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POINTS RELIED ON

A. This Court lacks appellate jurisdiction over this appeal in that Husband’s brief and Point Relied On fails to comply with Rule 84.04 and Rule 74.01(a) in that Husband’s sole point is internally inconsistent in that the Point raises multiple allegations of error including a) the trial court’s denial of Husband’s motion to vacate the default judgment and b) the trial court’s decision not to conduct an evidentiary hearing on Husband’s motion to vacate the default judgment due to pleading insufficiency while Husband’s point fails to set forth the “wherein and why” the trial court erred and c) Husband’s point relied on does not reference a final and appealable judgment as required under Rule 74.01 and, as a result, this Court lacks appellate jurisdiction over this appeal.

Thummel v. King, 570 S.W.2d 679 (Mo. 1978)

Eddington v. Cova, 118 S.W.3d 678, 681 (Mo. App. S.D. 2003)

J.A.D. v. F.J.D. III., 978 S.W.2d 336, 338 (Mo. 1998)

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Mo. R. Civ. Pro. Rule 84.04

Mo. R. Civ. Pro. Rule 74.01

Mo. R. Civ. Pro. R. 84.13

Mo. Rev. Stat. § 512.020

I. [In response to Appellant's Point One]

The trial court correctly exercised its discretion in denying Husband's motion to vacate a default judgment under Rule 74.05 (d) and Rule 74.06(b) in that Husband failed to allege sufficient facts to show excusable neglect or mistake and that Husband had a meritorious defense.

Doe v. Hamilton, 202 S.W.3d 621 (Mo. App. ED 2006)

Kocsis v. Kocsis, 28 S.W.3d 505, 508 (Mo. App. ED 2000)

McElroy v. Eagle Star Group, Inc., 156 S.W.3d 392 (Mo. App. WD 2005)

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Mo. Const. Art. V § 5.

Mo. R. Civ. Pro. Rule 73.01

Mo. R. Civ. Pro. Rule 74.05

Mo. R. Civ. Pro. Rule 74.06

Mo. R. Civ. Pro. Rule 84.13

Mo. Rev. Stat. § 477.010

Mo. Rev. Stat. § 506.110

Mo. Rev. Stat. § 511.200

JURISDICTIONAL STATEMENT

On October 4, 2007, the Circuit Court of St. Francois County entered a default judgment against Husband and in favor of Wife, dissolving the parties' marriage. (LF 12-22). On November 2, 2007, Husband filed his Motion to Set Aside Default Judgment. (SLF 1). On November 5, 2007, the Circuit Court entered an "order" denying Husband's motion to set aside the default judgment. (SLF 2). Husband filed his first Notice of Appeal on November 16, 2007. (SLF 2). The Eastern District issued a "show cause order" questioning whether the "order" denying Husband's motion to set aside a default judgment was a final and appealable judgment.

In response to the appellate court's query, Husband filed a motion to reduce the order to judgment form in the Circuit Court. (SLF 4). This "order" was finalized into "judgment" form on May 7, 2008. (SLF 6). Husband filed his second "Notice of Appeal" on the same date. (SLF 4). On May 12, 2008, the Eastern District issued its order finding that the May 8, 2008 judgment was now a final and appealable judgment. The Eastern District had appellate jurisdiction under the recently amended Rule 74.05(d) which was in effect at all relevant times. This Court granted transfer, pursuant to Article V, § 10 of the Missouri Constitution, on November 25, 2008.

While Husband's points relied on in his original brief in the Eastern District challenged the trial court's "judgment" denying his motion to set aside the default judgment, Husband's substitute brief is confined solely to challenging the trial court's "order" denying Husband's request for relief. As a result of Husband's substitute brief

limiting itself to the Circuit Court's "order" rather than the judgment, Wife now challenges this Court's jurisdiction to hear this appeal due to Husband challenging a non-appealable order as well as other briefing irregularities as more fully set forth in the Respondent's Points A to this brief.

STATEMENT OF FACTS

Husband is appealing from an “order” denying his motion to set aside a default judgment rendered on Wife’s petition for dissolution of marriage. The brief record in this case tells us that Husband and Wife were married for 28 years. (LF 4, 28). The parties had three children, all of whom are now emancipated. (LF 4, 26).

While seeking maintenance and a property division commensurate with Husband’s financial, physical, and sexual marital misconduct, Wife filed a petition for dissolution of marriage on June 18, 2007 in the Circuit Court of St. Francois County, State of Missouri. (LF 4). On August 2, 2007, the court issued a summons and authorized service by special process server. (LF 8). Husband was served by the special process server personally on August 3, 2007. (LF 8-9). Husband was served at 1029 Olive Road, Park Hills in St. Francois County. (LF 8-9).

The summons provided Husband with clear directions. “You are summoned to appear before this court and file your pleading to the petition, a copy of which is attached, and to serve a copy of your pleading upon the attorney for Plaintiff/Petitioner at the above address all within 30 days after receiving this summons, exclusive of the day of service. If you fail to file your pleading, judgment by default may be taken against you for the relief demanded in the petition.” (LF 8).

The record shows us that Husband took no action on the legal matter. Husband did not file an answer, nor did he file an entry of appearance. (See legal file generally). Wife received notice of the default hearing at 401 W. Elvins Blvd. in Park Hills, which was not

the marital home. (LF 11). On October 4, 2007, after hearing Wife's evidence, the trial court issued a default judgment against Husband. (LF 12-22).

After hearing evidence on the default, the Court found that Wife used to be employed and that she is now permanently disabled. (LF 13). Wife suffers from uncontrolled high blood pressure and fibromyalgia and has had a stroke, all of which prevents her from being able to return to work. (LF 13). The trial court found that due to Wife's illnesses, Wife had earned only 123 credits towards her retirement and that at age 62 (Wife is not 47 years old) Wife would only receive \$518 per month from her retirement plan. (LF 13, 18). Husband currently receives \$5,271 per month from his retirement pension. (LF 13).

The trial court found that Husband had received an early buy-out package from his employer and has retired. (LF 13). As part of the buyout program, Husband received \$70,000. (LF 13). The court found that Husband had committed marital misconduct by concealing his assets and committing marital waste while failing to account for any of the \$70,000 he received for the buyout as well as additional cash with a total of \$155,000 held to be concealed. (LF 13, 16). Husband also committed marital misconduct in the nature of adultery and domestic violence and made threats to Wife and caused property damage. (LF 15, 18).

The court calculated the marital portion of Husband's retirement plan and awarded Wife 47.2% of Husband's retirement plan. (LF 13-14). Wife was awarded the same percentages of Husband's 401(k) and Husband's early buy-out award. (LF 16).

The court found that Wife is entitled to maintenance. (LF 17). Wife was awarded \$800 per month in permanent, non-modifiable monthly maintenance. (LF 17). Husband was ordered to pay \$3,105 towards Wife's attorney fees, in favor of her trial counsel. (LF 20). Wife was awarded a cash equalization judgment of \$74,616 with statutory interest. (LF 21). Wife was awarded the marital home and 56.47 acres as well as the adjoining 80 acres of real estate. (LF 22).

Husband filed a motion to set aside the default judgment on November 2, 2007. (LF 23). Husband's motion did not cite the rule(s) upon which he relied but when asked at oral argument on the motion; Husband's counsel stated he relied on Rule 74.05(d) and Rule 74.06(b). (L.F. 23-25) (Tr. 7-9). Husband's verified motion lacked supporting affidavits or other documentary evidence supporting his claims of a "meritorious defense" or "good cause" excusing his failure to timely respond to Wife's lawsuit. (LF 23-25). Other than the conclusory allegations in Husband's verified motion, no other evidence was presented and Husband made no request for an evidentiary hearing on his motion to set aside default. The record is devoid of additional evidence from Husband which details his claims of "good cause" and "meritorious defense."

On November 5, 2007, the Circuit Court overruled Husband's motion via a court order (without denominating the order a "Judgment"). (LF 23). The Eastern District, after receiving the Legal File, entered a show cause order questioning the finality and appealability of the trial court's November 2007 order. In response to this Court's query, Husband filed a motion to reduce the order denying Husband's motion to set aside a

default to judgment form. (SLF 4). On May 7, 2008, upon Husband's motion, the trial court reduced its prior ruling to Judgment form for purposes of this appeal. (SLF 6-7). Husband filed his second Notice of Appeal on the same date. (SLF 8). Between November 2, 2007 and May 7, 2008 (when the final judgment was entered), Husband never requested an evidentiary hearing in this case, either in writing or on the record.

Despite the provisions of Rule 74.05 mandating that Husband's motion be treated as an "independent action," the record does not show that Husband paid an additional filing fee or that a summons was ever issued to Wife with Husband's Rule 74.05 motion.

ARGUMENT

Husband is appealing the trial court's denial of his motion to set aside a default judgment.¹ Husband neither requested an evidentiary hearing on his motion nor did he make an "offer of proof." Wife challenges Husband's supplemental brief in that Husband's brief fails to comply with Rule 84.04 and Rule 74.01. Wife's challenges to Husband's brief are set out as Points A.

In deciding this appeal, this Court need address the following issues: 1) what is the proper standard of review to apply in a post-2007 Rule 74.05 motion; 2) did Husband's motion to set aside state a claim upon which relief could be granted under Rule 74.05; 3) is an evidentiary hearing *always* required when a Rule 74.05 motion is filed or does the trial court have the authority to find the pleadings deficient on their face; and 4) now that Rule 74.05 motions are "independent actions" does due process require that Husband treat this as a new action with a filing fee and/or the issuance and service of a summons? Wife responds to each of these issues in response to the issues raised by Husband's sole point on appeal in Point I.

¹ Husband's Point Relied On challenges only the trial court's "order" denying Husband's motion and not the final judgment issued by the trial court. Wife is objecting to Husband's sole point on grounds that the Point fails to challenge a final judgment or decree and said objection is more fully set forth in Wife's Point A.

A. [Husband’s point fails to comply with Rule 84.04 and Rule 74.01]

A. This Court lacks appellate jurisdiction over this appeal in that Husband’s brief and Point Relied On fails to comply with Rule 84.04 and Rule 74.01(a) in that Husband’s sole point is internally inconsistent in that the Point raises multiple allegations of error including a) the trial court’s denial of Husband’s motion to vacate the default judgment and b) the trial court’s decision not to conduct an evidentiary hearing on Husband’s motion to vacate the default judgment due to pleading insufficiency while Husband’s point fails to set forth the “wherein and why” the trial court erred and c) Husband’s point relied on does not reference a final and appealable judgment as required under Rule 74.01 and, as a result, this Court lacks appellate jurisdiction over this appeal.

Under Missouri law, an appellant’s brief must comply with Rule 84.04. This rule provides:

“(1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;

(B) state concisely the legal reasons for the appellant's claim of reversible error;

and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.”

Mo. R. Civ. Pro. R. 84.04.

Husband's failure to state the "wherein and why" to describe his challenge to an appealable ruling may be fatal to appellate review. *Thummel v. King*, 570 S.W.2d 679 (Mo. 1978). "The requirement that the point relied on clearly state the contention on appeal is not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts." *Id.* at 686. "Instead, the purpose of this rule is to give notice to the opposing party as to the precise matters that must be contended with and to inform the court of the issues presented for review." *Eddington v. Cova*, 118 S.W.3d 678, 681 (Mo. App. S.D. 2003).

If a brief is defective under Rule 84.04 this Court will generally 1) disregard the point; 2) review the point only for plain error; or 3) dismiss the appeal. *J.A.D. v. F.J.D. III.*, 978 S.W.2d 336, 338 (Mo. 1998). Since this case is not a child custody case and it only involves monetary issues (property division, maintenance, and attorneys fees), there is nothing in this case which warrants plain error review and thus, this Court should dismiss Husband's appeal. *See* Mo. R. Civ. Pro. Rule 84.13(c) (providing for plain error review in cases affecting substantial rights where the Court finds that manifest injustice or a miscarriage of justice would result for failing to review an issue).

In this case, Husband's sole point relied on is deficient in the following respects:

- a) Husband's Point Relied On does not state the rule of law the trial court failed to apply. Husband's Point addresses the contents of Husband's motion to vacate the default judgment but the Point, in a convoluted fashion, starts by attacking the trial court's "order" denying Husband's motion to set aside a default while later

portions of the point attack the trial court's failure to hold an evidentiary hearing on Husband's motion.

- b) Husband fails to cite the rule of law the trial court should have applied in analyzing Husband's underlying motion. "It is not sufficient to merely set out what the alleged errors are, as [Appellant] has done in this case, without stating why the ruling is erroneous." *In re H.B.*, 165 S.W.3d 578, 582 (Mo. App. SD 2005).

Here, Wife must resort to reading the text of Husband's brief in order to discern the nature of Husband's legal complaints. For example, on page 14 Husband begins by setting out Rule 74.05 in full. On Page 17, Husband argues that his motion to set aside met a "*prima facie*" burden for pleading under Rule 74.05. Yet, in the "Applicable Legal Principle" section, Husband focuses on the Court's failure to conduct an evidentiary hearing on Husband's motion. Then, from pages 17-26, Husband argues his motion's merits. In his Conclusion, Husband does not ask for the matter to be remanded for an evidentiary hearing, but he asks for this Court to outright reverse the default judgment based on Husband's pleadings.

Additionally, Husband's point relied on in his Substitute Brief on Appeal (as contrasted to his Eastern District brief where Husband properly challenged the Judgment) challenges only the trial court's November 5, 2007 ORDER denying Husband's motion to set aside a default judgment and not the May 7, 2008 JUDGMENT denying Husband's motion to set aside the default judgment. The Eastern District Court of Appeals had

previously issued an “Order to Show Cause” questioning the appealability of the November 5, 2007 order.

Mo. Rev. Stat. § 512.020 governs the right to appeal in civil cases. The right to appeal set forth in this statute is limited in nature, and instructs us that an appeal can only lie from the following types of orders and judgments:

1. Final Judgments;
2. Orders granting a new trial;
3. Special Orders after a final judgment;
4. Orders refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers;
5. Orders dissolving an injunction; and
6. Interlocutory Orders in partition actions and partition proceedings that finally determine the rights of the parties.

See Mo. Rev. Stat. § 512.020.

The trial court’s November 5, 2007 order denying Husband’s motion to set aside a default does not fall under any classification of an appealable judgment or order pursuant to Mo. Rev. Stat. § 512.020. In *In re Marriage of Coonts*, 190 S.W.3d 590 (Mo. App. SD 2006), the Southern District found that the Court of Appeals lacked jurisdiction to hear an appeal on a trial court’s denial of a motion to set aside default where the trial court’s ruling was not denominated a judgment or decree and was not signed by a judge as required under Rule 74.01.

Consequently, this Court should decline to exercise jurisdiction over Husband's sole point on appeal and affirm the decision of the trial court.

I. [Trial court correctly denied Husband’s motion to vacate default judgment]

I. The trial court correctly exercised its discretion in denying Husband’s motion to vacate a default judgment under Rule 74.05 (d) and Rule 74.06(b) in that Husband failed to allege sufficient facts to show excusable neglect or mistake and that Husband had a meritorious defense.

A. Relevant Facts

On June 18, 2007, Wife filed her petition for dissolution of marriage in the Circuit Court of St. Francois County, State of Missouri. (LF 4). The Court issued a summons on August 2, 2007 and on August 3, 2007, Husband was personally served. (LF 8-9). On October 4, 2007 the trial court heard evidence and entered a default judgment against Husband. (LF 12-22).

Husband filed his motion to set aside a default judgment on November 2, 2007. (LF 23). The Circuit Court overruled Husband’s motion on November 5, 2007. (LF 23). Husband’s motion did not cite the rule(s) upon which he relied but when asked at oral argument on the motion; Husband’s counsel stated he relied on Rule 74.05(d) and Rule 74.06(b). (LF 23-25) (Tr. 7-9). The Court later reduced its ruling to Judgment form for purposes of this appeal on May 7, 2008 (SLF 6-7). Husband never requested an evidentiary hearing on his motion, even during the time between the trial court’s “order” and when the court reduced the “order” to judgment form.

B. Standard of Review

1. *Murphy v. Carron* versus “abuse of discretion” standards

There remains some ambiguity regarding the appropriate standard of review to be applied to current Rule 74.05 motions. Husband argues that the standard of review is an “abuse of discretion” standard of review while Wife argues for application of the oft-cited *Murphy v. Carron* standard of review. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976).

Even though the district courts have liberally interchanged the standards of review, there is a difference between the “abuse of discretion” standard of review and the *Murphy v. Carron* standard of review. Usually, the abuse of discretion standard is the more deferential standard of review. In Missouri, a trial court’s decision is reversed if “the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron, supra* at 32. “[I]f reasonable men can differ about the propriety of action taken by the trial court, then it cannot be that the trial court abused [its] discretion.” *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. 1988).

2. Amendment to Rule 74.05

The Missouri Constitution gives this Court authority to promulgate rules concerning judicial procedure. Mo. Const. Art. V § 5. *See also* Mo. Rev. Stat. § 477.010. Using that authority, this Court amended Rule 74.05, effective January 1, 2007. This

amendment now makes a defendant's motion to vacate a default judgment an "independent action."

In *Brungard*, this Court addressed the question of the appropriate standard of review in a pre-2007 motion to set aside a default judgment. This Court noted that, historically, Missouri Courts had applied the "abuse of discretion" standard of review to Rule 74.05 motions but that the district courts were now in disagreement as to the appropriate standard of review. *Brungard v. Risky's, Inc.*, 240 S.W.3d 685, 687 (Mo. 2007).

This Court, in, noted, in *dicta*, that the amendment (which did not apply to the parties in the *Brungard* matter since their motion to set aside default in 2006) would not affect the standard of review and that the amendment which classified these motions as "independent actions" was intended to "resolve the confusion regarding whether and when judgments denying or granting motions to set aside default judgments are appealable." *Id.* at 687. Despite this Court's comments in *Brungard*, Wife urges this Court to re-examine the applicable standard of review to be applied in this case now that the motion is deemed an "independent action."

3. Jurisprudence under prior Rule 74.05

Under the *prior* version of Rule 74.05, the trial court had more discretion to set aside a default judgment than to not set aside a default judgment. *Kocsis v. Kocsis*, 28 S.W.3d 505, 508 (Mo. App. ED 2000). Pre-*Brungard*, the districts were inconsistent on the standard of review. The Western District, in *Dozier v. Dozier*, 222 S.W.2d 308 (Mo. App. W.D. 2007), placed Rule 74.05 motions into two categories: 1) motions filed within

30 days and 2) motions filed between 31 days and 1 year. The former category was reviewed for abuse of discretion and the latter under *Murphy v. Carron*. The Southern District, in *In re Marriage of Coonts*, 190 S.W.3d 590 (Mo. App. SD 2006), held that either category of Rule 74.05 motions were to be considered “independent actions” while ruling that appellate jurisdiction attached only if the circuit court resolved the motion in an independent judgment.

This jurisprudence was in effect when the Supreme Court classified both categories of Rule 74.05 motions as “independent actions.” Given this Court’s adoption of the “independent action” phraseology from *Dozier* and *Coonts* as to all Rule 74.05 motions, it reasonably follows that this Court meant to adopt the standard of review first formulated by the Western and Southern Districts under the prior version of the Rule – that of *Murphy v. Carron, supra*.

4. *Murphy v. Carron* standard is the appropriate standard of review

Despite this Court’s statements in *Brungard, supra*, it is appropriate to reexamine the appropriate standard of review in this Rule 74.05 motions. If the addition of the phrase “independent action” is to be given any meaning, then cases filed pursuant to Rule 74.05(d) should be reviewed like any other case – under a *Murphy v. Carron* standard of review. In *Brungard*, this Court held that the phrase “independent action” was added to Rule 74.05 in order to clarify that the ruling on the motion was independently appealable. However, the rule doesn’t mention appealability. Rule 74.05(d) now uses a phrase which is located in other rules – “independent action.” Independent actions are usually new

causes of action – causes of action in equity cases are usually reviewed under *Murphy v. Carron*. Wife respectfully requests this Court to reexamine its holdings and findings in *Brungard, supra*.

The differences between an “abuse of discretion” standard of review and a “*Murphy v. Carron*” standard of review, although subtle, are meaningful. Under the “abuse of discretion” standard of review, the trial court is granted “narrow” discretion to deny motions to set aside default judgments and “broad” discretion to grant Rule 74.05 motions. *Brungard v. Risky’s, Inc., supra* at 687-88. Under *Murphy v. Carron*, there is no default “discretion” deference. In this case, all facts not explicitly found are deemed to have been found in accordance with the result. Mo. R. Civ. Pro. Rule 73.01.

The decision as to which standard of review to apply will have little effect on this Court’s opinion in this case because the trial court found Husband’s pleadings to be legally deficient and denied Husband’s motion on the grounds of his pleadings alone. Using an “independent action” analogy – the Court reviewed the pleadings and found that Husband, essentially, had failed to state a claim upon which relief may be granted and dismissed his “petition” for failing to state a cause of action. *Murphy v. Carron* is routinely used to analyze these types of dismissals because this standard provides for reversal if the trial court erred as a matter of law in finding the pleadings to be deficient.

The “abuse of discretion” standard of review is no longer an equitable choice in that this standard treats the parties differently. By giving the trial court “narrow” discretion to deny a Rule 74.05 motion while granting “broad” discretion to grant the motion, the

Court is, effectively, shifting the burden to the underlying Petitioner to justify or attack the Court's actions when the Petitioner is not the moving party.

Here, the trial court properly found that Husband's motion did not sufficiently plead the elements required under a Rule 74.05 motion. As set forth below, the trial court correctly determined that Husband's pleadings did not state a claim for relief under Rule 74.05 and thus, under either standard of review, the decision of the trial court should be affirmed.

B. Legal Analysis

Husband raises only one point but it is difficult to determine whether Husband is challenging the trial court's denial of his motion outright or the trial court's failure to grant him an evidentiary hearing on his motion. Husband did not request an evidentiary hearing on his motion and the Court properly considered Husband's motion and the record (or the lack thereof) and found Husband's Motion to Set Aside to be so facially deficient as to not entitle Husband to an evidentiary hearing. Husband's mere conclusory allegations, without alleging detailed facts along with supporting documentary evidence or affidavits, failed to meet Husband's burden to proceed to the second stage – an evidentiary hearing.

Husband commences his argument on the premise that his motion met the *prima facie* pleading burden of Rule 74.05. Wife disagrees with this premise. Under Rule 74.05, Husband was required to file a motion stating facts constituting a meritorious defense and show good cause for disregarding the judicial process.

Wife, for purposes of this appeal only, treats all of Husband's allegations as if they were true and argues despite doubts as to Husband's veracity, that Husband's motion still fails to meet the minimum pleading thresholds of Rule 74.05.

1. Good Cause

Husband has the burden to state sufficient facts to show "good cause" for being in default. Mo. R. Civ. Pro. R. 74.05. In this case, Husband failed to plead sufficient facts to meet this burden. Husband's sole allegation for "good cause" was that Wife told Husband that she was going to the doctor and did not tell Husband she was going to Court for the default hearing. Wife was required to file a notice of the hearing with the Court, but there is no requirement to notify a defaulting party of the date and time of the trial. *Kocsis*, 28 S.W.3d at 508. The docket entries for this case remained available on the Missouri court's website via Case.net.

Wife filed the required notice. (LF 10-11). After service of process, Missouri law requires Husband to take an affirmative step in the legal proceeding in order to receive any further information about the divorce proceeding, until entry of the judgment. Therefore, a party in default has no right to notice of the default proceedings, and a statement of a lack thereof does not show good cause. *Kocsis*, 28 S.W.3d at 508. Lack of knowledge of the Court's trial setting is not sufficient to prove "good cause."

Pursuant to Rule 74.05(d) good cause excludes reckless conduct. *Doe v. Hamilton*, 202 S.W.3d 621 (Mo. App. ED 2006). "'Reckless' has been defined to mean 'lacking in caution' or 'deliberately courting danger.'" Additionally, a person is 'reckless' when he

makes a conscious choice of his actions with knowledge of facts which would disclose a danger to a reasonable person.” *Id.* at 623. (internal citations omitted).

Here, Husband has not pled any facts rising to “good cause” level. He had been served months earlier and ignored the judicial proceedings. There are no allegations that he wasn’t served, that he was in the hospital and unable to respond, or any other typical excuses for ignoring a judicial proceeding. A reasonable person would heed the directions of a summons to file an answer within a required period of time.

Husband also argues that he made a mistake in this case by thinking that he and his Wife were represented by the same counsel. (LF 23). He did not allege that he ever met with Wife’s counsel or any other similar facts which might support his “mistake.” He was served with papers by a process server and he did not sign a “waiver of service” or any other similar document prepared by Wife’s counsel. Husband’s motion did not allege why he failed to hire an attorney, why he failed to file a responsive pleading, or why he failed to take any affirmative action in his case prior to the default. Thus, Husband’s pleadings were deficient as to the necessary element of “good cause.” *See Klaus v. Shelby*, 42 S.W.3d 829 (Mo. App. ED 2001). *See also Kocsis, supra* (holding that Husband failed to show “good cause” to set aside a default when his motion alleged that he did not receive notice of the hearing, he believed his case was settling, and thought the case was on the docket for administrative purposes only).

As to the merits of Husband’s arguments for “good cause”— they do not meet Missouri standards. In *McElroy*, the Western District entertained a defendant’s

arguments of good cause. *McElroy v. Eagle Star Group, Inc.*, 156 S.W.3d 392 (Mo. App. WD 2005) (held to be superseded by statute in *Pyle v. Firstline Transp. Sec. Inc.*, 230 S.W.3d 52 (Mo. App. WD 2007) as to other grounds). In *McElroy*, the defendant faxed his lawsuit paperwork to his insurance broker. The defendant was repeatedly told by his insurance carrier that they were handling his lawsuit. Once the defendant learned about an interlocutory default being granted, he contacted his insurance broker again. Based on the broker's reassurance, the defendant took no further action. The defendant apparently contacted Plaintiff's counsel and learned that no one had entered in his case and then his broker admitted that there had been an administrative mix-up regarding his case and that the insurance company was now questioning whether the Defendant had coverage. *Id. at 405-06*. Upon hearing this news, the Defendant hired independent counsel who filed a motion to set aside the default judgment. Despite all of this confusion and definite responsibility of the insurance carrier, the trial court denied the defendant's motion to set aside the default and the Western District affirmed this decision. The Western District held that the defendant "recklessly chose to rely on his insurance agent's" advice.

"'Reckless' has been defined as meaning 'lacking in caution' or 'deliberately courting danger'....To be reckless, a person makes a conscious choice of his course of action, either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to a reasonable man. One may also be said to have acted recklessly if he or she is intentionally indifferent to a harmful consequence in

that he or she simple ‘does not care about the consequences of his or her actions.’”

McElroy, supra at 403-04. (internal citations omitted).

In this case, Husband’s motion states he relied on his own faulty assumptions and alleged statements from Wife in deciding to ignore this matter. Even taking Husband’s motion in the light most favorable to Husband, it is clear his allegations don’t rise anywhere close to the injustice suffered by the Defendant in *McElroy*. Husband did not allege he consulted counsel and was given poor advice. He does not allege that he took any action whatsoever after being served. Husband could afford to hire counsel (although inability to afford counsel is not an excuse in these types of cases), but he took no action. (LF 15-16). Husband stated he believed that he and Wife were to use one lawyer but he doesn’t state when, during their 28 year marriage, he came to believe that their divorce would be facilitated by one lawyer. He did not execute an entry of appearance and waiver of service of process but he was personally served – evidence more consistent with an adversarial process than one where Husband would reasonably believe the parties would “share” one attorney. Husband alleged that Wife had been destroying Husband’s mail since July, 2007 but this allegation does not excuse Husband’s reckless indifference to the judicial process. First, Husband was not entitled to any further notice of the legal proceedings after service of process unless he filed an answer. He did not. There is no evidence that Husband was mailed anything from any party which would have required his action. Finally, upon receiving a copy of the

judgment (presumably from the clerk mailing him his certified copy as required under the civil rules), Husband hired counsel and filed a motion to set aside the default.

Husband, on page 19 of his substitute brief, proceeds to discuss factual material not in the record – such as Wife’s familial relationship with her trial counsel. Such information was not included in Husband’s motion to set aside judgment, was not mentioned on the record, and Wife moves to strike this evidence from Husband’s brief as not being properly in front of the Court.

Husband’s reliance *Bothe v. Bothe*, 266 S.W.3d 321 324 (Mo. App. ED 2008), is misplaced. In *Bothe*, Wife appealed the trial court’s denial of her motion to set aside a default judgment. The Eastern District noted its disdain for defaults in child custody situations. Here, there are no child custody issues. In *Bothe*, Wife’s second motion to set aside judgment contained attached affidavits and supporting e-mails that bolstered her claims against Husband. Here, Husband attached no supporting documentation supporting any type of claim of reliance on any actionable statements by Wife.

Ultimately, Husband did not plead facts which rise to the level of “good cause” therefore, no further evidentiary inquiry was justified. Husband’s inaction over the judicial proceeds wasn’t negligent – but was a reckless disregard for the judicial process. The law does not provide a safety valve for Husband’s reckless indifference.

2. Meritorious defense

Husband must plead, in the conjunctive, both 1) good cause for ignoring the Court’s summons and 2) a meritorious defense to Wife’s divorce petition. *Dozier, supra*.

Husband failed to plead sufficient meritorious defenses other than speculative assertions and a legal conclusion that he had not committed marital misconduct and facts which might refute some of Wife's claims for maintenance. Almost all of Husband's assertions in his motion were bald assertions as far as his meritorious defense and Husband did not include any supporting affidavits or admissible documentary evidence to substantiate his claim that Wife was not disabled or that Wife would be returning to work to earn more money than Husband. He failed to present any documentary support as to these issues. *See Husband's motion generally.* In his substitute brief Husband relies on assertions made in his answer, but Husband never received leave to file his answer with the Circuit Court and therefore any references to Husband's proposed answer are not properly a part of the legal file and should be stricken from Husband's brief.

Husband relies on *Saloma v. Saloma-Orozco*, 788 S.W.2d 799 (Mo. App. ED 1990), to justify his meritorious defense argument. In *Saloma*, the appellate court held that when Husband and Wife were living together and Husband was able to establish that Wife committed extrinsic fraud in the procurement of the judgment, the judgment should be set aside. However, *Saloma* goes on to say that Husband can only use this meritorious defense if Husband is free from fault, neglect or inattention to his case. *Id.* at 801. Husband's pleadings do not show that he was free from neglect or inattention. His own motion states that he believed the divorce process was proceeding, his brief argues that he thought he and his Wife were going to obtain a "cheap" divorce.

Husband's reliance on *Saloma* is misplaced. First, *Saloma* involved a child custody proceeding which has a different set of rules than default judgments that don't involve minor children. *Saloma* also involved allegations of extrinsic fraud. *Saloma* defines extrinsic fraud as fraud that would have prevented the trial court from entering the judgment at all, not just fraud that would have resulted in a different judgment. *Id.* at 801.

In this case, Husband alleged facts that, if true, may have made the award of maintenance different as to duration or amount, but not facts which would have rendered the award of maintenance completely off the table. Examples of the type of necessary testimony would be 1) the parties were never lawfully married or 2) Wife was not entitled to maintenance due to statutory factors. Husband did not allege that Wife did not or could not meet the statutory factors for maintenance. Husband alleged, at best, his beliefs and speculation which might have affected the duration or amount of maintenance to be awarded to Wife if proven to be true. Finally, in *Saloma*, Husband alleged that Wife told Husband that she wasn't proceeding with the divorce and while Wife proceeded with the divorce when Husband was out of the country. In this case, Husband admits he knew the divorce was proceeding, he merely was reckless in thinking that he and Wife had the same definition of "cheap divorce."

In *In re Marriage of Macomb*, 169 S.W.3d 191 (Mo. App. SD 2005), the Court of Appeals found, in facts similar to *Saloma*, that the trial court did not error in not setting aside a default judgment entered against Husband. The Court of Appeals affirmed the

order while finding that, pursuant to Rule 73.01, the trial court could have easily found that Husband's reliance on his Wife's statements about the court date for their divorce to be reckless. *Id.* at 194.

In *In re the Marriage of Williams*, 847 S.W.2d 896 (Mo. App. SD 1993), the Southern District found that Wife's decision to take no action after being served was the product of wife's recklessness. The Court carefully defined recklessness in this context as "[Wife's] conscious choice of a course of action with knowledge of the serious danger that a default judgment could result." *Id.* at 902. "To be reckless, a person makes a conscious choice of his court of action, 'either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man.'" *Id.* at 900 (internal citations omitted).

In this case, the trial court's judgment should be affirmed since Husband's motion failed to allege sufficient admissible facts to warrant "good cause" and "meritorious defense" for ignoring the pending judicial proceedings. Husband failed to meet his burden under Rule 74.05.

3. Evidentiary hearing and the improperly verified Rule 74.05 motion

In Husband's statement of legal principles Husband argues that he was entitled, as a matter of law, to an evidentiary on a motion to set aside a default judgment. Husband correctly points out that *Tyree* would require an evidentiary hearing *if* the trial court were to find that the motion to vacate default judgment were sufficient on its face in order to warrant the granting of an evidentiary hearing. *Tyree v. Tyree*, 978 S.W.2d 847 (Mo.

App. SD 1998) (overruled on other grounds by *Brooks v. Brooks*, 98 S.W.3d 530 (Mo. 2003)). “Entitlement to an evidentiary hearing on a motion to set aside a default judgment depends on meeting the pleading requirements of Rule 74.05.” *McElroy, supra* at 403.

Husband also relies on *Moore v. Baker*, 982 S.W.2d 286 (Mo. App. WD 1998). In *Baker*, the Western District determined it needed a factual record in order to determine the merits of a defendant’s motion to set aside a default judgment. The *Baker* court held that *Baker* had pled lack of personal jurisdiction in his motion to set aside the default and that this pleading was sufficient to entitle him to an evidentiary hearing as to the good cause issue, but the Court explicitly refused to rule on *Baker*’s motion on the basis of the legal file alone.

In this case, the trial court limited arguments to the “four corners of the motion.” (Tr. 11). As discussed above, a party moving to set aside a default judgment has the burden of proving both a meritorious defense and good cause and this motion cannot prove itself; it must be verified or supported by affidavits. *Hinton v. Proctor & Schwartz*, 99 S.W.3d 454, 458 (Mo. App. ED 2003).

In *Hinton*, the Eastern District held “[t]o determine compliance with the pleading requirements of Rule 74.05(d), we look to the allegations in the defaulting party’s motion, and such other documents as affidavits, exhibits, and proposed answers. Bare statements amounting to mere speculations or conclusions fail to meet the pleading requirements. A motion to set aside a judgment cannot prove itself.” *Id.* (internal citations omitted). The *Hinton* court then held that the Rule 74.05 motion must be

verified or supported by affidavits and these documents must contained admissible evidence based on the affiant's personal knowledge. *Id.* at 459.

Husband's motion does not meet the *Hinton* requirements for an affidavit based on personal knowledge.

- Husband included in his motion statements Wife allegedly made to Husband's son about her whereabouts on the day of trial. (LF 23). This is hearsay from the son.
- Husband alleges that Wife had been getting all of the mail of the parties and destroying Husband's mail since July 2007 but he does not include any statements about how he came to this conclusion and thus such a statement is pure speculation. (LF 24).
- Husband alleges that Wife "will be able to return to work making \$30,000 more than Husband and this statement has no evidentiary foundation and is presumably hearsay if not a fabrication. (LF 24).
- Husband's motion states that Wife will have sufficient income from her employment to meet her reasonable needs and this is inadmissible speculation in that Wife was on disability at the time Husband filed his motion. (LF 24).

Husband made no attempt to introduce any evidence that Wife is no longer on disability or was never on disability.

Additionally, Husband's jurat states that the information "contained therein are true to the best of [Husband's] knowledge, information, and belief." (LF 25). Beliefs and information aren't admissible – facts are. Husband's motion is replete with his "belief"

that Wife is not disabled, that Wife is able to return to work, that Wife can earn more than Husband. Husband did not support this with facts. In *State v. Simpson*, 118 S.W. 1187 (Mo. App. WD 1909), the Court of Appeals held that a criminal information based on an affidavit stating that the facts are based on the affiant's "best knowledge, information, and belief" was a bad affidavit because "**information** implies a lack of knowledge." *Id.* at 1188 (emphasis added).

Here, the trial court inquired extensively as to whether the statements made in Husband's motion, if taken as true, would be sufficient to grant the motion. After hearing arguments from both sides, the Court determined Husband's motion was deficient on its face and denied the motion since Husband failed to meet the pleading requirements. (Tr. 22).

Additionally, Husband never asked for an evidentiary hearing. When the trial court stated its intent was to determine first whether the motion met pleading requirements, Husband did not protest. (Tr. 4). When Husband first noticed up his motion to set aside the default judgment, he did not notice it for an evidentiary hearing. (LF 31-32). After the trial court denied Husband's motion in order form, and after the Court of Appeals issued a show cause order since the denial was not in judgment form, Husband did not make any further attempts to set his motion for evidentiary hearing. *See Husband's Supplemental Legal File, generally.* Instead, Husband filed his Motion to Reduce to Judgment on April 8, 2008 and his motion to reduce to judgment was heard on the record on May 7, 2008 without any further request for an evidentiary hearing. (S.L.F. 4 –

docket entries). Any error about the trial court's failure to grant an evidentiary hearing now is invited error on Husband's part. Husband cannot challenge an action on appeal that he invited. *See Kettler v. Kettler*, 884 S.W.2d 729 (Mo. App. ED 1994).

4. Other issues

The Circuit Court properly denied Husband's motion in that Husband did not properly file his motion as an "independent action." Husband did not pay a separate filing fee and Husband did not have a summons issued as to his motion. Since this Court is concerned, in a court-tried case, with the correctness of the result and not the route by which the trial court reached the result, the trial court's denial of Husband's motion should be affirmed. *Eckhoff v. Eckhoff*, 71 S.W.3d 619, 622 (Mo. App. WD 2002).

"Independent actions" should be commenced as a new action, with the issuance and service of a summons. The necessity for a summons in these types of motions is obvious. Since a Rule 74.05 motion can be filed up to 1 year after entry of judgment, there is no guaranteeing that a Plaintiff or Petitioner would continue to reside at the address where the party initiated the lawsuit. If simple service of a Rule 74.05 motion by mail were sufficient, there would be no proof that Plaintiffs or Petitioners had received notice of the motion. Petitioners are entitled to the same due process rights and procedures as Respondents. Due process requires that notice must be reasonably calculated to afford the parties with notice of the pendency of the action. *In re Marriage of Chamberlain*, 63 S.W.3d 326 (Mo. App. SD 2002).

There is little guidance as to the steps required for an “independent action.” Rule 74.06 reiterates that the Court has the power to entertain “independent actions” for relief from judgment based on fraud but said relief shall be made by motion as prescribed by “these rules” or by independent action. Those cases that have addressed Rule 74.06 independent actions, and other independent actions, have focused on the right of a defendant to file an independent action in equity. *See Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. 1989) (listing a suit in equity as a method to set aside a judgment)(superseded by Rule 74.05(d) as noted in *Continental Basketball Ass’n v. Harrisburg Professional Sports, Inc.*, 947 S.W.2d 471, 474 (Mo. App. ED 1997)); *West v. West*, 871 S.W.2d 64 (Mo. App. SD 1994) (holding that omitted marital property discovered after final judgment should be addressed via an independent action in equity). *Nilges v. Nilges*, 610 S.W.2d. 58 (Mo. App. ED 1980)(holding that independent actions, such as motions to modify, require notice to a party to be adversely affected). In *Chamberlain, supra*, the Southern District discussed the appropriateness of filing a separate petition alleging extrinsic fraud as a basis to set aside a dissolution decree. *Id.* at 331.

The introduction of the phrase “independent action” in Rule 74.05 is consistent with the statutory counterpart, Mo. Rev. Stat. § 511.200. In *Garrison v. Schmicke*, 193 S.W.2d 614 (Mo. 1946), this Court held that Petitions for Review of a default judgment are independent actions. Rule 53.01 provides that a “civil action is commenced by filing a petition with the Court.” *See also* Mo. Rev. Stat. § 506.110.

Since a defendant has up to 12 months to file a Rule 74.05 motion, and there is no requirement that a Plaintiff keep either the Court or the defendant notified of his or her current address well after entry of the judgment, the mere mailing of a motion to set aside doesn't provide any of the due process assurances one would expect after obtaining a judgment in his or her favor. Only the issuance and service of a summons with the motion, like that of an independent action, would provide such a constitutional protection. Husband did not follow these procedures. Thus, Husband did not properly initiate the filing of an "independent action" and therefore the trial court properly denied Husband's Rule 74.05 motion.

Conclusion

This Court should affirm the trial court's finding under *Murphy v. Carron, supra*. In the event this Court finds that Husband's pleadings met the stringent requirements of Rule 74.05, this Court should deny Husband's requested relief of entering an order setting aside the default and should remand the case for the limited purpose of providing Husband's requested evidentiary hearing.

Certificate of Compliance

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief 1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 8789 words determined using the word count in Microsoft Word 2007. A copy of this brief was submitted, in Microsoft Word 2003 format, on disk

to the Court. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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Certificate of Service

A true and accurate copy of the Respondent's brief was mailed to Arthur Muegler, 5241 Cathedral Drive, St. Louis, Missouri 63129 and James Pennoyer, 116 West Liberty Street, Farmington, MO 63640 and emailed to: muegler@mindspring.com and jjep12@sbcglobal.net on the 2nd day of January, 2009 and all electronic copies were scanned and found to be virus free pursuant to Rule 84.06(h).