**IN THE MISSOURI SUPREME COURT**

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**CASE NO. S.C. 88654**

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**RANDALL BRUNGARD AND CINDY BRUNGARD,**
**Plaintiffs/Appellants**

**v.**

**PATTI CAKES BAKING COMPANY, INC., d/b/a Risky's Pizza and Spirits and d/b/a Risky's Pizza and d/b/a Risky's**
**Defendant/Respondent.**

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**Appeal from the Circuit Court of Miller County, Missouri**
**26th Judicial Circuit**
**The Honorable Greg Kays, Circuit Judge**
**Miller County Case No. 26V050400040**

**Transferred to Missouri Supreme Court After Opinion In**
**Missouri Court of Appeals, Western District, Case No. W.D. 67217**

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**APPELLANTS' SUBSTITUTE BRIEF**

**ORAL ARGUMENT REQUESTED**

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## III. JURISDICTIONAL STATEMENT

This appeal involves the question of whether a default judgment, which was entered in favor of Plaintiffs/Appellants Randall Brungard and Cindy Brungard (hereinafter referred to as "Appellants") on April 13, 2006, was properly set aside, under Mo.R.Civ.P. 74.05(d), by the June 15, 2006, docket entry, and the August 17, 2006, *Judgment Setting Aside Default Judgment*, both of which were entered by the Circuit Court of Miller County, Missouri, Judge Greg Kays presiding (hereinafter referred to as the "Trial Court"). *Legal File* (hereinafter abbreviated "*L.F.*") 7, 9. The default judgment was entered on April 13, 2006. *L.F.* 7, 36-38. On May 3, 2006, Defendant/Respondent Patti Cakes Baking Company, Inc. (hereinafter referred to as "Respondent"), filed a *Motion to Set Aside Default Judgment*. On May 17, 2006, Respondent filed its *Suggestions in Support of Motion to Set Aside Default Judgment*, with a May 13, 2006, *Affidavit* of James Wedig attached thereto as "Exhibit A". *L.F.* 7, 41-45.

The August 17, 2006, *Judgment Setting Aside Default Judgment* (hereinafter referred to as the "Judgment"), which reflected the Trial Court's June 15, 2006, docket entry, is appealable. "A motion to set aside a default judgment is an independent action, the determination of which is an independent judgment." *Gantz v. Director of Revenue, State of Missouri*, 921 S.W.2d 156, 157 (Mo.App.E.D. 1996), *citing Kueper v. Murphy Distributing*, 834 S.W.2d 875, 878 (Mo.App.E.D. 1992). "When a trial court sets aside a default judgment after the judgment has become final, the trial court's order setting aside the default judgment is immediately appealable." *Continental Basketball Association v.*

*Harrisburg Professional Sports Inc.*, 947 S.W.2d 471, 473 (Mo.App.E.D. 1997), *citing Gantz*, 921 S.W.2d at 157. The Missouri Court of Appeals, Western District, stated, in *McElroy v. Eagle Star Group, Inc.*, that, "'In such a case, the trial court's order granting or denying the motion to set aside default judgment is itself (assuming that all other prerequisites of appellate jurisdiction are met) a separately appealable judgment.'" *McElroy v. Eagle Star Group, Inc.*, 156 S.W.3d 392, 400 (Mo.App.W.D. 2005), *quoting Popular Leasing USA, Inc. v. Universal Art Corp.*, 57 S.W.3d 875, 878 (Mo.App.E.D. 2001); *also citing Casper v. Lee*, 245 S.W.2d 132, 135 (Mo. 1952). In *In re the Marriage of Coonts*, the Missouri Court of Appeals, Southern District, held that, regardless of whether a motion to set aside a default judgment is filed before the expiration of thirty days after the entry of the default judgment (the default judgment has not yet become final), or the motion to set aside is filed after the thirty-day mark (and the default judgment has become final), the motion to set aside "is an independent action, regardless of when it is filed, requiring an independent judgment." *In re the Marriage of Coonts*, 190 S.W.3d 590, 604 (Mo.App.S.D. 2006). In order to lay to rest a conflict among the Southern, Eastern, and Western Districts of the Missouri Court of Appeals regarding whether or not motions to set aside default judgments should be treated in different procedural manners depending on when the motion to set aside was filed, the Missouri Supreme Court signaled that the view of the Southern District, stated in *Coonts*, supra, was correct; effective January 1, 2007, the Missouri Supreme Court adopted a new paragraph to Mo.R.Civ.P. 74.05(d), which clearly states that a motion to set aside a

default judgment is an independent action, regardless of when it is filed. Therefore, the August 17, 2006, Judgment reflecting the June 15, 2006, docket entry is appealable.

Furthermore, the Missouri Court of Appeals, Western District, had jurisdiction to hear this appeal of that Judgment. This appeal does not involve the validity of a treaty or statute of the United States, nor of a statute or provision of the Constitution of Missouri. Nor does this appeal involve the construction of the revenue laws of Missouri nor the title to any state office. Nor is this a case where the punishment imposed is death. Therefore, this appeal is not one in which the Missouri Supreme Court has exclusive appellate jurisdiction. Mo. Const. Art. V § 3. Appellants/Plaintiffs are aggrieved by, and appeal from, a Judgment of the Circuit Court of Miller County, Missouri, Judge Greg Kays, presiding. Therefore, the Missouri Court of Appeals, Western District, had jurisdiction in this appeal because Miller County, Missouri, is within the territorial jurisdiction of the Missouri Court of Appeals, Western District, in that it is not within the territorial jurisdiction of the Southern or Eastern Districts. RSMo. §477.070, RSMo. §477.050, RSMo. §477.060. The Missouri Court of Appeals, Western District, exercised its jurisdiction over this case by hearing the case and issuing an opinion on June 26, 2007.

After said opinion, on July 11, 2007, Respondent filed an application to transfer this case from the Missouri Court of Appeals, Western District, to the Missouri Supreme Court. On August 21, 2007, the Missouri Supreme Court sustained that application and ordered the case transferred to the Missouri Supreme Court. Mo. Const Art. V, § 10, states, in relevant part, that "Cases pending in the court of appeals may be transferred to the supreme court … by order of the supreme court before or after opinion because of the

general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal." Accordingly, the Missouri Supreme Court has jurisdiction over this appeal.

## IV. STATEMENT OF FACTS

This case involves a slip-and-fall incident that befell Appellant Randall Brungard at a restaurant located at 301-302 Arrowhead Plaza, Lake Ozark, Missouri, on March 11, 2000. *L.F* 10-11, 15-16,18-23. On January 29, 2004, Appellants Randall Brungard and Cindy Brungard, as Plaintiffs, filed a petition against Defendant Risky's, Inc., in the Circuit Court of Miller County, Missouri, alleging that, on March 11, 2000, Randall Brungard was walking down a greasy wooden ramp leading from the back door to the parking lot of the property located at 301-302 Arrowhead Plaza, Lake Ozark, Missouri, when he slipped, fell, and sustained injuries to his back, resulting in medical expenses, loss of earnings, diminution of earning capacity, and loss of household contributions; Cindy Brungard claimed, in said petition, her damages arising out of the injuries to her husband, Randall. *L.F.* 2, 10-14. On September 15, 2005, Appellants filed their *First Amended Petition* against Respondent alleging the same incident and damages as the original *Petition*, plus additional facts intended to invoke the relation back of the amended petition to the date the original petition was filed, pursuant to Mo.R.Civ.P. 55.33(c). *L.F.* 3, 15-29.

The *First Amended Petition* and *Summons in Civil Case* were served on Respondent at 2:50 p.m. on January 18, 2006, by serving Respondent's registered agent, James Wedig, at his place of business in Lake Ozark, Miller County, Missouri. *L.F.* 6; 32. Respondent did not file an answer or otherwise defend within the thirty days following said service. *L.F.* 6-7, 36-38.

On March 27, 2006, Appellants filed a motion entitled *Motion for Default Judgment Against Patti Cakes Baking Company, Inc. d/b/a Risky's Pizza and Spirits and d/b/a Risky's Pizza and d/b/a Risky's*, requesting the Trial Court to enter a default judgment against Respondent. *L.F.* 6; 34-35. On April 13, 2006, the Trial Court held a hearing on that motion, and found based upon the evidence and argument of Appellants that Randall Brungard was damaged in the amount of $529,631.59 and Cindy Brungard was damaged in the amount of $100,000.00. *L.F.* 7; 37. On April 13, 2006, the Trial Court entered a default judgment (hereinafter referred to as the "Default Judgment") in favor of Appellant Randall Brungard against Respondent in the amount of Five Hundred Twenty-Nine Thousand Six Hundred Thirty-One Dollars and Fifty-Nine Cents ($529,631.59) plus prejudgment interest thereon from February 15, 2004, until the date of the judgment at the rate of nine percent (9%) per annum, plus post-judgment interest thereon at the legal rate of nine percent (9%) per annum until paid, plus court costs, and in favor of Appellant Cindy Brungard against Respondent in the amount of One Hundred Thousand Dollars ($100,000.00) plus prejudgment interest thereon from February 15, 2004, until the date of the judgment at the rate of nine percent (9%) per annum, plus post-judgment interest thereon at the legal rate of nine percent (9%) per annum until paid, plus court costs. *L.F.* 7; 36-38. Appellants then filed a voluntary dismissal without prejudice as to Defendant Risky's, Inc.

On May 3, 2006, Respondent filed its *Motion to Set Aside Default Judgment* (hereinafter referred to as "*Motion*"). *L.F.* 7, 39-40. On May 17, 2006, Respondent filed *Suggestions in Support Motion to Set Aside Default Judgment* with an affidavit of James

Wedig attached thereto as "Exhibit A". *L.F.* 7, 41-45. In the *Motion*, Respondent requested the Trial Court to set aside the Default Judgment, pursuant to Mo.R.Civ.P. 74.05(d), alleging that "good cause further exists because the default was based upon a mistake and/or conduct that was not intentionally or recklessly designed to impede the judicial process." *L.F.* 39. Respondent did not present any evidence to explain why Respondent did not timely file an answer until May 17, 2006, when, in the affidavit of James Wedig, Respondent advised the Court that James Wedig is Respondent's registered agent, that Wedig "believes that he was served with a summons in this matter on or about January 18, 2006," that Wedig "thought that he faxed the same to his insurance agent for delivery to his insurance carrier" that Wedig "cannot find the summons and is not sure what he did with the same but he did not intentionally ignore this matter" and that Wedig "was unaware that a default was being taken against [Respondent] on or about April 13, 2006, and only learned about the default later at which time he immediately contacted his insurance agent for the matter to be turned over to his insurance carrier and counsel." *L.F.* 44-45. Said affidavit was executed by James Wedig on May 13, 2006. *L.F.* 45.

A hearing was held on Respondent's *Motion* on June 15, 2006. *L.F.* 7. On that day, the Trial Court granted the *Motion* and set the Default Judgment aside via a docket entry that reads "Case called. Plaintiff appears by Atty David Tunnell. Defendant Patti Cakes appears by atty Jeff Parshall. Court takes up "Motion to Set Aside Default" filed 5-3-06 by Defendant, and hears argument of parties. Motion taken under advisement. Court considers argument of parties, filings & suggestions filed. "Motion to set aside default" is sustained. Clerk to advise parties." (hereinafter referred to as the "Docket

Entry"). *L.F.* 7. On July 24, 2006, Appellants filed a *Motion for Entry of Judgment* requesting the Trial Court to enter a document entitled "Judgment" upon the aforementioned Docket Entry, with a proposed "Judgment" attached thereto. *L.F.* 8, 55. On August 17, 2006, a hearing was held on said motion, and the Trial Court did execute and file a document entitled "Judgment Setting Aside Default Judgment", which document was the same as Appellant's proposed "Judgment" except that the Trial Court changed the title from "Judgment" to "Judgment Setting Aside Default Judgment" and struck one sentence in the text. *L.F.* 9, 70-71. In said "Judgment Setting Aside Default Judgment" (heretofore and hereinafter referred to as the "Judgment"), the Trial Court found, among other things, that, "Good cause has been shown for setting aside the default judgment." *L.F.* 60-61. Appellants now appeal from this Judgment and the June 15, 2006, Docket Entry upon which it is based.

On July 24, 2006, Appellants filed a Notice of Appeal in the Circuit Court of Miller County, Missouri. *L.F.* 8; 58-59. Along with said Notice of Appeal, Appellants filed a Civil Case Information Form, with a copy of the Docket Entry attached. *L.F.* 8, 62-64. A copy of the Notice of Appeal, a copy of the Civil Case Information Form, and the prescribed appellate docket fee were transmitted to the clerk of the Missouri Court of Appeals, Western District. *L.F.* 59. After the Trial Court entered the Judgment, Appellants, on August 25, 2006, filed a First Amended Notice of Appeal and First Amended Civil Case Information form, with a copy of the Judgment attached. *L.F.* 67-73.

## V. POINTS RELIED ON

### POINT I

**THE TRIAL COURT ERRED IN GRANTING RESPONDENT PATTI CAKES BAKING COMPANY, INC.'S *MOTION TO SET ASIDE DEFAULT JUDGMENT* BECAUSE THAT RULING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IN THAT THE EVIDENCE RESPONDENT PRESENTED IN SUPPORT OF ITS MOTION SHOWED EITHER 1) THAT RESPONDENT'S REGISTERED AGENT "THOUGHT" HE FAXED THE SUMMONS TO HIS INSURANCE AGENT, BUT DID NOT REALLY FAX IT, OR 2) RESPONDENT'S REGISTERED AGENT DID FAX THE SUMMONS TO HIS INSURANCE AGENT, BUT RESPONDENT'S INSURER (WHOSE NEGLECT IS IMPUTED TO RESPONDENT) FAILED TO DEFEND RESPONDENT, AND THEREFORE RESPONDENT FAILED TO MAKE THE SHOWING OF "GOOD CAUSE" REQUIRED BY MO.R.CIV.P. 74.05(d).**

***In re Marriage of Coonts*, 190 S.W.3d 590 (Mo.App.S.D. 2006)**

***J. E. Scheidegger Co. v. Manon*, 149 S.W.3d 499 (Mo.App.S.D. 2004)**

***Krugh v. Millstone Marina Service, L.L.C.*, 126 S.W.3d 391 (Mo. 2004)**

***Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. 1989)**

**Mo.R.Civ.P. 74.05**

**Mo.R.Civ.P. 74.05(d)**

**Mo.R.Civ.P. 81.05(a)(1)**

## VI. ARGUMENT

### Standard of Review

The applicable standard of appellate review of the Trial Court's Docket Entry, and subsequent Judgment, which granted Respondent's *Motion to Set Aside Default Judgment*, is the standard set forth in *Murphy v. Carron*: "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*, 536 S.W.2d 30, 32 (Mo.banc 1976). *See also Dozier v. Dozier*, 222 S.W.3d 308, 311 (Mo.App.W.D. 2007), *citing In re Marriage of Coonts*, 190 S.W.3d 590, 603-04 (Mo. App. S.D. 2006) and Mo.R.Civ.P. 74.05(d). In reviewing a court-tried case such as this one, "the evidence, and permissible inferences therefrom, are viewed in the light most favorable to the judgment disregarding all contrary evidence and inferences." *Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corrections*, 59 S.W.3d 520, 522 (Mo.banc 2001).

## Point I

**THE TRIAL COURT ERRED IN GRANTING RESPONDENT PATTI CAKES BAKING COMPANY, INC.'S *MOTION TO SET ASIDE DEFAULT JUDGMENT* BECAUSE THAT RULING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IN THAT THE EVIDENCE RESPONDENT PRESENTED IN SUPPORT OF ITS MOTION SHOWED EITHER 1) THAT RESPONDENT'S REGISTERED AGENT "THOUGHT" HE FAXED THE SUMMONS TO HIS INSURANCE AGENT, BUT DID NOT REALLY FAX IT, OR 2) RESPONDENT'S REGISTERED AGENT DID FAX THE SUMMONS TO HIS INSURANCE AGENT, BUT RESPONDENT'S INSURER (WHOSE NEGLECT IS IMPUTED TO RESPONDENT) FAILED TO DEFEND RESPONDENT, AND THEREFORE RESPONDENT FAILED TO MAKE THE SHOWING OF "GOOD CAUSE" REQUIRED BY MO.R.CIV.P. 74.05(d).**

### A. Introduction

This appeal poses the question of whether the Trial Court properly set aside a default judgment. Respondent sought, in its *Motion to Set Aside Default Judgment* (hereinafter referred to as the "*Motion*"), to have the Trial Court set aside Appellants' April 13, 2006, Default Judgment under Mo.R.Civ.P. 74.05(d). (*L.F.* 39)

Respondent filed its *Motion* on May 3, 2006, but did not file any evidence in support of said *Motion* until it filed an affidavit of Respondent's Registered Agent James

Wedig, along with suggestions in support of the *Motion*, on May 17, 2006 (*L.F*. 41-45). Respondent's filing of its unsupported *Motion* on May 3, 2006, (which was 20 days after the entry of the Default Judgment) did not prevent the Default Judgment from becoming final, because "The party moving to set aside a default judgment per Rule 74.05(d) has the burden of proof to convince the court that the party is entitled to relief." *Weidner v. Anderson*, 174 S.W.3d 672, 680-681 (Mo.App.S.D. 2005), *citing Hinton v. Proctor & Schwartz*, 99 S.W.3d 454, 458 (Mo.App.E.D. 2003). When a motion to set aside a default judgment is not verified or supported by evidence such as an affidavit or sworn testimony, that motion suffers from a "fatal evidentiary deficiency". *Weidner*, 174 S.W.3d at 680. Therefore, despite Respondent's May 3, 2006, *Motion*, the Default Judgment became final on May 13, 2006, thirty days after its entry, because "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Mo.R.Civ.P. 81.05(a)(1). Like the Missouri Court of Appeals, Western District, stated below in its opinion, under *In re the Marriage of Coonts*, 190 S.W.3d 590, 604 (Mo.App.S.D. 2006) and the current version of Mo.R.Civ.P. 74.05(d), Appellants believe that it no longer matters whether or not a motion to set aside a default judgment is filed before or after the expiration of thirty days after the default judgment; no matter when it is filed, such a motion is an independent action, and the standard of review on an appeal of the judgment on that motion is the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976). However, in case this Court is of the opinion that the timing of the filing of the motion to set aside default judgment is still important, Appellant has left the preceding argument, originally set forth in *Appellant's*

*Brief* in the Court of Appeals, Western District, that the default judgment had already become final by the time Respondent filed any evidence in support of its *Motion*. The fact that the Default Judgment had already become final, even if the timing of the *Motion* still matters, causes the standard of review in this case to still be that set forth in *Murphy v. Carron*.

Respondent claimed, in its *Motion*, that it was entitled to relief under Mo.R.Civ.P. 74.05(d). Mo.R.Civ.P. 74.05(d), states, in relevant part, as follows:

> **Mo.R.Civ.P. 74.05 Entry of Default Judgment**
>
> …
>
> ***(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.*

"According to Rule 74.05(d), a trial court may set aside a default judgment if the aggrieved party satisfies three requirements. The aggrieved party must (1) timely file a motion to set aside the default judgment, (2) the motion must contain facts constituting a meritorious defense and (3) the motion must show good cause for setting it aside." *J. E. Scheidegger Co. v. Manon*, 149 S.W.3d 499, 502 (Mo.App.S.D. 2004). There is no dispute in this case as to the meritorious defense element; Appellants have always acknowledged that Respondent's *Motion* and the *Suggestions in Support* thereof set forth

"an arguable theory from which a defense may be made", as is required by the "meritorious defense" component of Mo.R.Civ.P. 74.05(d). *Gibson by Woodall v. Elley*, 778 S.W.2d 851, 855 (Mo.App.W.D. 1989). Moreover, Appellants admit that the timeliness element has also been satisfied, the *Motion* having been filed within a reasonable time less than a year after the entry of the default judgment, as required by Mo.R.Civ.P. 74.05(d). The real issue concerning the propriety of the Trial Court's Judgment is the "good cause" element: Respondent failed to show good cause for setting aside the Default Judgment, and the Trial Court erred when it set aside the Default Judgment despite Respondent's failure to make that showing.

In order to set aside a default judgment under Mo.R.Civ.P. 74.05(d), good cause must be shown. The party moving to set aside the default judgment, Respondent in this case, bears the burden of demonstrating good cause. *In re Marriage of Pierce*, 867 S.W.2d 237, 238 (Mo.App.S.D. 1993)**,** *citing In re Marriage of Baker*, 584 S.W.2d 449, 450 (Mo.App. 1979) "A 'defaulted defendant shows good cause by proving that he or she did not recklessly or intentionally impede the judicial process.' [*Great Southern Savings & Loan Association v. Wilburn*, 887 S.W.2d 581, 584 (Mo.banc 1994)]. Accordingly, 'good cause excludes not only intentional conduct but also reckless conduct.' *Crain* [*v. Crain*], 19 S.W.3d [170], 174 [Mo.App.W.D. 2000]. In the Rule 74.05 context, 'reckless' has been defined as meaning 'lacking in caution' or 'deliberately courting danger.' *In re Marriage of Williams*, 847 S.W.2d 896, 900 (Mo.App.S.D. 1993)." *McElroy v. Eagle Star Group, Inc.*, 156 S.W.3d 392, 403 (Mo.App.W.D. 2005).

The Trial Court erred in entering the Judgment setting aside the Default Judgment because Respondent failed to carry its burden of demonstrating good cause. Respondent failed to present any evidence that it was innocent of conduct intentionally or recklessly designed to impede the judicial process. The only evidence Respondent presented in support of its *Motion* was the May 13, 2006, Affidavit of Respondent's Registered Agent James Wedig, which affidavit is contained at Pages 44-45 of *Appellants' Legal File*. Concerning the actions he took after he was served with the summons and petition on January 18, 2006, James Wedig, in his Affidavit, stated only that he "thought that he faxed the same to his insurance agent for delivery to his insurance carrier" and that he "cannot find the summons and is not sure what he did with the same but he did not intentionally ignore this matter". The Affidavit did not definitively say that James Wedig faxed the summons to his insurance agent. Based upon the evidence presented by Respondent in support of its *Motion*, there are two, and only two, possibilities of what happened after James Wedig was served on January 18. The first possibility is that James Wedig "thought he faxed the summons to his agent", but, in reality, did not. The second possibility is that James Wedig actually did fax the summons to his agent, but his insurer failed to timely respond to the lawsuit. Neither of these situations constitutes an absence of intentional or reckless conduct. These situations are examined in the following sections.

**B. Scenario One: James Wedig "Thought" He Faxed The Summons, But Didn't**

If James Wedig "thought" he faxed the summons to his insurance agent but actually did not fax it to the agent, this situation did not involve an absence of reckless behavior. If Mr. Wedig had exercised due diligence in following up with his insurance company regarding what was being done about the lawsuit, Mr. Wedig would have discovered that he was mistaken in his belief that he had faxed the summons to his agent, and the situation could have been rectified before the default judgment was entered. Appellants did not swoop in and take their default judgment at the earliest possible opportunity. Wedig was served on January 18, 2006, but Appellants did not have their default judgment hearing until April 13, 2006, nearly three months later. This gave Respondent plenty of time follow up with its insurer, discover that James Wedig was mistaken in his belief that he had faxed the summons, and cause the insurer to begin to defend Respondent. This did not occur. If this situation is the one that actually occurred, then it is apparent (from the lack of any response to the lawsuit until after the default was taken) that Respondent Defendant did not *actually* take any action to defend itself against Appellants' lawsuit before Respondent became in default on February 17, 2006, (thirty days after service) even though the Summons and Petition were in the hands of Respondent's registered agent a full month before that date. "The only cases in which defendants have been held to have established good cause for failure to file [an answer] are those, unlike the case at hand, in which the defendants had taken at least some action in their defense within the 30-day period before default." *Krugh v. Millstone Marina Service, L.L.C.*, 126 S.W.3d 391, 393 (Mo. 2004).

In the *Krugh* case, the Missouri Supreme Court reversed a ruling of the Circuit Court of Jackson County that set aside a default judgment for "good cause". *Id*. at 391. The Krughs sued defendant Millstone Marina for failing to check for leaks in the fuel system while de-winterizing a boat, which boat exploded due to a fuel leak. *Id*. Carla Blazier, who was Millstone's co-owner and registered agent, was served on May 23, 2000, but Millstone did not file an answer within 30 days. *Id*. at 391-392. In early August, 2000, the Krughs filed a motion for default judgment, and on August 10, 2000, the Krughs' attorney faxed a courtesy copy of the petition and return of service to Blazier, asking that they be forwarded to Millstone's insurer. *Id*. at 392. Thirteen days later, Blazier finally sent the documents to Millstone's insurance agency, which forwarded them "to its general managing agency, which, in turn, forwarded the papers to its wholesale insurance broker. At that point, the claim was to be transmitted to the appointed adjuster, but instead, it was mistakenly sent to a prior insurer. It was not until July of 2001, more than three months after the default judgment was entered, that the mistake was discovered and the claim was forwarded to the proper entity. Only then did a defense of the case begin." *Id*. The Circuit Court of Jackson County set the *Krugh* default judgment aside, and the Krughs appealed, claiming Millstone failed to show good cause for failing to file an answer within thirty days after service. *Id*. In weighing the issue of whether or not Millstone made the requisite showing of good cause, the Missouri Supreme Court stated: "In determining the presence or absence of 'good cause,' this Court is deferential to the trial court's finding that Blazier failed to act because she simply forgot having been served. But that finding must be considered in conjunction with the

uncontradicted evidence that in the three-year period before service in this case, four other default judgments had been taken against Millstone, or Blazier, personally. This leads to the conclusion that she was well aware of the consequences of her inattention and makes her failure to file more egregious than excusable. Indeed, her disregard for the system is all the more evident given the fact that even after the plaintiff's lawyer gratuitously notified her on August 10 that Millstone was already several weeks in default, she still waited another 13 days to contact the insurer. On this proof, Blazier's failure to file is reckless conduct at the least, more than just the negligent mishandling of the paperwork as Millstone contends. To be sure, the insurers, themselves, later mishandled the paperwork and compounded the problem, but the relative responsibility of Millstone and its insurers is not an issue that has been raised by the parties." *Id*. at 393. The *Krugh* court examined *Great Southern Savings & Loan Ass'n v. Wilburn*, 887 S.W.2d 581 (Mo.banc 1994), and found it to be "particularly instructive. In that case, the two defendants were both in default, but one had hired an attorney who attempted to contact opposing counsel within 30 days of service, while the other neglected even to hire an attorney within the 30 days. [*Great Southern Savings & Loan Ass'n v. Wilburn*, 887 S.W.2d 581, 584 (Mo.banc 1994)]. This Court held that the first defendant established good cause and did not intentionally or recklessly impede the judicial process, but the second defendant did not establish good cause. *Id*. *See also Klaus v. Shelby*, 42 S.W.3d 829, 832 (Mo.App. 2001)." *Krugh*, 126 S.W.3d at 393. The *Krugh* court reversed the trial court's ruling, finding that Millstone did not establish good cause for failing to file a timely answer.

If James Wedig merely "thought" he faxed the summons to his insurance agent but did not, then, in the instant case, just like the *Krugh* defendant, Respondent took absolutely no action in its defense prior to becoming in default on the thirtieth day after service. In fact, the first indication that Respondent took *any* action in its defense is when Respondent's counsel filed an entry of appearance on May 3, 2006, three and a half months after service. Respondent did not show good cause for setting aside the Default Judgment, as is required by Mo.R.Civ.P. 74.05(d). The Trial Court erred when it entered the Judgment setting aside the Default Judgment, because there was no substantial evidence upon which the Trial Court could have based its finding of good cause for setting aside the Default Judgment, and the Trial Court erroneously applied the law when it set the Default Judgment aside. Accordingly, this Court should reverse the Trial Court's Judgment and remand this case back to the Trial Court with instructions to reinstate the Default Judgment.

### C. Scenario Two: James Wedig *Did* Fax The Summons But The Insurer Didn't Defend

The second factual possibility set forth in the affidavit of James Wedig is that James Wedig actually *did* fax the summons to his insurance agent. If that is what occurred, the fact remains that the insurer did not do anything to defend Respondent until

after Respondent was in default, and the insurer still had not done anything in Respondent's defense at the time the default judgment was taken nearly three months after service. If this is what happened, then Respondent still failed to show good cause for setting aside the default judgment, because Respondent's insurer's neglect in defending the case is imputed to Respondent.

In *Sprung v. Negwer Materials, Inc.* 775 S.W.2d 97 (Mo. 1989), the defendant suffered a default judgment after defendant was served with a summons and petition, and then delivered the papers to its insurance company. *Sprung*, 775 S.W.2d at 98. The insurance company then delivered the papers to a law firm. One of the attorneys at the firm dictated an entry of appearance and a request for extension of time to plead, but rather than filing them with the court, his secretary mailed them to the insurance company. *Id.* The claims manager at the insurance company received those papers, but took no action to correct the attorney's mistake; she just "placed the documents in the insurance company's file and advised no one". The *Sprung* defendant did all that it knew to do. Its attorney, and its insurance company, however, dropped the ball. In affirming the trial court's decision to overrule the defendant's petition in equity to set aside the ensuing default judgment, the Missouri Supreme Court wrote: "The law is well-settled that the neglect of a defendant's attorney or his insurer which results in a default judgment is imputable to the defendant. *Ward v. Cook United, Inc.*, 521 S.W.2d 461,472 (Mo.App. 1975)." *Id.* at 100. The *Ward* case cited in *Sprung* is another case where the insurance company messed up to the detriment of its insured. In that case, Cook United, Inc. was sued for false arrest and imprisonment. *Ward v. Cook United, Inc.*, 521 S.W.2d 461, 463 (Mo.App. 1975). Cook

sent the papers to its insurance company, Zurich, which received the papers and processed them, but misrouted them by intermingling them with assignments to an adjuster rather than assigning them to defense counsel. *Id*. at 472. The *Ward* court examined several cases imputing neglect of a lawyer to his client, and stated that "Reason and logic render impossible the acceptance of any real distinction between the inexcusable neglect of a lawyer (held in Missouri to be imputable to his client) and the inexcusable neglect of a claims manager and attorney for the defendant's insurer. Both occupy a contractual relationship with the client, the prime purpose of which is to handle the litigation within the framework of judicial proceedings. But even of more significant force is that by undertaking such responsibilities they also assume an obligation to third parties interested in the matter and to the courts administering and judicially determining the controversy." *Id*. at 473. The *Ward* court affirmed the trial court's refusal to set aside the default judgment entered against Cook.

If James Wedig actually did fax the summons to his insurer, but the insurer failed to mount a defense, then the Respondent in the instant case occupies the same position as the defendants in *Sprung* and *Ward*. Respondent's insurer dropped the ball and permitted a default judgment to be entered against its insured. If this is the case, then the insurer's negligence is clearly imputable to Respondent under Missouri law, and Respondent was not entitled to relief from the Default Judgment. The Trial Court erred when it entered the Judgment setting aside the Default Judgment, because there was no substantial evidence upon which the Trial Court could have based its finding of good cause for setting aside the Default Judgment, and the Trial Court erroneously applied the law when it set the

Default Judgment aside. Therefore, this Court should reverse that Judgment and remand this case to the Trial Court with instructions to reinstate the Default Judgment.

## VII. CONCLUSION

The Trial Court erred when it issued the Docket Entry setting aside the Default Judgment, which Docket Entry was later reflected in the Trial Court's August 17, 2006, Judgment; therefore, that Judgment, should be reversed. The Judgment was not supported by substantial evidence and the Trial Court erroneously applied the law in setting aside the Default Judgment because, as shown above, Respondent did not present evidence sufficient to demonstrate "good cause" as required to set aside a default judgment under Mo.R.Civ.P. 74.05(d). Accordingly, Appellants respectfully request that this Court reverse the Trial Court's Judgment, that this Court remand this case to the Trial Court with instructions to reinstate the Default Judgment, and that this Court grant Appellants such other and further relief as is just and proper.

**Respectfully submitted,**
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## PLAINTIFFS/APPELLANTS' REQUEST FOR ORAL ARGUMENT

COME NOW Plaintiffs/Appellants Randall Brungard and Cindy Brungard, by and through their counsel, Corbett Law Firm, and hereby request oral argument in this appeal.

**Respectfully submitted,**
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate paper copies, and one true and accurate disk copy on a virus-scanned disk, of the foregoing *Appellants' Substitute Brief*, along with this *Certificate of Service* and the *Appendix to Appellants' Substitute Brief*,, were delivered this 7th day of September, 2007, by depositing them with Federal Express, delivery fees for overnight delivery prepaid, addressed to the following:

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## MO.R.CIV.P. 84.06(c) AND (g) CERTIFICATE

The undersigned hereby certifies that the foregoing *Appellants' Substitute Brief* complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 6,733 words and 724 lines in the foregoing brief, according to the Word Count tool in Microsoft Word for Windows, the word processing software used to prepare the foregoing brief. The one paper original and ten paper copies of the foregoing brief and one copy of the brief on a double sided, high density, IBM-PC 1.44MB 3 ½-inch disk shall be filed in the Missouri Court of Appeals, Western District. In addition, two paper copies plus one copy of the brief on such a computer disk has been served on the attorney named in the certificate of service which appears on the page immediately preceding. The disk filed in the Court and the disk served on the attorney have been scanned for viruses and those disks are virus-free.

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