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OPINION FILED: March 23, 2021

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Thomas H. Newton,
Judge and Mark D. Pfeiffer, Judge

Gregory Schoenberg ("Schoenberg") appeals from the trial court's entry of judgment denying his Rule 74.05(d) motion to set aside a default judgment. Schoenberg argues that the trial court abused its discretion in denying his motion to set aside the default judgment because the motion set forth a good cause for failing to answer the petition. Schoenberg further argues that, because the trial court concluded that Timothy G. Vogel ("Vogel") failed to present sufficient evidence supporting a count that related to a violation of the Missouri Securities Act of 2003 against Schoenberg's co-

defendant, the trial court erred in entering the default judgment against Schoenberg on the same count. Finding no error, we affirm.

Factual and Procedural Background

On April 23, 2019, Vogel filed a petition ("Petition") against Cars-N-Kids, L.L.C. ("Cars-N-Kids"), Robert S. Steffen ("Steffen"), Birch, L.L.C. ("Birch"), Poplar, L.L.C. ("Poplar"), Schoenberg, and Robert B. Glarner, Jr. ("Glarner") (collectively "the Defendants") in the Circuit Court of Morgan County. The Petition set forth five causes of action arising out of Steffen's attempted sale of a one-half percent interest in Cars-N-Kids to Vogel for \$50,000 that allegedly took place on July 28, 2012: (1) breach of contract against Steffen; (2) fraudulent misrepresentation against Steffen and Cars-N-Kids; (3) violation of the Missouri Securities Act of 2003¹ ("Missouri Securities Act") against the Defendants; (4) in the alternative to Counts I, II, and III of the Petition, a request for a declaratory judgment against all Defendants pronouncing Vogel a member of Cars-N-Kids; and (5) in the alternative to Counts I and II of the Petition, a request for the trial court to order an accounting of Cars-N-Kids against the Defendants.

Schoenberg was personally served with a summons and the Petition on May 8, 2019, at 10890 Sunset Hills Plaza in St. Louis, Missouri. The summons warned that if Schoenberg did not respond to the petition within thirty days of service, "judgment by default may be taken against you for the relief demanded in the petition." Cars-N-Kids, Steffen, Birch, Poplar, and Glarner were also served in May 2019. Cars-N-Kids, Poplar,

¹Sections 409.1-101 to 409.7.703. All statutory references are to RSMo 2000 as amended through July 28, 2012.

Birch, and Glarner were represented by counsel and filed a joint answer, and Steffen filed a separate answer *pro se*. Schoenberg never filed an answer or any other responsive pleading.

Vogel's action against the Defendants continued throughout 2019. On December 4, 2019, Vogel filed a motion to dismiss his claims against Cars-N-Kids, Poplar, Birch, and Glarner with prejudice. Vogel's motion to dismiss expressly indicated that his claims against Steffen and Schoenberg remained pending.

A bench trial took place on January 9, 2020. Steffen appeared and represented himself. The trial court noted that "Schoenberg, though duly served, fail[ed] to appear." The trial court directed the parties "to submit any additional legal authorities for the court to consider within 20 days," after which the trial court would take the case under advisement.

The trial court entered its judgment on April 29, 2020 ("Judgment"). The Judgment found in favor of Vogel and against Steffen on Counts I and II. On Count III, the Judgment found in favor of Steffen and against Vogel, concluding that there was insufficient evidence to establish a violation of the Missouri Securities Act by Steffen. With respect to Schoenberg, the Judgment found that Schoenberg was in default, and entered a default judgment on Count III in Vogel's favor in the amount of \$25,000 plus interest at a rate of 8% per annum from July 28, 2012, plus attorney's fees in the amount of \$17,923.13. All other claims in the Petition were dismissed.

Schoenberg filed a motion to set aside the default judgment pursuant to Rule 74.05(d)² on May 29, 2020 ("Motion to Set Aside"). In the Motion to Set Aside, Schoenberg acknowledged that he was a 25 percent minority member of Cars-N-Kids from approximately April 27, 2011, to May 5, 2014, when he sold his 25 percent interest in the corporation to Poplar, the corporation's majority interest holder. The Motion to Set Aside asserted that Steffen was the other member of Cars-N-Kids, holding a 25 percent membership interest in the corporation. According to the Motion to Set Aside, Steffen sold portions of his minority interest in Cars-N-Kids at various times in 2012, and Schoenberg consented to those sales pursuant to the Cars-N-Kids operating agreement but received no consideration for his consent.

The Motion to Set Aside acknowledged that Schoenberg was served with a summons and the Petition on May 8, 2019, and spoke with Glarner about the suit. According to Schoenberg's affidavit, an exhibit attached to the Motion to Set Aside, Glarner told Schoenberg that he would "handle the claims" made against Schoenberg so that Schoenberg need not take further action because he was no longer a member of Cars-N-Kids. The Motion to Set Aside asserted that Schoenberg was unfamiliar with the law and did not understand the consequences of failing to respond to the Petition, and that he simply made a good faith mistake in relying on Glarner's representation that he would take care of Vogel's claims against Schoenberg. The Motion to Set Aside asserted that Schoenberg had several defenses against Vogel's claims and that, if the trial court granted the Motion to Set Aside, those defenses would prove meritorious.

²All rule references are to the Missouri Supreme Court Rules (2020) unless otherwise indicated.

The trial court held a hearing on the Motion to Set Aside on June 11, 2020. On that same date, the trial court denied the Motion to Set Aside by docket entry. A written judgment denying the Motion to Set Aside was entered on June 26, 2020 ("Rule 74.05(d) Judgment"). The Rule 74.05(d) Judgment concluded:

After considering the pleadings and the arguments of counsel, the Court denies Defendant Schoenberg's Motion to Set Aside. Defendant Schoenberg has failed to show that good cause exists for his failure to answer or otherwise participate in the case until over a year after he was served and a contested trial in the matter was heard. In deciding whether good cause has been established to set aside a default, a trial court is free to "disbelieve statements made by a moving party in its affidavits." Coble v. NCI Building Systems, Inc., 378 S.W.3d. 443, 449 (Mo. App. W.D. 2012).

Defendant Schoenberg has failed to carry his evidentiary burden to establish good cause to set aside the default judgment entered against him. As the lack of either a meritorious defense or good cause is fatal to a request to set aside a default, Defendant Schoenberg's Motion is denied.

Schoenberg appeals.

Analysis

Schoenberg presents two points on appeal.

Point One: Good Cause to Set Aside Default Judgment

Schoenberg's first point on appeal contests the Rule 74.05(d) Judgment denying his Motion to Set Aside, and argues that the trial court abused its discretion in refusing to find that he established good cause to set aside the default judgment. Schoenberg argues that the Motion to Set Aside "clearly set forth a good cause for why he failed to answer or participate in the action which was not intentionally or recklessly designed to impede the judicial process." [Appellant's Brief, p. 13]

Rule 74.05(d) provides that a default judgment may be set aside "[u]pon motion stating facts constituting a meritorious defense and for good cause shown," so long as the motion to set aside is filed within a reasonable time, not to exceed one year. Schoenberg, as the party seeking to set aside the default judgment, bore the burden to prove both the "meritorious defense" and "good cause" elements. *Paes v. Bear Commc'ns, LLC*, 568 S.W.3d 52, 58 (Mo. App. W.D. 2019). The failure to prove either element requires denial of a motion to set aside a default judgment.³ *Id.*

We review a trial court's decision to deny a Rule 74.05(d) motion to set aside a default judgment for abuse of discretion. *Irvin v. Palmer*, 580 S.W.3d 15, 23 (Mo. App. E.D. 2019). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful consideration." *Paes*, 568 S.W.3d at 58 (quoting *Saturn of Tiffany Springs v. McDaris*, 331 S.W.3d 704, 709 (Mo. App. W.D. 2011)). We have "traditionally afforded significant deference to the [trial] court's decision to set aside a default judgment because of the public policy favoring the resolution of cases on the merits and the distaste our system holds for default judgments." *Id.* (quoting *Saturn of Tiffany Springs*, 331 S.W.3d at 709). Thus, we are more likely to reverse a judgment denying a motion to set aside a default judgment than one granting relief. *Id.*

³Vogel concedes that Schoenberg's Motion to Set Aside was filed within a reasonable time and that the Motion to Set Aside included allegations sufficient to establish that Schoenberg had a meritorious defense to Count III in Vogel's Petition.

Rule 74.05(d) provides that "[g]ood cause' includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." We liberally interpret the phrase "to include good-faith mistakes, and even negligence, in failing to timely answer" in order to "prevent a manifest injustice or to avoid a threatened one." *Hanlon v. Legends Hosp., LLC*, 568 S.W.3d 528, 532 (Mo. App. E.D. 2019) (quoting *Jones v. Riley*, 560 S.W.3d 540, 544 (Mo. App. E.D. 2018)). Recklessness, which would not constitute good cause pursuant to Rule 74.05(d), "includes 'mak[ing] a conscious choice of [a] 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.'" *Paes*, 568 S.W.3d at 59 (quoting *Lee v. Lee*, 449 S.W.3d 383, 385 (Mo. App. W.D. 2014)). "Intentional indifference, meaning that an individual 'does not care about the consequences of his or her actions,' can [also] constitute recklessness." *Coble v. NCI Bldg. Sys., Inc.*, 378 S.W.3d 443, 448 (Mo. App. W.D. 2012) (quoting *Barsto Constr., Inc. v. Gladstone Senior Partners, L.P.*, 270 S.W.3d 440, 443 (Mo. App. W.D. 2008)). In other words, "[r]ecklessness involves a deliberate choice to risk the possibility of a default judgment." *Wilderman v. Drawbond*, 267 S.W.3d 772, 775 (Mo. App. S.D. 2008). Negligence, on the other hand, "occurs if a party's 'inadvertence, incompetence, unskillfulness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency.'" *Piva v. Piva*, 610 S.W.3d 395, 401 (Mo. App. E.D. 2020) (quoting *Dozier v. Dozier*, 222 S.W.3d 308, 313 (Mo. App. W.D. 2007)).

Here, the trial court concluded that Schoenberg failed to satisfy his burden to establish that good cause existed for failing to answer or otherwise participate in Vogel's suit against him for over a year after he was served with the summons and Petition. The Rule 74.05(d) Judgment indicated that the trial court found all or some of the assertions in Schoenberg's affidavit submitted in support of the Motion to Set Aside to be not credible.

Relevant to the issue of good cause, Schoenberg's affidavit stated that, when Vogel purchased a membership interest in Cars-N-Kids from Steffen in July 2012, Schoenberg held 25 percent membership in Cars-N-Kids and, as required by the Cars-N-Kids operating agreement, signed a resolution consenting to allow the transaction between Steffen and Vogel to take place. Schoenberg's affidavit provided that he received no consideration for his consent to the transaction, did not control Steffen in any way regarding the transaction, and had no knowledge of the details of the transaction. According to Schoenberg's affidavit, he sold his membership interest in Cars-N-Kids to Poplar, a company controlled by Glarner, on or about May 5, 2014. The affidavit acknowledged that Schoenberg was served with a summons and the Petition in the instant case on May 8, 2019. Schoenberg's affidavit continued:

22. Shortly after being served with the summons and petition in this case, I spoke with Robert B. Glarner who told me he would handle the claims made against me by [Vogel].

23. Robert B. Glarner told me I did not need to do anything further regarding this case because I was no longer a member of Cars-N-Kids, LLC.

24. Relying upon Robert B. Glarner's statements to me, I did nothing further regarding the summons and petition in this case.

25. I believed Robert B. Glarner would handle and take care of the claims made by Plaintiff against me.

26. I have never before been a defendant in a civil action.

27. I am not familiar with the Missouri rules of civil procedure.

28. I did not know the consequences of me failing to answer the summons and petition in this case.

29. I did not know my failure to answer the summons and petition would result in a default judgment against me.

In addition to Schoenberg's affidavit, the Motion to Set Aside attached three other exhibits for the trial court's consideration: a copy of the Judgment; a copy of the resolution consenting to the sale of 2 percent of Steffen's membership interest; and a copy of a deposition in which Vogel acknowledged that he bought a one-half percent interest in Cars-N-Kids from Steffen.

Schoenberg argues that his affidavit establishes that he did not act in a manner intentionally or recklessly designed to impede the judicial process, and that his failure to answer or otherwise respond to the Petition was "at most negligence." [Appellant's Brief, p. 21] Schoenberg asserts that any doubt about whether his actions were intentionally or recklessly designed to impede the judicial process should be resolved in favor of finding that Schoenberg relied in good faith on Glarner's assurance that he would take care of claims asserted against Schoenberg in the Petition.

Schoenberg's argument ignores, however, that the trial court, was free to disbelieve the assertions in his affidavit offered to establish "good cause" and plainly did

so. *Coble*, 378 S.W.3d at 449 (holding that trial court is "free to 'disbelieve statements made by a moving party in its affidavits'" (quoting *Beckmann v. Miceli Homes, Inc.*, 45 S.W.3d 533, 542 (Mo. App. E.D. 2001))).⁴ That means the trial court was free to disbelieve Schoenberg's self-serving assertion that he did not understand the consequences of failing to answer the Petition.

The trial court did not abuse its discretion in concluding that Schoenberg failed to establish good cause. The affidavit asserted that: Schoenberg had not been a member of Cars-N-Kids since May 2014; Schoenberg contacted Glarner after being served with the summons and the Petition in May 2019; Glarner told Schoenberg that he would take care of the suit; Schoenberg believed Glarner; Schoenberg, due to his inexperience with the judicial system and unfamiliarity with the Missouri Rules of Civil Procedure, did not understand the implications of failing to answer or otherwise respond to the Petition; and Schoenberg received the summons which warned Schoenberg:

You are summoned to appear before this court and to file your pleading to the petition, a copy of which is attached, and to serve a copy of your pleading upon the attorney for plaintiff/petitioner at the above address all within 30 days after receiving the summons, exclusive of the day of service. If you fail to file your pleading, judgment by default may be taken against you for the relief demanded in the petition.

⁴Schoenberg asserts that, unlike *Coble v. NCI Building Systems, Inc.*, 378 S.W.3d 443 (Mo. App. W.D. 2012), the trial court had no reasons to be skeptical of his showing of good cause. In *Coble*, we held that the trial court is free to disbelieve statements a party makes in an affidavit supporting a motion to set aside a default judgment. *Id.* at 449. There, in-house legal counsel for the defendant filed an affidavit that gave the trial court "specific reasons . . . to have been skeptical of [the defendant's] showing of good cause," particularly the vagueness of the affidavit as to the investigation the defendant undertook to locate the summons and petition. *Id.* Schoenberg claims that the instant case differs in that he "fully admits he received the summons and [the] Petition," and "[t]here is no ambiguity regarding what happened to the documents." [Appellant's Brief, p. 23] But what this argument overlooks is that *Coble* did not hold that a vague affidavit was the *only* reason a trial court could find an affidavit unpersuasive. As explained *supra*, Schoenberg's decision to consult with Glarner upon receipt of the Petition indicates that he did, in fact, appreciate the risks of not responding to the Petition so that it was not an abuse of discretion for the trial court to disbelieve that the statements in Schoenberg's affidavit as to his ignorance of the risks associated with the failure to respond to the Petition.

The trial court acted within its discretion by concluding that it was not merely negligent, and was instead reckless or indifferent, for Schoenberg: to receive a summons containing this warning; to understand the implications of the warning sufficiently to call a former business partner and fellow defendant in order to address the summons; to then elect to rely on the former business partner to protect his interests in the lawsuit notwithstanding the warning in the summons; and to undertake no subsequent follow up to ensure his interests had in fact been protected. Schoenberg did not make a mistake, or act inadvertently. He made a deliberate and reckless choice. *See Wilderman*, 267 S.W.3d at 775 ("Recklessness involves a deliberate choice to risk the possibility of a default judgment.").

The trial court did not abuse its discretion in concluding that Schoenberg failed to satisfy his burden to establish good cause to set aside the default judgment.⁵ The Rule 74.05(d) Judgment is affirmed.

Point One is denied.

⁵Schoenberg asserts that *Brungard v. Risky's, Inc.*, 240 S.W.3d 685 (Mo. banc 2007), demands that we conclude he acted negligently, not recklessly, in relying on Glarner's assurances that he would "take care" of the Petition for Schoenberg. We disagree. In *Brungard*, the plaintiff appealed from the trial court's decision to grant the defendant's motion to set aside the default judgment. *Id.* at 686. The trial court had before it an affidavit from the registered agent of a corporation that established the registered agent thought he faxed the summons and petition to the insurance agent for delivery to his insurance carrier so that he did not unintentionally ignore the summons. *Id.* Our Supreme Court affirmed, holding that the affidavit provided "an adequate basis to support a finding that he did not intentionally impede the judicial process," and citing case law in which parties "prove[d] by sworn affidavit that [their] conduct was based on a mistake or conduct not intentionally or recklessly designed to impede the judicial process." *Id.* at 688. *Brungard* did not hold that the trial court **must** rely on a defendant's affidavit in a motion to set aside a default judgment. To hold so would have contradicted our standard of review, which provides the trial court has discretion in ruling on a motion to set aside a default judgment, and we review that exercise of discretion for abuse.

Point Two: Sufficiency of Evidence to Support the Default Judgment

In his second point on appeal, Schoenberg argues that the trial court erred in entering a default judgment against him because Rule 74.05(a) required Vogel to prove damages or his entitlement to other relief before a default judgment may be entered. Schoenberg claims that the evidence Vogel presented at trial was insufficient to establish that Schoenberg violated the Missouri Securities Act since the Judgment found in favor of Steffen on the same claim, and "[Schoenberg] had no part in such [a] transaction between Steffen and Vogel."⁶ [Appellant's Brief, p. 27]

Schoenberg's effort to construe Rule 74.05(a) to permit a challenge to the sufficiency of the evidence to support a liability determination in a default judgment is without support. Rule 74.05(a) provides that following a party's failure to plead or defend a claim for affirmative relief as required, "upon proof of damages or entitlement to other relief, a judgment may be entered against the defaulting party." The quoted phrase has never been construed by any case in Missouri to permit a party to attack the sufficiency of the evidence to support a liability determination in a default judgment. Instead, Rule 74.05(a) is consistent with the concept that the entry of a default judgment consists of two parts. "The first is the entry of an interlocutory judgment of liability. The basis for the interlocutory judgment is the defendant's admission of liability by failing to

⁶Schoenberg has not argued that the Judgment is void pursuant to Rule 74.06(b)(4), which permits a party to secure relief from a final judgment, including a default judgment, even years after its entry if "the judgment is void." "A judgment is void under Rule 74.06(b)(4) only if the trial court lacked subject matter jurisdiction, lacked personal jurisdiction over the defendant, or entered the judgment in a manner inconsistent with due process." *New LLC v. Bauer*, 586 S.W.3d 889, 895 (Mo. App. W.D. 2019).

plead." 16 MARTHA CHAREPOO, MISSOURI PRACTICE: CIVIL RULES PRACTICE section 74.05(a):1 (3d ed. 2016). "[T]he second part is the assessment of damages." *Id.*

The first part of this concept is addressed by Rule 74.05(b), which provides for the entry of an interlocutory order of default on the issue of liability, with damages then to be decided by either the court or a jury. Rule 74.05(a) contemplates the entry of a **final** default judgment, subject to proof of "damages or entitlement to other relief." The phrase "or entitlement to other relief" contemplates damages other than monetary relief, including, for example, injunctive relief. 16 CHAREPOO, MISSOURI PRACTICE: CIVIL RULES PRACTICE at section 74.05(a):1 n.4 ("The provision of [Rule 74.05(a)] concerning proof of entitlement to other relief is applicable when relief such as injunctive relief is sought."); *see also* Rule 74.05(c) ("A default judgment may include an award of damages, **other relief**, or both.") (emphasis added). Though in concept, a final default judgment anticipates two steps, Rule 74.05(a) makes clear that an interlocutory order of default (addressing liability only) is not required. Liability and the assessment of damages can be permissibly resolved in a single hearing, as occurred in this case. *See, e.g., Robson v. Willers*, 784 S.W.2d 893, 896 (Mo. App. W.D. 1990). "But, it is only 'upon proof of damages or entitlement to other relief' that a final judgment may properly be entered." 16 CHAREPOO, MISSOURI PRACTICE: CIVIL RULES PRACTICE at section 74.05(a):1 (quoting Rule 74.05(a)); *see also Ct. of 5 Gardens Condo. Ass'n v. 10330 Old Olive, LLC*, 326 S.W.3d 834, 838 (Mo. App. E.D. 2010) ("Although a defaulting defendant loses the right to contest a determination of liability, the defendant is entitled to

have the court hear evidence regarding damages and to base its determination on the evidence adduced.").

Proof of damages (as opposed to liability) is required as a condition of entering a default judgment because damages awarded on default cannot exceed that which has been demanded in the pleading seeking affirmative relief. Section 511.160; *Ct. of 5 Gardens Condo. Ass'n*, 326 S.W.3d at 838 ("Because a judgment is by default does not excuse the legal requirement that 'probative evidence' sustain a damage award for the adjudication of an unliquidated claim for damages."). This prevents a party seeking affirmative relief from taking advantage of another party, even one who is in default. See *La Presto v. La Presto*, 308 S.W.2d 724, 728 (Mo. 1957). In theory, a party in default is deemed "willing to have the plaintiff granted the relief his petition asked, but no intendment can be indulged that he is willing for other relief to be granted." *White v. McFarland*, 128 S.W. 23, 27 (Mo. App. 1910).

Schoenberg does not challenge the damages assessed in the default judgment. Rule 74.05(a) does not authorize him to contest liability, which was admitted when he defaulted. His reliance on *Agnello v. Walker*, 306 S.W.3d 666 (Mo. App. W.D. 2010), for a contrary proposition is unavailing, as the sufficiency of the evidence issues in that case all involved the categories or amounts of damages awarded in a default judgment. *Id.* at 675-76 ("The default judgment was entered after the trial court heard evidence on Agnello's claims **of damages** and, thus, is a court-tried case subject to review under the standard announced in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (emphasis added)).

Point Two is denied.

Motion for Attorney's Fees

Pursuant to Local Rule 29, Vogel has filed a motion for attorney's fees, which was taken with the case. Vogel's motion claims that he is entitled to attorney's fees pursuant to section 409.5-509(b)(1), and seeks an award of attorney's fees in the amount of \$10,191.15. The motion for attorney's fees indicates that those fees were incurred from January 9, 2020, the date of the bench trial, through the drafting of Vogel's respondent's brief and the motion for attorney's fees on appeal. In other words, Vogel seeks to recover attorney's fees for the representation he received in obtaining the default judgment, in responding to Schoenberg's Motion to Set Aside, and in responding to Schoenberg's appeal from the Rule 74.05(d) Judgment, including the preparation of the motion for attorney's fees.

"In awarding attorney's fees, we follow the 'American Rule,' which provides that 'orders requiring one party to pay another party's attorney's fees or other expenses ordinarily are not permitted unless the parties' contract or a statute authorizes the court to make such an award.'" *Darks v. Jackson Cnty.*, 601 S.W.3d 247, 261 (Mo. App. W.D. 2020) (quoting *Birdsong v. Children's Div., Mo. Dep't of Soc. Servs.*, 461 S.W.3d 454, 459 (Mo. App. W.D. 2015)). Section 409.5-509(b)(1) allows the purchaser of a security that was sold in violation of section 409.3-301 or by means of an untrue statement of a material fact or omission of a material fact to "maintain an action to recover the consideration paid for the security, less the amount of any income received on the

security, and interest at a rate of eight percent per year from the date of the purchase, costs, and reasonable attorneys' fees determined by the court."

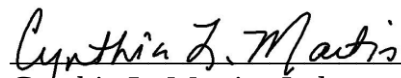
The trial court has already awarded Vogel \$17,923.13 in attorney's fees in the Judgment, which included the default judgment on Vogel's claim of a violation of the Missouri Securities Act against Schoenberg. According to Vogel's motion for attorney's fees, that award did not include attorney's fees incurred for the day of trial and drafting the post-trial motion as directed by the trial court, and Vogel asks us to enter an award for those attorney's fees incurred in securing the default judgment. This court is not the correct forum for that request. These attorney's fees were incurred in connection with securing the default judgment against Schoenberg and should have been sought from the trial court as part of that action, not as part of the appeal from the Rule 74.05(d) Judgment.

Rule 74.05(d) is clear that a motion to set aside a default judgment "is an independent action and not an authorized after-trial motion." In other words, the Rule 74.05(d) Judgment is separate from the Judgment which included the default judgment entered against Schoenberg. As such, there must be an exception to the American Rule that would authorize us to award Vogel attorney's fees incurred in connection with responding to Schoenberg's Motion to Set Aside and responding to Schoenberg's appeal from the Rule 74.05(d) Judgment, including preparing the motion for attorney's fees. The only authority supporting an award of attorney's fees that Vogel cites in his motion for attorney's fees is section 409.5-509(b)(1). Vogel cites no authority for his position that he is entitled to attorney's fees for the representation associated with responding to

Schoenberg's Motion to Set Aside, an action independent from the default judgment, and Schoenberg's appeal therefrom. Absent statutory authorization or a contractual agreement providing for attorney's fees, we must conclude that the American Rule applies so that Vogel bears the expense of the attorney's fees he incurred in connection with responding to Schoenberg's Motion to Set Aside and Schoenberg's appeal from the Rule 74.05(d) Judgment, including preparation of the motion for attorney's fees filed in this court pursuant to Local Rule 29. *See Robinson v. Langebach*, 599 S.W.3d 167, 188 (Mo. banc 2020). Vogel's motion for attorney's fees is denied.

Conclusion

The Rule 74.05(d) Judgment is affirmed.


Cynthia L. Martin, Judge

All concur