IN THE SUPREME COURT OF MISSOURI

JOSEPH LOVENDUSKI	PLAINTIFF/RESPONDENT
vs.	APPEAL NO. SC83987
CRAIG L. MCGRAIN	DEFENDANT/APPELLANT

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
HONORABLE ABE SHAFER, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

Joseph W. Vanover #48074
WITT, HICKLIN & VANOVER, P.C.
4th at Main, P.O. Box 1517
Platte City, Missouri 64079
Telephone (816) 858-2750
Fax (816) 858-3009
Attorney for Respondent

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

This action involves the question of whether McGrain should be made to repay money loaned to him by Lovenduski. The Trial Court entered Default Judgment in favor of Lovenduski and against McGrain on July 24, 2000 (LF 28-30). The Trial Court conditionally set aside that Judgment on August 22, 2000 (LF 69). McGrain's Amended Motion to Set Aside Default Judgment was overruled and the Default Judgment previously entered was reinstated by the Trial Court's Amended Order and Judgment which was filed November 7, 2000 (LF 181-183). McGrain subsequently appealed to the Missouri Court of Appeals, Western District. McGrain appealed the Trial Court's entry of the Default Judgment and its Order Overruling his Amended Motion to Set Aside Default Judgment which reinstated the Default Judgment.

Jurisdiction is now vested in this Court pursuant to its Order of Transfer dated November 20, 2001. The Missouri Court of Appeals, Western District, issued its Opinion on August 7, 2001. A timely Motion for Rehearing or in the Alternative Request to Transfer was filed with the Western District on August 21, 2001. Said Motion for Rehearing was overruled and the Motion for Transfer was denied on October 2, 2001. A subsequent Application for Transfer was filed with this Court on October 15, 2001. Jurisdiction of this cause is now properly in this Court pursuant to Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rules. This Court, pursuant to Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rules, now has jurisdiction as to all issues the same as if on an original appeal.

STATEMENT OF FACTS

Joseph A. Lovenduski loaned Craig L. McGrain One Hundred Twenty Thousand Dollars ($120,000.00) in two (2) separate transactions on or about July 7, 1998 and on or about September 9,

1998 (LF 22 and 28). These transactions occurred in Missouri (LF 22 and 28). The funds were transferred from Citizens Bank and Trust in Chillicothe, Missouri to First Austin Funding Corporation by wire transfer (LF 22 and 28).

McGrain defaulted in the payment of these obligations (LF 22) and Lovenduski brought suit in the Circuit Court of Platte County, Missouri by filing his Petition on April 20, 2000 (LF 10). Lovenduski requested a summons be issued so that service could be had out of Missouri (LF 16). The Petition and Out of State Summons was forwarded to the Sheriff of Monroe County, New York. On April 28, 2000, Richard Zicari who was a Constable served the Petition and Summons on McGrain by personal service (Supp. LF 2).

Constable Zicari signed a written return of service on May 3, 2000 which stated that he had authority within the State of New York to serve such pleadings (Supp. LF 2). However, Constable Zicari did not file that return of service with the Circuit Court of Platte County, Missouri (LF 1-9).

On May 30, 2000 Charles A. Hurth filed a Special Entry of Appearance on behalf of McGrain in the Circuit Court of Platte County, Missouri (LF 18). In it, Mr. Hurth alleged that the Court didn't have personal jurisdiction over McGrain, but did not make
any allegations as to the sufficiency of process or the sufficiency of the service of process (LF 18). Likewise Mr. Hurth did not request the Court for any affirmative relief (LF 18). Following the service of process on April 28, 2000 until July 21, 2000, neither McGrain nor anyone for him filed any Answer or motion with the Trial Court (LF 1-3, Opinion 3 "Prior to the hearing, no Motion to Dismiss for Lack of Personal Jurisdiction had been made by Mr. McGrain, nor had he filed an Answer."). He did not file a Motion to Dismiss for Lack of Personal Jurisdiction nor did he file a Motion to Quash Service of Process during this time frame (LF 1-3).

On June 19, 2000 Lovenduski filed a Motion for Entry of Default Judgment (LF 20). This motion was originally noticed up for July 7, 2000 (LF 25). Subsequent to the motion being noticed up for that date, Mr. Hurth requested the motion be set for a different date (LF 26). Subsequently, Lovenduski filed an Amended Notice noticing up the Motion for Entry of Default Judgment for July 21, 2000 (Supp. LF 1).

On July 21, 2000, Lovenduski appeared by attorney Keith Hicklin and McGrain appeared by attorney Mr. Hurth (TR 4, L 13-18). McGrain again orally asserted to the Court that it had no personal jurisdiction, but failed to ask the Court for any relief or an extension of time so that he could file an Answer or file a motion challenging personal jurisdiction (TR 4-11). The Court then proceeded to take up Lovenduski's Motion for Entry of Default Judgment (TR 7, L 9-13). Lovenduski advised the Court that service had been had for more than thirty (30) days (TR 5, L 8-10). Lovenduski offered into evidence and the Court admitted Lovenduski's Affidavit which stated, inter alia, the transaction occurred within Missouri (TR 8, L 5-6, 14; LF 22). Mr. Hurth argued that McGrain was not a resident of Missouri, that there was litigation pending in New York between the parties, and that McGrain was not a proper party because the proceeds of the loans were transferred to First Austin (TR 4-11). McGrain presented no affidavits and no witnesses at this hearing (TR 4-11). He requested no relief from the Court other than to set a date on which the Court would hear his Motion to Set Aside a Default Judgment in the event one was entered (TR 9, L 11-14).

Upon the Affidavit of Lovenduski and the statements of counsel, the Court entered judgment in favor of Plaintiff and against Defendant in the amount of One Hundred Twenty-Two Thousand Four Hundred Sixty-Nine and 38/100 Dollars ($122,469.38) plus accrued interest from and after March 30, 2000 at the rate of Thirty and 92/100 Dollars ($30.92) per day and costs (LF 28). The Court found

that the transaction occurred in Missouri, that the Defendant had been served, that time had expired for filing an Answer and that McGrain had not filed any motion or requested any affirmative relief (LF 28).

McGrain filed a Motion to Set Aside Default Judgment on July 31, 2000 (LF 35) and noticed it up for hearing on August 11, 2000 (LF 32). McGrain appeared by Mr. Hurth on August 11, 2000 and Lovenduski appeared by attorney Don Witt (TR 12, L 13-16). At that hearing Lovenduski pointed out deficiencies in McGrain's motion (TR 13, L 18 to p. 15, L 12). Based on those deficiencies, McGrain requested and the Court granted an additional week to file an Amended Motion to Set Aside Default Judgment (TR 18, L 16-25). The Court set August 18, 2000 as the date to hear such motion (TR 18, L 23-25).

The Trial Court took up McGrain's Amended Motion to Set Aside on August 18, 2000 and granted that motion conditioned upon McGrain's payment to Witt & Hicklin, P.C. of Five Hundred Dollars ($500.00), for their partial attorney fees (TR 30, L 10-16). The Court entered its formal Order to that effect on August 22, 2000 which gave McGrain fifteen (15) days to satisfy the condition (LF 69). A copy of the Order was mailed by the Court Clerk to Mr. Hurth on that date (LF 5).

In spite of the condition, which was clearly stated in the Order, McGrain failed to pay the Five Hundred Dollars ($500.00) to Witt & Hicklin, P.C. within fifteen (15) days of the entry of the Order (LF 183). McGrain failed to even make the payment or tender payment within fifteen (15) days after September 14, 2000, the date Mr. Hurth acknowledges receiving the Order (LF 182). Tender of the payment of attorney fees was not offered until October 6, 2000, at which time Lovenduski refused (LF 182).

On October 6, 2000, Lovenduski filed his Motion for Entry of Order Denying Amended Motion to Set Aside Default Judgment (LF 87-89). McGrain appeared by Gary V. Fulghum and

Lovenduski appeared by Mr. Hicklin at the Trial Court's hearing of the motion on November 3, 2000 (TR 39, L 11-15). After hearing arguments of counsel, the Court found that the condition in the Order Setting Aside Default Judgment was not satisfied and denied McGrain's Amended Motion to Set Aside Default Judgment (TR 52, L 1-8). The Court also denied Defendant's Motion to Dismiss which had been filed previously, but never decided (LF 8).

The Court entered its formal order on November 7, 2000 (LF 181).

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE THE TRIAL COURT HAD PERSONAL JURISDICTION OVER DEFENDANT

(a) IN THAT DEFENDANT HAD BEEN SERVED WITH PROCESS, PLAINTIFF'S PETITION AND AFFIDAVIT ESTABLISHED THAT DEFENDANT HAD TRANSACTED BUSINESS AND MADE A CONTRACT WITHIN THE STATE OF MISSOURI RELATING TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, AND THAT DEFENDANT HAD MINIMUM CONTACTS WITH THE STATE OF MISSOURI, AND

(b) IN THAT DEFENDANT'S AFFIDAVITS WERE NOT PRESENTED TO THE COURT AT THE DEFAULT JUDGMENT HEARING; AND

(c) IN THAT THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS DUE TO LACK OF PERSONAL JURISDICTION FILED ON AUGUST 25, 2000 HAS NOT BEEN APPEALED AND DEFENDANT FAILED TO FILE A 74.06 MOTION.

_____(d) IN THAT THE DEFENDANT RECOGNIZED THE CASE WAS IN COURT, BUT WAIVED THE DEFENSES OF LACK OF PERSONAL JURISDICTION AND INSUFFICIENCY OF SERVICE OF PROCESS THROUGH INACTION.

State ex rel. White v. Marsh, 646 SW2d 357 (Mo. 1983)

Greenwood v. Schnake, 396 SW2d 723, 726 (Mo. 1965)

Worley v. Worley, 19 SW3d 127 (Mo. 2000)

Chase Third Century Leasing Co., Inc. v. Williams, 782 SW2d 408 (Mo. App. W.D. 1989)

Crouch v. Crouch, 641 SW2d 86 (Mo. 1982)

In Re Adoption of J.P.S., 876 SW2d 762 (Mo. App. S.D. 1994)

Laser Vision Centers, Inc. v. Laser Vision Centers Intern., SpA., 930 SW2d 29 (Mo. App. E.D. 1996)

State ex rel. Tinnon v. Mueller, 846 SW2d 752 (Mo. App. E.D. 1993)

Sullenger v. Cooke Sales and Service Co., 646 SW2d 85 (Mo. 1983)

Missouri Supreme Court Rule 44.01

Missouri Supreme Court Rule 54.20(b)

Missouri Supreme Court Rule 55.27

Missouri Supreme Court Rule 55.36

Missouri Supreme Court Rule 55.37

Missouri Supreme Court Rule 74.05

Missouri Supreme Court Rule 74.06

Section 509.330 R.S. Mo.

Section 509.340 R.S.Mo.

POINTS RELIED ON

II.

THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE DEFENDANT FAILED TO "PLEAD OR OTHERWISE DEFEND" WITHIN THE MEANING OF RULE 74.05, IN THAT THE SPECIAL ENTRY OF APPEARANCE CONTESTING JURISDICTION AND DEFENDANT'S ARGUMENT AT THE JULY 21, 2000 HEARING DID NOT PROPERLY PRESENT THE ISSUE OF PERSONAL JURISDICTION TO THE COURT.

Murphy v. Carron, 536 SW2d 30 (Mo. 1976)

State ex rel. White v. Marsh, 646 SW2d 357, 359 (Mo. 1983)

Chapman v. Commerce Bank of St. Louis, 896 SW2d 85 (Mo. App. E.D. 1995)

State ex rel. Fisher v. McKenzie, 754 SW2d 557 (Mo. 1988)

Missouri Supreme Court Rule 44.01(b)

Missouri Supreme Court Rule 55.27

Missouri Supreme Court Rule 74.05(a)

Missouri Supreme Court Rule 55.26

5th and 14th Amendment to the U.S. Constitution

Article I, Section 10 of the Missouri Constitution

Article I, Section 14 of the Missouri Constitution

POINTS RELIED ON

III.

THE TRIAL COURT DID NOT ERR AND DID NOT ABUSE ITS DISCRETION IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE DEFENDANT FAILED TO MEET THE CONDITION UPON WHICH THE SETTING ASIDE OF THE DEFAULT JUDGMENT WAS CONDITIONED AND BECAUSE DEFENDANT FAILED TO PLEAD OR SHOW GOOD CAUSE FOR ALLOWING THE DEFAULT TO BE ENTERED

(a) IN THAT DEFENDANT FAILED TO PAY FIVE HUNDRED DOLLAR ($500.00) ATTORNEY FEES TO WITT & HICKLIN, P.C., AND

(b) IN THAT DEFENDANT'S AFFIDAVITS AND PLEADINGS WERE INSUFFICIENT AND FAILED TO ESTABLISH THAT THE FAILURE TO FILE AN ANSWER WAS DUE TO MISTAKE OR INADVERTENCE OF DEFENDANT OR OTHER GOOD CAUSE.

Bredeman v. Eno, 863 SW2d 24 (Mo. App. W.D. 1993)

Crain v. Crain, 19 SW3d 170, on May 31, 2000 (Mo. App. W.D. 2000)

Cotleur v. Danziger, 870 SW2d 234 (Mo. 1994)

Crowe v. Clairday, 935 SW2d 343 (Mo. App. S.D. 1996)

Gering v. Walcott, 975 SW2d 496, 499 (Mo. App. W. D. 1998)

Gibson By Woodall v. Elley, 778 SW2d 851 (Mo. App. W.D. 1989)

Murphy v. Carron, 536 SW2d 30 (Mo. 1976)

Schulte v. Venture Stores, Inc., 832 SW2d 13 (Mo. App. E.D. 1992)

Missouri Supreme Court Rule 74.05

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE THE TRIAL COURT HAD PERSONAL JURISDICTION OVER DEFENDANT

(a) IN THAT DEFENDANT HAD BEEN SERVED WITH PROCESS, PLAINTIFF'S PETITION AND AFFIDAVIT ESTABLISHED THAT DEFENDANT HAD TRANSACTED BUSINESS AND MADE A CONTRACT WITHIN THE STATE OF MISSOURI RELATING TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, AND THAT DEFENDANT HAD MINIMUM CONTACTS WITH THE STATE OF MISSOURI, AND

(b) IN THAT DEFENDANT'S AFFIDAVITS WERE NOT PRESENTED TO THE COURT AT THE DEFAULT JUDGMENT HEARING; AND

(c) IN THAT THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS DUE TO LACK OF PERSONAL JURISDICTION FILED ON AUGUST 25, 2000 HAS NOT BEEN APPEALED AND DEFENDANT FAILED TO FILE A 74.06 MOTION.

_____(d) IN THAT THE DEFENDANT RECOGNIZED THE CASE WAS IN COURT, BUT WAIVED THE DEFENSES OF LACK OF PERSONAL JURISDICTION AND INSUFFICIENCY OF SERVICE OF PROCESS THROUGH INACTION.

STANDARD OF REVIEW

Where an Appellant challenges the entry of a Default Judgment on the basis that it was void on jurisdictional grounds, this Court should review the Trial Court's decision independently on appeal by examining the matters before the Trial Court at the time the Default Judgment was entered. ***Laser Vision Centers, Inc. v. Laser Vision Centers Intern., SpA.,*** 930 SW2d 29 (Mo. App. E.D. 1996). This Court's standard of review on the issue of the Trial Court overruling Defendant's Amended Motion to Set Aside Default Judgment and reinstating the Default Judgment is addressed under Point III.

ARGUMENT ON POINT I

PERSONAL JURISDICTION OVER MCGRAIN

A trial court acquires personal jurisdiction either because: (1) the long arm statute and the constitutional minimum contact are satisfied, or (2) personal jurisdiction is waived. Personal jurisdiction may be waived through action or inaction.

Lovenduski agrees that Mr. Hurth's Special Entry of Appearance did not waive the personal jurisdiction defense. McGrain is correct that the act of filing the Special Entry of Appearance did not waive McGrain's challenge to personal jurisdiction. However, McGrain's failure to present the defense of lack of personal jurisdiction to the Court and failure to ask the Court for relief by motion or answer within the time provided waived those defenses. Rule 55.27(g). McGrain waived personal jurisdiction through inaction, not action.

LAW ON WAIVER OF PERSONAL JURISDICTION

The modern application of the waiver rule appears to have its beginning in ***Greenwood v. Schnake,*** 396 SW2d 723, 726 (Mo. 1965). ***Greenwood*** states that "a defendant objecting to lack of jurisdiction over his person should *promptly* file the motion raising the question. Such a motion must be made within the time allowed for responding to the opposing party's pleading, Civil Rule 55.36; Section 509.330, and if not made within the time therein limited, the party waives all objections to jurisdiction then available to him, by the express provisions of Civil Rule 55.37 and Section 509.340." ***Greenwood*** states that if a party does not file a motion to contest personal jurisdiction and does not file an answer contesting personal jurisdiction within the time allowed, then that party waives all objections to personal jurisdiction. The Supreme Court again addressed the issue of waiver in ***Crouch v. Crouch***, 641 SW2d 86 (Mo. 1982). Judge Welliver stated in footnote 4, "waiver may occur, therefore, by either the defendant's inaction or his action. It results from a 'failure to assert the defense within the time prescribed by the rules' whenever the defendant appears and fails to raise the defense within the time allowed for pleading."

The Missouri Supreme Court examined the history of "special appearances" and interpreted the rules related to challenging personal jurisdiction in ***State ex rel. White v. Marsh,*** 646 SW2d 357 (Mo. 1983). This Court laid out two (2) ways to challenge personal jurisdiction. First, this Court said a Defendant may challenge personal jurisdiction by "ignor[ing] a summons in the hope that any default judgment subsequently rendered will be found to be void for want of jurisdiction over the person." Id. at 359. The second option historically was to enter a "special appearance" to challenge in court the jurisdiction over the person. Id. The second approach is today exercised by taking advantage of Missouri Supreme Court Rule 55.27.

In ***State ex rel. White v. Marsh*** a defendant sought to exercise the second option by affirmatively challenging the jurisdiction of the court. However, the defendant, prior to raising the issue of personal jurisdiction, sought and received an extension of time within which it could answer or make a motion pursuant to Rule 55.27. Previously, seeking such an extension was deemed to be a general entry of appearance which waived any challenge to personal jurisdiction. However, this Court said that under the new interpretation of Rule 55.27, such a request would not waive a challenge to personal jurisdiction. Relevant to the case at bar, "a defendant who obtains an extension of time to respond 'recognizes that the case is in court,' so that the option of testing personal jurisdiction by submitting to default is no longer available. The defendant who obtains an extension might also be held to be in court for all purposes if defenses relating to personal jurisdiction or venue are not presented within the time specified in an order complying with Rule 44.01(b)." Id. at 362. This statement means that once a party takes any action in court, whether by seeking an extension of time or by entering a special entry of appearance, that party foregoes the first method of challenging personal jurisdiction, i.e. allowing a default to be entered and challenging the judgment collaterally. Basically, once a party is in court, even though that party is challenging the jurisdiction of the court, the party must abide by the Rules of Civil Procedure. The party can no longer deny knowledge of the proceedings. The party must take measures authorized by the Rules of Civil Procedure to challenge the court's jurisdiction. In the event the party does not subsequently challenge the jurisdiction of the court, the party is deemed to have foregone the first method of challenging personal jurisdiction by ignoring court proceedings and challenging the judgment collaterally.

Also in 1983 the Supreme Court, in ***Sullenger v. Cooke Sales and Service Co.,*** 646 SW2d 85 said "personal jurisdiction (as opposed to subject matter jurisdiction) may be waived when a

defendant makes no objection or pleading on the issues but otherwise subjects itself to the jurisdiction of the court."

The Western District Court of Appeals filed an Opinion on this issue in ***Chase Third Century Leasing Co., Inc. v. Williams,*** 782 SW2d 408 (Mo. App. W.D. 1989), and said "although it is generally necessary to satisfy the Missouri long arm statute to obtain in personam jurisdiction over a non-resident defendant pursuant to Section 506.500, jurisdiction over the person may be obtained by consent or by waiver." The Eastern District affirmed this rule in ***State ex rel. Tinnon v. Mueller,*** 846 SW2d 752 (Mo. App. E.D. 1993) by saying "personal jurisdiction may nevertheless be conferred by consent or waiver." The Southern District has also affirmed this rule in ***In Re Adoption of J.P.S.,*** 876 SW2d 762 (Mo. App. S.D. 1994). The Southern District held that "a party may, however, waive a personal jurisdiction defense by voluntarily appearing without service of any writ, or whether the notice is short of that required by law or was defectively served *if* the party who so appears either fails then to raise his personal jurisdiction defense in a timely fashion or takes action that is wholly inconsistent with his assertion that the Trial Court is without personal jurisdiction." The most recent case counsel for Lovenduski has found is ***Worley v. Worley,*** 19 SW3d 127 (Mo. 2000), in which this Court said, if he or she appears, "a defending party who wishes to raise defenses of lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process must do so either in a pre-answer motion or in the party's answer." The waiver provision does not require a finding by the trial court that each defense is waived. All defenses that are not raised are waived automatically.

FACTS ON WAIVER THROUGH INACTION

In the case at bar, Mr. Hurth's filing of a Special Entry of Appearance, his Request for a Continuance filed June 26, 2000 and his appearance and argument in court on July 21, 2000 brought McGrain into court for all purposes, "if defenses relating to personal jurisdiction or venue are not presented within the time specified." McGrain did not present his defense related to personal jurisdiction within the time specified in Rule 55.27. Therefore under Rule 55.27(g)(1), McGrain waived any defense he may have had regarding lack of "jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, that Plaintiff should furnish security for costs, that Plaintiff does not have legal capacity to sue, that there is another action pending between the same parties for the same cause in this state, that several claims have been improperly united or that the counterclaim or crossclaim is one which cannot be properly interposed" because he did not make a motion under Rule 55.27 nor did he include any such defenses in a responsive pleading. Rule 55.27.

In other words, Mr. Hurth's filing of a Special Entry of Appearance, filing of an Application for Continuance and appearance on July 21, 2000 did not waive McGrain's defense of personal jurisdiction, but McGrain's failure to file a responsive pleading, including such defense and McGrain's failure to file a motion challenging personal jurisdiction waived those defenses. The actions of McGrain and his attorney did not waive personal jurisdiction. The lack of action of McGrain waived that defense as well as several others.

PROOF OF SERVICE OF PROCESS

McGrain raises for the first time on appeal a challenge to the proof of the service of process. It is important to note the distinction between a challenge to the method of service of process and a challenge to the proof of the service of process. Appellant's arguments related to the return of service are a challenge to the proof of service of process which is governed by Missouri Supreme Court Rule

54.20(b). This rule was amended effective January 1, 1989. In this amendment, a sentence was added which states, "The court may consider the affidavit or any other evidence in determining whether service has been properly made." (emphasis added). With the addition of this sentence, Circuit Courts have the authority to look at matters other than a return of service in deciding whether service was proper.

McGrain was served on April 28, 2000 (Supp. LF 2). This fact has not been challenged until now. At the default judgment hearing, Lovenduski's attorney advised the Court that service had been had for more than thirty (30) days (TR 5, L 8-10). McGrain did not challenge the service of process at that time (TR 5, L 20 - TR 6, L 23). McGrain's personal jurisdiction defense at that time and continuously up to the filing of the Appellant's Brief consisted of argument that he did not have minimum contacts with Missouri or contacts sufficient to satisfy Missouri's long-arm statute. McGrain argued other defenses such as the allegation that First Austin should have been a party to the lawsuit instead of him in addition to his no minimum contacts argument, but did not challenge the sufficiency of the service of process or the sufficiency of process itself until the filing of Appellant's Brief (TR 6, L 12-17). Because the service of process was not challenged in the trial court, it was waived.

BASIS OF TRIAL COURT'S FINDING OF PERSONAL JURISDICTION ON JULY 21, 2000

On July 21, 2000, the Trial Court took up Lovenduski's Motion for Entry of Default Judgment. Prior to this hearing and during the hearing, McGrain had failed to properly present to the Court a challenge to personal jurisdiction. McGrain had merely made generalized statements that the Court had no personal jurisdiction because McGrain resided in New York. At no point prior to or during the hearing on July 21, 2000 did McGrain challenge the service of process. The only evidence before the Court on July 21, 2000 was the Affidavit of Lovenduski which was admitted as Plaintiff's Exhibit 1

which generally recited the allegations in the Petition, including the allegation that the transaction occurred in Missouri, and the statements of counsel. McGrain presented no affidavits to counter any of Lovenduski's allegations. Upon Lovenduski's offer of Exhibit 1 into evidence, Mr. Hurth asked the Trial Court to note that the Affidavit was a "New York Affidavit" and stated that New York was the proper place for the parties to litigate (TR 8, L 5-14). McGrain has never provided any authority why the Trial Court should have not believed the sworn statement of Lovenduski in the Affidavit simply because it was executed in a sister state, even though it appeared on its face to be authentic. In fact, McGrain later submitted to the Trial Court two (2) Affidavits signed by him in New York (the second of which was notarized on October 17, 2000 by Diana L. Liberti without a notarial stamp as she had placed on the previous Affidavit executed August 11, 2000 which contained a notarial stamp that said her commission expired September 2, 2000).

On July 21, 2000 the Court found that there had been proper service on McGrain and that the Court had personal jurisdiction over him based on the limited evidence presented. The statements contained in the Affidavit are sufficient independent of the fact that personal jurisdiction was waived.

Appellant in various places argues that the Affidavits and motions which came subsequent to the Default Judgment should be considered in deciding whether the Trial Court had jurisdiction on July 21, 2000. This Court however should limit its examination to the evidence before the Court on July 21, 2000. Although this Court's review of whether the Trial Court had jurisdiction on July 21, 2000 is independent, this Court should not look at evidence or argument that was not presented to the Trial Court by that date.

The evidence before the Trial Court on July 21, 2000 was that the loan transactions had occurred within Missouri (LF 22). This allegation satisfied both the "transacts any business within the

state" and the "makes any contract within the state" provisions of Rule 54.06. As stated in ***Laser Vision Centers, Inc. v. Laser Vision Centers Intern., SpA.,*** 930 SW2d 29 (Mo. App. E.D. 1996), "the '[t]ransacts any business' prong in the rule must be construed broadly so that even a single transaction may confer jurisdiction under the rule if that is the transaction sued upon." The evidence before the Court was sufficient to find personal jurisdiction over the Defendant. It is conceivable that had McGrain properly challenged the jurisdiction of the Court, then Lovenduski would have presented more detailed evidence. However, since McGrain did not properly challenge jurisdiction, Lovenduski's allegations were sufficient for the Trial Court to find jurisdiction.

In addition to the above-stated legal reasons why McGrain's current attack on personal jurisdiction should fail, this Court should rule against McGrain on his personal jurisdiction arguments for policy reasons. The Missouri Rules of Civil Procedure lay out an orderly method for challenging personal jurisdiction. McGrain failed to abide by those rules. A party who fails to abide by the Rules of Civil Procedure should not later be allowed relief from this Court. Likewise, although Abe Shafer, the Trial Judge, was an attorney, he was not Craig McGrain's attorney and should not have an obligation to advise McGrain on how to defend lawsuits. The review of the record shows that Judge Shafer in no way impeded Mr. Hurth's attempted defense of this case. In fact, a review of the record on appeal shows that Judge Shafer provided McGrain every opportunity to correct errors. Eventually, however, it appears that Judge Shafer decided that further accommodations to McGrain would do injustice to Lovenduski.

Furthermore, McGrain has not appealed the denial of his motion to dismiss for lack of personal jurisdiction filed on August 25, 2000 and did not file a motion pursuant to Rule 74.06. Rule 74.06 sets out the method of challenging a judgment on the basis that it is void. A Rule 74.05 motion does not

permit the court to address that issue. Therefore, because McGrain has never asked the trial court to determine if the judgment was void for lack of personal jurisdiction (or void for lack of service of process), this Court should hold that the issue has not been preserved for appeal and is not ripe for review.

ARGUMENT

II.

THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE DEFENDANT FAILED TO "PLEAD OR OTHERWISE DEFEND" WITHIN THE MEANING OF RULE 74.05, IN THAT THE SPECIAL ENTRY OF APPEARANCE CONTESTING JURISDICTION AND DEFENDANT'S ARGUMENT AT THE JULY 21, 2000 HEARING DID NOT PROPERLY PRESENT THE ISSUE OF PERSONAL JURISDICTION TO THE COURT.

STANDARD OF REVIEW

The standard of review for determining whether the Trial Court erred in entering Default Judgment is the standard set forth in ***Murphy v. Carron,*** 536 SW2d 30 (Mo. 1976). Because Appellant only alleges in Point II that the Trial Court "erroneously declared and applied the law and reached a conclusion against the weight of the evidence," Respondent will only respond to those two (2) items and not address whether the Trial Court's order and judgment had no substantial evidence to support it (App. Brief P. 28).

ARGUMENT ON POINT II

MCGRAIN DID NOT PLEAD OR OTHERWISE DEFEND ON OR BEFORE JULY 21, 2000

FACTS ON OTHERWISE DEFEND

Because McGrain through his attorney Mr. Hurth did very little prior to the Court's entry of Default Judgment, it is helpful to look at what he failed to do. McGrain failed to ask the Court for any affirmative relief related to the issue of personal jurisdiction. McGrain did not file an Answer which incorporated the defense of lack of personal jurisdiction. McGrain did not file a Motion to Dismiss because of a lack of personal jurisdiction. McGrain did not testify in person or by affidavit on the matter of personal jurisdiction. McGrain did not have any other witnesses testify in person or by affidavit on issues related to personal jurisdiction. In the event this Court determines that Mr. Hurth's Special Entry of Appearance and statements in Court constituted a motion to dismiss for lack of personal jurisdiction, McGrain did not notice that matter up for hearing. McGrain did not ask the Court to hear and decide the issue of personal jurisdiction.

LAW ON PLEAD OR OTHERWISE DEFEND

McGrain was in "default" if he "failed to plead or otherwise defend as provided by these rules." Rule 74.05(a). The method provided by the rules for asserting "every defense, in law or fact," is described in Rule 55.27. This rule says a defending party must either: 1) file a responsive pleading, or 2) make a 55.27 motion. Normally, "plead" means "answer", and "otherwise defend" means file a 55.27 motion.

As stated above, there are two (2) ways to challenge personal jurisdiction. A defendant may either: (1) ignore court proceedings and collaterally attack the judgment, (2) come into court and

actively challenge personal jurisdiction. A defendant challenges personal jurisdiction in the first method by ignoring a summons in the hope that any default judgment subsequently rendered will be found to be void for want of jurisdiction over the person. ***State ex rel. White v. Marsh*** at 359. If a Defendant elects to proceed with this method of challenging personal jurisdiction, Rule 55.27(g) is of no effect. Therefore when a defendant ignores litigation all together, he is not held to have waived the defenses listed in Rule 55.27, including personal jurisdiction. To say that a defendant waives the defenses contained in Rule 55.27 pursuant to Rule 55.27(g) when the defendant ignores the summons would eliminate the first method of challenging personal jurisdiction.

The second method of challenging personal jurisdiction was historically to enter a "special appearance". A special appearance is no longer required. However, if a defendant wishes to challenge personal jurisdiction under the second method, then he must now do so under Rule 55.27. Under Rule 55.27 a defendant may either file a motion raising the defense of lack of personal jurisdiction or file an answer which raises the defense of lack of personal jurisdiction.

MCGRAIN'S ELECTION

McGrain elected not to challenge personal jurisdiction using the first method when his attorney filed a Special Entry of Appearance with the Trial Court. The filing of this Special Entry of Appearance, of course, did not by itself waive personal jurisdiction. However, the filing of the Special Entry of Appearance recognized that the case is in court, much the same as a defendant who obtains an extension of time to respond "recognizes that the case is in court". ***State ex rel. White*** at 362. Because McGrain elected to pursue the second method of challenging jurisdiction, i.e. coming into court and actively attacking personal jurisdiction, he forwent the option of testing personal jurisdiction by submitting to default and later collaterally attacking the judgment. By electing to challenge personal

jurisdiction by the second method, he was in court for all purposes if defenses related to personal jurisdiction were not presented within the time specified. Id. As previously stated, McGrain failed to present a defense related to personal jurisdiction within the time required.

Once McGrain was in Court to challenge personal jurisdiction, he was required to conduct his affirmative attack on personal jurisdiction pursuant to the rules of court. McGrain's limited acts and limited statements of his counsel did not ask for any relief of Court and did not permit the Court to take any action in the nature of dismissing the Petition for lack of personal jurisdiction. If the Court would have dismissed the lawsuit based on Mr. Hurth's Special Entry of Appearance and statements in Court on July 21, 2000, it would have violated Lovenduski's procedural due process rights to notice that such action would be considered by the Court and Lovenduski's right to prepare a response on that issue.

McGrain asserts in various parts of his brief that Mr. Hurth's Special Entry of Appearance and his oral statements to the Court on July 21, 2000 served as a motion to dismiss for lack of personal jurisdiction and were sufficient actions to fall within the term "otherwise defend".

At the time the Trial Court ruled on Lovenduski's Motion for Entry of Default Judgment, McGrain had not requested any relief or order. Additionally, even in the event that this Court construes McGrain's actions to that point as requesting relief, time had expired for making such request. Rule 55.27. Because time expired for filing a responsive pleading which included the defense based on personal jurisdiction or a motion under Rule 55.27 challenging personal jurisdiction, McGrain waived that defense as well as the others listed under the Rule. Rule 55.27(g).

The record indicates that McGrain was served with process on April 28, 2000, but more than thirty (30) days passed before McGrain's attorney, Mr. Hurth, filed a Special Entry of Appearance on May 30, 2000. Likewise, more than thirty (30) days passed from Mr. Hurth's filing of his Special Entry

of Appearance until the Trial Court heard Lovenduski's Motion for Entry of Default Judgment on July 21, 2000.

The Rules of Civil Procedure lay out the method for challenging personal jurisdiction and the time within which the challenge must be made. McGrain abused the Rules of Civil Procedure by not raising the personal jurisdiction defense properly. The Trial Court properly entered rulings only on matters properly presented to it by motion and noticed up and called for hearing. If the Trial Court would have done otherwise, i.e. regarded Mr. Hurth's Special Entry of Appearance and oral arguments as a motion to dismiss for lack of personal jurisdiction or a motion to quash service of process, then Lovenduski would have been substantially prejudiced and the court would have violated his procedural due process rights. For the Trial Court to consider Mr. Hurth's words and actions as a request for relief would have done injustice to Lovenduski and would have violated his due process rights because Lovenduski would not have had notice that such a matter would be taken up by the court, and he would not have had an opportunity to prepare a response to McGrain's request for relief.

Rule 55.26 requires that all applications to trial courts for any orders be made by written motion unless the motion is made during a hearing or at trial. This rule requires the motion to state two (2) items. It requires a motion to "state with particularity the grounds therefore," and it requires the motion to "set forth the relief or order sought." This Court will violate Lovenduski's procedural due process rights if it holds that Mr. Hurth's Special Entry of Appearance and oral statements in open court constituted, collectively or separately, a motion. Lovenduski's procedural due process rights are secured by the 5th and 14th Amendment to the U.S. Constitution and by Article I, Section 10 of the Missouri Constitution. Article I, Section 14 of the Missouri Constitution also gives Lovenduski the right to have any defenses alleged by McGrain heard in open court.

To say that Mr. Hurth's Special Entry of Appearance or oral statements constitute a motion asserting the defense of personal jurisdiction denies Lovenduski his procedural due process rights by permitting McGrain to assert a defense without giving notice to Lovenduski of the relief sought. Additionally McGrain never noticed up for hearing any request for relief. To permit McGrain to request affirmative relief at the default judgment hearing would have denied Lovenduski his procedural due process right to notice of a matter to be heard in open court. For the Trial Court to take up and consider the issue of personal jurisdiction at the default judgment hearing also would have denied Lovenduski his procedural due process right to prepare and provide a response.

The Missouri Rules of Civil Procedure set forth the method and time within which a party can raise certain defenses. The requirements are specific. McGrain failed to satisfy those requirements and the Trial Court correctly did not dismiss the Petition for lack of personal jurisdiction. McGrain's abuse of the Rules of Civil Procedure went so far as to request the Trial Court on July 21, 2000 to take up Lovenduski's Motion for Entry of Default Judgment (TR 5, L 4-6). Instead of requesting the Trial Court grant him additional time to file an Answer asserting the defense of personal jurisdiction, filing a Motion to Dismiss pursuant to Rule 55.27 or otherwise properly presenting to the Court the issue of personal jurisdiction, McGrain through his attorney Mr. Hurth informed the Court that if a default judgment were entered, then he would attempt to have it set aside ("and I guess if you were to take a default, then I'd have to enter to try to set that aside, but that's where we stand." (TR 6, L20-22). As demonstrated in the above quote and through the remainder of the transcript of the proceedings on July 21, 2000, at no time did Mr. Hurth request additional time to properly present his defense and at no time did he even ask the Court for affirmative relief related to personal jurisdiction.

The Trial Court's Judgment filed July 24, 2000 was not in error because McGrain had failed to deny the allegations in Lovenduski's Petition, failed to properly present to the Court a Motion to Dismiss pursuant to Rule 55.27, failed to make any motion, oral or written, which complies with Rule 55.26 and procedural due process requirements, failed to request additional time to present a defense, and even if McGrain's actions prior to the entry of Default Judgment are considered to be a motion related to personal jurisdiction, said "motion" was not made within the time permitted for such. Because McGrain had not requested any relief prior to July 21, 2000, the Trial Court had no other option but to hear and decide the only motion pending before it (TR 7, L 9-13).

McGrain, in his Brief under Point II, cites two (2) cases for the proposition that an allegation of lack of personal jurisdiction without requesting relief and presenting the issue to the Court constitutes "otherwise defend". Both in ***Chapman v. Commerce Bank of St. Louis,*** 896 SW2d 85 (Mo. App. E.D. 1995) and in ***State ex rel. Fisher v. McKenzie,*** 754 SW2d 557 (Mo. 1988) the issue was different. These cases held that the statements of counsel and appearance in Court were sufficient to preserve the personal jurisdiction defense. However, in the present case, it is McGrain's inactions, not his actions, which waived his personal jurisdiction defense. Mr. Hurth's Special Entry of Appearance and statements in Court sufficiently apprized the Trial Court of his claim to a personal jurisdiction defense so that these actions, by themselves, did not waive that defense. However, once McGrain was in Court, he was required to attack personal jurisdiction pursuant to the Rules of Civil Procedure. Because he failed to do so, he waived that defense as well as others pursuant to Rule 55.27(g).

In summary, these two (2) cases cited by McGrain dealt with whether acts by an attorney waived personal jurisdiction whereas McGrain, in the case at bar, waived the defense of lack of

personal jurisdiction by his inaction. Merely stating that the Court has no personal jurisdiction is not and should not be sufficient to stop all court proceedings. A party who desires to challenge personal jurisdiction is under an obligation to make that challenge properly under the Rules of Civil Procedure, to notice up such a motion and ask the Court to enter an Order granting that party affirmative relief.

McGrain fell into the exact situation contemplated by the Missouri Supreme Court when it said in ***State ex rel. White v. Marsh*** "the defendant who obtains an extension might also be held to be in court for all purposes if defenses relating to personal jurisdiction or venue are not presented within the time specified in an order complying with Rule 44.01(b)". Id. at 362. Because McGrain opted to attack personal jurisdiction by the second method and not ignore the summons, he was required to prosecute that attack on personal jurisdiction pursuant to the Rules of Civil Procedure. When he failed to do so or even ask for more time within which to do so, he suffered the consequences. He waived that defense.

ARGUMENT

III.

THE TRIAL COURT DID NOT ERR AND DID NOT ABUSE ITS DISCRETION IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT OR IN REINSTATING THE DEFAULT JUDGMENT BECAUSE DEFENDANT FAILED TO MEET THE CONDITION UPON WHICH THE SETTING ASIDE OF THE DEFAULT JUDGMENT WAS CONDITIONED AND BECAUSE DEFENDANT FAILED TO PLEAD OR SHOW GOOD CAUSE FOR ALLOWING THE DEFAULT TO BE ENTERED

(a) IN THAT DEFENDANT FAILED TO PAY FIVE HUNDRED DOLLAR ($500.00) ATTORNEY FEES TO WITT & HICKLIN, P.C., AND

(b) IN THAT DEFENDANT'S AFFIDAVITS AND PLEADINGS WERE INSUFFICIENT AND FAILED TO ESTABLISH THAT THE FAILURE TO FILE AN ANSWER WAS DUE TO MISTAKE OR INADVERTENCE OF DEFENDANT OR OTHER GOOD CAUSE.

STANDARD OF REVIEW

The standard of review of a ruling on a Motion to Set Aside a Default Judgment is abuse of discretion and the Trial Court's discretion to not set aside a default judgment "is a good deal narrower than the discretion to set aside said judgment". ***Schulte v. Venture Stores, Inc.,*** 832 SW2d 13 (Mo. App. E.D. 1992). However, in the case at bar, the Trial Court conditionally set aside the Default Judgment. The Trial Court had the authority to condition the order setting aside the Default Judgment on "such terms as are just, including a requirement that the party in default pay reasonable attorney's

fees and expenses incurred as a result of the default by the party who requested the default". Missouri Supreme Court Rule 74.05(d). When McGrain failed to meet that condition, Lovenduski moved the Court to make a finding on whether the condition had been met and enter the appropriate order accordingly.

On November 3, 2000, the Court took up Lovenduski's motion related to the condition. At the hearing, McGrain admitted that he did not offer to tender payment of the attorney fees until October 6, 2000 (TR 40, L 21-22). That offer of tender was approximately forty-five (45) days after the condition was set, more than thirty (30) days after the tender was required and more than twenty-two (22) days after McGrain's counsel admitted receiving the order which said McGrain had to pay Five Hundred Dollars ($500.00) attorney fees within fifteen (15) days.

The Court found that "Defendant failed to comply with the condition of the Order Setting Aside Judgment by failing to pay partial attorney's fees in the amount of Five Hundred Dollars ($500.00) to the firm of Witt & Hicklin, P.C. within fifteen (15) days." (LF 183). Therefore the Trial Court overruled Defendant's Amended Motion to Set Aside Default Judgment. This finding by the Trial Court was without the assistance of a jury and therefore should be reviewed pursuant to ***Murphy v. Carron*** and should only be reversed if the finding was against the weight of the evidence, there was no substantial evidence to support it, or if it erroneously applied the law.

ARGUMENT ON POINT III

ONLY POINT APPEALABLE

Generally, a litigant may only appeal the final order or judgment of a trial court. In the case at bar, the final order was the order which reinstated the default judgment because the condition was not satisfied. Whether the trial court erred in reinstating the default judgment, after finding the Five Hundred

Dollars ($500.00) had not been paid within fifteen (15) days of even the date McGrain's attorney admits receipt of the order, is the only appealable point.

SETTING ASIDE THE DEFAULT JUDGMENT WAS AN ABUSE OF DISCRETION

McGrain filed his Motion to Set Aside Default Judgment pursuant to Rule 74.05(d). Missouri Supreme Court Rule 74.05(d) states as follows, "Upon motion *stating facts* constituting a meritorious defense and for good cause *shown*, ... a default judgment may be set aside." (Emphasis added). Rule 74.05(d) requires the "assertion of sufficient facts to constitute both a meritorious defense and good cause shown." ***Gering v. Walcott,*** 975 SW2d 496, 499 (Mo. App. W. D. 1998). (Emphasis added). The Western District of the Missouri Court of Appeals handed down ***Crain v. Crain,*** 19 SW3d 170 (Mo. App. W.D. 2000) which in describing good cause said, "good cause ... contemplates conduct not intentionally or recklessly designed to impede the judicial process and *which demonstrates freedom from negligence in allowing the default to occur*." (Emphasis added). McGrain must first assert in his motion facts showing a meritorious defense and facts showing good cause for allowing the default to occur. Then McGrain bears the burden of proving the facts he has pleaded do in fact constitute good cause.

The Defendants in ***Bredeman v. Eno,*** 863 SW2d 24 (Mo. App. W.D. 1993), had a judgment entered against them by default on two promissory notes. The Defendants filed a motion to set aside the default judgment but the Appellate Court held that the Defendants "were not entitled to an evidentiary hearing because their motion to set aside the default judgment failed to meet the pleading requirements of Rule 74.05(c)." The former Rule 74.05(c) is now Rule 74.05(d). The ***Bredeman***

court stated that "Entitlement to an evidentiary hearing on a motion to set aside a default judgment depends on meeting the pleading requirements of Rule 74.05(c). Under the explicit terms of Rule 74.05(c), a motion to set aside a default judgment must state *facts* constituting both a meritorious defense and good cause for the default. Bare statements amounting to mere speculations or conclusions fail to meet the requirement of pleading *facts*." (Citations omitted) (Emphasis in original).

The Defendants in ***Bredeman*** gave two reasons for the default: first, they failed to receive any notice of the default proceedings or hearing; and second, they did not obtain counsel until after receiving notice of the default judgment. The Court held that the Defendants were not entitled to an evidentiary hearing because they stated no reasons for their failure to obtain counsel until the day after entry of the default judgment.

McGrain was not entitled to an evidentiary hearing on his Amended Motion to Set Aside because he failed to meet the pleading requirements of Rule 74.05(d) in that he failed to plead facts showing good cause why the default judgment should be set aside. Nowhere in McGrain's: 1) Motion to Set Aside Default Judgment, 2) Motion for Leave to File Answer Out of Time, 3) Answer to Petition on Loan/Breach of Contract, 4) Entry of Appearance, 5) Notice of Hearing, 6) Amended Motion to Set Aside Default Judgment, 7) Affidavit of Defendant/Respondent Denying Personal Jurisdiction, or 8) Defendant's Suggestions in Opposition to Plaintiff's Motion for Entry of Order Denying Defendant's Amended Motion to Satisfy [sic] Default Judgment has McGrain made any speculations or conclusions, let alone facts, as to any cause, good or bad, for allowing the default to occur or any "reasonable excuse for failure to respond to the summons". ***Crain*** at 174.

McGrain's consistent position throughout court proceedings has been that he did nothing wrong through the time of the entry of the Default Judgment and he did not *cause* the default to occur.

McGrain's consistent position has been that the Trial Court erred in entering Default Judgment on July 21, 2000 and therefore it was the Trial Court that *caused* the default to occur. ***Crain*** uses the phrase "reasonable excuse for failure to respond to the summons" in place of good cause for allowing the default to occur. McGrain's position has been and continues to be that he did not fail to respond. Because McGrain denies that the Default Judgment was entered due to his fault, it is understandable that he has never stated any facts which show that he caused the Default Judgment to be entered. Lovenduski respectfully suggests to the Court that McGrain's argument on good cause has been and continues to be "I didn't do anything wrong. It was the Trial Court who erroneously entered the Default Judgment. I did not fail to respond to the summons."

Lovenduski made every effort to notify McGrain of his intention to take a judgment by default, although such notices were not required. ***Crain*** at 174. Lovenduski first advised McGrain of his intent to take a default judgment in the first Notice calling up the Motion for Default Judgment which was filed on June 19, 2000 (LF 25). After a phone conference between counsel for Lovenduski and McGrain, Lovenduski filed an Amended Notice calling up the Motion for Default Judgment on June 28, 2000 (Supp. LF1). Following the Court's entry of judgment against McGrain and McGrain's filing of his Motion to Set Aside the Default Judgment, counsel for Lovenduski, Keith W. Hicklin, informed counsel for McGrain that he would oppose McGrain's Motion to Set Aside the Default Judgment. The Trial Court gave McGrain the opportunity to file an Amended Motion to Set Aside Default Judgment after counsel for Lovenduski, Don Witt, argued to the Court on August 11, 2000 that McGrain's original motion was insufficient.

In spite of Lovenduski's multiple notices and the second chances given by the Trial Court, McGrain still failed to give any cause or excuse for his failure to comply with the Missouri Supreme

Court Rules. McGrain did not allege any cause for his failure to file an Answer prior to the entry of Judgment. McGrain did not allege any cause for his failure to challenge the jurisdiction of the Trial Court. McGrain did not allege any cause for allowing the default judgment to be entered.

The appellate courts have sometimes held that mishandling of documents within a corporation may be good cause for allowing a default judgment to be entered. However, McGrain has been represented by counsel since shortly after he was served with process. McGrain cannot allege that the default was entered due to document mishandling or that he did not know the default was about to be entered. In fact, he requested the Court take up and allow parties to argue the Motion for Entry of Default Judgment at the hearing on July 21, 2000 (TR 5, L 4-6). McGrain also acknowledged the fact that the Court was about to enter a Default Judgment against him at the hearing (TR 6, L 8-10, L 20-22). McGrain failed to take any action to prevent the entry of Default Judgment. Defendant's actions, and inaction, were intentional, or at least reckless, in allowing the Default Judgment to be entered. McGrain made a "conscious choice of his course of action" when he decided that instead of trying to prevent the default from being entered he would ask the Court to set it aside later. ***Gibson By Woodall v. Elley,*** 778 SW2d 851 (Mo. App. W.D. 1989). McGrain should not be permitted to use his efforts after the default was entered as evidence of good cause of why he allowed it to be entered in the first place. Instead of challenging jurisdiction or filing an Answer, McGrain impeded the judicial process by refusing to comply with the Missouri Supreme Court Rules.

Because McGrain failed to plead facts showing good cause, or even speculate or make conclusions as to good cause for setting aside the Default Judgment, McGrain was not entitled to an evidentiary hearing on his motion and McGrain's Amended Motion to Set Aside should have been

denied. To quote the Southern District of the Missouri Court of Appeals in ***Crowe v. Clairday,*** 935 SW2d 343 (Mo. App. S.D. 1996), as cited in ***Gering v. Walcott,*** 975 SW2d 496 (Mo. App. W.D. 1998), "If ... a litigant chooses to ignore or act in reckless disregard of the rules and procedures set out for the orderly administration of the judicial process, he cannot then be heard to complain when he receives no relief under its rules, particularly Rule 74.05(d)." In the case at bar, McGrain either chose to ignore or acted in reckless disregard of the rules of procedure set out for the orderly administration of this case. He did not show good cause and did not demonstrate his freedom from negligence in allowing the default to occur.

OVERRULING OF THE MOTION TO SET ASIDE SHOULD NOT BE REVERSED BECAUSE THE CONDITION WAS NOT SATISFIED

Although it was error to set aside the default judgment, the Trial Court remedied this through later acts. On August 18, 2000, the Trial Court conditionally set aside the Default Judgment. The formal Order Setting Aside Judgment was filed August 22, 2000 (LF 69). Because McGrain failed to pay Five Hundred Dollars ($500.00) within fifteen (15) days of: (1) the date of the hearing; (2) the date the Order was filed; (3) the date his attorney acknowledged receipt of the Order, Lovenduski moved the Court for an entry denying the Amended Motion to Set Aside Default Judgment (LF 87).

The Court took up Plaintiff's motion on November 3, 2000 at which time the Court found that based on the statements of counsel and the Affidavit of Keith W. Hicklin that the condition had not been satisfied (LF 183).

The Trial Court had the power to condition the set aside of the Default Judgment under Rule 74.05(d). McGrain has not challenged the Court's ability to do so or the Court's determination that the payment was required to be made within fifteen (15) days. Because there was no jury to assist the

Court in determining whether the condition had been satisfied, this Court should review the decision under the standard provided in ***Murphy v. Carron***.

The only evidence before the Court was that McGrain did not offer to pay the attorney fee amount within fifteen (15) days of the hearing at which the default was conditionally set aside, within fifteen (15) days of the date the Order was entered, or within fifteen (15) days of the date receipt of the Order was acknowledged.

This Court should affirm the Trial Court's ruling that the condition had not been met, and should do so for policy reasons. Rule 74.05(d) allows the Trial Court to condition an Order Setting Aside Default Judgment on such terms as are just. The Trial Court below determined that it was just to set aside the Default Judgment if McGrain paid Five Hundred Dollars ($500.00) attorney fees within fifteen (15) days. For this Court to now reverse the Trial Court's condition would greatly limit the Trial Court's ability to control matters pending before it. Conditional set asides of default judgments are granted in the discretion of the Trial Court to prevent injustice. However, the Trial Court must have the power to regain control of a party who has failed to abide by the Rules of Civil Procedure. The consequence of violating Judge Shafer's order to pay attorney fees within fifteen (15) days was clear. This Court should establish precedent that when a Defendant is given a break by having a default judgment set aside, he should know that further violations of the Rules of Civil Procedure will not be allowed.

McGrain's actions following the conditional set aside are particularly egregious. From the start of the proceedings in open court in this case, McGrain knew that Lovenduski sought default judgment, but he failed to abide by the Rules of Civil Procedure. When the parties appeared in Court on August 11, 2000, Lovenduski ably pointed out that McGrain's Motion to Set Aside Default Judgment was

deficient. Instead of denying the motion at that time, the Trial Court allowed McGrain to amend his motion. One week following, Lovenduski again argued that McGrain failed to plead or show good cause for allowing a default to be entered. However, the Trial Court, in its discretion, gave McGrain one more chance but conditioned that chance on his payment of Five Hundred Dollars ($500.00) attorney fees within fifteen (15) days. In spite of the knowledge of the Order, more than fifteen (15) days before his first tender, McGrain failed one last time to take the action required to prevent a default judgment from remaining entered against him.

McGrain generally argues that he should be provided relief because he did not have knowledge of the order requiring him to pay Five Hundred Dollars ($500.00) attorneys within fifteen (15) days until October 5, 2000. However, the long standing rule in Missouri is that "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 SW2d 234 (Mo. 1994). This Court in that case discussed how the rule was a "harsh rule", but the consequence of not having the rule was too great. There has been no allegation that Mr. Hurth abandoned McGrain without notice. Therefore all acts of Mr. Hurth or his later attorney should be imputed to him. As stated in ***Cotleur*** "negligence is not equivalent to abandonment. Circumstances in which an attorney engages in representation of a client but fails properly to handle the matter is not abandonment." Id. at 238.

CONCLUSION

Will Missouri's ordered system of justice be affirmed or reversed? For many years, our Rules of Civil Procedure have served the people of Missouri well. They permit litigants to pick their fights and not argue about undisputed facts. Affirming the Trial Court will give Lovenduski a judgment for money he loaned McGrain. Affirming the Trial Court will uphold our ordered system of justice.

From time to time this Court sees the need to change the Rules of Procedure. If the Court feels the Rules need to be changed, Respondent asks the Court to do so by promulgating new Rules that will apply prospectively and not change the Rules by court opinion which will apply retroactively.

Lovenduski prays this Court give him justice and not reward a party who failed to abide by the Rules of our justice systems. Lovenduski prays this Court affirm the Trial Court below.

Respectfully submitted,
WITT, HICKLIN & VANOVER, P.C.

Joseph W. Vanover #48074
4th at Main, P.O. Box 1517
Platte City, Missouri 64079
Telephone (816) 858-2750
Fax (816) 858-3009
Attorney for Respondent

CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF PLATTE)

Joseph W. Vanover, being of lawful age, and being first duly sworn does under oath state that two (2) copies of the foregoing Respondent's Supplemental Brief was mailed, on this _____ day of _____, 2002 to Ms. Ann E. Buckley, Armstrong Teasdale LLP, One Metropolitan Square, Suite 2600, St. Louis, MO 63102-2740, Attorney for Appellants.

_____
Joseph W. Vanover

Subscribed and sworn to before me, a Notary Public, this _____ day of _____, 2002.

_____
Notary Public

My Commission Expires:

_____

CERTIFICATION OF COMPLIANCE

In accordance with Rule 84.06, the undersigned certifies that Respondent's Substitute Brief complies with the limitations contained in Rule 84.06(b) and that the number of words in this Brief is 10,850 and the number of lines in this Brief is 1,105. The undersigned further certifies that the disk accompanying this Brief has been scanned for viruses and that it is virus free.

WITT, HICKLIN & VANOVER, P.C.

_____

Joseph W. Vanover #48074
4th at Main, P.O. Box 1517
Platte City, Missouri 64079
Telephone (816) 431-2750 & 858-2750
Fax (816) 858-3009
Attorney for Respondent