S.C. 88654

IN THE MISSOURI SUPREME COURT

RANDALL BRUNGARD AND CINDY BRUNGARD, Appellants

v.

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

Appeal from the Circuit Court of Miller County, Missouri
26TH Judicial Circuit
The Honorable Greg Kays

SUBSTITUTE BRIEF OF RESPONDENT PATTI CAKES BAKING CO., INC.

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ATTORNEYS FOR RESPONDENT
PATTI CAKES BAKING, CO., INC.

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ARGUMENT

The trial court did not err in setting aside the default judgment because Patti Cakes Baking Company demonstrated good cause.

Rule 74.05 (d) allows the trial court to set aside a default judgment upon a motion stating facts constituting a meritorious defense and for good cause shown. The motion must be filed within one year of the default judgment. The Brungards admit that Patti Cakes Baking Company timely filed its motion to set aside the default and they admit that a meritorious defense was sufficiently alleged. Accordingly, the issue for this court's determination is whether the trial court properly acted in finding that good cause was shown sufficient to support the judgment setting aside the default judgment.

Clarification is needed on the relevant standard of review.

Recently this court adopted the following sentence in Rule 74.05 (d): "A motion filed under 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." In this case the appellate court determined that this court's recent rule amendment signaled approval of a new, stricter standard of review to be applied in analyzing trial court judgments setting aside default judgments. The appellate court determined that this court's rule amendment reconciled a conflict between McElroy v. Eagle Start Group, Inc., 156 S.W.3d 392 (Mo.App. W.D. 2005)(applying abuse of discretion standard) and In re Marriage of Coonts, 190 S.W.3d 590 (Mo.App. S.D. 2006)(applying Murphy v. Carron standard). The appellate court interpreted this court's rule change as signifying

approval to abandon the abuse of discretion standard and apply instead the standard set forth in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976).

The appellate court then determined that where an affidavit is used in support of a motion to set aside a default, as opposed to bringing the individual to testify live before the court, a de novo standard is appropriate and no discretion needs to be afforded the trial court in reviewing the judgment setting aside the default. This conclusion conflicts with longstanding precedent recognizing the applicability and importance of affording trial courts broad discretion in reviewing decisions to set aside default judgments. It also signals an abrupt and unanticipated retreat from this court's prior liberalization of the "good cause" standard in 1988 when it adopted the current language defining what constitutes good cause.

Did this court intend to alter the relevant standard of review by its recent rule amendment?

Nothing in the language of the new Rule 74.05 (d) provision indicates that this court meant anything other than addressing confusion regarding whether and when judgments denying or granting motions to set aside default judgments are appealable. The lengthy discussion by the appellate courts in Coonts and McElroy demonstrate the confusion previously existing within the appellate courts as to whether they had jurisdiction to review trial court judgments based on motions to set aside default judgments when the motions were filed within 30 days of the default judgment. Coonts,

190 S.W.3d at 591-604; McElroy, 156 S.W.3d at 398-404. The new rule provision clears up this confusion.

The rule amendment comports with the unique nature of a default judgment. A default judgment cannot itself be appealed. Kuhlman v. Arnold, 154 S.W.2d 430, 431 (Mo.App. W.D. 2005). Now pursuant to Rule 74.05 (d) it is clear that the 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. However, in this case the appellate court went further in its analysis than perhaps what this court intended when the court concluded that the rule amendment results in requiring application of a more stringent standard of review in addressing judgments setting aside default judgments. The appellate court then went even further and concluded that de novo review is what should be applied when the evidence supporting a request to set aside a default judgment is produced by affidavit as opposed to live testimony. These conclusions seemingly lacking in precedent and it lead to an incongruous results, such as what occurred in the underlying case.

De novo review is not appropriate

As a starting point, this court should reject the appellate court's conclusion that de novo review is appropriate in analyzing the propriety of a trial court's action in setting aside a default judgment—whether the evidence was adduced by way of affidavit or by live testimony. Applying a de novo review, with no discretion afforded to the trial court, in entering a judgment setting aside a default judgment is not only contrary to precedent,

but it ignores the long-standing distaste for default judgments and strong desire for cases to be decided on the merits. See Hancock v. Shook, 100 S.W.3d 786, 795 (Mo. banc 2003) wherein this court determined that if "reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." Appellate courts will interfere with the trial court's discretion on a motion to set aside a default judgment only if the record convincingly demonstrates abuse. Klaus v. Shelby, 42 S.W.3d 829, 831 (Mo.App. E.D. 2001).

Deference to the trial court has been an important component for analyzing judgments setting aside default judgments because of the articulated public policy of addressing cases on the merits and the "distaste our system holds for default judgments." Continental Basketball Ass'n v. Harrisburg Professional Sports Inc., 947 S.W.2d 471, 473 (Mo.App. E.D. 1997), quoting, Gibson by Woodall v. Elley, 778 S.W.2d 851, 854 (Mo.App. W.D. 1989). This deference has been afforded whether the evidence supporting the motion to set aside the default was presented by paper or live testimony. See Hinton v. Proctor & Schwartz, Inc., 99 S.W.3d 454, 458 (Mo.App. E.D. 2003) (court looks to allegations in the defaulting party's motion and other documents such as affidavits, exhibits and proposed answers.) The appellate courts afford broad discretion to trial court decisions granting motions to set aside a default judgment and narrow discretion in decisions denying the motions—the reason for the differing standards is the distaste the court system holds for default judgments. Hinton, 99 S.W.3d at 458.

In this case the appellate court rejects application of the preceding law and also seems to overlook this court's determination that the use of "de novo" is not appropriate in appellate review of cases under Rule 73.01. Murphy, 536 S.W.2d at 32. De novo review can be appropriate in limited circumstances, for example, when issues such as subject matter or personal jurisdiction are addressed. See State v. Ecford, 198 S.W.3d 156, 158 (Mo.App. E.D. 2006) wherein the appellate court determined that because the issue of whether a default is void for lack of personal jurisdiction is a question of law the appellate court reviews it de novo; and Jew v. Home Depot USA, Inc., 126 S.W.3d 394, 397 (Mo.App. E.D. 2004) wherein the appellate court used de novo review on the question of whether a default judgment should be vacated because it was void on jurisdictional grounds.

In reaching its conclusion that a de novo review standard is appropriate, the appellate court cites Smith v. State of Missouri, 152 S.W.3d 275 (Mo. banc 2005), however, Smith is inapplicable as it is a summary judgment case and the case at bar would have yielded a more favorable result if decided under the summary judgment standard. Furthermore, the appellate court's opinion is in conflict with Business Men's Assurance Co. v. Graham, 984 S.W.2d 501, 506 (Mo. banc 1999) and American Family Mutual Ins. Co., v. Missouri Department of Ins., 169 S.W.3d 905, 909 (Mo.App. W.D. 2005). In American Family, Legal Aid asserted that the appellate court should review the trial court's decision "de novo" because the trial court did not hear any testimony and the case was submitted to the court on the briefs, affidavits, exhibits and discovery materials

and that the appellate court owes no deference to the factual findings made by the trial court.

The appellate court correctly disagreed, finding that the appellate court defers to the trial court as the finder of facts in determinations as to whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence, "even where those facts are derived from pleadings, stipulations, exhibits and depositions." American Family, 169 S.W.3d at 909, quoting, Business Men's, 984 S.W.2d at 506.

Reviewing for an abuse of discretion should remain the relevant standard.

For years appellate courts have been uniform in applying an abuse of discretion standard in determining whether the trial court erred in setting aside a default judgment. Nguyen v. Wang, 182 S.W.3d 688, 691 (Mo.App. E.D. 2006); Martin v. Martin, 196 S.W.3d 632, 635 (Mo.App. W.D. 2006); Klaus, 42 S.W.3d at 831 (Mo.App. E.D. 2001); Ward v. Cook United, Inc., 521 S.W.2d 461, 470 (Mo.App. W.D. 1975). This review is appropriate in light of what the court is looking at—whether the defendant demonstrated good cause sufficient to set aside the default judgment.

This standard was applied even before this court's 1998 rule change adopting the current language defining "good cause" as including a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process. Rule 74.05(d). See Sprung v. Negwer Materials, Inc., 775 S.W.2d 97 (Mo. banc 1989) (this case superceded by Rule 74.05(d) as stated in Continental Basketball Assoc. v. Harrisburg Professional

Sports, Inc., 947 S.W.2d 471 (Mo.App. E.D. 1997) and Ward v. Cook United Inc., 521 S.W.2d 461 (Mo.App. 1975).

Clarifying the confusion of whether it made any difference for purposes of appeal whether the motion to set aside the default judgment was filed within or outside of 30 days of entry of the default judgment was a needed action. However, this should not necessarily lead to a conclusion that just because the motions are treated as "independent actions" they must be analyzed under a Murphy v. Carron standard with an abandonment of deference to the discretion of the trial court.

Abandoning broad deference to the trial court's discretion would defeat this court's prior liberalization of the standard required to obtain a judgment setting aside a default judgment.

For years, appellate courts have consistently recognized that this court's 1988 adoption of rule 74.05 (d) signified a liberalization of the standard required to obtain a judgment setting aside a default judgment. Courts have acknowledged that evidence that may not have risen to the standard required of good reason or excuse under the old Rule 74.04 is analyzed differently today under Rule 74.05(d). Cases decided under the predecessor rule may have denied to relief to defendants who negligently failed to file a timely answer. However, courts have recognized that under the current rule, "good faith mistakes do constitute good cause, and a default judgment can be vacated even if the movant has negligently failed to file a timely answer." CBD Enterprises, Inc. v. Braco Manuf., Inc., 181 S.W.3d 129, 132 (Mo.App. S.D. 2005), quoting, Myers v. Pitney

Bowes, Inc., 914 S.W.2d 835, 839 [6] (Mo.App. S.D. 1996), quoting, Newton v. Manley, 824 S.W.2d 522, 524 (Mo.App. S.D. 1992)(quoting Laughrey, Judgments—The New Missouri Rule, J.Mo.Bar 11, 15 (Jan.-Feb.1988)(original emphasis).

In adopting Rule 74.05(d) this court "considerably broadened" the discretion of the trial court to forgive the mishandling of legal documents. CBD, 181 S.W.3d at 132, quoting, Myers, 914 S.W.2d at 839 [5]. Under the current version of Rule 74.05 (d), where there exists a reasonable doubt as to whether the conduct was intentionally designed or irresponsibly calculated to impede the work of the courts, it should be resolved in favor of finding good faith. CBD, 181 S.W.3d at 132, quoting, Myers, 914 S.W.2d at 839. Stated another way, the trial court should resolve all doubts on the issue of whether the defendant's conduct was intentionally designed or calculated to impede the work of the courts in favor of a finding of good faith on the part of the defendant. CBD, 181 S.W.3d at 133. Cf. Sprung with Billingsley v. Ford Motor Co., 939 S.W.2d 493 (Mo.App. S.D. 1997). The "good cause" requirement is satisfied by proving that the party in default did not recklessly or intentionally impede the judicial process. Great Southern Savings & Loan Assoc. v. Wilburn, 887 S.W.2d 581 (Mo. banc 1994).

Nothing in the recent rule change indicates that a retreat from this liberal standard is now adopted. Clarifying finality issues should not be confused with the long-recognized abuse of discretion standard of review.

The importance of trial court discretion is demonstrated by the result reached by the appellate court in this case.

In this case the appellate court started with Murphy v. Carron, but then applied a de novo review, which ended up affording no deference to the trial court's use of discretion in setting aside the default. The use of these standards of review gave the appellate court the perceived ability to reverse the trial court's judgment by engaging in an unusual inquiry into the affiant's state of mind that ultimately led to an opinion inconsistent and in conflict with precedent. The following facts are relevant to demonstrate how the appellate court erred and why this court should affirm the trial court's judgment.

The first amended petition was served on Patti Cakes Baking Company on January 18, 2006. (L.F. 32, 33.) No responsive pleading was filed within 30 days of service of the summons. (L.F. 2.) On March 27, 2006 the Brungards filed a motion for a default judgment against Patti Cakes Baking Company. (L.F. 34, 35.) On April 13, 2006 a default judgment was entered in favor of the Brungards against Patti Cakes Baking Company. On May 3, 2006 Patti Cakes Baking Company filed a motion to set aside the default judgment. (L.F. 39, 40.) On May 17, 2006 suggestions in support of the motion to set aside the default judgment including an affidavit by James Wedig were filed. (L.F. 41-45.) The affidavit stated as follows:

> COMES NOW James Wedig, of lawful age, and states the following, all based on his personal knowledge:
>
> 1. That the undersigned is the registered agent for Patti Cakes Baking Company, Inc., a Missouri Corporation.

2. That the undersigned believes he was served with a summons in this matter on or about January 18, 2006.

3. That the undersigned thought he faxed the same to his insurance agent for delivery to his insurance carrier.

4. That the undersigned cannot find the summons and is not sure what he did with the same but he did not intentionally ignore this matter.

5. That the undersigned was unaware that a default was being taken against Patti Cakes Baking Company, Inc. 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; Appendix at A-3.)

The affidavit at issue stated in part that the defendant Wedig "thought that he faxed" the summons he recalled being served with to his insurance agent for delivery to his insurance carrier. Applying a de novo review the appellate court took the word "thought" from the affidavit and entered into the following unusual discussion:

"No explanation is offered other than the statement that he 'thought' he faxed the papers to his insurance agent. We are not told when he first 'thought' that. Did he 'think it' on the day he was served? Evidently he does not still 'think' that he did. He acknowledges that he lost the summons and the petition. He does not know

why he lost them. He does not say what he thought about the papers when he reviewed them." (Opinion at pages 6, 7.)

Under decades of decisions, this type of conduct (explaining that you thought you handled it but in fact must not have) proven by way of a sworn affidavit, has been sufficient to support a trial court's finding of good cause (or stated another way, to support a finding of conduct that is based on a mistake or conduct not intentionally or recklessly designed to impede the judicial process). See Gibson by Woodall v. Elley, 778 S.W.2d 851 (Mo.App. W.D. 1989)(papers mishandled by temporary clerks); Heintz Elec. Co. v. Tri Lakes Interiors, Inc., 185 S.W.3d 787 (Mo.App. S.D. 2006)(defendant's employee inadvertently threw away the suit papers under the mistaken belief that the papers were from another case); Billingsley v. Ford Motor Company, 939 S.W.2d 493 (Mo.App. S.D. 1997)(lawyer mistakenly failed to file answer); Bell v. Bell, 849 S.W.2d 194 (Mo.App. W.D. 1993)(attorney's secretary thought another attorney was handling). It defies reasoning and common sense if the law in this state is that remembering you threw away the suit papers is sufficient to set aside a default, but not remembering if in fact you threw them away is insufficient. It also ignores the deference that should be afforded to the trial court and to the liberal standard defining what constitutes good cause.

Regardless of the standard of review to be applied, good cause was shown sufficient to set aside the default.

This court should not condone the appellate court's abandonment of the abuse of discretion review. Missouri should continue to follow the policy of having cases addressed on the merits. However, even if this court decides to now analyze judgments setting aside default judgments under Murphy v. Carron, the trial court's judgment should be affirmed. Under the facts of this case the trial court correctly set aside the default because good cause was demonstrated sufficient to warrant setting aside the default judgment.

Good cause is defined under Rule 74.05 (d) as including "a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05 (d) attached in the Appendix at A-5. The rule's good cause requirement is satisfied by proving that the party in default did not recklessly or intentionally impede the judicial process. Great Southern Savings & Loan Assoc. v. Wilburn, 887 S.W.2d 581 (Mo. banc 1994); Heintz Elect. Co. v. Tri Lakes Interiors, Inc., 185 S.W.3d 787, 793 (Mo.App. S.D. 2006). Wedig's affidavit proves that he did not intentionally impede the judicial process when he thought that he forwarded the summons and petition to his insurance company. Believing that he provided notice by appropriately forwarding the suit papers to his insurance company does not demonstrate either reckless or intentional conduct designed to impede the judicial process.

Appellate courts have interpreted the concept of good cause liberally in order to prevent a manifest injustice and to avoid a threatened one, especially in cases tried without a jury where only one side of the evidence is presented. Heintz, 185 S.W.3d at

793. Reckless conduct 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).

The following cases illustrate why the trial court in this case appropriately set aside the default judgment by finding that the evidence presented showed good faith mistakes in why no responsive pleading was timely filed and that these mistakes were not intentionally or recklessly designed to impede the judicial process. In Gibson by Woodall v. Elley, 778 S.W.2d 851 (Mo.App. W.D. 1989) the defendant railroad established good cause for failing to timely answer the petition by showing that the suit papers had been mishandled by temporary clerks while the permanent staff was away at a week-long special meeting. Gibson, 778 S.W.2d at 853-855. This court found that the affidavits reveal no intent on the part of the defendant in failing to answer and that the series of mishaps is inconsistent with the intentional or reckless behavior required by Rule 74.05(d). Id.

In Heintz Elec. Co. v. Tri Lakes Interiors, Inc., 185 S.W.3d 787 (Mo.App. S.D. 2006) the appellate court found the defendant demonstrated good cause when the defendant's employee had inadvertently discarded the suit papers under the mistaken belief that the papers were from another case. Heintz, 185 S.W.3d at 793. The appellate court found that to be reckless the defendant must make a conscious choice of the choice of action and that the defendant's employees' actions were the result of an honest mistake and were not intentionally or recklessly designed to impede the judicial process. Id. The

court also found it important that once the default was discovered, action was soon taken to attempt to set aside the default. Id. These cases demonstrate the propriety of the trial court's action in this case.

Mistakes made by lawyers or their staff constitutes good cause to set aside a default judgment. In Billingsley v. Ford Motor Company, 939 S.W.2d 493 (Mo.App. S.D. 1997) the appellate court found good cause was established when the local counsel assigned to handle the case failed to timely file a responsive pleading as the conduct might have been negligent but was not reckless. Billingsley, 939 S.W.2d at 500-501. In Bell v. Bell, 849 S.W.2d 194 (Mo.App. W.D. 1993) the mistake was made by an attorney's secretary and this court found that good cause was established when the secretary mistakenly thought that another attorney was handling the matter. Bell, 849 S.W.2d at 198. In Continental Basketball Assoc. v. Harrisburg Professional Sports, Inc., 947 S.W.2d 471 (Mo.App. E.D. 1997) the assigned law firm thought that an answer had been timely filed.

The appellate court found that Sprung v. Negwer Materials Inc., 775 S.W.2d 97 (Mo. banc 1989) was no longer controlling in light of Rule 74.05 (d) and that even though negligence occurred in the failure to timely file an answer, good faith was established in the absence of conduct intentionally or recklessly designed to impede the judicial process. Continental Basketball, 947 S.W.2d at 473, 474. The court found that prompt action taken by a movant once the default is discovered assists in establishing the defendant's good faith as required under Rule 74.05(d). Id. These cases establish the

propriety of the trial court's action in this case. This court should affirm the trial court's judgment in all respects.

There are occasions where a default judgment is appropriate because good cause is not proven. Sometimes the defendant appears at the trial but offers no evidence and fails to file a responsive pleading, see Martin v. Martin, 196 S.W.3d 632, 635-636 (Mo.App. W.D. 2006) or appears in court when the case is called but leaves before the trial begins, see In re Marriage of Williams v. Williams, 847 S.W.2d 896, 897-900 (Mo.App. S.D. 1993). Others offer no explanation as to why no action was taken within thirty days of being served, see Klaus v. Shelby, 42 S.W.3d 829, 830 (Mo.App. E.D. 2001), while others proclaim they do not need a lawyer and that they are not going to participate in court. See In re Marriage of Pierce, 867 S.W.2d 237, 238 (Mo.App. S.D. 1993). Some defendants deny being served though testimony adduced at trial refutes the contention, see Nguyen v. Wang, 182 S.W.3d 688, 690, 691 (Mo. App. E.D. 2006), while others argue that though they were in default they should have received notice of the hearing on damages. See Crain v. Crain, 19 S.W.3d 170, 172 (Mo.App. W.D. 2000).

Other times the defendant fails to provide any evidence on the issue of good cause by way of affidavit or testimony on the request to set aside the default. See Hinton v. Proctor & Schwartz, Inc., 99 S.W.3d 454, 458-460 (Mo.App. E.D. 2003)(motion unverified, affidavit not notarized and no testimony adduced at hearing) and Weidner v. Anderson, 174 S.W.3d 672 (Mo.App. S.D. 2005). Finally, others provided evidence that may not have risen to the standard required of good reason or excuse under the old Rule

74.04 but would be analyzed differently today under Rule 74.05(d). See Sprung v. Negwer Materials, Inc., 775 S.W.2d 97 (Mo. banc 1989) (this case superceded by Rule 74.05(d) as stated in Continental Basketball Assoc. v. Harrisburg Professional Sports, Inc., 947 S.W.2d 471 (Mo.App. E.D. 1997) and Ward v. Cook United Inc., 521 S.W.2d 461 (Mo.App. 1975). Cf. Sprung with Billingsley v. Ford Motor Co., 939 S.W.2d 493 (Mo.App. S.D. 1997).

Cases decided under the predecessor rule may have denied to relief to defendants who negligently failed to file a timely answer. However, courts have recognized that under the current rule, "good faith mistakes do constitute good cause, and a default judgment can be vacated even if the movant has negligently failed to file a timely answer." CBD, 181 S.W.3d at 132, quoting, Myers, 914 S.W.2d at 839 [6], quoting, Newton v. Manley, 824 S.W.2d 522, 524 (Mo.App. S.D. 1992)(quoting Laughrey, Judgments—The New Missouri Rule, J.Mo.Bar 11, 15 (Jan.-Feb.1988)(original emphasis). In adopting Rule 74.05(d) the Missouri Supreme Court "considerably broadened" the discretion of the trial court to forgive the mishandling of legal documents. CBD, 181 S.W.3d at 132, quoting, Myers, 914 S.W.2d at 839 [5].

Under the current version of Rule 74.05 (d), where there exists a reasonable doubt as to whether the conduct was intentionally designed or irresponsibly calculated to impede the work of the courts, it should be resolved in favor of finding good faith. CBD, 181 S.W.3d at 132, quoting, Myers, 914 S.W.2d at 839. Stated another way, the trial court should resolve all doubts on the issue of whether the defendant's conduct was

intentionally designed or calculated to impede the work of the courts in favor of a finding of good faith on the part of the defendant. CBD, 181 S.W.3d at 133.

The trial court in this case correctly set aside the default judgment. Under the relevant standard of review, this court is to affirm the trial court's judgment unless this court finds that the trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful and deliberate consideration. Hancock v. Shook, 100 S.W.3d 786, 795 (Mo. banc 2003). All doubts on the issue of whether the defendant's actions (as proven in Wedig's affidavit) are to be resolved in favor of finding that the conduct was not intentionally designed or calculated to impede the work of the courts. CBD, 181 S.W.3d at 133.

Wedig thinks that he forwarded the summons and petition to his insurance company. He stated under oath that he did not intentionally ignore the suit papers. The motion to set aside the default was filed two weeks after entry of the default judgment. The sooner the mistake regarding the default is discovered and acted upon, the more receptive the courts should be to a motion to set aside. Myers v. Pitney Bowes, Inc., 914 S.W.2d 835, 839 (Mo.App. S.D. 1996). There is no evidence of prior default judgments being taken against Patti Cakes Baking Company. Cf. Krugh v. Hannah, 126 S.W.3d 391, 392, 393 (Mo. banc 2004). Likewise, there is no evidence that Wedig on behalf of Patti Cakes Baking Company failed to take any action within the thirty-day period after being served. Cf. Klaus v. Shelby, 42 S.W.3d 829, 830 (Mo.App. E.D. 2001).

Having proven that his conduct was not intentionally or recklessly designed to impede the judicial process, the trial court correctly set aside the default judgment. The Brungards' reliance upon Krugh v. Millstone Marina Service, L.L.C., 126 S.W.3d 391 (Mo. 2004), Klaus v. Shelby, 42 S.W.3d 829 (Mo. App. 2001), Sprung v. Negwer Materials, Inc., 775 S.W.2d 97 (Mo. banc 1989) and Ward v. Cook United, Inc., 521 S.W.2d 461 (Mo.App. 1975) is misplaced. As previously stated, Sprung and Ward were decided under the predecessor rule and more strict standard and caution should be exercised in using these cases to argue that the trial court abused its discretion in this case. Krugh is factually distinguishable as the defendant had conduct demonstrating intent as three additional defaults had been taken against the defendant in recent years and the defendant ignored the case even after being notified it was in default. Klaus is distinguishable because the defendant gave no reason or explanation of any actions taken in the thirty-day period after being served. These cases do not support the Brungards' request for this court to reverse the trial court's judgment. This court should affirm the trial court's judgment in all respects.

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ATTORNEYS FOR PATTI CAKES BAKING COMPANY, INC.

CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF BOONE)

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on October 11, 2007, she served two (2) copies of the foregoing BRIEF OF RESPONDENT by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope addressed to: Mr. James Corbett, 2015 E. Phelps, Springfield, MO 65802 as attorney for Appellants.

I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains _____ words, excluding the cover, the certification and the appendix as determined by Microsoft Word software and that the floppy disk filed with the brief containing a copy of this brief has been scanned for viruses and is virus free.

_____
SUSAN FORD ROBERTSON, Attorney

Subscribed and sworn to before me this _____ day of _____ here in my office in Columbia, Missouri.

_____
NOTARY PUBLIC

(seal)
My commission expires:_____

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