

IN THE MISSOURI SUPREME COURT

CASE NO. S.C. 88654

**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.**

**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**

APPELLANTS' SUBSTITUTE REPLY BRIEF

ORAL ARGUMENT PREVIOUSLY REQUESTED

**CORBETT LAW FIRM
James E. Corbett, Mo. Bar No. 36279
David T. Tunnell, Mo. Bar No. 51217
Matthew W. Corbett, Mo. Bar No. 57633
Anne H. Rogers, Mo. Bar No. 59363
2015 E. Phelps
Springfield, MO 65802
Telephone (417) 866-6665
Facsimile (417) 866-6699
Attorneys for Plaintiffs/Appellants**

I. TABLE OF CONTENTS

I.	Table of Contents	1
II.	Table of Authorities	2
	A. Cases	2
	B. Missouri Court Rules	3
	C. Other Authorities	3
III.	Reply to Respondent’s <i>Argument</i>	4
	A. Reply to Respondent’s Discussion of the Standard of Review	4
	B. Reply to Respondent’s Discussion of “Good Cause” Caselaw	5
IV.	Conclusion	11
	Certificate of Service	13
	Mo.R.Civ.P. 84.06(c) and (g) Certificate	14

II. TABLE OF AUTHORITIES

A. Cases

Billingsley v. Ford Motor Company, 939 S.W.2d 493 (Mo.App.S.D. 1997) 2, 9

Brungard v. Patti Cakes Baking Company, Inc., 2, 4

2007 Mo.App. LEXIS 774 (Mo.App.W.D. 2007)

Burleson v. James Fleming & Enter. 2, 9

Leasing Co., 58 S.W.3d 599 (Mo.App.W.D. 2001)

Cotleur v. Danziger, 870 S.W.2d 234 (Mo.banc 2004) 2, 10

Gibson by Woodall v. Elley, 778 S.W.2d 851 (Mo.App.W.D. 1989) 2, 6

Hendrix v. Hendrix, 183 S.W.3d 582 (Mo. 2006) 2, 10

Heintz Elec. Co. v. Tri Lakes Interiors, Inc., 2, 7, 8

185 S.W.3d 787 (Mo.App.S.D. 2006)

Hinton v. Proctor & Schwartz, 99 S.W.3d 454 (Mo.App.E.D. 2003) 2, 11

Krugh v. Millstone Marina Service, L.L.C., 2, 7

126 S.W.3d 391 (Mo. 2004)

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976) 2, 4, 5

Newton v. Manley, 824 S.W.2d 522 (Mo.App.S.D. 1992) 2, 10

Smith v. State, 152 S.W.3d 275 (Mo.banc 2005) 2, 4

Sprung v. Negwer Materials, Inc., 775 S.W.2d 97 (Mo. 1989) 2, 10

Ward v. Cook United, Inc., 521 S.W.2d 461 (Mo.App. 1975) 2, 9

Weidner v. Anderson, 174 S.W.3d 672 (Mo.App.S.D. 2005) 2, 11

B. Missouri Court Rules

Mo.R.Civ.P. 74.05 3, 10, 11, 12

Mo.R.Civ.P. 74.05(d) 3, 6, 10, 12

Mo.R.Civ.P. 84.06(b) 3, 14

Mo.R.Civ.P. 84.06(c) 1, 3, 14

Mo.R.Civ.P. 84.06(g) 1, 3, 14

C. Other Authorities

Laughrey, *Judgments—The New Missouri Rule*, J.Mo.Bar 11, 15 (Jan-Feb. 1988) ... 3, 10

III. REPLY TO RESPONDENT’S ARGUMENT

Appellants continue to rely upon the *Argument* contained in *Appellants’ Substitute Brief*, and Appellants incorporate same as if fully set forth herein verbatim.

A. Reply to Respondent’s Discussion of the Standard of Review

Because this is a court-tried case, the proper standard of review in this case is the standard of review 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). The Missouri Court of Appeals, Western District, applied that standard in the instant case.

Respondent spends a significant portion of its brief arguing against the following statement contained in the Western District opinion: “The trial judge is in a better position than this court to determine the credibility of the parties. [citation omitted]. Here, however, there was no evidentiary hearing. The only evidence presented to the trial court was the short, vague affidavit of Mr. Wedig. In such a case, the issue is one of law. *See Smith v. State*, 152 S.W.3d 275, 277 (Mo. Banc 2005). We engage in de novo review because we are just as capable of reading the affidavit as the trial judge was.” *Brungard v. Patti Cakes Baking Company, Inc.*, 2007 Mo. App. LEXIS 774, 10-11 (Mo.App.W.D. 2007). The only evidence presented to the Trial Court on the issue of whether or not there was good cause to set aside the default judgment was a written affidavit of James Wedig.

There was no appearance in Court by Mr. Wedig, and no testimony by Mr. Wedig. The only information the Trial Court had to aid it in making a determination of the credibility of Mr. Wedig was his written affidavit.

The Missouri Court of Appeals, Western District, had the exact same information before it as the Trial Court had, no more, no less. Accordingly, it was appropriate for the Trial Court to examine the affidavit of Mr. Wedig de novo, and, having done so, to apply the *Murphy v. Carron* standard and determine whether that affidavit set forth substantial evidence to support the Trial Court's setting aside of the default judgment, and whether the Trial Court erroneously applied the law when it set aside the default judgment based upon the information contained in the affidavit. The Missouri Court of Appeals, Western District, used the appropriate standard of review in deciding this case.

Respondent advocates the use of the "abuse of discretion" standard of review in this case. Appellants disagree with this contention, and maintain that *Murphy v. Carron* is the appropriate standard. However, even if this Court applies an "abuse of discretion" standard, Appellants will still win in this case. As is fully discussed in *Appellants' Substitute Brief*, a default judgment can be set aside only upon a showing of good cause. Respondent failed to show that good cause. The Trial Court abused its discretion when it set aside the default judgment despite the fact that Respondent failed to make the requisite showing.

B. Reply to Respondent's Discussion of "Good Cause" Caselaw

Appellants continue to rely upon the *Argument* contained in *Appellants' Substitute Brief*, and Appellants incorporate same as if fully set forth herein verbatim.

As is fully set forth in the *Argument* section of *Appellants' Substitute Brief*, Respondent did not show good cause to set aside the default judgment. The facts show that one of two possible scenarios occurred in the case: either, 1) Respondent's registered agent James Wedig "thought" he faxed the suit papers to his insurance carrier, but, in reality, did not, or 2) he really did fax the papers to the insurer and the insurer failed to take any timely steps to defend Respondent. Neither of these scenarios demonstrates the "good cause" requirement of Mo.R.Civ.P. 74.05(d), as is demonstrated in *Appellant's Substitute Brief*.

The cases cited by Respondent in support of its position are distinguishable. In *Gibson by Woodall v. Elley*, 778 S.W.2d 851 (Mo.App.W.D. 1989), this Court found good cause for setting aside a default judgment against Union Pacific Railroad Company. *Gibson by Woodall v. Elley*, 778 S.W.2d 851, 855 (Mo.App.W.D. 1989). In that case, Union Pacific was served on October 18, 1988. *Id.* at 852. Pursuant to a defense and indemnification agreement with Amtrak, Union Pacific tendered defense of the case to Amtrak, informing Amtrak of the suit on October 24, 1988, and mailing the suit papers via certified mail on October 28, 1988. *Id.* at 853. Amtrak received the suit papers in its Law/Claims Department on November 10, 1988, but the personnel of that department were in a meeting in Pennsylvania that week, and the office was staffed by temporary secretaries. *Id.* The temporary secretaries misplaced the documents, and they were not found by Amtrak's director of litigation until December 2, 1988, at which time counsel was immediately engaged (although a default judgment had already been entered on November 23). *Id.* The instant case is different from *Gibson*. Respondent has never said

for sure what happened to the suit papers. Respondent states only that James Wedig “thought” he faxed the papers to the insurance carrier. If, in reality, he did not fax the papers to his insurer, he did not take any step to defend Respondent until Respondent was in default. This was not just a mishandling of papers by temporary workers like those in *Gibson*, but rather, was a mishandling by the registered agent himself, who, under the law, is the person designated to receive service of process and direct it appropriately. On the other hand, if he did really fax the papers to the insurer, then he apparently did not engage in any follow-up to ensure the matter was taken care of, because Appellants did not rush to take a default judgment, but waited nearly three months after service to take their default. Respondent did not show any sign of mounting a defense in this case until it filed its bare-bones *Motion to Set Aside Default Judgment* on May 3, 2006, followed by an affidavit and suggestions on May 17, 2006. “The only cases in which defendants have been held to have established good cause for failure to file [an answer] are those ... 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). Respondent took no such action, and the Trial Court erred in finding that Respondent established good cause.

Likewise, *Heintz Elec. Co. v. Tri Lakes Interiors, Inc.*, 185 S.W.3d 787 (Mo.App.S.D. 2006) is distinguishable from the instant case. *Heintz* is a landlord-tenant case wherein Heintz sued Tri Lakes Interiors for failure to pay the rent for August 2004 and for possession of the premises. *Heintz Elec. Co. v. Tri Lakes Interiors, Inc.*, 185 S.W.3d 787, 789 (Mo.App.S.D. 2006). Heintz filed Case No. 304AC7131 on

September 15, 2004, and received a judgment in that case, after which Heintz began execution and garnishment proceedings. *Id.* Heintz then filed a second case (the one from which the appeal sprung) on February 1, 2005, seeking rent due from October 2004-March 2005. *Id.* at 789-90. The suit papers on the second case were served upon Tri Lakes's secretary, but Tri Lakes disregarded the papers because it "mistakenly 'assumed the papers served were [papers relating to the first case], as the parties were the same and the allegations were the same.'" *Id.* at 790. Tri Lakes and Heintz were, at the time of service on the second case, engaged in negotiating payment of the judgment on the first case. *Id.* The Southern District Court of Appeals held that Tri Lakes's "honest mistake" in confusing the two cases demonstrated good cause for failing to answer the second case. *Id.* at 794. This case is different from *Heintz*. In *Heintz*, Tri Lakes was essentially blindsided by a second suit, when they thought they were resolving their issues with Heintz in the first suit. There is no such blindsiding here. Appellants filed one, and only one, lawsuit against Respondent. Respondent was duly served with the Petition and Summons, and thus was put on notice of the need for Respondent to ensure that the suit was timely answered. No such answer was ever filed. Even if Respondent really did fax the papers to his insurer like James Wedig "thought" he did, Respondent took no additional steps to ensure that the matter was being handled, not a phone call, not an email, nothing. If that had occurred, the insurer would likely have begun a defense of the suit in a timely manner. Or, such a follow-up communication would have made Respondent aware that he was mistaken in his "thought" that he faxed the papers to the insurer. Either way, Respondent lacked caution and deliberately courted danger when it

failed to ensure that the case was defended, and thus was reckless. Respondent did not demonstrate good cause for setting aside the default judgment, and the Trial Court erred in setting the default judgment aside.

Respondent argues, on Page 19 of its Brief, that “Mistakes made by lawyers or their staff constitutes good cause to set aside a default judgment.” It is true that, if conduct on the part of a law firm results in the entry of a default judgment, and that conduct is negligent but does not rise to the level of recklessness, there can exist “good cause” to set aside a default judgment. *Billingsley v. Ford Motor Company*, 939 S.W.2d 493 (Mo.App.S.D. 1997). However, it is not a foregone conclusion that “good cause” exists just because it is the conduct of a defendant’s attorney or insurer, and not that of the defendant itself, that results in the entry of a default. *See Ward v. Cook United, Inc.*, 521 S.W.2d 461,472 (Mo.App. 1975). *See also Burlison v. James Fleming & Enter. Leasing Co.*, 58 S.W.3d 599, 606 (Mo.App.W.D. 2001). In order to decide the issue of “good cause”, the conduct of the attorney or insurer must be examined to determine whether or not that conduct was reckless. In the instant case, Respondent presented absolutely no evidence that the conduct of any insurer or attorney resulted in the entry of the Default Judgment. Respondent stated only that James Wedig “thought” he faxed the suit papers to Respondent’s insurer. As is fully argued in *Appellant’s Reply Brief*, the evidence that was presented allows only two possible scenarios: Either 1) James Wedig did not fax the papers to his insurer, in which case Respondent took no actual action in its defense within thirty days after having been served, or 2) the suit papers were faxed to the insurer, in which case the insurer did not lift a finger to defend the suit within thirty

days after service. Neither of these scenarios constitutes the “good cause” necessary to set aside the Default Judgment.

Respondent is correct that *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo.banc 1989) has been superseded in the sense that *Sprung* was decided under a prior version of Mo.R.Civ.P 74.05, under which courts interpreted the “good cause” requirement to mean that good cause was not present when there was a negligent failure to timely answer; “Amended Rule 74.05 changes this standard for setting aside a default judgment by making it clear that good faith mistakes do constitute good cause, and a default judgment can now be vacated even if the movant has negligently failed to file a timely answer.’ Laughrey, Judgments -- The New Missouri Rule, J.Mo.Bar 11, 15 (Jan-Feb 1988).” *Newton v. Manley*, 824 S.W.2d 522, 524 (Mo.App.S.D. 1992). The current text of Mo.R.Civ.P. 74.05(d) states that, “Good cause includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process.” Mo.R.Civ.P. 74.05(d). However, *Sprung*’s principle that the conduct of a party’s attorney or insurer is imputable to the client (which is the principle for which *Sprung* was cited in *Appellant’s Brief*) is alive and well. “Generally, actions of a party’s attorney, including procedural neglect that precludes a client’s substantive rights, are imputed to the client,’ *Cotleur v. Danziger*, 870 S.W.2d 234, 238 (Mo.banc 1994).” *Hendrix v. Hendrix*, 183 S.W.3d 582, 593 (Mo. 2006). Even if James Wedig really did fax the summons and petition to his insurer, Respondent has presented no evidence that the insurer did *anything* to defend the case; nothing was filed with the Trial Court on behalf of Respondent until the then-unsupported *Motion to Set Aside Default Judgment* was filed on May 3, 2006, which was

105 days after service, 85 days after Respondent fell into default, and 20 days after Appellants presented their evidence and attained their default judgment. The evidence in this case is that either James Wedig failed to provide the papers to his insurer or he did provide the papers but the insurer sat on its hands. Either way, Appellant's lawsuit was treated recklessly; Respondent or its insurer lacked caution and deliberately courted danger in failing to respond to the lawsuit. Respondent bore the burden of showing good cause for setting aside the default judgment. *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). Respondent wholly failed to make that showing. The Trial Court erred in setting aside the default judgment because there was a dearth of substantial evidence to support that action, and the Trial Court misapplied the law in setting aside the default judgment in the absence of that evidence.

IV. CONCLUSION

Appellants continue to rely upon the *Conclusion* contained in *Appellants' Substitute Brief*, and Appellants incorporate same as if fully set forth herein verbatim.

It is true, as Respondent has said, that the law favors a trial on the merits, and that default judgments are looked upon with distaste. However, default judgments taken pursuant to Mo.R.Civ.P. 74.05 are an integral feature of civil practice in Missouri. If there were no Rule 74.05, defendants would have all the power in litigation. Defendants could ignore the summonses served on them with impunity, if judgment could never be entered in their absence. Without Rule 74.05, defendants would have no incentive to give a plaintiff's lawsuit a second thought; they could just stay home and stall the

plaintiff's lawsuit forever, resting assured that their recalcitrance eliminated the plaintiff's ability to proceed with the lawsuit. Rule 74.05 takes that omnipotence away from defendants, by forcing them to defend themselves, and move the case through the docket, lest they suffer judgment anyway. That is what Rule 74.05 is for. It moves cases through the courts, and prevents the inevitable gridlocked court system that would surely develop if defendants could forestall resolution of the claims against them by simply not showing up. Rule 74.05(d) also protects defendants by allowing default judgments to be set aside, but courts are only permitted to do so when the movant carries its burden of showing a meritorious defense and good cause. Respondent failed to show good cause in this case. Because the Trial Court abused its discretion in setting aside the default judgment, the Trial Court's judgment should be reversed, and the case should be remanded to the Trial Court with instructions to reinstate the default judgment.

**Respectfully submitted,
CORBETT LAW FIRM**

JAMES E. CORBETT Mo. Bar #36279
DAVID T. TUNNELL Mo. Bar #51217
MATTHEW W. CORBETT Mo. Bar #57633
ANNE H. ROGERS Mo. Bar #59363
2015 E. Phelps
Springfield, MO 65802
Telephone: (417) 866-6665
Facsimile: (417) 866-6699
Attorneys for Plaintiffs/Appellants Brungard

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 Reply Brief*, along with this *Certificate of Service*, were delivered this 22nd day of October, 2007, by depositing them with Federal Express, delivery fees for overnight delivery prepaid, addressed to the following:

Susan Ford Robertson, Esq.
FORD, PARSHALL & BAKER, L.L.C.
3210 Bluff Creek Drive
Columbia MO 65201-3525
Attorney for Respondent Patti Cakes

CORBETT LAW FIRM

JAMES E. CORBETT Mo. Bar #36279
DAVID T. TUNNELL Mo. Bar #51217
MATTHEW W. CORBETT Mo. Bar #57633
ANNE H. ROGERS Mo. Bar #59363
2015 E. Phelps
Springfield, MO 65802
Telephone: (417) 866-6665
Facsimile: (417) 866-6699
Attorneys for Plaintiffs/Appellants Brungard

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

The undersigned hereby certifies that the foregoing *Appellants' Substitute Reply Brief* complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 3,392 words and 386 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 Supreme Court. 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.

CORBETT LAW FIRM

JAMES E. CORBETT **Mo. Bar #36279**
DAVID T. TUNNELL **Mo. Bar #51217**
MATTHEW W. CORBETT **Mo. Bar #57633**
ANNE H. ROGERS **Mo. Bar #59363**
2015 E. Phelps
Springfield, MO 65802
Telephone: (417) 866-6665
Facsimile: (417) 866-6699
Attorneys for Plaintiffs/Appellants Brungard