IN THE MISSOURI SUPREME COURT

TERESA M. CALLAHAN,	)	
	)	
Respondent	)	
	)	
vs.	)	**No. SC89676**
	)	
GARY W. CALLAHAN,	)	
	)	
Appellant	)	

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

SUBSTITUTE REPLY BRIEF

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I.

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ABBREVIATIONS USED

Legal File	.....	**LF:(page)**
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I(A).

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II.

Reply Argument

Reply To Respondent's Brief Point A (Jurisdictional Contention)

Respondent's Substitute Brief (page 14, ¶A) erroneously contends "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…".

The Rule 74.01 contention is easily shown to be without merit. Gary's May 7, 2008 Notice of Appeal (SLF2:8) states : "Notice is given that Respondent Gary W. Callahan this 7th day of May, 2008 appeals from the judgment entered in this action on May 7, 2008 and the now final Order dated November 7, 2007". That satisfied the "final judgment" appeal requirement.

Next, Appellant's Substitute Brief Point I mirrors the format identified at Rule 84.04(d).

Further, as shown below, Appellant's Substitute Brief Point I satisfied the substance requirements of Rule 84.04(d), to wit :

a. Rule 84.04(d)(1)(A) … "Identify the trial court ruling or action that the appellant challenges" --- Appellant's Substitute Brief Point I identifies "The trial court committed prejudicial error by entering the November 5, 2007 Order (LF:23) denying Gary Callahan's verified Motion To Set Aside Default Judgment (LF:23) without an evidentiary hearing". This satisfied Rule 84.04(d)(1)(A).

b. Rule 84.04(d)(1)(B) … "state concisely the legal reasons for the appellant's claim of reversible error" --- Appellant's Substitute Brief Point I states

"because Gary's set aside motion sufficiently alleged both 'good cause' for being in default and a 'meritorious defense' to Petition allegations thereby entitling Gary to an evidentiary hearing on the presented issues". This satisfied Rule 84.04(d)(1)(B).

c. Rule 84.04(d)(1)(C) … "explain in summary fashion, why, in the context of the case, those legal reasons support the claim of reversible error" --- Appellant's Substitute Brief Point I states " in that the motion satisfied the pleading requirements of *Rule 74.05(d)* by pleading sufficient facts (a) to *prima facie* show "good cause" for being in default, including *inter alia*, misrepresentation by Teresa Callahan to Gary Callahan at the time of filing suit that her lawyer was in fact representing both Teresa Callahan and Gary Callahan in the divorce case to settle the dispute and Gary need not take any further action, on the day of the default hearing Teresa Callahan misrepresented she was going to see a doctor when in fact she was going to court to obtain the default judgment sought to be set aside and Teresa Callahan received and destroyed all court related mail addressed to Gary Callahan at the family home from the filing of the dissolution case up to the time of the default judgment and (b) to *prima facie* show a "meritorious defense" in the underlying marriage dissolution proceeding, including *inter alia*, that Teresa Callahan was not permanently disabled as she alleged in her dissolution Petition and as found in the Judgment of Dissolution of Marriage but was in fact able to return to Daimler Chrysler and earn wages of at least $30,000.00

per year, that Gary Callahan did not engage in any marital misconduct as alleged in Petition and as found in the Judgment of Dissolution of Marriage and that based upon relevant stated factors Teresa Callahan was not entitled to receive either maintenance or attorney fees from Gary Callahan." This satisfied Rule 84.04(d)(1)(C).

Clearly, Appellant's Substitute Brief Point I satisfied the requirements of Rule 84.04(d) and the issues were preserved for appellate review. *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978).

Reply To Teresa's *Murphy v. Carron* Standard Of Review Point

Introduction :

Teresa just does not want to accept this Court's "abuse of discretion" standard of review holding in *Brungard v. Risky's, Inc.*, 240 S.W.3d 685, 688 (Mo. banc 2007)("*Brungard*").

Instead, she asks for a *Brungard* "do-over", "mulligan" "second bite of the apple". See, Respondent's Substitute Brief, page 23 ¶1 ("Wife respectfully requests this Court to reexamine its holding and findings in *Brungard*, supra.").

There's no reason to revisit this issue … it was correctly decided by this Court on December 18, 2007.

Amended Rule 74.05(d) :

Prior to the January 1, 2007 amendment to Rule 74.05(d) and *Brungard* confusion existed respecting the "appealability" of the grant or denial of a motion to set aside a default judgment filed within thirty days after judgment was entered. In other words,

was ruling on such motion to be treated as an "independent action" or as "an authorized after-trial motion subject to Rule 78.04 or Rule 78.06" for purposes of determining "when" a timely notice of appeal was required to be filed. See, *McElroy v. Eagle Star Group, Inc*., 156 S.W.3d 392, 400 (Mo. App. W.D. 2005); *In Re Marriage of Coonts,* 190 S.W.3d 590, 603 (Mo. App. S.D. 2006).

The January 1, 2007 Rule 74.05(d) amendment provided : "A motion filed under this Rule 74.05(d), even if filed within 30 days after judgment, is an independent action and not an authorized after-trial motion subject to Rule 78.04 or Rule 78.06."

***Brungard* Controls … Abuse Of Discretion Standard Applies In Case *Sub Judice* :**

Brungard held : " "The emphasized language in Rule 74.05(d) does nothing more than resolve the confusion regarding whether and when judgments denying or granting motions to set aside default judgments are appealable. Now, pursuant to Rule 74.05(d), a motion to set aside the default judgment is treated as an independent action, and the trial court's decision to grant or deny the motion is treated as an independent judgment. It does not follow, however, that the amended rule alters the abuse of discretion standard of review that is applied to motions to set aside a default judgment. *The rule amendment does not alter precedent that disfavors default judgments and establishes a strong preference for deciding cases on the merits. Abuse of discretion is the proper standard of review*." (Emphasis supplied). *Brungard v. Risky's, Inc.*, 240 S.W.3d at 687-688.

When discussing the abuse of discretion standard of review, *Brungard* observed : "Missouri appellate courts have traditionally afforded significant deference to the circuit court's decision to set aside a default judgment because of the public policy favoring the

resolution of cases on the merits and the 'distaste our system holds for default judgments'….Broad discretion is afforded to trial court decisions granting motions to set aside a default judgment while the trial court has narrowed discretion in decisions denying a motion." *Brungard v. Risky's, Inc.*, 240 S.W.3d at 686-687.

Brungard accurately stated the applicable abuse of discretion standard in the case *sub judice* consistently applied by Rule 74.05(d) pre-amendment lower court decisions. "However, the trial court's discretion is notably limited in this case for two reasons. First, a trial court's discretion whether to set aside a default judgment in a divorce case is more restricted than in other cases because there is practically no such thing as a judgment by confession in a dissolution case. (Citation omitted). Also, courts dislike default judgments in dissolution cases because of our state's interest in the welfare of the parties.(Citation omitted). Second, a trial court's discretion to deny a motion to set aside a default judgment is narrower than its discretion to grant such a motion. (Citation omitted). As a result, we are much more willing to reverse an order *overruling* a motion to set aside a default judgment than an order granting such a motion.”**.** *In Re The Marriage Of Tyree*, 978 S.W.2d 846,849 (Mo.App.S.D.1998);*Gantz v. Director of Revenue*, 858 S.W.2d 793 (Mo. App. E.D. 1993); *Kueper v. Murphy Distributing*, 834 S.W.2d 875 (Mo. App. E.D. 1992).

The Public Policy favoring the abuse of discretion standard of review has not changed … and, accordingly, there is no legitimate ground to reverse or disregard the well established deferential abuse of discretion standard of review Missouri Public Policy, as reflected most recently in *Brungard,* in the case *sub judice*.

Reply To Respondent's Substitute Brief Point I

(A) General Observation Re Respondent's Substitute Brief Point I Contentions :

Respondent's Substitute Brief advances several contentions that fly in the face of the applicable standards for review and established substantive law principles respecting "what" Gary had to do before he was entitled to an evidentiary hearing on his motion to set aside the default judgment.

For example, Respondent's Substitute Brief's entire argument about the alleged insufficiency (which is disputed by Gary) of Gary's motion to set aside the default judgment (LF:12) at Respondent's Substitute Brief pages 24, 30-36 (i.e. Gary did not request an evidentiary hearing, did not present documentary support, etc.) overlooks the fundamental, well-established legal principle that if the set aside motion, under the applicable standards for review, sufficiently satisfied the Rule 74.05(d) "good cause" and "meritorious defense" pleading requirements that the trial court was obligated as a matter of law (without any request from Gary) to conduct a evidentiary hearing on the set aside motion issues. See, *Sears v. Dent Wizard International*, 13 S.W.3d 661, 664 (Mo. App. E.D. 2000)(“A movant is entitled to an evidentiary hearing on a motion to set aside a default judgment if the pleading requirements of Rule 74.05 are met.”); *In Re The Marriage Of Tyree*, 978 S.W.2d at 849 (“After a movant has satisfied the threshold pleading requirements of Rule 74.05[d], the rule tacitly requires the trial court to conduct an *evidentiary* hearing in order to provide the movant with an opportunity to ‘show` good cause for setting aside the default judgment.[Citations omitted]”).

Further, Respondent's Substitute Brief (See, e.g. pages 33-34) is premised on the erroneous notion Gary somehow was obligated to *prove* his "good cause" and "meritorious defense " by affidavit, documentary evidence, etc. *before* he was entitled to an evidentiary hearing. But, that's not The Law … Gary only had to "sufficiently *plead*" Rule 74.05(d) "Good Cause" and "A Meritorious Defense". See, *In Re The Marriage Of Tyree*, supra.

The reason for an evidentiary hearing is to present admissible evidence to *prima facie* show "good cause" and a "meritorious defense". The *evidence* need not … as suggested in Respondent's Substitute Brief … be supplied with the set aside motion. *Id.*

It was not even necessary for Gary to *prove* a "meritorious defense" in fact at the set aside evidentiary hearing … that issue, along with credibility issues, are to be determined after the default was set aside and at trial of the case on the merits . *Pyle v. Firstline*, 230 S.W.2d 52, 60 (Mo. App. W.D. 2007)("Whether the evidence is credible is to be determined *after* the default judgment is set aside at a subsequent trial on the merits.").

Gary's burden (i.e. at the evidentiary hearing) was merely to show he had an arguable theory of defense on some contested issue :

A. " In order to show a meritorious defense, a party need not present extensive and airtight evidence. (Citation omitted). He or she need only make some showing of at least an *arguable theory* of *defense*. 'Meritorious defense' has been interpreted liberally to mean 'any factor likely to materially affect the

substantive result of the case."'(Emphasis supplied), *Pyle v. Firstline,* 230 S.W.2d at 60.

B. "A party satisfies the requirement if he or she sets forth allegations which, if supported by evidence, would defeat or adversely affect the plaintiffs claim. (Citation omitted). ", *Pyle v. Firstline,* 230 S.W.2d at 60.

(B) "Good Cause" Was Sufficiently Alleged :

Respondent's Substitute Brief Relies Upon Materially False Facts

As shown below, Respondent's Substitute Brief misstated material facts in this case.

For example, Respondent's Substitute Brief, page 25, lines 7-9, states : "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."

And, further, Respondent's Substitute Brief, page 26, lines 12-14, states: "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."

Those are material false statements of fact.

See, Motion To Set Aside Default Judgment ¶1 and ¶2 (LF:23)("Said Judgment was entered to the surprise, through inadvertence or excusable neglect of Respondent in that Petitioner and Respondent had agreed to use the same lawyer and settle their case which process Respondent understood was ongoing… Said judgment was obtained by fraud and misrepresentation in that Petitioner represented to Respondent that they were

using the same lawyer to save money and Respondent believed that process was ongoing…".

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

McElroy Not Controlling Or Relevant In Case Sub Judice

Next, Teresa misconstrued the facts, holding and relevance of *McElroy v. Eagle Star Group, Inc.,* 156 S.W.3d 392 (Mo. App. W.D. 2005)("*McElroy*").

Specifically, Respondent's Substitute Brief page 28, lines 4-6 erroneously concludes:"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*."

In fact, McElroy's conduct was egregious and reckless because:

- McElroy was an experienced *pro se* litigant who had participated as either a plaintiff or a defendant in more than 85 cases which resulted in default judgments, knew full well that Eagle Star's failure to file a timely answer or other response to McElroy's petition in accordance with Rule 55.25(a) could result in a default judgment against Eagle Star. *McElroy v. Eagle Star Group,* 156 S.W.3d at 405.

- McElroy (a) failed to notify the insurance carrier of the potential claim against him, (b) after being served waited 20 days of the 30 days for filing an Answer before forwarding the Petition to the insurance agent, (c) received a notice of interlocutory default which expressly stated "you are now in default" and (d) in spite of these facts McElroy contended he chose to rely on the insurance agent's alleged statement to him that he "would handle the matter". *McElroy v. Eagle Star Group*, 156 S.W.3d at 405.

One cannot reasonably conclude Gary's conduct was anything near the reckless conduct of McElroy.

Under the applicable liberal standards for review, it is submitted the factual allegations made in the verified Motion To Set Aside Default Judgment *prima facie* pled "good cause" to set aside the default judgment in that Gary's conduct involved "a mistake or conduct that (Sic: was) not intentionally or recklessly designed to impede the judicial process" as defined at Rule 74.05(d). … Gary's failure to file a timely Answer was directly caused by Respondent wife's fraud and misrepresentation. *Bothe v. Bothe*, __ S.W.3d ___ (Mo. App. E.D. 2008), Appeal ED90491, Op. 10/21/2008 (Mandate issued 10/30/2008); *Saloma v. Saloma-Orozco,* 788 S.W.2d 799 (Mo. App. E.D. 1990).

In the worst light, under the applicable standards of review, Gary was guilty of "excusable neglect" not rising to the level of "recklessness" by not discovering the fraud perpetrated upon him by wife Teresa.

In the clear light of day, it’s apparent Gary was intentionally duped and deceived by Teresa Callahan …always a serious risk in dissolution cases … and, it would be a miscarriage of justice to let her pull it off.

Based upon the facts, points and authorities stated in Appellant's Substitute Brief and this Substitute Reply Brief, Gary's Motion To Set Aside Default Judgment (LF:23) sufficiently satisfied the "Good Cause" pleading requirements of *Rule 74.05(d).*

(C) "Meritorious Defense" Was Sufficiently Alleged :

Respondent's Substitute Brief acknowledges Gary's Motion To Set Aside Default Judgment sufficiently pled a Rule 74.05(d) "Meritorious Defense" thereby entitling Gary to an evidentiary hearing when it was admitted at :

- Respondent's Substitute Brief page 30 lines 2-3 Gary alleged "facts which might refute some of Wife’s claims for maintenance"; and,
- Respondent's Substitute Brief page 31 lines 7-9 "Husband alleged facts that, if true, may have made the award of maintenance different as to duration or amount".

"A party satisfies the requirement if he or she sets forth allegations which, if supported by evidence, would defeat or adversely affect the plaintiffs claim. (Citation omitted). " *Pyle v. Firstline*, 230 S.W.2d at 60.

By admitting Gary's Motion To Set Aside Default Judgment pled facts which would have changed the award of maintenance to Teresa, Respondent's Substitute Brief

conceded Gary's Motion To Set Aside Default Judgment sufficiently pled a viable Rule 74.05(d) "Meritorious Defense". *Id.*

But, before leaving this sub-point, it is appropriate to point out two further misstatements of law by Respondent's Substitute Brief :

- Respondent's Substitute Brief page 31 lines 1-3, without citation to any precedent or other legal authority, states : "First, *Saloma* involved a child custody proceeding which has a different set of rules than default judgments that don't involve minor children." In fact, the rules are the same for dissolution case default judgments.
- Respondent's Substitute Brief page 31 lines 19-21 states : "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.". This is a blatantly false statement based upon the express language in *Macomb*, to wit : "Here, contrary to *Saloma*, the trial court did not set aside the judgment nor did it find any misleading statements by Respondent". *In Re The Marriage of Macomb*, 169 S.W.3d 191, 194 (Mo. App. S.D. 2005).

(D) Respondent's Substitute Brief Misconstrued *Hinton* Case :

Respondent's Substitute Brief pages 32-36 advances a novel, and erroneous, condition precedent to entitlement to an evidentiary hearing on a Rule 74.05(d) motion … namely, the requirement that affidavits and other admissible evidence be attached to

the set aside motion to *prima facie* "prove" the set aside "Good Cause" and "Meritorious Defense" allegations. That's nonsense … and, clearly not what The Law requires.

The only condition precedent to the entitlement to an evidentiary hearing is that the Rule 74.05(d) motion sufficiently *plead* both Rule 74.05(d) "Good Cause" and a "Meritorious Defense". *In Re The Marriage Of Tyree*, 978 S.W.2d 846, 849 (Mo. App. S.D. 1998); *Sears v. Dent Wizard International*, 13 S.W.3d 661, 664 (Mo. App. E.D. 2000); *Moore v. Baker*, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998).

Rule 74.05(d) does not even require a verified motion.

In spite of this firmly established legal principle, Respondent's Substitute Brief pages 33-34 misrepresented the facts and holding in *Hinton v. Proctor & Schwartz*, 99 S.W.3d 454 (Mo. App. E.D. 2003)("*Hinton*") by erroneously stating :

- " 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 support by affidavits. *Hinton v. Proctor & Schwartz*, 99 S.W.3d 454, 458 (Mo. App. ED 2003)."; and,
- "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."

That's not a fair or accurate reading of *Hinton*.

Here, in the case *sub judice*, Gary complains he was unlawfully denied opportunity to present testimonial evidence at an evidentiary hearing on his motion to set aside the default judgment. Therefore, the preliminary issue in Gary's case is whether the

set aside motion sufficiently *pled* both Rule 74.05(d) "Good Cause" and a "Meritorious Defense".

That was not the issue in *Hinton*. In *Hinton*, the trial court granted an evidentiary hearing on an unverified set aside motion but the movant did not "produce sworn testimony at the hearing on the motion". *Hinton v. Proctor & Schwartz*, 99 S.W.3d at 458. In fact, movant failed to produce any admissible testimony, documents or other evidence at hearing. *Id*. Accordingly, the set aside motion was denied for want of "Good Cause" and "Meritorious Defense" *prima faci*e proof *at hearing.*

Here, Respondent's Substitute Brief pages 33-34 conveniently failed to advise The Court *Hinton's* "a motion does not proof itself", "it must be verified or supported by affidavits", etc. language was made by The Eastern District in the context of the case … namely, when ruling whether movant made a *prima facie* Rule 74.05(d) "Good Cause" and a "Meritorious Defense" showing *after an evidentiary hearing* where the movant solely relied upon the bare statements in his motion without supplying the Court with any admissible evidence.

That certainly is not our case. Here, Gary was denied opportunity for an evidentiary hearing and that is what he is complaining about in this appeal. *Hinton* is factually distinguishable and not relevant to any issue in this appeal.

(E) Teresa's "Independent Action" Contention Is Without Merit :

Respondent's Substitute Brief page 36 lines 5-6 claims "…Husband did not properly file his motion as an 'independent action.' ”

Elaborating, Respondent's Substitute Brief page 36 lines 11-12 then states :" '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. "

That's baloney !

One need only consider the express language of Rule 74.05(d) to reveal the lack of merit of Teresa's contention, to wit:

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

Therefore, by definition, Rule 74.05(d) defines a "motion" (such as Gary's motion in the case *sub judice*) filed under Rule 74.05(d) as an "independent action" without regard to whether the motion was filed before or after the expiration of thirty post judgment.

Rule 74.05(d) does not require issuance of a summons as postulated by Respondent's Substitute Brief. Nor does Rule 74.05(d) require the payment of a separate filing fee as suggested by Respondent's Substitute Brief page 36 lines 6-7.

Respondent's Substitute Brief "other issues" argument has no merit whatsoever and should be summarily rejected.

III.
Conclusions

Based upon the applicable standards for review, Gary's verified Motion To Set Aside Default Judgment (LF:23) sufficiently stated "Good Cause" and a "Meritorious Defense" under Rule 74.05(d) and its was prejudicial error for the trial court to deny Gary an evidentiary hearing on the presented issues.

Based upon the points, authorities and argument contained in this Substitute Rely Brief and Appellant's Substitute Brief, the May 7, 2008 Judgment (ASLF:6) should either be (a) reversed and the cause should be remanded to the trial court with instruction to vacate and set aside the October 4, 2007 Judgment Of Dissolution Of Marriage (LF:12), or, alternatively, (b) reversed and the cause should be remanded to the trial court for an evidentiary hearing on Gary Callahan’s Motion To Set Aside Default Judgment (LF:23).

Respectfully submitted this 12th day of January, 2009.

_____

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Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Substitute Reply Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b] and (c) contains **4,385 Words** (gross – no exclusions) determined by The Microsoft Office 2007 Professional Word computer program count (program used to prepare Substitute Reply Brief).

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Arthur G. Muegler, Jr. MoBar #17940

Certificate of Service

The undersigned certifies two (2) true copies of Substitute Reply Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus and found to be virus free, containing the same] and this Certificate of Service were served January 12, 2009 by First Class U.S. Mail, postage prepaid, addressed to (1) Clerk, Missouri Court of Appeals, Eastern District, 815 Olive Street, Room 304, St. Louis, Missouri 63101 Tel (314)539-4300 and FAX (314)539-4324 and (2) Benica Ann Baker-Livorsi, Esq., #6 Westbury Drive, St. Charles, Missouri 63301 Tel. (636)947-8181 and FAX (636)940-2888.

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