v. Bothe, __ S.W.3d __ (Mo. App. E.D. 2008), Appeal ED90491, Op. 10/21/2008

Brungard v. Risky's, Inc., 240 S.W.3d 685 (Mo. banc 2007)

In Re The Marriage Of Tyree, 978 S.W.2d 846 (Mo. App. S.D. 1998)

Moore v. Baker, 982 S.W.2d 286 (Mo. App. W.D. 1998)

Saloma v. Saloma-Orozco, 788 S.W.2d 799 (Mo. App. E.D. 1990)

Other principle authority:

Rule 74.05(d)

V. Argument

Point I

The trial court committed prejudicial error by entering the November 5, 2007 Order (LF:23) denying Gary Callahan's verified Motion To Set Aside Default Judgment (LF:23) without an evidentiary hearing because Gary's set aside motion sufficiently alleged both "good cause" for being in default and a "meritorious defense" to Petition allegations thereby entitling Gary to an evidentiary hearing on the presented issues in that the motion satisfied the pleading requirements of *Rule 74.05(d)* by pleading sufficient facts (a) to *prima facie* show "good cause" for being in default, including *inter alia*, misrepresentation by Teresa Callahan to Gary Callahan at the time of filing suit that her lawyer was in fact representing both Teresa Callahan and Gary Callahan in the divorce case to settle the dispute and Gary need not take any further action, on the day of the default hearing Teresa Callahan misrepresented she was going to see a doctor when in fact she was going to court to obtain the default judgment sought to be set aside and Teresa Callahan received and destroyed all court related mail addressed to Gary Callahan at the family home from the filing of the dissolution case up to the time of the default judgment and (b) to *prima facie* show a "meritorious defense" in the underlying

marriage dissolution proceeding, including *inter alia*, that Teresa Callahan was not permanently disabled as she alleged in her dissolution Petition and as found in the Judgment of Dissolution of Marriage but was in fact able to return to Daimler Chrysler and earn wages of at least \$30,000.00 per year, that Gary Callahan did not engage in any marital misconduct as alleged in Petition and as found in the Judgment of Dissolution of Marriage and that based upon relevant stated factors Teresa Callahan was not entitled to receive either maintenance or attorney fees from Gary Callahan.

(A) Standard of Review :

The denial of a motion to set aside a default judgment is reviewed on an abuse of discretion standard. *Brungard v. Risky's, Inc.*, 240 S.W.3d 685, 688 (Mo. banc 2007).

"Broad discretion is afforded to trial court decisions granting motions to set aside a default judgment while the trial court has narrowed discretion in decisions denying a motion", *Brungard v. Risky's, Inc.*, 240 S.W.3d at 687.

"The rule (Sic: *Rule 74.05[d]*) amendment does not alter precedent that disfavors default judgments and establishes a strong preference for deciding cases on the merits", *Brungard v. Risky's, Inc.*, 240 S.W.3d at 687-688.

"However, the trial court's discretion is notably limited in this case for two reasons. First, a trial court's discretion whether to set aside a default judgment in a divorce case is more restricted than in other cases because there is practically no such

thing as a judgment by confession in a dissolution case. (Citation omitted). Also, courts dislike default judgments in dissolution cases because of our state's interest in the welfare of the parties.(Citation omitted). Second, a trial court's discretion to deny a motion to set aside a default judgment is narrower than its discretion to grant such a motion. (Citation omitted). As a result, we are much more willing to reverse an order *overruling* a motion to set aside a default judgment than an order granting such a motion.”. *In Re The Marriage Of Tyree*, 978 S.W.2d at 849. In accord: *Gantz v. Director of Revenue*, 858 S.W.2d 793, 794 (Mo. App. E.D. 1993); *Kueper v. Murphy Distributing*, 834 S.W.2d 875, 878 (Mo. App. E.D. 1992).

Under an applicable standard of review, *Rule 74.05(d)* "good cause" allegations are to be liberally construed. *Pyle v. Firstline*, 230 S.W.3d 52, 58 (Mo. App.W.D. 2007)("Good cause should be interpreted liberally not only to prevent a manifest injustice, but also to avoid a threatened one, especially in cases tried without a jury where evidence on only one side is presented"); *Dozier v. Dozier*, 222 S.W.3d 308, 313 (Mo. App.W.D. 2007)("Good cause should be given a liberal interpretation...").

(B) Rule 74.05 :

Rule 74.05 provides, in relevant part, as follows :

“RULE 74.05 ENTRY OF DEFAULT JUDGMENT

(a) Entry of Default Judgment. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as

provided by these rules, upon proof of damages or entitlement to other relief, a judgment may be entered against the defaulting party. The entry of an interlocutory order of default is not a condition precedent to the entry of a default judgment.

(b) Entry of Interlocutory Order of Default. ...

(c) Default Judgment May Include. ...

(d) When Set Aside. Upon motion stating facts constituting a meritorious defense and for good cause shown, an interlocutory order of default or a default judgment may be set aside.

The motion shall be made within a reasonable time not to exceed one year after the entry of the default judgment.

'Good cause' includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process.

An order setting aside an interlocutory order of default or a default judgment may be conditioned on such terms as are just, including a requirement that the party in default pay reasonable attorney's fees and expenses incurred as a result of the default by the party who requested the default.

A motion filed under this Rule 74.05(d), even if filed within 30 days after judgment, is an independent action and not an authorized after-trial motion subject to Rule 78.04 or Rule 78.06.”

(C) Applicable Legal Principle :

The following Rule Of Law is well established in Missouri, namely, “When a party avers a *prima facie* basis under *Rule 74.05(d)* for setting aside a default judgment, the circuit court is obligated to convene an evidentiary hearing to give the moving party an opportunity to establish good cause”, *Moore v. Baker*, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998).

In accord : *Sears v. Dent Wizard International*, 13 S.W.3d 661, 664 (Mo. App. E.D. 2000)(“A movant is entitled to an evidentiary hearing on a motion to set aside a default judgment if the pleading requirements of Rule 74.05 are met.”); *In Re The Marriage Of Tyree*, 978 S.W.2d at 849 (“After a movant has satisfied the threshold pleading requirements of Rule 74.05[d], the rule tacitly requires the trial court to conduct an *evidentiary* hearing in order to provide the movant with an opportunity to ‘show` good cause for setting aside the default judgment.[Citations omitted]”).

Here, the trial court failed to conduct an evidentiary hearing prior to denial of the set aside motion, and, therefore, the relevant inquiry is whether Gary’s verified Motion To Set Aside Default Judgment (LF:23) met the pleading requirements of *Rule 74.05(d)* ... which it did as shown below.

(D) Motion Satisfied Rule 74.05(d) "Good Cause" Pleading Requirements:

Rule 74.05(d) provides " 'Good cause' includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process". See, also, *Great Southern Savings & Loan v. Wilburn*, 887 S.W.2d 581, 584 (Mo. banc 1994).

Missouri court's have universally adopted the principle of "liberal interpretation" when making Rule 74.05(d) "good cause" determinations. See, Dozier v. Dozier, 222 S.W.3d at 313 ("Good cause should be given a liberal interpretation and includes good faith mistakes and even negligence in failing to file a timely answer."); Pyle v. Firstline, 230 S.W.2d at 58 ("Good cause should be interpreted liberally not only to prevent a manifest injustice, but also to avoid a threatened one, especially in cases tried without a jury where evidence on only one side is presented.").

“When deciding whether a moving party has complied with the pleading requirements of Rule 74.05(d), courts examine the allegations set forth in the motion to set aside the default judgment and consider the contents of any accompanying materials such as affidavits, exhibits, and proposed answers.”, *In Re The Marriage Of Tyree*, 978 S.W.2d at 849.

The "other facts" presented in the record *inter alia* included :

- (a) This was a 28 year marriage (LF: 4 ¶5; LF: 28 ¶21);

(b) Gary and Teresa continued to live together in the same family home even after Teresa filed the dissolution action (LF:4, ¶3, ¶4 & ¶6;LF: 26, ¶3, ¶4 & ¶6);

(c) Three children, now emancipated, were born of this marriage (LF: 4 ¶7; LF: 26, ¶7).

To satisfy the *Rule 74.05(d)* “good cause” essential element, the Motion To Set Aside Default Judgment (LF:23) pled the following facts, to wit :

“1. On October 4th, 2007, the court entered its Default Judgment against Respondent.

2. Said Judgment was entered to the surprise, through inadvertence or excusable neglect of Respondent in that Petitioner and Respondent had agreed to use the same lawyer and settle their case which process Respondent understood was ongoing. Instead Petitioner proceeded by default obtaining a judgment grossly to Petitioner’s advantage and grossly harming Respondent.

3. Said judgment was obtained by fraud and misrepresentation in that Petitioner represented to Respondent that they were using the same lawyer to save money and Respondent believed that process was ongoing, that Petitioner told Respondent and his son that she was going to the doctor when in fact she was going to court to obtain the default judgment; that Petitioner had been getting all mail of the parties and destroying Respondent’s mail since July of 2007.”

Under the liberal deferential standard of review, Gary's "good cause" allegations should be interpreted to mean "Wife intentionally deceived Gary into believing he need not respond to the Petition within the time stated on the summons because Wife and Gary were going to use the same lawyer (i.e. a long-term family friend and nephew of Wife) to settle the case without the necessity of pleadings or a trial".

Viewed in a macro sense, these "good cause" allegations contend Gary was intentionally duped and deceived by Teresa Callahan ... and, because this was a long term marriage ... spouses still living together ... with a certain element of trust between them ... Teresa's misrepresentation that her lawyer nephew would handle the divorce for the both of them (by implication "for nothing", or, at worst, for a "cheap" fee) to settle the case made sense to Gary. These are not rich people. These are not people experienced in legal or litigation matters.

Bothe v. Bothe, ___ S.W.3d ___ (Mo. App. E.D. 2008), Appeal ED90491, Op. 10/21/2008 (Mandate issued 10/30/2008) involved a similar fact pattern and "good cause" issue.

In *Bothe v. Bothe*, supra, Slip Opinion pages 4-5, The Eastern District held :

"In First Motion, Mother alleged that her discussions with Father reasonably led her to believe that they would settle the case and that she did not need to retain an attorney. Furthermore, Mother filed First Motion on September 11, 2007, approximately 6 days after she received notice of the default judgment

against her. This evidence shows that Mother's failure to respond to Father's dissolution petition was not intentionally or recklessly designed to impede the judicial process. See *Brueggemann v. Elbert*, 948 S.W.2d 212, 214 (Mo.App.E.D. 1997) (holding that the trial court abused its discretion in refusing to set aside a default judgment because attorney's failure to appear for trial was due to an innocent error and not intentionally or recklessly designed to impede the judicial process)."

Under the applicable liberal standards for review and the holding in *Bothe*, supra, Gary's "good cause" allegations *prima facie* satisfied the *Rule 74.05(d)* "good cause" definition on the theory Gary's default was the product of Gary's "mistake or conduct that (Sic: was) not intentionally or recklessly designed to impede the judicial process".

This type of fact pattern arises with frequency in marriage dissolution cases. Misrepresentation between the litigating parties is always a serious risk in dissolution cases (most cases ?)... and, it would be a miscarriage of justice to let Teresa pull this one off.

It is interesting to observe at least one case held the mere conduct of a non-evidentiary hearing on a *Rule 74.05(d)* set aside motion, as in the case *sub judice*, by implication is a finding by the trial court that the set aside motion met the factual "Good cause" and "meritorious defense" pleading requirements of *Rule 74.05(d)* thereby mandating an evidentiary hearing on the *Rule 74.05(d)* "good cause" issue.

See, *In Re The Marriage Of Tyree*, 978 S.W.2d at 849 (“Here, the trial court apparently found that Wife's motions, affidavit, proposed answer, and proffered counterclaim pleaded both good cause and a meritorious defense, as evidenced by the fact that the trial court afforded Wife a hearing on her motion. We agree with the trial court's implicit finding that Wife's motion and other filings satisfied the pleading requirements of Rule 74.05(d). Thus, the trial court acted appropriately in granting Wife a hearing on her motion. However, it appears from the docket that the hearing consisted only of arguments by the parties' attorneys. After a movant has satisfied the threshold pleading requirements of Rule 74.05(d), the rule tacitly requires the trial court to conduct an *evidentiary* hearing in order to provide the movant with an opportunity to ‘show’ good cause for setting aside the default judgment.”).

However, Gary need not rely on a trial court finding by implication. Gary's set aside motion, under the applicable standards for review, sufficiently pled Rule 74.05(d) "Good Cause".

(E) Motion Satisfied Rule 74.05(d) "Meritorious Defense" Pleading Requirement:

“When deciding whether a moving party has complied with the pleading requirements of Rule 74.05(d), courts examine the allegations set forth in the motion to set aside the default judgment and consider the contents of any accompanying materials such as affidavits, exhibits, and proposed answers.”, *In Re The Marriage Of Tyree*, 978 S.W.2d at 849.

Pyle v. Firstline, 230 S.W.2d at 60 elaborates on additional legal principles :

"In order to show a meritorious defense, a party need not present extensive and airtight evidence. *Heintz*,185 S.W.3d at 791. He or she need only make some showing of at least an arguable theory of defense. *Id.* 'Meritorious defense' has been interpreted liberally to mean 'any factor likely to materially affect the substantive result of the case.' *Id.* at 792 (*quoting Tinsley v. B & B Engines,Inc.*, 27 S.W.3d 859, 861 (Mo.App. 2000). This concept is not intended to impose a high hurdle, but is meant to allow the case to be decided on its merits where there are legitimate issues to be considered. *Id.* A party satisfies the requirement if he or she sets forth allegations which, if supported by evidence, would defeat or adversely affect the plaintiffs claim. *Winsor*, 43 S.W.3d at 166. Whether the evidence is credible is to be determined *after* the default judgment is set aside at a subsequent trial on the merits. *Id.*"

As a foundation for the Rule 74.05(d) "meritorious defense" pleading issue, it is relevant to consider the following Petition For Dissolution Of Marriage (LF:4) allegations and Judgment Of Dissolution Of Marriage (LF:12) findings :

- (a) The Petition alleged Teresa Callahan was "disabled" and "will not be able to return to work" at Daimler-Chrysler at ¶8 and ¶16 (LF:5);
- (b) The Petition alleged Teresa "does not have sufficient property ... to provide for her reasonable needs and Petitioner (Sic: Teresa Callahan) is unable to support herself through appropriate employment" at ¶16 (LF:5);

- (c) The Petition requested an award for attorney fees and costs at ¶17 (LF:6);
- (d) The Petition sought maintenance from Gary Callahan at Prayer ¶3 (LF:6);
- (e) The Judgment (LF:12) found Teresa Callahan to be permanently disabled and unable to work at ¶8, ¶16.1, ¶16.2, ¶16.7; and,
- (f) The Judgment (LF:12) found Gary Callahan engaged in numerous acts of marital misconduct at ¶8, ¶13.1, ¶13.4, ¶13.6, 16.7 and ¶19 and made a disproportionate distribution of marital property and awarded Teresa Callahan maintenance based upon such misconduct findings at ¶13.7 and Order (LF:19 et seq.) ¶5, ¶6 and ¶11.

Against this background the Motion To Set Aside Default Judgment (LF:23) alleged the following facts as “meritorious defenses” under *Rule 74.05(d)*, to wit :

“4. Respondent further has meritorious defenses herein in that facts found by the judgment are untrue, particularly:

- a. Petitioner (Sic: Teresa Callahan) is not permanently disabled but will be able to return to Daimler Chrysler making \$ 30,000.00 more than Respondent (Sic: Gary Callahan);
- b. Petitioner should not receive any share of Respondent’s retirement as she is working and able to achieve similar retirement;
- c. Petitioner is not disabled;
- d. Respondent has not committed marital misconduct;

e. Petitioner will have sufficient income from her employment and considering marital property to be awarded to her to meet her reasonable needs making any award of maintenance contrary to law.” (LF:24).

In addition, Gary Callahan’s accompanying Answer (LF:26) at ¶18 denied Teresa’s “disabled and unable to return to work” Petition allegations, at ¶16 denied Teresa’s “does not have sufficient property to provide for her reasonable needs” requesting maintenance Petition allegations and at ¶17 denied Teresa should be awarded attorney fees and costs as requested in the Petition.

In juxtaposition, the facts and issues in *Saloma v. Saloma-Orozco*, 788 S.W.2d 799 (Mo. App. E.D. 1990)(“*Saloma*”) are very similar to the facts and issues in the case *sub judice*.

In *Saloma*, the default set-aside motion alleged the decree of dissolution was procured by fraud and misrepresentation in that (a) wife intentionally mislead husband into believing she did not intend to proceed with the dissolution action, (b) husband and wife continued to live together in the same residence and (c) on the date of their hearing husband was out of the country.

In affirming the trial court's setting aside of the default judgment based upon a fraud "meritorious defense", the Eastern District held :

- a. "It is axiomatic that a judgment may be set aside if it can be shown that it was obtained by extrinsic fraud." *Saloma v. Saloma-Orozco*, 788 S.W.2d at 801.
- b. "Extrinsic fraud is established when proof of facts is made which if known to the trial court would have caused the trial court to *not* enter the judgment; facts which would have caused the court to enter a *different* judgment do not constitute fraud extrinsic to the judgment." (Citation omitted). The complaining party must show that he, himself, was free from fault, neglect, or inattention to his case. (Citation omitted).. In that regard, we keep in mind that the relationship of confidence between a wife and husband may justify the latter's reliance on the wife's representations." *Saloma v. Saloma-Orozco*, 788 S.W.2d at 801.
- c. "Considering respondent's verified allegation of fraud in the procurement of the default judgment, and in light of the deferential standard of review applied when a trial court sets aside a default judgment in a dissolution action, we cannot say that the trial court has abused its discretion." *Saloma v. Saloma-Orozco*, 788 S.W.2d at 801.

In the case *sub judice*, Teresa and Gary continued to live together in the same residence up to and after the time the default judgment was entered as in *Saloma*. Petition For Dissolution Of Marriage, ¶3 and ¶4 (LF:4). There was a certain element of trust as discussed in *Saloma*.

Under the applicable liberal standards for review, and based upon the above points, authority and argument, it is submitted Gary's set aside motion factual allegations *prima facie* sufficiently pled a “meritorious defense” under *Rule 74.05(d)*.

(F) Rule 74.05(d) Conclusions :

Having sufficiently satisfied the pleading requirements of *Rule 74.05(d)*, the trial court committed prejudicial error by denying, without evidentiary hearing, Gary's Motion To Set Aside Default Judgment. *In Re The Marriage Of Tyree*, supra; *Sears v. Dent Wizard International*, supra; and, *Moore v. Baker*, supra.

(G) Court Has Power To Vacate And Set Aside Judgment Below :

It was recognized in *Gantz v. Director Of Revenue*, 858 S.W.2d 793, 795 (Mo. App. E.D. 1993) that an appellate court has judicial power to reverse the May 7, 2008 Judgment and to remand mandating that the trial court vacate and set aside the October 4, 2007 default Judgment Of Dissolution Of Marriage (LF:12). In accord : *Ray v. Lake Chevrolet-Oldsmobile, Inc.*, 714 S.W.2d 928, 931 (Mo. App. S.D. 1986).

This is an appropriate case to exercise that judicial power.

VI. Conclusions

Based upon the facts, points, authorities and argument contained in this Appellant's Substitute Brief, the May 7, 2008 Judgment (ASLF:6) should be reversed and the cause should be remanded to the trial court with instruction to vacate and set aside the October 4, 2007 Judgment Of Dissolution Of Marriage (LF:12).

Alternatively, based upon the facts, points, authorities and argument contained in this Appellant's Substitute Brief, the May 7, 2008 Judgment (ASLF:6) should be reversed and the cause should be remanded to the trial court for further proceeding on Gary Callahan's Motion To Set Aside Default Judgment (LF:23).

Respectfully filed, served and submitted this 11th day of December, 2008.

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Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Appellant's Substitute Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b] and (c) contains **5631 words** (gross – no exclusions) determined by The Microsoft Office 2007 Word computer program count (program used to prepare Appellant's Substitute Brief).

Arthur G. Muegler, Jr. MoBar #17940

Certificate of Service

The undersigned certifies two (2) true copies of Appellant's Substitute Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus and found to be virus free, containing the same] and this Certificate of Service were served December 11, 2008 by First Class U.S. Mail, postage prepaid, addressed to (1) Clerk, Missouri Court of Appeals, Eastern District, 815 Olive Street, Room 304, St. Louis, Missouri 63101 Tel (314)539-4300 and FAX (314)539-4324 and (2) Benica Ann Baker-Livorsi, Esq., #6 Westbury Drive, St. Charles, Missouri 63301 Tel. (636)947-8181 and FAX (636)940-2888.

Arthur G. Muegler, Jr. MBE #17940

APPENDIX

IN THE MISSOURI SUPREME COURT

TERESA CALLAHAN,)
)
Respondent)
)
 vs.) SC89676
)
GARY CALLAHAN,)
)
Appellant)

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