IN THE
SUPREME COURT OF MISSOURI

MARGARET MILLER,	)	
	)	
PLAINTIFF/APPELLANT,	)	Appeal No. SC 87027
	)	
	)	
vs.	)	
	)	
ROTHSCHILD MANAGEMENT GROUP,	)	
	)	
DEFENDANT/RESPONDENT.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
DIVISION III
THE HONORABLE THOMAS C. GRADY

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondent Rothschild Management Group ("Rothschild") is satisfied with and accepts Appellant Margaret Miller's ("Miller") Jurisdictional Statement.

STATEMENT OF FACTS

Because Appellant Miller's Statement of Facts fails to give the court a fully accurate picture of this case, Rothschild offers the following Statement of Facts. The inaccuracies and omissions of Ms. Miller's Statement are discussed in the context of the events of this case.

A. Rothschild's Handling of Claim

According to the undisputed evidence, the first notice Rothschild had of Ms. Miller's claim was when a summons and petition were served on Jennifer Finkelstein at Rothschild's office on May 3, 2003. Trial Exhibit E, Deposition of Ms. Leonard, p. 34-36; LF 78-79. Ms. Miller's suit had been filed on April 29, 2003 and made claims arising out of injuries allegedly suffered by her when she fell on snow and ice on a parking lot located at 7322 Wise, St. Louis, Missouri. LF 3, 4; Supplemental Brief, p. 8-9.[1] Three days later, Ms. Finkelstein delivered the summons and petition to the office's general manager, Leigh Leonard, who immediately faxed both to Robert McBride, Rothschild's insurance broker, pursuant to usual custom and practice. LF 22-23; Trial Exhibit E, Deposition of Leonard, p. 34-37; A.S.B., p. 10. According to Ms. Leonard, she had no contact with Mr. McBride regarding the suit either before or after the papers were faxed to his office. Trial Exhibit E, Deposition of Ms. Leonard, p. 37-38; LF 28-29; A.S.B.,

[1] For simplicity, Appellant's Supplemental Brief will be referred to by the initials A.S.B. throughout Rothschild's brief, and Appellant's Brief before the Court of Appeals will be referred to by the initials A.B.

p. 10. This was in line with her customary practice and what typically occurred. Trial Exhibit E, Deposition of Ms. Leonard, p. 37-38; LF 28-29; A.S.B., p. 10.

Ms. Leonard thought, in accordance with what had always happened in the past, Mr. McBride would "put our insurance carrier on notice of the lawsuit, and provide them with copies" of the documents, and that "anything that took place after that" he or the insurance company "would have taken care of." LF 28-29; Trial Exhibit E, Deposition of Ms. Leonard, p. 38. She had "every reason to believe that Mr. McBride would see that the suit papers were properly forwarded to the insurance company so that timely responsive pleadings" would be filed. LF 29.

Mr. McBride admits that he received the suit papers by fax on May 6, 2003. LF 31. Mr. McBride and his company, AIA, obtained numerous insurance policies for the different companies in which Pete Rothschild was involved, including Rothschild Management Group. Trial Exhibit F, Deposition of Mr. McBride, p. 9-11. At that time, each piece of rental property in which either Rothschild or a related entity was involved was insured "by a very large mix of companies" and Mr. McBride used a spreadsheet containing the address of each property to determine what insurance policy went with each piece of property. Trial Exhibit F, Deposition of McBride, p. 10-14. Rothschild was also covered by its own liability policy, issued by Zurich. Trial Exhibit F, Affidavit of Mr. McBride, p. 14-15. Mr. McBride attempted to determine which piece of property the claim was related to, but found no property owned by Rothschild at 7322 Wise Avenue. LF 31. He attempted to clarify the piece of property on which the alleged events occurred by contacting Ms. Miller's attorney, Michael Stokes, on May 6 and 7, but

was unable to reach him. Trial Exhibit G, Deposition of Mr. McBride, p. 11-12. Although he was told Mr. Stokes would call him back, he never received a return call from anyone associated with Ms. Miller. Trial Exhibit G, Deposition of Mr. McBride, p. 11-12. Though Mr. McBride should have forwarded the claim on to Zurich, who likely would have provided coverage and a defense for the claim, he failed to do so. Trial Exhibit F, Deposition of Mr. McBride, p. 54, 78. It was the fault of Mr. McBride and his office that the claim was never turned into Zurich, simply because "we assumed in error that this was a property" owned outside of their insurance coverage. Trial Exhibit F, Deposition of Mr. McBride, p. 53. As Mr. McBride admitted, his "office screwed up in not turning in to Zurich" the claim. Trial Exhibit F, Deposition of Mr. McBride, p. 78.

Mr. McBride claims "[t]o the best of my recollection" that he spoke with Ms. Leonard after receiving the fax and told her that the property in question was not owned by Rothschild or a related entity and that "coverage for that claim should be provided by the insurance carrier for the owner of the property." LF 31. However, that was directly contradicted by Ms. Leonard, who denied that any such conversation took place. Trial Exhibit E, Deposition of Ms. Leonard, p. 38. If Mr. McBride had told her she needed to do something else to take care of the lawsuit or that Rothschild was not covered by an insurance policy issued by his office, she would have remembered because it would have been a "very unusual circumstance" . . . "[b]ecause he was the only person who covered" Rothschild and the related entities. Trial Exhibit E, Deposition of Ms. Leonard, p. 70. Mr. McBride had no written documentation of a conversation with her and sent nothing in writing to Rothschild prior to the default judgment. LF 31.

Timeline of Defaults and Motions

According to the minute entries prepared by the Circuit Clerk of the City of St. Louis, Notices of Setting were mailed to Rothschild on September 16, 2003 and November 6, 2003. LF 1. However, the "notices" are computed-generated by the Circuit Clerk's office, then sent to the Court's purchasing department, where they are put in envelopes and sent to a third-party "pre-sort company" to be mailed. Trial Vol. I, p. 34-42. There is no way to verify that the notices were actually sent to the Circuit Clerk's purchasing department or actually mailed. Trial Vol. I, p. 37-38. When asked about the notices, Ms. Leonard had no recollection of ever seeing them, and stated that if they had been received, they would have been placed in the file. Trial Exhibit E, Deposition of Ms. Leonard, p. 50-51.

On November 24, 2003, Ms. Miller was granted a default inquiry and an evidentiary hearing was held before the Honorable Thomas Grady, Judge of the Circuit Court of the City of St. Louis on January 9, 2004. LF 1. On that same day, Judge Grady entered default judgment in favor of Miller and against Rothschild for $3,000,000. LF 6. On January 12, the taxing department of the Circuit Court sent a "costs bill" to Rothschild, which it received. LF 1. On January 20, Rothschild immediately filed a "Verified Motion to Set Aside Default Judgment." LF 7-10.

The motion was filed 11 days after Default Judgment was entered. LF 1. The Motion and its supporting Affidavits alleged that (1) Rothschild had a meritorious defense because it did now own, manage or have access to the property at issue in the suit, and (2) good cause existed to overturn the default because it did not "intentionally or

recklessly act to impede the judicial process." LF 7-8. The theory set out in the Motion was that Mr. McBride had actually informed Ms. Leonard that the insurance carrier did not provide coverage for the suit. LF 8. The Motion further alleged that although Ms. Leonard seemed to be performing her duties, she was later terminated when it was discovered that she had problems "with organization and follow-through." LF 8-9. These allegations were based upon the investigation into the issue conducted by Caroline Jolette, the CEO of Red Brick Management, Rothschild's successor. LF 11. At that time, Ms. Jolette had not had the chance to speak with Ms. Leonard and investigate the issue further. LF 11-13.

On March 4, 2004, fifty-four days after the Judgment was entered and forty-three days after its original motion, Rothschild filed a motion entitled "Amended Motion to Set Aside Default Judgment." LF 2, 17-20. The second motion specifically invoked Rules 74.05(d) and 74.06 and alleged new grounds for good cause. LF 18-19. It stated that Mr. McBride had failed to forward the suit papers on to the proper insurance carrier, Zurich, and that Ms. Leonard had no recollection of Mr. McBride ever telling her that there was no coverage. LF 18-19. On April 30, 2004, 111 days after the judgment was entered, Judge Grady took up Rothschild's Amended Motion to Set Aside Default Judgment. TR Vol. I, p. 4.

After considering the trial exhibits and affidavits submitted by Rothschild, and the testimony, depositions and exhibits submitted by Ms. Miller, the Court entered an Order setting aside the default on June 16, 2005. LF 78-82. As part of its Order, the Court specifically noted that the property where the events alleged in the Petition occurred was

not owned or managed by Rothschild and specifically found that "Mr. McBride neglected to turn over the suit papers to Zurich Insurance, which would have provided coverage for the incident." LF 79. The Court also held that it was unlikely that any conversation between Mr. McBride and Ms. Leonard occurred. LF 79. Ms. Miller filed a Notice of Appeal on July 17, 2004. LF 83-84. After briefing and argument by the parties, the Eastern District of the Court of Appeals reversed the trial court on June 28, 2005. After timely application, this Court granted transfer.

ARGUMENT

I.

RESPONSE TO POINT RELIED ON I OF MILLER'S SUPPLEMENTAL BRIEF

The trial court had jurisdiction to set aside the January 9, 2004 default judgment. As a matter of law, a motion to set aside a default judgment, made pursuant to Rule 74.05(d) of the Missouri Rules of Court, is outside the scope of Rules 78.06 and 81.05, which deem overruled any after-trial motion not ruled on within a ninety day period. The plain language of the rules and the purposes behind the current version of Rule 74.05(d) require that a motion to set aside a default judgment is treated separately from after-trial motions governed by Rules 78.06 and 81.05. Even assuming Rothschild's first motion to set aside the default was automatically overruled at the end of ninety days, its amended motion alleging a new and different basis for relief was filed more than thirty days after judgment but within the one-year limit of Rule 74.05(d) and gave the trial court jurisdiction.

A. Standard of Review

Under the applicable standard of review, the trial court properly had jurisdiction to set aside the default judgment. Generally, whether or not jurisdiction exists is "a question of fact left to the sound discretion of the trial court" to "not be reversed on appeal absent an abuse of that discretion." *Missouri Soybean Association v. Missouri Clean Water Commission,* 102 S.W3d 10, 22 (Mo. banc 2003). However, when the facts relevant to jurisdiction are uncontested review is *de novo. Id.*

Historically, default judgments are not favored by Missouri courts. *Vandergriff v. Missouri Pacific Railroad,* 769 S.W.2d 92, 101 (Mo. banc 1989); *Sprung v. Negwer Materials, Inc.,* 727 S.W.2d 883, 886-887 (Mo. banc 1987). Because defaults are not favored, appellate courts grant greater deference to the decisions of trial courts setting aside a default and construe narrowly a trial court's discretion not to do so. *Vandergriff*, 769 S.W.2d at 101. In order to promote the justice system's goal "to seek the truth and to do justice," defaults are disfavored so that a "case must be decided on the merits; procedural 'niceties' should not pose insurmountable barriers." *Sprung*, 727 S.W.2d at 887.

B. Analysis

1. Motions to Set Aside Default Not Subject to Automatic Overrule After 90 Days

Because motions under Rule 74.05(d) are not "after-***trial***" motions, they are not subject to the ninety day time limits of Rules 78.06 and 81.05. Moreover, Rules 74.05(d) and 74.06 grant jurisdiction for the filing of motions not to exceed up to a year after default judgment is entered. Because neither motion was an "after-***trial***" motion, neither was overruled by provisions of Rules 78.06 and 81.05, and the trial court had jurisdiction on June 16, 2004 to set aside the default judgment against Rothschild. LF 78-82. Ms. Miller incorrectly claims that (1) motions to set aside a default are, like after-trial motions specified in Rule 78.06, subject to the ninety day limit present in both Rules 78.06 and 81.05 and that (2) Rothschild's amended motion to set aside default, filed within ninety days of the filing of its first motion, was simply a "supplement to the first motion" and

was automatically overruled by the operations of Rules 78.06 and 81.05 after ninety days had elapsed since the filing of the first motion. A.S.B., p. 23-35.

No matter when a motion to set aside default is filed, it is not subject to the ninety day time limit. As this Court has noted, the provisions of the Missouri Rules of Court are to be interpreted under the same rules of construction as statutes. *State ex rel. Vee-Jay Contracting, Co. v. Neill,* 89 S.W.3d 470, 471-472 (Mo. banc 2002). The meaning of a rule or group of rules must be "determined by considering the plain and ordinary meaning" of the words used. *Id.* When analyzing how particular rules function, like here, courts should "consider all of the rules in relation to the subject with which they treat" and "the purpose for which they were adopted." *St. Louis Realty Development Corporation v. Gordon,* 354 S.W.2d 324, 326 (Mo. App. 1962). As noted earlier, the purpose of the rule allowing default judgments to be set aside is the justice system's interest in having cases decided on the merits and not on "procedural niceties." *Sprung,* 727 S.W.2d at 887

The plain language of Rules 74.05, 78.06 and 81.05 all demonstrate that a motion to set aside a default judgment is not subject to the ninety day jurisdictional period for after-trial motions. First, the language of Rule 74.05 contains no such limitation. Under the rule, a motion to set aside a default judgment must "be made within a reasonable time not to exceed one year" of the judgment being entered. Rule 74.05(d), Mo. Rules of Court. The rule is devoid of language limiting the jurisdiction of the trial court to grant a motion to set aside at any time more constricted than the one year period after judgment, so long as it is a "reasonable" time.

It is illogical to read into the rule a limitation on the trial court's jurisdiction, requiring it to rule on motions filed in the earliest part of the one year period within ninety days. No such limitation exists on motions filed later in the one year period. Under the interpretation of the Rule 74.05(d) relied on by Ms. Miller, a trial court has only ninety days to grant a motion to set aside if the motion is filed immediately after the default judgment is entered. However, the trial court has an unlimited period of time in which to rule on a motion filed up to **one full year** after judgment is entered. A diligent and prompt defendant is penalized with the risk of the trial court losing jurisdiction to grant her motion, in spite of the long-standing principle that a trial court should be "more receptive" to a motion to set aside the sooner the error is discovered and the motion is filed. *Myers v. Pitney Bowes, Inc.*, 914 S.W.2d 835, 839 (Mo. App. S.D. 1996).

Under the plain language of both Rules 78.06 and 81.05, a motion to set aside default pursuant to Rule 74.05(d) is not within the scope of the ninety day time limit. Rule 78.06 states that "[a]ny motion for new trial, motion to amend the judgment or opinion, or motion for judgment not withstanding the verdict" is overruled if not granted within ninety days of the filing of the "last such timely motion." Similarly, Rule 81.05 provides that, for the purposes of appeal, a judgment becomes final ninety days from the filing of the last timely "authorized after-trial motion," at which time all such motions are deemed overruled if not otherwise previously granted or overruled. Neither rule says anything about motions to set aside default judgment or Rule 74.05(d). Rule 78.06 lists only three distinct motions to which it applies, all of which specifically authorized by Rule 78.04. Rule 81.05 only governs authorized after-trial motions.

This Court has listed other motions authorized by various current rules that are treated as "authorized after trial motions" under Rules 78.06 and 81.05. *Taylor v. United Parcel Service, Inc,* 854 S.W.2d 390, 392 *Fn. 1* (Mo. banc 1993). But, as will be discussed *infra*, notably absent from that list is a motion to set aside a default judgment pursuant to Rule 74.05(d).

Although there is authority to the contrary, a motion to set aside default is not an authorized after-trial motion. *Moore v. Baker,* 982 S.W.2d 286, 288 (*Fn. 2*) (Mo. App. W.D. 1998) (noting that, although some courts consider motions to set aside default after trial motions, they are actually independent actions); *Thompson v. St. John,* 915 S.W.2d 350, 358 (Mo. App. S.D. 1996); *but see Popular Leasing USA, Inc., v. Universal Art Corporation,* 57 S.W.3d 875, 877 (Mo. App. E.D. 2001). This Court has defined a "trial" as a "judicial examination and determination of issues between the parties." *Taylor*, 854 S.W.2d at 392-393 (*quoting Tittsworth v. Chaffin*, 741 S.W.2d 314, 317 (Mo. App. S.D. 1987)).

A judgment by default is the antitheses of a trial. By definition, a default judgment is against a party "who has failed to plead or otherwise defend" against the plaintiff. *Black's Law Dictionary* 428 (7th Ed. 1999). It is not a trial on the merits rendered after "argument and investigation," but rather is a judgment on technical or preliminary grounds. *Wilkes v. St. Paul Fire and Marine Insurance,* 92 S.W.3d 116, 121 (Mo. App. E.D. 2002).

The approach to Rule 74.05 urged by Ms. Miller ignores the independent nature of a motion to set aside a default judgment and the amendment of the rule in 1987. Prior to

1987, Missouri court rules only specifically allowed a default judgment to be set aside "before the damages are assessed or final judgment rendered." Rule 74.05, Mo. Rules of Court (1986). A motion to set aside default, under the pre-1987 formulation of Rule 74.05, filed within the time the trial court still had control over its judgment, was treated as a motion for new trial, which the court could only act on for ninety days. *State ex rel. Stoffer v. Moore*, 628 S.W.2d 637, 643 (Mo. banc 1982). A motion to set aside a default judgment filed after that time was treated as an independent equitable suit. *State ex rel. Sprung*, 727 S.W.2d at 888-889 (Mo. banc 1987).

Under the current language of Rule 74.05, a motion to set aside default is, at all times, treated as an independent action to which the ninety time limit is inapplicable. *Moore,* 982 S.W.2d at 288 Fn. 2; *Clark v. Brown,* 794 S.W.2d 254, 256 (Mo. App. S.D. 1990). It is an independent action even when the motion if filed within the thirty days the trial court still controls the judgment. *Thompson*, 915 S.W.2d at 358. As the court in *Clark* explained:

> The rule now provides for one year after entry of default for the filing of a motion to set aside that default. This new time provision serves to sharply distinguish motions to set aside default judgments from motions for new trial and other motions in the nature thereof. The latter motions must be filed with 15 days [now 30 days] after judgment and will be automatically denied if not otherwise ruled at the end of 90 days. These time limitations cannot logically apply to motions to set aside defaults . . . .

794 S.W.2d at 256.

The cases since 1988 which hold to the contrary rely either on cases decided prior to the 1987 change in Rule 74.05 or on mistaken *dicta* in *Taylor v. United Parcel Service, Inc,* 854 S.W.2d 390. *See, e.g Klaus v. Shelby,* 4 S.W.3d 635, 637-638 (Mo. App. E.D. 1999). This Court in *Taylor* did not hold that a motion to set aside a default is an after-trial motion subject to Rules 78.06 and 81.05. 854 S.W.2d at 392-393. Rather, it dealt with when time for appeal ran on a motion to reconsider a grant of ***summary judgmen****t*. *Id.* at 391.

Chief Justice Robertson, writing for the Court, noted the similarities between a grant of summary judgment and a grant of judgment by trial and then held that a motion to reconsider summary judgment was, for the purposes of time to appeal, a motion for new trial. *Id.* at 392-393. The Court noted in *dicta* that the holding was consistent with a 1949 case under the old civil code, *In re Franz' Estate,* 221 S.W.2d 739 (Mo. 1949), that supposedly held a motion to set aside default was a motion for rehearing or new trial. *Id.* at 393. But the Court ***excluded*** a motion to set aside a default judgment from its list of "authorized after-trial motions" which are "expressly provided for" in the current Rules and to which the time constraints of Rule 78 and 81.05 apply. *Id., Fn. 1*.

Other courts have similarly excluded motions to set aside a default judgment under Rule 74.05(d) when setting forth their lists of authorized after-trial motions under court rules. *State ex rel. Eddy v. Rolf,* 145 S.W.3d 429, 434, Fn. 2 (Mo. App. W.D. 2004).; *Dangerfield v. City of Kansas City,* 108 S.W.3d 769, 773 (Mo. App. W.D. 2003); *Anderson v. Shelter Mut. Ins. Co*., 127 S.W.3d 698, 701 (Mo. App. E.D. 2004); *see also*

Ort v. DaimlerChrysler Corp., 138 S.W.3d 777, 779 (Mo. App. E.D. 2004) (acknowledging the *Taylor* list of six authorized after-trial motions, but omitting mention of a default judgment under Rule 74.05(d)).

Contrary to the *dicta* in *Taylor*, neither *Franz' Estate* nor *Love Mortgage Property, Inc. v. Horen*, 639 S.W.2d 839 (Mo. App E.D. 1982), actually dealt with motions to set aside a default judgment. Both concerned motions to reconsider the dismissal of a petition for failing to state a cognizable claim, an entirely different matter than a motion to set aside default judgment. *In re Franz*, 221 S.W.2d at 740; *Love*, 639 S.W.2d at 840.

Regardless of when it is filed, a Rule 74.05 motion to set aside a default judgment is like an independent action, outside the scope of the ninety day limits found in Rules 78.06 and Rule 81.05. The trial court had jurisdiction to grant Rothschild's motion to set aside the default judgment so long as the motion was filed within one year after entry of default judgment.

2. Argument Not Waived Under Rule 83.08

Rothschild has not waived, as claimed in Ms. Miller's supplemental brief, the argument that motions to set aside a default judgment are exempt of the ninety day time limit contained in Rules 78.06 and 81.05. The court rule, Rule 83.08, and cases on which Ms. Miller relies for her argument only require that a party "not alter the basis of any claim raised in the court of appeals." *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999); *Linnzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997). Rothschild is the *respondent* in this case and has not raised any "claims," which unquestionably refer to

claims of error, as it has no duty to assert any claim of error and, indeed, no interest in attacking the trial court's order. Both *Linnzenni* and *Blackstock* deal with claims of error raised by an *appellant* before the Supreme Court on transfer that were not raised before the court of appeals. 937 S.W.2d at 726-727; 994 S.W.2d at 952-953.

Second, even if Rule 83.08 applies to Rothschild as the respondent, it has not violated it. Rothschild has consistently argued that at least one of its motions is an independent action over which the trial court had jurisdiction in spite of the time limits in Rules 78.06 and 81.05. Respondent's Prior Brief, p. 9-13.

3. Amended Motion Timely

Rothschild's Amended Motion to Set Aside Default, filed with the trial court on March 4, 2004, was timely. LF 17-20. As noted above, a motion to set aside default can be filed within "a reasonable time not to exceed one year after the date of the default judgment." Rule 74.05(d), Mo. Rules of Court. By contrast, an authorized after-trial motion, such as a motion for new trial, referred to in Rule 78, may not be filed or amended more than thirty days after judgment. Rule 78.04, *Grass v. Myers*, 67 S.W.3d 716, 717 (Mo App. S.D. 2002).

The amended motion filed outside the 30 day window of Rule 78, asserting that the default be set aside and alleging for the first time the new fact that the insurance agent was at fault in causing the default, could not be treated as merely a supplement or amendment to a post-trial motion under Rule 78.

Here, the amended motion was filed fifty-six days after judgment was entered, well within the one year limit, but after the time permitted for filing an after-trial motion

under Rule 78. Because a motion to set aside a default judgment is treated as an independent action, the ninety day time limits of Rules 78.06 and 81.05 do not constrain the court's jurisdiction to grant the motion. *Thompson*, 915 S.W.2d at 358; *Clark*, 794 S.W.2d at 256; *see also Kueper v. Murphy Distributing*, 834 S.W.2d 875, 878 (Mo. App. E.D. 1992) ("We now hold that because a motion to set aside a default judgment is an independent action which does not automatically terminate after 90 days, the trial court's determination of whether to grant or deny such a motion is an independent judgment.").

Ms. Miller makes four arguments against the trial court having jurisdiction to consider Rothschild's amended motion. Each of these arguments fail. First, Ms. Miller argues that the amended motion is nothing more than an untimely attempt to amend a timely after-trial motion. A.S.B., p. 28. However, a motion to set aside default is not, as noted above, an after-***trial*** motion and the amended motion was timely under Rule 74.05.

Rule 74.05 (d) makes it unmistakably clear that trial courts have jurisdiction for a "reasonable time not to exceed one year" to set aside a default judgment. That one year period is analogous, though obviously not identical, to the time within which a motion for new trial must be filed under Rule 78.04. It has long been the rule that a motion for new trial may be filed and amended at anytime during the period allowed for filing such a motion. *State ex rel. and to Use of Hicklin v. Fidelity & Cas. Co. of N. Y.*, 274 S.W.2d 596, 599 (Mo. App. 1955). Nothing less than the full time allowed for filing the motion, including any amendments made within that time, can cut short the trial court's jurisdiction. *Id.* Applying that principle here, the one year period had not expired either when the motion to set aside the default judgment was filed and amended or when the

trial court ruled on the amended motion. ***Nothing short of the passing of one full year without a motion being filed could terminate the trial court's jurisdiction to consider the motion to set aside the default judgment***.

As previously noted, there are distinct differences between after-***trial*** motions provided for under Rule 78 and referred to in Rule 81.05 and a motion to set aside a default judgment under Rule 74.05(d). The most notable differences being, (1) the trial court's jurisdiction to entertain a motion to set aside a default judgment extends one full year from entry of such judgment under Rule 74.05(d), while an after trial motion under Rule 78 must be filed within 30 days of judgment, and (2) the after-***trial*** motions referred to in Rules 78 and 81.05 presuppose there was a trial based on some dispute of law or fact. As noted earlier, this Court has defined a "trial" as a "judicial examination and determination of issues between the parties" while a default judgment is one entered on technical or preliminary grounds. *Taylor,* 854 S.W.2d at 392-393; *Wilkes*, 92 S.W.3d at 121.

Likewise, Ms. Miller's second argument, that the amended motion "related back" to the time of filing the first motion is both incorrect and irrelevant. As support, Ms. Miller cites Rule 55.33(c), which deals with amended pleadings. A.S.B, 29-30. Here, Rule 55.33(c) is inapplicable in the sense contemplated by the rule itself. Rule 55.33(c) tolerates a fiction in allowing certain amendments to relate back to the original filing for the laudable purpose of preventing the running of the statute of limitations on certain claims. *Tyson v. Dixon*, 859 S.W.2d 758, 761 (Mo. App. W.D. 1993). The rule was not designed as a trap for the unwary to shorten time for amended and timely filed motions

pursuant to Rules 74.05, or even to shorten time for filing any other "authorized" post-trial motions pursuant to Rules 78.06 or 81.05. To shorten the permissible time authorized for filing such motions using the "relation back of pleadings" doctrine is both a distortion of reality and of the intent and purpose of Rule 55.33(c), that is, to have a case decided on the merits, rather than on technical grounds.

Even if the amended motion related back to the first motion, neither was overruled by the operation of Rules 78.06 and 81.05 as noted above, *supra*. Her argument, relying once again on Rule 55.33, that the amended motion is an unauthorized attempt to amend a timely motion pursuant to Rule 74.05 would eviscerate the plain language of the rule permitting the filing of the motion for a year after default judgment. A.S.B, p. 31.

Ms. Miller's final argument, though built on the correct idea that the amended motion was itself a completely independent action that gave the trial court jurisdiction to set aside the default, is faulty for two independent reasons. A.S.B., p. 33-35. Her argument is that even if the second amended motion is a timely, independent action to which Rules 78.06 and 81.05 do not apply, it is barred because the ninety day time limit in both rules caused the first motion to be overruled by operation of law. A.S.B., p. 33. The first problem with this argument is, of course, that Rothschild's first motion was subject to neither Rule 78.06 nor 81.05. Thus, it was never overruled by operation of those rules and Ms. Miller's argument fails on that basis alone.

Second, even assuming Rothschild's first motion was somehow automatically overruled by Rules 78.06 or 81.05, Ms. Miller cannot now argue that event deprived the trial court of jurisdiction to consider the amended motion timely setting forth an

additional cause to set aside the default pursuant to Rule 74.05. The case relied on by Ms. Miller, *Munday v. Thielecke*, 483 S.W.2d 679 (Mo. App. 1972), did not deal with jurisdiction but rather "estoppel by judgment." *Id.* at 681-682. "Jurisdiction" is the court's authority to hear a particular type of issue. *Sexton v. Jenkins & Associates, Inc.*, 152 S.W.3d 270, 273 (Mo. banc 2005). Even if collateral estoppel or *res judicata* might bar a particular claim, the trial court still has jurisdiction to hear the case, and by failure to assert either doctrine before the trial court and preserve them in a point on appeal, a Plaintiff waives those claims. *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 532-534 (Mo. banc 2002). Here, Ms. Miller has waived any such claim she may have had. Her Points Relied On both before this Court and the court of appeals only allege jurisdiction was deficient, not that Rothschild's claim was barred by collateral estoppel or *res judicata.* A.S.B., p. 16; A.B., p. 14.

II.

RESPONSE TO POINT RELIED ON II OF APPELLANT'S SUPPLEMENTAL BRIEF.

Rothschild was legally entitled to have the default judgment set aside. As Miller admits by her failure to raise the issue in her supplemental brief, Rothschild has a meritorious defense. Thus, it fulfills the first phase of the two-part test for relief from a default judgment. A.S.B., p. 39-50; Rule 74.05, Mo. Rules of Court (stating that default judgment may be set aside upon showing of a "meritorious defense and for good cause"). Here, the facts clearly establish that there was good cause to set aside the default judgment.

A. Standard of Review

Under the applicable standard of review, the trial court correctly set aside the default judgment. As Ms. Miller admits, Missouri law provides that the trial court's decision to set aside a default judgment is reviewed for abuse of discretion. *Myers v. Pitney-Bowes, Inc.*, 914 S.W.2d 835, 838 (Mo. App. S.D. 1996); *Magee v. Magee*, 904 S.W.2d 514, 518 (Mo. App. W.D. 1995); A.S.B., p. 38. An abuse of discretion occurs only "when a trial court's ruling is so 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." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003). The discretion of the trial court to set aside a default judgment is broader that its discretion to refuse to do so. *Myers*, 914 S.W.2d at 838; A.S.B., p. 38. Significant "deference must be given to the determination of the trial judge

as to whether conduct in a particular case is excusable" and constitutes good cause. *Magee,* 904 S.W.2d at 518.

Ms. Miller claims the standard of review found in *Murphy v. Carron,* 536 S.W.2d 30 (Mo banc 1976), is applicable to this case if the Court rules under Point Relied On I that default judgment was set aside under Rothschild's Second Amended Motion. A.S.B., p. 38-39. The standard of review under *Murphy* is that the trial court's ruling should only be set aside if (1) "there is no substantial evidence to support it," (2) "it is against the weight of evidence," (3) "it erroneously declares the law" or (4)"it erroneously applies law." *Id.* at 32; A.S.B., p. 39. It is immaterial whether the abuse of discretion standard or the *Murphy* standard is used. Under either standard of review, the trial court correctly held that Rothschild showed good cause.

B. Good Cause Exists to Set Aside Default

The record clearly demonstrates that the default judgment against Rothschild was properly set aside. Under Missouri law, a default judgment must be set aside if the defendant: (1) demonstrates the possible existence of a meritorious defense, and (2) "shows good cause by proving that he or she did not recklessly or intentionally impede the judicial process." *Great Southern Savings and Loan Association v. Wilburn,* 887 S.W.2d 581, 583 (Mo. banc 1994). "Good cause includes mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05(d), Mo. Rules of Court. While good cause "eludes precise definition," it has a "remedial purpose and is applied with discretion to prevent manifest injustice." *Billingsley v. Ford*

Motor Company, 939 S.W.2d 493, 498 (Mo. App. S.D. 1997). Negligent conduct and good faith mistakes do not preclude good cause. *Id*.

Here, only one of the two parts of the test for setting aside a default judgment is at issue. Ms. Miller argues only that there was not good cause to set aside the default, waiving the issue of whether or not Rothschild has a meritorious defense. A.S.B., p. 39-49. Contrary to Ms. Miller's argument, the facts establish good cause. As noted above, good cause is defined by the court rules as any conduct that constitutes a "mistake," or that is not "intentionally or recklessly designed to impede the judicial process." Rule 74.05(d), Mo. Rules of Court.

Rothschild acted with diligence and clear respect for the legal process. The default was entered against Rothschild solely due to the error of its insurance agent. As soon as the suit was served on Rothschild, Ms. Leonard immediately forwarded the claim on to its insurance broker, Mr. McBride. Trial Exhibit E, Deposition of Ms. Leonard, p. 34-38. Her actions in doing so were entirely consistent with the usual practices of Rothschild and with what she had done in the past. Trial Exhibit E, Deposition of Ms. Leonard, p. 34-35. On all previous occasions, once a summons and petition were sent to Mr. McBride, he or his office forwarded them on to the appropriate insurance carrier without any further action from Rothschild. LF 28-29. Mr. McBride's office "screwed up" and made a "mistake" by failing to forward the summons and petition in this case to Rothschild's insurer, Zurich. Trial Exhibit F, Deposition of Mr. McBride, p. 78, 101.

This case is very similar to the one faced by the court of appeals in *Keltner v. Lawson*, 931 S.W.2d 477 (1996). In *Keltner*, the Defendant promptly forwarded the

summons and petition on to his automobile insurance carrier, AIG. *Id.* at 478. The paperwork relating to the claim was subsequently mishandled by AIG and placed in the basket of a staff member who was on leave due to a work-related injury. *Id.* at 478-479. The summons and petition were only discovered after it was too late to prevent the entry of default judgment. *Id.* The court ruled that the Defendant had "demonstrated good cause for having failed to timely plead." *Id.* at 481.

Mr. McBride clearly admits that he and his office "made a mistake here" by not turning the claim over to Zurich, who would have provided coverage and a defense. Trial Exhibit F, Deposition of Mr. McBride, p. 54, 101. Even assuming, contrary to what the trial court with good reason concluded, that Mr. McBride spoke with Ms. Leonard, the default was the result of a "miscommunication" and a mistake by McBride's office. Trial Exhibit F, Deposition of Mr. McBride, p. 94. Rothschild's policy with Zurich did not provide coverage just for one specific piece of property but rather was general policy that would have provided coverage for Ms. Miller's suit. Trial Exhibit F, Deposition of Mr. McBride, p. 14-15, 54.

The trial court's conclusion that Ms. Leonard and Mr. McBride did not discuss the claim after Ms. Leonard forwarded the papers to him is supported by the record. That conclusion also must be treated with great deference. As Judge Stith has noted, deference must be granted in a close case "to the determination of the trial judge as to whether the conduct in a particular case is excusable as not being reckless or intentional." *Magee*, 904 S.W.2d at 518; see also *Myers*, 914 S.W.2d at 839 ("Where reasonable doubt exists as to whether the conduct was intentionally designed or irresponsibly calculated to impede the

work of the courts, it should be resolved in favor of good faith," citing *Gibson v. Elley*, 778 S.W.2d 851, 855 (Mo. App. W.D. 1989)).

Here, the trial court specifically concluded that "no such conversation likely took place" between Ms. Leonard and Mr. McBride. LF 79. There are substantial reasons to support the court's conclusion. First, Ms. Leonard clearly stated that it would have been highly unusual for her to hear from Mr. McBride and to hear that there was no coverage, making it very likely she would have remembered the conversation had it actually occurred. Trial Exhibit E, Deposition of Ms. Leonard, p. 38, 43-44; LF 29. She does not remember ever talking with Mr. McBride about Ms. Miller's claim and, when asked about Mr. McBride's claim to the contrary, stated "I don't think he made that call." Trial Exhibit E, Deposition of Ms. Leonard, p. 43-44.

Second, Mr. McBride has no documentation to back up his claim of a call between him and Ms. Leonard, even though he has documentation for other telephone calls involving this matter made on the same or next day. LF 31; Trial Exhibit G, Deposition of Mr. McBride, p. 11-13. Mr. McBride has a motivation for misrepresenting the facts. As he stated during one of his depositions, his office erred in not turning the claim in to Zurich. Trial Exhibit F, Deposition of Mr. McBride, p. 78. As Mr. McBride likely knew already, he and his company had significant potential liability for their failure to properly handle the claim documents and turn the matter over to Zurich in a timely fashion.

Contrary to Ms. Miller's argument, the Court of Appeals, Western District's opinion in *McElroy v. Eagle Star Group* is not analogous to this case. 156 S.W.3d 392 (Mo. App. W.D. 2005); A.S.B, p. 48. In *McElroy*, the plaintiff's attorney informed the

defendant's registered agent of the claim almost six months prior to suit being filed, sent him numerous letters during the course of the action, tried to make contact with him by telephone, and sent a final letter via certified mail before the hearing on damages. *Id.* at 396-397. Here, the first Rothschild learned of the claim was when the summons and petition were served on it. Trial Exhibit E, Deposition of Ms. Leonard, p. 37. Neither Ms. Miller nor her attorneys attempted to contact Rothschild at any time. Additionally, Ms. Leonard had every reason, based on her prior experiences with Mr. McBride, to believe that the appropriate insurance carrier was taking care of the claim.

Even assuming, for the sake of argument only, that *McElroy* is somehow factually similar, the trial court's order setting aside the default should be affirmed. In *McElroy*, the trial court *did not* grant the motion to set aside the default. *Id.* at 398. Here, the trial court *did* grant Rothschild's motion to set aside. LF 78-82. A trial court's decision to set aside a default is given far more latitude than a decision not to do so. *Billingsley*, 939 S.W.2d at 498. Thus, even if all the facts in this case and *McElroy* are identical, which they are not, the trial court's decision to set aside the default should not be disturbed.

The worst that can be said about Rothschild's actions in the record before this Court is that its insurance broker or its employees made a mistake. A defendant making a mistake or even acting negligently does not prevent good cause for setting aside a default from existing. *Id.* Both the *Billingsley* case and *Continental Basketball Association v. Harrisburg Professional Sports, Inc.*, 947 S.W.2d 471 (Mo. App. E.D. 1997), illustrate this principle clearly. In *Billingsley*, lead counsel for defendant was notified of the suit and drafted a document telling an associate at his firm to prepare an answer. *Billingsley*,

939 S.W.2d at 496. Either the lead attorney failed to get a corrected version of the document to his secretary for revising and forwarding to the associate or the secretary mishandled it and failed to give it to the associate. *Id.* The court of appeals ruled that there was good cause to set aside the default even though "the ball was dropped" by someone in the attorney's office. *Id.* at 499.

Similarly, in *Continental Basketball Association,* the defendant had suits pending in three different courts at the same time involving the same issue and parties. 947 S.W.2d at 474. The defendant's attorneys "mistakenly believed that answers had been filed in the Missouri case" and the court of appeals ruled that their mistake constituted good cause. *Id.* Here, Rothschild either believed that Mr. McBride had forwarded the suit on to the proper insurance carrier or, at worst, there was a miscommunication between Mr. McBride and Ms. Leonard over who would find and contact the proper carrier. The mistakes made by here, by lay persons, are at least as excusable as those made by attorneys in *Billingsley* and *Continental Basketball Association.*

CONCLUSION

The trial court had jurisdiction, at all times after the filing of Rothschild's first motion, to set aside the default judgment. A motion to set aside a default is an independent action to which the ninety day time limits in Rules 78.06 and 81.05 are inapplicable. Even if Rothschild's first motion was somehow subject to the time limit, its second motion was not. In setting aside the default judgment, the trial court acted properly as there was good cause. Rothschild's default was due to an error by its insurance broker or, at worst, to a miscommunication between the broker and one of Rothschild's employees. The trial court's order should be: **AFFIRMED.**

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06. According to the word count function of Microsoft Word by which it was prepared, it contains 8,090 words, exclusive of cover, Certificate of Service, the Certification and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Substitute Brief of Defendant-Respondent ROTHSCHILD MANAGEMENT GROUP and one diskette were served by regular U.S. mail, Postage prepaid, to James Leonard, Devereaux Stokes Nolan Hernandez & Leonard, P.C., 133 S. 11th St., Suite 350, St. Louis, MO 63102, counsel for Plaintiff-Appellant, this _____ day of October, 2005.

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APPENDIX
TO RESPONDENT'S BRIEF

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