IN THE SUPREME COURT OF MISSOURI

MARGARET MILLER,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Appeal No. SC87027
	)	
ROTHSCHILD MANAGEMENT GROUP,	)	
	)	
	)	
Defendant/Respondent.	)	

On Appeal from the Circuit Court of the City of St. Louis
The Honorable Thomas C. Grady, Division 3
Cause No. 032-01275

APPELLANT'S SUPPLEMENTAL BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from an action for personal injuries filed in the Circuit Court of the City of St. Louis. On January 9, 2004, a Default Judgment was entered in favor of Appellant and against Respondent in the sum of $3,000,000. Defendant filed a "Verified Motion to Set Aside Default Judgment" on January 20, 2004, and an "Amended Motion to Set Aside Default Judgment" on March 4, 2004. On June 16, 2004, the trial court entered its Order and Findings granting Defendant's Motion and set aside the Judgment. A timely Notice of Appeal regarding the Order of June 16, 2004, was filed by Appellant.

The Missouri Court of Appeals, Eastern District heard the appeal and issued its Opinion on June 28, 2005. A Timely Motion for Rehearing and Application for Transfer were filed and denied.

A timely Application for Transfer was filed in the Supreme Court of Missouri. Accordingly, this Court has jurisdiction over this matter as provided in Article V, §10 of the Missouri Constitution.

STATEMENT OF FACTS

This case arises out of a Default Judgment entered in favor of Margaret Miller (hereinafter "Plaintiff") and against Rothschild Management Group (hereafter "Defendant"). In her Petition, Plaintiff claimed that she sustained personal injuries on or about March 3, 2002, when she fell on a parking lot owned and maintained by Defendant. A Default Judgment in the amount of $3,000,000 was entered in favor of Plaintiff and against Defendant on January 9, 2004.

I. Procedural History

Plaintiff's Petition was filed on April 29, 2003 (LF 3-5; App. 1-3). According to the Minute entries of the Circuit Clerk of the City of St. Louis, summons was issued on April 3, 2003, and a Proof of Service was filed indicating service on the Defendant on May 13, 2003. Defendant's employees acknowledged receipt of said summons on May 3, 2003, and its eventual delivery to the person responsible for the handling of such documents (Deposition of Leigh Leonard, p. 34-36; LF 1). The Minute entries also indicate that Notices of Setting were mailed to Defendant on September 16, 2003, and November 6, 2003 (LF 1). A Default and Inquiry was granted on November 24, 2003 (LF 1). A default hearing on damages was held before Judge Thomas Grady on January 9, 2004 (Tr. Vol. IA). Following said hearing, Judgment was entered in favor of Plaintiff and against Defendant in the amount of $3,000,000 (LF 6; App. 4).

According to the Minute records, a bill was generated and mailed to Defendant on or about January 12, 2004. Defendant acknowledges receiving said cost bill.

Defendant filed a "Verified Motion to Set Aside Default Judgment" on January 20, 2004 (LF 7-10; App. 5-8), along with supporting Affidavits (LF 11-16). On March 4, 2004, Defendant filed its "Amended Motion to Set Aside Default Judgment" (LF 17-20; App. 9-12) along with additional Affidavits (LF 21-38). A hearing was held on Defendant's Motion on April 30, 2004, at which time exhibits were marked and introduced into evidence and certain live testimony was presented (Tr. Vol. I).

The trial court entered its Order and Finding setting aside the Default Judgment on June 16, 2004 (LF 78-82; App. 13-17). Plaintiff filed a timely Notice of Appeal on July 17, 2004 (LF 83-84).

II. Plaintiff and Her Injuries

At the hearing of January 9, 2004, Plaintiff was 45 years old (Tr. IA, p.8). She described as having fallen while attempting to navigate a sidewalk next to a parking lot located at the intersection of Bellevue and Wise in St. Louis County, Missouri (Tr. IA, p. 9-10). It was at the corner of an apartment complex, managed by Defendant (Tr. IA, p. 10). Plaintiff produced evidence that she had sustained injuries to her back which resulted in nerve damage. She had surgery at the L4, 5

level of her back (Tr. IA, P. 3-4). She remained under the care of a neurosurgeon and pain management physician (Tr. IA, p. 6-7). Her medical expenses up to the hearing were $80,000. Because of her pain, she was unable to sit and spent her days lying on the couch (Tr. IA, P. 9). She has been unemployed since the date of the accident and has been declared permanently and totally disabled a s a result of her injuries. Her average annual income at that time was approximately $15,000. (Tr. IA, p. 5-7).

III. Evidence Regarding the Default Judgment

Evidence regarding the circumstances surrounding the failure to answer and defend is found in several places in the record.

In her second Affidavit attached to the Amended Motion, Carolyn Jotte provided the following information. She is the Chief Executive Officer of Redbrick Management, LLC and said business entity managed properties owned by Rothschild Development, Ltd. and certain properties that were previously managed by Defendant Rothschild Management Group, LLC (LF 21). Her review of the records failed to disclose information that Defendant owned or managed a property or parking lot at 7322 Wise Avenue (the address listed in the Petition) (LF 22). A review of the property records showed that the property at said address is owned by another entity (LF 22). Her interviews of employees then familiar with Rothschild Management, LLC had revealed no one with knowledge of said

property. She acknowledged that the summons was properly served on Defendant on May 3, 2003, and that said summons was delivered to Leigh Leonard, the employee responsible for handling the same. The documents indicated that the summons and Petition had been faxed to Defendant's insurance agent, Robert McBride on or about May 5 or 6, 2003 (LF 22).

The Affidavit of Leigh Leonard, acknowledged service upon Defendant. Further, Ms. Leonard described forwarding the Petition to Robert McBride pursuant to usual custom and practice. She further stated that she had no further contact with said insurance agent (LF 28-29).

The Affidavit of Robert McBride indicated receipt of the faxed transmission on May 6, 2003. He further described a telephone conversation in which he advised Leigh Leonard that the described property was not owned by Defendant or any of its related entities. On the faxed transmittal sheet he noted "not an owned property insured elsewhere". This information was not faxed to the Defendant until he learned of the Default Judgment. He did not forward the Petition or summons to any insurance company (LF 30-31).

Exhibit D to said Motion was a Quit Claim Deed identifying ownership of the property located at 7322 Wise Avenue in the name of another individual (LF 32-38).

The deposition of Leigh Leonard was introduced as Defendant's Exhibit E. It revealed the following: that Ms. Leonard began working for Defendant in 1997 and was terminated November 7, 2003 (Ex. E, p. 5); during that time, she was the overall manager for approximately 800 to 1000 rental units (Ex. E, p. 16); one of the properties that she was responsible for managing was located at 1107 to 1123 Bellevue; that property contained thirty residential apartments (LF 17); the building had an area for parking cars that could be accessed off both Wise Avenue and Bellevue (Ex. E, p. 18-19); in properties managed by Rothschild, they had agreements with individuals to remove ice and snow from parking lots (Ex. E, p. 20-21); as part of her job responsibilities, she oversaw court cases (Tr. 28-29); she was responsible for maintaining the legal files (Ex. E, p. 30-31); she knew what a default judgment was (Ex. E, p. 31) and had known of its significance for some time (Ex. E, p. 33); she first learned of the Miller lawsuit when the summons was received; she sent it on to Bob McBride (Ex. E, p. 35, 37); based on the address mentioned in the Petition, she assumed it involved the Bellevue property (Ex. E, p. 37-38); she has no recollection of speaking to Mr. McBride before or after forwarding the suit papers (Ex. E, p. 37-38); she would have opened a legal file regarding this claim and placed it with the others in her office (Ex. E, p. 48); she would not have looked at it again unless she received some kind of communication about it and has no recollection of receiving docket notices (Ex. E, p. 50); at the

time of her termination, she turned all of her files over to Carolyn Jotte, who was a practicing attorney (Ex. E, p. 63-64); she was never asked to nor did she explain the contents of the files to anyone with Defendant (Ex. E, p. 63-64); she understood that a legal matter had to be taken care of (Ex. E, p. 71); if she had been told there was no coverage, she would have been surprised and checked it out (Ex. E, p. 70-72); if she had received a trial setting, she would have contacted Bob McBride or the company attorneys to have something done in a timely fashion because it was critical (Ex. E, p. 74-75); and she did not maintain a diary system on the legal files (Ex. E, p. 79).

The depositions of Robert McBride (Defendant's Exhibits F and G) provided the following information: Mr. McBride and AIA, Inc. had a number of insurance policies in place which insured properties owned by various entities in which Mr. Peter Rothschild had some type of ownership interest (Ex. F, p. 9); ordinarily when a policy of insurance covered a particular policy, the policy would also cover the manager of such property, i.e., Defendant (Ex. F, p. 15); in addition, Defendant had a policy of insurance with Zurich Insurance which provided general liability insurance for Defendant; he agrees that he should have, but did not, forward the lawsuit to Zurich at the time he received it (Ex. F, p. 54, 68-69, 99, 101); he did not immediately forward the summons and Petition to Zurich Insurance because the Petition referred to a property located at 7322 Wise with which he was unfamiliar

and he wanted to determine the proper owner (Ex. F, p. 80); he called the offices of Plaintiff's attorney, Michael Stokes, on May 6, 2003, and May 7, 2003; his office notes indicate that he made telephone calls seeking information regarding the address (Ex. G, p. 12); he called again on May 7, 2003, and noted in his file that "Laurie does not know what is going on and will have Mr. Stokes call me tomorrow" (Ex. G, p. 12); he never heard back from Mr. Stokes (Ex. G, p. 12); and he believes that he spoke by telephone with Leigh Leonard after he received the summons and advised her that the property located at 7322 Wise was not owned by Rothschild and asked her to determine the owner of the property (Ex. F, p. 23).

Additional evidence was introduced at the hearing on April 30, 2004. Plaintiff introduced Exhibit No. 7, which was a certified copy of St. Louis County Court records involving a cause of action known and numbered as Airmaster Corporation v. Rothschild Management, LLC and Rothschild Development, Cause No. 02AC-018042. That file revealed that a Default Judgment had been taken against Rothschild in a lawsuit involving the same property in 2002 (Tr. Vol. I, p. 28-29; Exhibit 7).

Plaintiff Exhibit No. 11 was introduced through the testimony of Keith Hudson, the computer operations manager for the Circuit Clerk's Office for the City of St. Louis. Exhibit No. 11 was a trial docket notice that is generated by the Court system and mailed to Defendants who are not represented by attorneys (Tr.

Vol. I, p. 34-35). These notices are generated in each Division when the clerk makes a docket entry. When the clerk enters the schedule and the date into the computer, the computer generates the notice and the minute entry at the same time (Tr. Vol. I, p. 36-37). This same computer system generates the cost bills (Tr. Vol. I, p. 38-39).

Plaintiff's Exhibit Nos. 9 and 10 were introduced into evidence. Exhibit No. 10 was a letter of termination provided to Leigh Leonard on November 7, 2003. Exhibit No. 9 was a letter from Defendant to the Missouri Division of Employment Security discussing Leigh Leonard's employment habits. In that letter, Defendant's CEO complained that Ms. Leonard "did not fulfill her duties as a manager and director overseeing the operation of the management company" (Plaintiff's Exhibit No. 9). Further, it stated:

> "Ms. Leonard to (*sic*) not keep up with the status of the evictions and lawsuits with the outside counsel. There was no procedure or method of reporting--which was her responsibility as manager and director . . . ". (Exhibit No. 9).

Plaintiff also offered the testimony of Kevin Limber, an intern at the office of Plaintiff's counsel. Mr. Limber conducted a search of the records of the Circuit Clerk in the City of St. Louis pertaining to Rothschild Management and Redbrick Management--both as a party plaintiff and party defendant (Tr. Vol. I, p. 47). It

produced a printout of that information which was marked as Exhibit No. 12 (Tr. Vol. I, p. 48). The records of the Circuit Clerk revealed 408 cases in which Rothschild Management Group was a plaintiff between 1997 and 2004 (Tr. Vol. I, p. 51). One hundred and twenty three cases resulted in a default judgment (Tr. Vol. I, p. 51). In the same time period, there were four cases in which Rothschild Management Company was a defendant (Tr. Vol. I, p. 52).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING ITS ORDER OF JUNE 16, 2004, SETTING ASIDE THE DEFAULT JUDGMENT, AND SAID ORDER IS VOID BECAUSE THE TRIAL COURT LOST JURISDICTION OVER THE JUDGMENT ON APRIL 19, 2004 IN THAT:

a) DEFENDANT'S "MOTION TO SET ASIDE DEFAULT JUDGMENT" WAS FILED WITHIN THIRTY DAYS OF THE ENTRY OF THE DEFAULT AND WAS, THEREFORE, AN AUTHORIZED AFTER TRIAL MOTION PURSUANT TO MISSOURI SUPREME RULE 81.05;

b) THE TRIAL COURT HAD JURISDICTION TO RULE ON SAID MOTION WITHIN NINETY DAYS OF ITS FILING AND FAILED TO DO SO; AND

c) SUCH FAILURE TO RULE CONSTITUTED A DENIAL OF SAID MOTION, AND DEFENDANT FAILED TO FILE A TIMELY NOTICE OF APPEAL

Popular Leasing USA, Inc. v. Universal Art Corporation,

57 S.W.3d 875 (Mo. App. ED 2001);

Missouri Supreme Court Rule 81.05(a)(2);

Missouri Supreme Court Rule 78.06;

Klaus v. Shelby, 4 S.W.3d 635 (Mo. App. ED 1999);

Missouri Supreme Court Rule 55.33; and

Missouri Supreme Court Rule 74.05.

II. THE TRIAL COURT ERRED IN SETTING ASIDE THE DEFAULT JUDGMENT BECAUSE IT ABUSED ITS DISCRETION IN REACHING THE CONCLUSION THAT THE FAILURE OF DEFENDANT TO TIMELY ANSWER WAS THE RESULT OF EXCUSABLE NEGLECT OR BECAUSE SAID CONCLUSION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, WAS AGAINST THE WEIGHT OF THE EVIDENCE OR ERRONEOUSLY DECLARED OR APPLIED THE LAW IN THAT THE EVIDENCE ESTABLISHED THAT DEFENDANT'S CONDUCT WAS RECKLESS WHERE:

a) DEFENDANT WAS PROPERLY SERVED;

b) THE SUMMONS WAS RECEIVED BY THE EMPLOYEE RESPONSIBLE FOR ITS HANDLING;

c) SAID EMPLOYEE RECOGNIZED THE LOCATION OF THE INCIDENT AS ONE MANAGED BY DEFENDANT;

d) SAID EMPLOYEE DELIVERED THE SUMMONS TO DEFENDANT'S INSURANCE AGENT WITHOUT

SUPPLYING INFORMATION REGARDING THE LOCATION;

e) THE INSURANCE AGENT NOTIFIED SAID EMPLOYEE THAT HE COULD NOT IDENTIFY THE LOCATION OR THE APPROPRIATE INSURER;

f) DEFENDANT UNDERTOOK NO FURTHER STEPS TO ASCERTAIN THE IDENTITY OF THE APPROPRIATE LIABILITY INSURER OR TO OTHERWISE RESPOND TO THE PETITION;

g) THE EMPLOYEE WAS RESPONSIBLE FOR HANDLING COURT CASES AND KNEW THE SIGNIFICANCE OF A DEFAULT JUDGMENT;

h) AFTER THE RECEIPT OF THE SUMMONS, THE COURT FORWARDED TWO NOTICES TO DEFENDANT REGARDING THE STATUS OF THE MATTER;

i) DEFENDANT WAS AWARE OF PROBLEMS WITH THE RECORD-KEEPING AND PERFORMANCE OF SAID EMPLOYEE INCLUDING, BUT NOT LIMITED TO, HER HANDLING OF COURT CASES PRIOR TO THE ENTRY OF THE DEFAULT; AND

j) UPON DISCHARGING SAID EMPLOYEE PRIOR TO THE ENTRY OF THE DEFAULT, DEFENDANT TOOK NO STEPS TO FURTHER INVESTIGATE THE STATUS OF THE MATTER.

Krugh v. Hannah, 126 S.W.3d 391 (Mo. 2004);

In Re: Marriage of Williams, 847 S.W.2d 896 (Mo. App. SD 1993);

Egelhoff v. Holt, 875 S.W.2d 543 (Mo. banc 1994);

Hancock v. Shook, 100 S.W.3d 786 (Mo. 2003);

Klaus v. Shelby, 42 S.W.3d 829 (Mo. App. ED 2001);

McElroy v. Eagle Star Group, Inc., WD 63862 (January 25, 2005);

Missouri Supreme Court Rule 74.05;

Missouri Supreme Court Rule 74.05(d);

Missouri Supreme Court Rule 81.05; and

Black's Law Dictionary 1298 (8th Ed. 2004).

ARGUMENT

I

THE TRIAL COURT ERRED IN ENTERING ITS ORDER OF JUNE 16, 2004, SETTING ASIDE THE DEFAULT JUDGMENT, AND SAID ORDER IS VOID BECAUSE THE TRIAL COURT LOST JURISDICTION OVER THE JUDGMENT ON APRIL 19, 2004 IN THAT:

a) DEFENDANT'S "MOTION TO SET ASIDE DEFAULT JUDGMENT" WAS FILED WITHIN THIRTY DAYS OF THE ENTRY OF THE DEFAULT AND WAS, THEREFORE, AN AUTHORIZED AFTER TRIAL MOTION PURSUANT TO MISSOURI SUPREME RULE 81.05;

b) THE TRIAL COURT HAD JURISDICTION TO RULE ON SAID MOTION WITHIN NINETY DAYS OF ITS FILING AND FAILED TO DO SO; AND

c) SUCH FAILURE TO RULE CONSTITUTED A DENIAL OF SAID MOTION, AND DEFENDANT FAILED TO FILE A TIMELY NOTICE OF APPEAL.

Plaintiff's position on this point is quite simple. The Judgment was entered on January 9, 2004. Defendant filed a pleading, it denominated a "Verified Motion to Set Aside Default Judgment" on January 20, 2004 (L.F. 7-10). Under long

standing Missouri law, that Motion, filed within thirty (30) days of the entry of the Judgment, must be treated as an authorized after trial Motion under Rule 81.05(a)(2). **Gorzel v. Orlamander**, 352 S.W.2d 675 (MO. 1962); **Popular Leasing U.S.A., Inc. v. Universal Art Corporations**, 57 S.W.3d 875 (Mo. App. ED 2001); **Klaus v. Shelby**, 4 S.W.3d 635 (Mo. App. ED 1999); **McElroy v. Eagle Star Group, Inc.**, 156 S.W.3d 392 (Mo. App. WD 2005). The filing of such a motion extends the Trial Court's jurisdiction over a judgment from thirty (30) days until ninety (90) days from the date the Motion is filed.

Giving a filing date of January 20, 2004 for the "Verified Motion to Set Aside Default Judgment" the Trial Court retained jurisdiction over the judgment until April 19, 2004. Because the Trail Court did not rule on the Motion before that date, it was overruled for all purposes under Rule 78.06. Upon the expiration of that ninety (90) days, the Default Judgment became final for purposes of appeal. Rule 81.05(a)(2)(A). Accordingly, the Trial Court lost jurisdiction over its judgment on April 19, 2004 and any further actions by purporting to amend or set aside that judgment are void.

The Default Judgment having become final, Defendant was required to file a notice of appeal no later than April 29, 2004. No such notice of appeal having been filed, the Judgment of January 9, 2004 is now final for all purposes. Accordingly, this court should affirm the opinion of the Missouri Court of

Appeals, Eastern District, find the Order of June 16, 2004 to be void and enter judgment in favor of Plaintiff and against Defendant in the amount of Three Million Dollars ($3,000,000) plus interest accrued since January 9, 2004.

In the Court of Appeals, Defendant raised two, and only two, arguments in support of the proposition that the Trial Court somehow retained jurisdiction over its Judgment until June 16, 2004. In summary, those two separate and inconsistent arguments were as follows:

a) Defendants "Amended Motion to Set Aside Default Judgment" filed more than thirty (30) days after the entry of the Default and was somehow outside the scope of Rules 81.05 and 78.06 and;

b) Defendants "Amended Motion to Set Aside Default Judgment" was not an amendment; instead, it was a subsequent independent action.

No other arguments were presented.

Based upon Defendant's Application for Transfer, Plaintiff suspects Defendant intends to raise a new argument to wit: motions pursuant to Rule 74.05(d), regardless of the time filed, are not subject to Rules 81.05 and 78.06. While said argument must be deemed waived, Plaintiff will address this newly raised issue for purpose of clarity.

A. Application of Rules 81.05 and 78.06 to Motions to Set Aside Default Judgments under Rule 74.05.

Defendant now, apparently, intends to argue that Rules 81.05 and 78.06 are not applicable in this case. This issue was not raised in the Court of Appeals. There, the Defendant conceded its original "Verified Motion to Set Aside Default Judgment" was an authorized post trial motion under Rule 81.05. At Page 10 of its Respondent's Brief, Defendant stated as follows:

> "It is true that Missouri Courts have held that a motion to set aside the default judgment filed less than thirty (30) days after the entry of a default judgment will be treated as an authorized after trial motion under Rules 78.04, 78.06 and 81.05. Klaus v. Shelby, 4 S.W.3d 635 (Mo. App. ED 1999)."

Defendants never contended that Klaus was an incorrect statement of the law; never cited cases that it claims are inconsistent with Klaus, and; never claimed that there was a split between the Appellate Court Districts on this issue. Accordingly, under Missouri Supreme Court Rule 83.08, Defendant is precluded from altering the basis of its argument and raising a new issue at this time. **Linzenni v. Hoffman**, 937 S.W.2d 723, 727 (Mo. banc 1997). **Blackstock v. Kohn**, 994 S.W.2d 947, 952 (Mo. banc 1999).

This Court need look no further than the Table of Authorities contained in Respondent's Brief below to conclude that this is, in fact, a new issue. Nowhere therein, did Defendant cite the cases upon which it relied in seeking transfer, to wit: **Clark v. Brown** 794 S.W.2d 254 (Mo. App. SD 1990); **Thompson v. Herb St. John** 915 S.W.2d 350 (Mo. App. SD 1996); **Roemer v. Roemer** 999 S.W.2d 754 (Mo. App. SD 1999). Having failed to raise this issue below, Defendant may not raise it for the first time in this Court. If this issue was the basis for transfer, Plaintiff respectfully submits that matter should be returned to the Missouri Court of Appeals, Eastern District for issuance of its mandate.

Even if this Court should decide to consider this issue, an analysis of existing law leads to the inevitable conclusion that the Trial Court lacked jurisdiction over its Judgment on June 16, 2004.

Rule 81.05(a) provides that "Authorized after-trial motions" shall be treated as new trial motions for the purposes of ascertaining the time within which an appeal must be taken. As this Court noted in **Taylor v. United Parcel Service**, 854 S.W.2d 390 (Mo. banc 1993), the phrase "authorized after-trial motions" had its origin in the Civil Code of 1943 Id. at 854[1]. Under current Supreme Court Rules and "authorized after-trial motion" is a Motion in which the rules expressly provide. Arguably, Rule 81.05 would apply only to motions strictly conforming to

those rules. This Court and the Courts of Appeals have not, however, required such strict adherence.

The appellate courts in Missouri have always been lenient in considering any number of motions filed within thirty (30) days to be "authorized after-trial motions". For example, in Taylor supra, the Court found a "Motion to Reconsider Summary Judgement" to be an authorized trial motion. This Court and the Courts of Appeals have also treated such disparate unauthorized motions as "Motion to have Judgment Set Aside", "Motion to Set Aside Order of Dismissal", "Motion to Vacate and Set Aside Judgment" as authorized post-trial motions. See **In Re: Franz' Estate**, 221 S.W.2d 739 (Mo. 1949); **Ward v. Davis**, 701 S.W.2d 192 (Mo. App. ED 1985); **Hoey v. Royston** 723 S.W.2d 929 (Mo. App. ED 1987); **McGee v. Allen**, 929 S.W.2d 278 (Mo. App. SD 1996). As discussed at In Re: Franz' Estate, any Motion filed within the appropriate time which seeks relief in the Trial Court should be considered an after-trial motion for purposes of appeal. Id. at 740.

With respect to default Judgments, this Court has specifically held that a "Motion to Set Aside Default Judgment" filed within the applicable timeframe, constitutes a motion to new trial for purposes of Rule 78.04. **Gorzel v. Orlamander**, 352 S.W.2d 675 (Mo. 1962).

There are substantial reason for the disparate treatment of Motions to Set Aside Default based upon the time of filing. A defaulting defendant who files within thirty (30) days of the entry of the judgment reaps several benefits by acting quickly. First, a Trial Court ruling upon a Motion filed within thirty (30) days need not specify the grounds for its action. **Kohn v. Kohn**, 839 S.W.2d 329 (Mo. App. 1992).

The second immediate benefit to the early filing Defendant is that the plaintiff has no right to an immediate appeal if the motion is filed within thirty (30) days and sustained. **Gantz v. Dir. Of Revenue**, 921 S.W.2d 156 (Mo. App. ED 1996); **Klaus v. Shelby**, 4 S.W.3d 635 (Mo. App. ED 1999).

The final, and most important, immediate benefit to the defaulting defendant is the clear trend in reported cases indicating that the earlier the motion to set aside default judgment is filed, the more the Court should be inclined to grant relief. As the Court in **Myers v. Pitney Bowes, Inc.**, 914 S.W.2d 835 (Mo. App. SD 1996) said:

> "The sooner the mistake is discovered and acted upon, the more receptive the Court should be to Motion to Set Aside" Id at 839."

No of these benefits are available to the defaulting defendant whose Motions is filed more than thirty (30) days after the entry of the Default.

To the extent that the Missouri Court of Appeals, Southern District, has suggested that motion to set aside default should be treated identically without regard to the date of the filing, said decisions are undfounded. The root of the Southern District's error seems to be it is overly broad application of certain language found in **Clark v. Brown**, 794 S.W.2d 254 (Mo. App. SD 1990) and **Kueper v. Murphy Distributing** 834 S.W.2d 875 (Mo. App. ED 1992). In both of those cases, the Courts were faced with a motion to set aside default which was filed more than thirty (30) days after the entry of the judgment. In Clark, the trial court failed to rule on the Motion within ninety (90) days. Plaintiff argued that the trial court lost jurisdiction over the motion because of the operation of Rule 81.05.

In Kueper, the trial court did deny the motion to set aside within ninety (90) days. The Plaintiff, however, did not file a notice of appeal until more than ten (10) days had elapsed. The Plaintiff there argued that the denial of the motions became final immediately upon its entry and the notice of appeal was untimely.

In each of those cases, the Court has determined that, because the motion to set aside default judgments filed more than thirty (30) days after the entry of the judgment, it was in the nature of an independent action not governed by the time constraints governing after-trial motions. Those decisions are completely consistent with existing law regarding the handling the motions to set aside defaults. Nothing in their rationale or language suggests that a motion filed within

thirty (30) days does not continue to constitute an authorized after-trial motion. Subsequent decision by the Southern District suggesting otherwise are, quite simply, wrong.

The Opinion of the Missouri Court of Appeals is consistent with the language of Rules 81.08, Rule 78.06, and the prior opinions of this Court. Compelling reasons exist for the current state of the law and Defendant has not suggested any basis for a change.

B. The Purported Amendment of Defendant's Verified Motion to Set Aside Default.

In the Court of Appeals, Eastern District, Defendant argued that its "Amended Motion to Set Aside Default Judgment" was somehow outside the scope of Rules 81.05 and 78.06. As discussed above, the original "Verified Motion to Set Aside Default" was filed within thirty (30) days and therefore constituted an authorized after-trial motion for purposes of Rule 81.05. Assuming, for the sake of argument, that the second pleading was an attempt to amend the first pleading, Defendant has numerous problems.

First and foremost among them is the fact that a timely authorized after-trial motion can not be amended after the expiration of the time within which it must be filed. This issue was addressed by this Court in **Lloyd v. Garren**, 366 S.W.2d 341 (Mo. 1963). In that case, Defendants filed a timely Motion for New Trial and a

Motion to Set Aside Verdict pursuant to Rule 78.02. Subsequently, Defendants filed pleadings, which they entitled "Amended Motion for New Trial" and "Amended Motion to Set Aside Verdict". Applying the applicable time limits the Supreme Court stated:

> "S. Ct. Rule 78.02 requires a motion for new trial to be filed not later than fifteen days after entry of the judgment. S. Ct. Rule 72.02 requires a motion to set aside verdict to be filed within fifteen days after the reception of a verdict. These amended motions for a new trial and to set aside verdict are a nullity because they were filed out of time, and they cannot be the foundation for the preservation of errors to be complained of on appeal". Id. at 344 (emphasis added).

Black's Law Dictionary (4th ed.) contains the following definition for a nullity:

> "Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has no legal force or effect…"

Even if amendments were possible, it would offer no relief to the Defendant. Missouri Supreme Court Rule 55.33(c) provides as follows:

> "[c] **Relation Back of Amendments**

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading…" (emphasis added).

The amended pleading obviously arose out of the same conduct, transaction, or occurrence set forth in the first motion, i.e., the circumstances surrounding the entry of the default. Therefore, under the provisions of Rule 55.33(c), the amended motion would be considered filed as of the date of the original motion, i.e., within thirty days of the entry of the judgment.

Given this relation back, the Trial Court had ninety days from the date of the filing of the original motion within which to rule upon Defendant's Amended Motion to Set Aside the Directed Verdict. It is undisputed that the Court failed to do so. In fact, the Trial Court failed to rule on Defendant's motions within ninety days of the filing of the amended motion. Because no such ruling was made, the motions were deemed overruled for all purposes under Rule 78.06 and the Default Judgment became final for purposes of appeal under Rule 81.05(a)(2)(A). The Trial Court lost jurisdiction over this matter on April 19, 2004; accordingly, the Order of June 16, 2004, is void. The judgment of January 9, 2004, is now final for all purposes. **Highland Gardens Nursery v. North American Developers**, 494 S.W.2d 321 (Mo. 1973)

Another problem with Defendant's Amendment Theory becomes evident upon review of the minute entries. (L.F. pages 1-2). Defendant's "Verified Motion to Set Aside Default Judgment" was a pleading to which no response of pleading was necessary. Under the terms of Rule 55.33 (a), Defendant had the right to amend that Motion within thirty (30) days after service. The Motion was filed on January 20, 2004. Giving Defendant the benefit of the doubt regarding time of service, the Motion could be amended as a matter of right until approximately February 23, 2004. After that date, Rule 55.33(a) required leave of court or written consent for the filing of an amended pleading. The minute entries failed to show that such leave was granted.

As will be discussed in *Sub-point C,* Defendant's argument for continued jurisdictions hinges in its withdrawal or abandonment of the first motion. Defendant, however, fails to explain how this abandonment took place. While the filing of true amended pleading can constitute an abandonment of an existing pleading, defendant could not amend its motion more than thirty (30) days after the entry of the judgment. . **State ex rel. Hicklin v. Fidelity and Casualty Company of New York**, 274 S.W.2d 596 (Mo. App. 1955). Similarly, it did not obtain leave of court or written consent to any purported amendment. Stated simply, the record is devoid of any notification to the Trial Court or Plaintiff of an attempt to abandon, supercede or otherwise withdraw the first Motion. Certainly, the trial

court did not believe that it had been abandoned. In its preamble to its Order, the Court made reference to "Defendant's Motion to Set Aside Default Judgment". (Legal File, p. 78). The operative portion of the judgment stated:" Motion to Set Aside Default Judgment Granted…" (Legal File, p. 82). In the body of the Order, the Court specifically relied upon elements contained only in the first motion:

> "The second issue is a demonstration of a meritorious defense. The Court notes the Jotte Affidavit attached to the first motion of Defendant to set aside judgment. That being presented as filed, the Court is constrained from holding that no meritorious defense theory in supporting facts are submitted". (Legal File, p. 81).

If the Defendant intended to withdraw the first motion, it had an affirmative obligation to so notify the Court and Plaintiff of that intention and to seek leave to withdraw the pleading. It failed to do so. As this Court has noted, the abandonment of a pleading does not dispose of it. Some affirmative ruling must be made to bring an end to a pleading. **Schabbing v. Schabbing**, 395 S.W.2d 256, 258 (Mo. App. 1965). Accordingly, the first motion remained pending before the Trial Court and was denied by operation of law when no ruling was made within ninety days.

C. The "Amended Motion to Set Aside Default" as an independent action.

In apparent recognition of the inherent weaknesses of its "amendment" theory, Defendant also suggested to the Missouri Court of Appeals, Eastern Districts that its "Amended Motion to Set Aside Default" was not an amendment. Instead, it was intended to be a separate independent action. Again, this argument has fatal deficiencies.

A similar argument was addressed in **Holzhausen v. Holzhauzen**, 815 S.W.2d 140 (Mo. App. 1991). There a litigant filed a timely after-trial motion. Thereafter, she belatedly attempted to file an amended motion. The Missouri Court of Appeals, Eastern District, noted that this purported amendment was untimely and void. On appeal, the litigant attempted to argue that the amended pleading was, in fact, a subsequent independent action under Rule 74.06. That argument was rejected.

This Court has also previously considered the situation where a Defendant has filed an authorized post trial motion, had that motion overruled by operation of law, and, then, sought to file an independent, subsequent motion to set aside a judgment for irregularities. In **Munday v. Thielecke**, 483 S.W.2d 679 (Mo. App. 1972), a judgment was entered in favor of Plaintiff and against Defendant. The Defendant filed a Motion to Set Aside the Judgment within the time then permitted by law. That motion was not called up nor ruled upon for ninety days. It was

deemed overruled pursuant to Rule 78.04 (predecessor to Rule 78.06). In rejecting the second motion, the Court stated:

> "….[W]e need not discuss the grounds for that conclusion. This is for the reason that the defendant's [first motion] and [second motion], both involve the same parties, both concern the same judgment in the one suit, and both sought the same relief, the vacating of the judgment, March 20, 1970, against the defendant. It has beyond dispute that when defendant's [first motion] to vacate the judgement was denied in accordance with Rule 78.04, defendant was entitled to appeal from the judgment. The record shows that he did not appeal, and the judgment therefore became a final and conclusive judgment. It is true that the grounds for the vacating of the judgment alleged in defendant's [second motion] were not the same as that pleaded in his [first motion]; but it is equally true that the purported irregularities alleged in defendant's [second motion] were all matters of record at the time defendant filed his [first motion]; were therefore known to him at that time; and could properly have been included in defendant's [first motion]. Under what is called an estoppel by judgment, a final adjudication is conclusive and subsequent proceedings not only as to every issue of fact, which was actually litigated, but also as to every issue of facts which might have been. (Citations omitted). ……Defendant has not cited us to any case, nor has our

> research disclosed one, in which a litigant has been allowed two bites of the cherry merely by shifting the grounds of the second motion to vacate a judgement after a timely motion for the same relief has been overruled and the judgment has become final". Id. at 681-682.

The same rationale would apply in this case and Defendant's purported subsequent, independent motion would be barred by res judicata and collateral estoppel principles.

For all the reasons set out above, it is clear that the trial Court lacked jurisdiction to consider Defendant's Motions after April 19, 2004. On that date, Defendant's pleadings, whatever their intended nature, were denied by operation of law. The issues raised therein were decided on the merits and Defendant is precluded from re-litigating them. Accordingly, the yrial Court lacked jurisdiction to enter its Order of June 16, 2004 and the Judgment must be reinstated.

II

THE TRIAL COURT ERRED IN SETTING ASIDE THE DEFAULT JUDGMENT BECAUSE IT ABUSED ITS DISCRETION IN REACHING THE CONCLUSION THAT THE FAILURE OF DEFENDANT TO TIMELY ANSWER WAS THE RESULT OF EXCUSABLE NEGLECT OR BECAUSE SAID CONCLUDING WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, WAS AGAINST THE WEIGHT OF THE EVIDENCE OR ERRONEOUSLY DECLARED OR APPLIED THE LAW IN THAT THE EVIDENCE ESTABLISHED THAT DEFENDANT'S CONDUCT WAS RECKLESS WHERE:

a) **DEFENDANT WAS PROPERLY SERVED;**

b) **THE SUMMONS WAS RECEIVED BY THE EMPLOYEE RESPONSIBLE FOR ITS HANDLING;**

c) **SAID EMPLOYEE RECOGNIZED THE LOCATION OF THE INCIDENT AS ONE MANAGED BY DEFENDANT;**

d) **SAID EMPLOYEE DELIVERED THE SUMMONS TO DEFENDANT'S INSURANCE AGENT WITHOUT SUPPLYING SAID INFORMATION REGARDING THE LOCATION;**

e) **THE INSURANCE AGENT NOTIFIED SAID EMPLOYEE AND SAID THAT HE COULD NOT IDENTIFY THE LOCATION OR**

THE APPROPRIATE INSURER;

d) DEFENDANT UNDERTOOK NO FURTHER STEPS TO ASCERTAIN THE IDENTITY OF THE APPROPRIATE LIABILITY INSURER OR TO OTHERWISE RESPOND TO THE PETITION;

e) THE EMPLOYEE WAS RESPONSIBLE FOR HANDLING COURT CASES AND KNEW THE SIGNIFICANCE OF A DEFAULT JUDGMENT;

f) AFTER THE RECEIPT OF THE SUMMONS, THE COURT FORWARDED TWO NOTICES TO DEFENDANT REGARDING THE STATUS OF THE MATTER;

g) DEFENDANT WAS AWARE OF PROBLEMS WITH THE RECORD-KEEPING AND PERFORMANCE OF SAID EMPLOYEE INCLUDING, BUT NOT LIMITED TO, HER HANDLING OF COURT CASES PRIOR TO THE ENTRY OF THE DEFAULT; AND

h) UPON DISCHARGING SAID EMPLOYEE PRIOR TO THE ENTRY OF THE DEFAULT, DEFENDANT TOOK NO STEPS TO FURTHER INVESTIGATE THE STATUS OF THE MATTER.

A. Standard of Review

As discussed in Point I, *supra*, Defendant may improperly attempt to raise a waived issues. The scope of review may be controlled by this Court's determination of that issue. If Defendant's Motion was an authorized post trial motion pursuant to Rule 81.05, the Trial Court's decision will be reviewed on an abuse of discretion basis. **McElroy v. Eagle Star Group, Inc.,** 156 W.W.2d 392 (Mo. App. WD 2005).

A judicial act which is untenable and clearly against reason and which works an injustice constitutes an abuse of discretion. **Egelhoff v. Holt**, 875 S.W.2d 543 (Mo. banc 1994). The Supreme Court said in **Hancock v. Shook**, 100 S.W.3d 786, 795 (Mo. 2003) that "an abuse of discretion occurs when a 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, deliberate consideration."

It must also be noted that the discretion afforded the trial court in setting aside a Default Judgment is broader than the discretion not to set it aside. **In Re: Marriage of Williams**, 847 S.W.2d 896, 900 (Mo. App. SD 1993). That deference is due to the distaste of the legal system for Default Judgments. In the event that this Court determines that the abuse of discretion standard is appropriate, Plaintiff bears a substantial burden in convincing this Court to reverse the Trial

Court's Order. Such burden, however, is not unbearable as shown by the recent decisions in **Krugh v. Hannah**, 126 S.W.3d 391 (Mo. 2004) and **Klaus v. Shelby**, 42 S.W.3d 829 (Mo. App. ED 2001).

The alternative standard of review is that found in **Murphy v. Karen** 536 S.W.2d 30 (Mo. banc. 1976). This Court should set aside the Trial Court's Order if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneous declares or applies the law.

Under either standard the Trial Court's determination that Defendant established "good cause" is erroneous and must be set aside.

B. The Appropriate Test

In order to justify setting aside a Default Judgment under Rule 74.05(d) Defendant bore the burden of establishing both a meritorious defense and "good cause shown".

In pertinent part, Rule 74.05(d) provides as follows:

> "(d) When Set Aside. Upon motion stating facts constituting a meritorious defense and for good cause shown, an interlocutory order of default or a default judgment may be set aside. The motion shall be made within a reasonable time not to exceed one year after the entry of the default judgment. Good cause includes a mistake or conduct that is not intentionally or recklessly

designed to impede the judicial process. . . ."

This case does not involve intentional conduct. Therefore, Defendant bore the burden of proving that its conduct was not "reckless" in order to establish good cause.

Recklessness, for purposes of Rule 74.05, has been defined as conduct "lacking in caution" or "deliberately courting danger". **In Re: Marriage of Williams**, ***supra*** at 900. To be reckless, a person makes a conscious choice of his course of action, either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to a reasonable man." **In Re: Marriage of Williams**, ***supra*** at 900; **Mullins v. Mullins**, 91 S.W.3d at 667 (MO. App. WD 2002). The recent decision of the Missouri Court of Appeals, Western District, in **McElroy v. Eagle Star Group, Inc.**, ***supra***, favorably quotes a definition found in the most recent edition of Black's Law Dictionary, to-wit:

> "Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word 'reckless' is

> the most appropriate. The words 'rash' and 'rashness' have also been used to indicate the same attitude. Black's Law Dictionary 1298 (8th Ed. 2004)." **Id** at p. 10.

The task in this case is to evaluate Defendant's conduct in light of these judicially pronounced definitions of recklessness.

C. Analysis of Conduct

From a review of the entire record and the Order, it is apparent that the Trial Court misperceived or misinterpreted crucial testimony and exhibits. While the Order is limited in describing factual determinations, two jump out as clearly erroneous:

a. The determination that no conversation took place between Leigh Leonard and Richard McBride, (Legal File, p. 79); and

b. The omission of any discussion of Defendant's failure to act upon discovering Leigh Leonard's management failures.

In order to address these inaccuracies, it is first necessary to understand Defendant's business and the method by which it obtained insurance.

As explained in the deposition of Leigh Leonard, she was the overall property manager for approximately 800 to 1,000 rental units controlled by the Defendant and its related entities. Defendant's insurance needs were handled by Robert McBride. Mr. McBride was employed by AIA, which is an independent

insurance agency that maintained policies for a number of different corporations in which Peter Rothschild was involved (the Rothschild companies). At the time in question, Mr. McBride would obtain insurance for each property owned or managed by the Rothschild companies at the best possible rates. As each property was purchased, Mr. McBride would place insurance on the property with the most competitive companies. In some cases, he would even refer the insurance business to American Family Insurance Company if that was the best available policy. He maintained records of which property was insured with which company on a spreadsheet compiled by property address. If the Rothschild companies did not own, but managed a particular property, the management company would be an additional named insured. (Exhibit F, p. 7-15, 80). The usual course of business between the Rothschild companies and Mr. McBride regarding claims was that these Rothschild companies would contact Mr. McBride and inform him that a suit had been filed, he would then obtain a fax copy of the summons to determine which property was involved. (Exhibit F, p. 44-45). He would then refer to his spreadsheet and notify the applicable insurer of the pending claim. (Exhibit F, p. 7).

In addition to the numerous policies covering each particular property, there was a general commercial liability policy which might afford coverage to Rothschild in addition to that applicable to each property. (Exhibit F, p. 25-27).

With that business model in mind, the testimony of Leigh Leonard and Richard McBride must first be analyzed for credibility. Because their testimony was entirely by way of deposition, this Court is not bound by the Trial Court's determinations regarding credibility**. Landmark Bank v. First National Bank in Madison**, 738 S.W.2d 922 (Mo. App. 1987).

Leigh Leonard testified that she received the summons and immediately "assumed" that it involved the Bellevue property. (Exhibit E, p. 37-38). She "probably" did not, however, call Mr. McBride before sending him the papers. She said "probably not" because she did not recall such a conversation. (Exhibit E, p. 38). She then faxed the papers to Mr. McBride and assumed that they would be taken care of. She did not "remember hearing from him" after she sent the fax. She does not recall having a conversation where Mr. McBride informed her that the listed property was not owned by the Rothschild companies. (Exhibit E, p. 43-44).

Mr. McBride's version of the events is significantly different. He testified that he received the summons and referred to his spreadsheet, but was unable to identify a property which was owned, managed, or insured, based upon the address in the Petition. He repeatedly and consistently described a conversation that he had with Leigh Leonard in which he advised her of his discovery. (Exhibit F, p. 23, 36-37, 39-40, 70; Exhibit G, p. 18-19). The copy of the summons which was

faxed to his office contained contemporaneous notations consistent with his discovery and the conversation. (Exhibit G, p. 8-9). He also described an independent investigation that he undertook to identify the property by calling Plaintiff's counsel. Again, he made contemporaneous notations of the information he received. (Exhibit G, p. 11-12). Even though Ms. Leonard immediately recognized the property involved, she never conveyed this information to Mr. McBride and he was unable to identify the appropriate insurer. He, admittedly, did not forward the Petition to the general commercial liability carrier, but that failure was in no way related to the address listed on the Petition.

The Trial Court's conclusion that the conversation between Leigh Leonard and Richard McBride never took place is simply against the weight of the evidence. Everything that Mr. McBride says he did is consistent with the business model of the Rothschild properties and supported by contemporaneous documentation. His direct, believable description of the events is consistent with the prior business dealings between the parties. His version of the chain of events is controverted only by Ms. Leonard's vague statement that she could not recall a conversation.

As evidence that it never took place, Ms. Leonard asserts that she would have taken immediate action if she had been informed that there was no insurance. That testimony is undercut by her testimony regarding the court notices. As the

Trial Court found, the testimony that the notices were not received strained credibility. (Legal File, p. 81). The court personnel testified as to the system employed in generating and delivering the notices and Defendant concedes receiving both the Petition and the cost bill. Nevertheless, Ms. Leonard testified that she could not remember receiving them and that they must not have been delivered to Defendant because she would have done something if they had been brought to her attention. In fact, the evidence shows that Defendant was put on notice on at least three separate occasions, once by Mr. McBride and twice by the Court, that this matter was not being handled properly and that a default was imminent. On each occasion, no action was undertaken.

By Defendant's own admission, Ms. Leonard's handling of this particular case was completely consistent with the manner in which Defendant had handled its legal affairs for years. In its own words, Defendant stated "Ms. Leonard did not fulfill her duties as a manager and director overseeing the operation of the management company". (Exhibit 9, p. 1). As examples of her ineffectiveness directly related to legal matters, the Defendant identified the following instances:

a. "She ordered a lawsuit for rent and possession to be cancelled, even though the tenant still owed money. When asked why, she could not give an explanation even though, as property director, it was her responsibility. She did not know what happened, even though there

was a fax by her directing the attorney to cancel the lawsuit. The company has now had to refile the lawsuit at an added expenses, not only with the attorney, but the tenant has still not paid";

b. "Ms. Leonard to not keep up with the status of the evictions and lawsuit with the outside counsel. (sic). There was no procedure or method of reporting – which was her responsibility as manager and director"; and

c. "Claimant did not file anything for the year 2003 and for part of 2002. There was correspondence from 1997 mixed in with current executed leases and invoices. The company has had to hire two part time employees just to catch up on the filing from the past two years that she never did". (Exhibit 9, p. 2).

Given Defendant's own description of Ms. Leonard and her handling of legal matters, the only reasonable conclusion that can be drawn from the evidence is that Mr. McBride did notify her that he was unable to identify the appropriate insurer, instructed her to investigate the matter, and awaited a timely report so that he could fulfil his duties as the insurance broker. Ms. Leonard failed to take any action.

Plaintiff's Exhibit 9 is also crucial with regard to Defendant's knowledge of the disarray of its legal matters and its failure to undertake any remedial action. As

set forth in Exhibit 9, Ms. Leonard was discharged on November 7, 2003. At that time, Defendant was on notice that its legal matters were not being properly handled. Ms. Leonard offered to review the status of pending matters at the time of her termination. That offer was refused. The exhibit describes a number of remedial actions taken to clean up filing, to correct mis-charges, and to institute cost saving procedures. What is glaringly missing is any reference to an investigation into the status of current legal affairs. Defendant had two months from the date of Ms. Leonard's discharge until the default was entered. A review of its files, a phone call to the insurance broker, or a visit to the courthouse would have allowed this Defendant to avoid the entry of the default. Significantly, the second court generated notice to the Defendant was mailed on November 6, 2003, and would have been received on the date of Ms. Leonard's termination or shortly thereafter. (Legal File, p. 1). Viewed in its entirety, this evidence clearly establishes Defendants own misfeasance caused the entry of the default judgment in this matter and that, in doing so, it acted recklessly.

Defendant has suggested that because it followed a "custom and practice" of delivering the summons to its insurance agent it is relieved of responsibility. That argument must be rejected because the so-called "custom and practice" was, itself, reckless. A reasonable business managing hundreds of rental properties must expect to be sued. Defendant's property manager, Leigh Leonard, was aware of the

importance of the summons and the potential for a Default Judgment. A reasonable system for handling such an important matter would not end with pushing the send button on a fax machine. It would include, at the very least, prior contact with the agent, confirmation of the receipt of the summons, and some notation somewhere to check the status of the matter before the time to answer expired. Defendant's "custom and practice" had none of these elements.

The facts of this case are remarkably similar to those in **McElroy v. Eagle Star Group**, 156 S.W.3d 392 (Mo. App. 2005). There, the Defendant received a summons and forwarded it to an insurer. Thereafter, the Defendant received two notices regarding the Court proceedings which should have caused it to question whether the matter was, in fact, "being handled". In McElroy, the Defendant at least became concerned and called its insurer to check on the status of the matter. Here, the Defendant did not even bother to do that. As is established in McElroy, it is not enough to simply assume that an insurer will properly handle a matter when there is clear evidence that it is not being handled. Such a course of conduct must be considered reckless.

In its Brief below, Defendant relied on a series of cases: Gibson v. Elley, 778 S.W.2d 851 (Mo. App. 1989), Billingsly v. Ford Motor Co., 939 S.W.2d 493 (Mo. App. 1997), Keltner v. Lawson, 931 S.W.2d 477 (Mo. App. 1966), and Continental Basketball Assn. v. Harrisburg Professional Sports, Inc., 947 S.W.2d

(Mo. App. 1997). In each of those cases, the defendant delivered the summons to an appropriate party in a timely fashion and reasonably relied upon that party to handle the litigation. The same is not true here where Defendant had received direct information from Mr. McBride advising that the case was not being handled. Further, Defendant received at least two court notices which Ms. Leonard acknowledged with the types of documents which would have put her on notice that something was amiss. Further, she acknowledged that upon receipt of such notice, she should had contacted the insurance agent and or attorneys handling the matter. None of that happened here. Defendants own misfeasance in the handling of the lawsuit resulted in the entry of the Default.

An evaluation of Defendant's conduct in light of the expressed tests, clearly establishes that it recklessly allowed the Default Judgment to be entered in this matter. The Trial Court's Order of June 16, 2005 was unsupported by creditable evidence, which was against the weight of the evidence and misapplied the law to the facts. Under Murphy v. Carron, Supra, it should be reversed. Similarly, the Trial Court's determination that Defendant's evidence established "good cause", constituted an abuse of discretion. For those reasons, this Court should set aside the Order of June 16, 2005 and enter judgment in favor of Plaintiff and against Defendant in the amount of three million dollars ($3,000,000) plus interest from January 9, 2004 to the date of its opinion.

CONCLUSION

For all of the reasons set forth above, this Court should enter its Order vacating, or in the alternative, reversing, the Order and Findings of the trial court of June 16, 2004 granting Defendant's Motion to Set Aside the Default Judgment, and enter Judgment in favor of the Plaintiff and against Defendant in the amount of $3,000,000 plus interest accrued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

An original and nine copies of Plaintiff/Appellant's Brief and disk filed with the Missouri Court of Appeals, Eastern District, this _____day of _____, 2005. Two copies and a disk mailed this 10th day of February, 2005, to: John G. Enright, of HAHN, ENRIGHT & CRANK, Attorneys for Defendant/Respondent, 701 Market Street, Suite 450, St. Louis, MO 63101.

_____
James P. Leonard

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Plaintiff/Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of Plaintiff/Appellant is 5,389excluding the cover page, signature block, and Certificates of Service and Compliance.

_____
James P. Leonard

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

MARGARET MILLER,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Appeal No. ED84886
	)	
ROTHSCHILD MANAGEMENT GROUP,	)	
	)	
	)	
Defendant/Respondent.	)	

On Appeal from the Circuit Court of the City of St. Louis
The Honorable Thomas C. Grady, Division 3
Cause No. 032-01275

APPENDIX TO APPELLANT'S BRIEF

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APPENDIX

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