Missouri Law Review

Volume 50
Issue 4 *Fall 1985*

Article 7

Fall 1985

Default Judgments in Missouri

Nanette K. Laughrey

DEFAULT JUDGMENTS IN MISSOURI

NANETTE K. LAUGHREY*

I. INTRODUCTION

Fifty years ago, a group of energetic professors and students began to publish the Missouri Law Review. At approximately the same time, a move was underfoot to modernize the rules of practice and procedure that governed the administration of the courts in Missouri.[1] At that time, the legislature and not the supreme court promulgated these rules of procedure. The system was unsatisfactory because the legislature lacked the expertise and the flexibility to develop procedural rules as they were needed by the courts. Furthermore, the

* Associate Professor of Law, University of Missouri-Columbia, B.A. 1967, UCLA; J.D. 1975, University of Missouri-Columbia School of Law. The author would like to thank Shaun Baskett of the Class of 1986 for her help in the preparation of this article. The research for this article was supported by a grant from the University of Missouri Law School Foundation.

1. In 1939 a bill was introduced in the legislature to give rulemaking authority to the Missouri Supreme Court. It was defeated. That same year, the legislature invited the supreme court to consider how the rules of the courts should be changed. Pursuant to that invitation the court appointed a committee to study the issue and submit a proposal. Carr, *The Modernized Civil Code of Missouri*, 9 MO. L. REV. 1 (1944); Atkinson, *Missouri's New Civil Procedure: A Critique of the Process of Procedural Improvement*, 9 MO. L. REV. 47, 48 (1944).

rules of procedure were sometimes interspersed throughout the revised statutes making them difficult to locate. The administration of the courts was further complicated by an array of common law procedural devices that could be discovered only by reading prior case law.[2]

Advocates for reform argued that the supreme court, not the legislature, should promulgate a unified code of civil procedure. The concept of a single set of procedural rules was not a new idea even in 1936 when the first edition of the Missouri Law Review was published. In 1916 Professor Manley O. Hudson had encouraged the Missouri Supreme Court to assume responsibility for modernizing the procedural rules of the state.[3] Twenty years later in the first volume of the Missouri Law Review, the call for reform was again raised by Professor Carl Wheaton.[4] Eight years thereafter, in Volume 9 of the Missouri Law Review, Professor Atkinson advocated a constitutional amendment which would specifically authorize the supreme court to enact rules of procedure.[5] It was not until 1960, however, that the Missouri Supreme Court finally adopted the Missouri Rules of Civil Procedure.[6]

Over the years, the rules of the supreme court have become more comprehensive, better organized, and more easily understood. It is fitting, however, on this fiftieth anniversary of the Missouri Law Review to consider ways in which they can be improved. While I cannot purport to fill the shoes of my distinguished predecessors, Professors Hudson, Wheaton, and Atkinson, it is in memory of their efforts to create a single set of modern procedural rules that this article is written.

The purpose of the article is to suggest ways to improve the rules that govern default judgments. The topic is prompted by the recent case of *Barney v. Suggs*,[7] in which a $300,000 default judgment was entered against a dentist for malpractice. The default occurred after Dr. Suggs did not file a timely answer. There was evidence in the record that the answer was not filed because the summons was left with someone at the doctor's office who did not give it to Dr. Suggs.[8] When Dr. Suggs learned of the default, he filed an application to appeal out of time and that application was granted. Not wanting to leave a stone unturned, Dr. Suggs also requested the trial court to set the judgment aside pursuant to its equitable power to vacate judgments or by a writ of error coram nobis. The trial court refused both requests and the de-

2. *See* Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court*, 13 UNIVERSITY OF MO. BULLETIN 3, 4-10 (1916).

3. *Id.*

4. Wheaton, *Courts and the Rule-making Powers*, 1 MO. L. REV. 261 (1936).

5. Atkinson, *supra* note 1, at 99-101.

6. For a short discussion of the history of the Missouri Rules of Civil Procedure see 15 C. WHEATON, MISSOURI PRACTICE, § 41.02-1 at 6-8 (1976).

7. 688 S.W.2d 356 (Mo. 1985) (en banc).

8. *Id.* at 365. The sherrif's return, however, showed that Dr. Suggs was personally served. Brief for the Respondent Paula Barney at 11, Barney v. Suggs, 688 S.W.2d 356 (Mo. 1985) (en banc).

fendant filed a timely appeal. The appeal from the default and the appeal from the trial court's refusal to set the default aside were consolidated.

The supreme court first held that the default judgment could not be appealed because a timely motion to vacate had not been filed in the trial court. To be timely this motion had to be filed within thirty days after judgment.[9] Dr. Suggs, however, did not even learn of the default until after this thirty day period had passed. Unlike other litigants, a party in default is not notified that a judgment has been entered in his absence.[10] The supreme court also affirmed the trial court's decision denying equitable relief and the writ of error coram nobis. The supreme court noted that the trial court had no jurisdiction to grant these requests because the trial court lost jurisdiction as soon as the first appeal was filed. This was so even though the court of appeals lacked jurisdiction to hear the appeal because no timely motion to vacate had been filed.[11]

The case of *Barney v. Suggs* brings into focus some of the problems that default judgments have caused the Missouri court system. If the courts are too lenient with the party in default, the rules of procedure will not be complied

---

9. MO. SUP. CT. R. 75.01; Davidson v. Commerce Bank of Mexico, N.A., 667 S.W.2d 477, 478 (Mo. App., E.D. 1984). In the *Suggs* case it was alleged that the plaintiff's attorney intentionally waited until after the thirty days had run before attempting to execute on the default judgment. Brief for the Appellant Dr. Suggs at 6. The plaintiff's attorney denied the allegation. *See* Reply brief of the Appellant Dr. Suggs at 7, *Suggs*.

10. MO. SUP. CT. R. 74.78 requires the court to send notice of judgment to all parties who were not present when the judgment was entered except those parties who are in "default for failure to appear." It is somewhat unclear whether this rule requires notice to be given to parties who are in default for failure to file no answer. The appellate cases have held that a party who fails to appear for trial and is thereby in default is not entitled to Rule 74.78 notice. Weber v. Hoesch, 603 S.W.2d 61 (Mo. App., E.D. 1985); Human Dev. Corp. v. Wefel, 527 S.W.2d 652, 656 (Mo. App., St. L. 1975). None of those cases, however, involved a default for failure to answer.

Arguably, Rule 74.78 should be interpreted to require notice of final judgment if the party is in default for failure to file an answer. The appellate courts have consistently drawn a distinction between a default for failure to answer and a default for failure to appear. *E.g.*, Weber v. Hoesch, 603 S.W.2d at 61. Rule 74.78 only exempts the notice requirement for those defaults that occur for failure to appear. In light of the historical difference between the two kinds of defaults why would the supreme court refer to one if they intended to include both? In MO. SUP. CT. R. 43.01 the court requires notice to be given to all parties except those in "default," but Rule 74.78 exempts those who are in "default for failure to appear." If the court was not intending to make a distinction between the two kinds of defaults, why would they choose different words to describe the same thing? Finally, it is not logical to conclude that MO. SUP. CT. R. 43.01 resolves this problem by specifically stating that a party in default is entitled to no notice. Rule 43.01 could not have been intended to require notice of the entry of judgment because all of Rule 74.78 would then be superfluous. While there is an argument that Rule 74.78 requires notice be given to the party in default for failure to answer, it is expected that Rule 74.78 will be strictly construed to prevent that result.

11. Barney v. Suggs, 688 S.W.2d at 361.

with and litigation will become increasingly inefficient.[12] Furthermore, a primary goal of the judicial system is finality. Litigation must end if the public is to have confidence in the court's ability to resolve disputes. If judgments are too easily vacated, then the public will not be able to rely on the court's decisions to formulate a future course of conduct.[13] On the other hand, a primary goal of the judicial system is to seek the truth and to do justice between the parties.[14] To promote this goal a case must be decided on the merits; procedural "niceties" should not pose insurmountable barriers. These competing goals of efficiency, finality, and justice must be carefully balanced to ensure the public's confidence in the court system.

It is the thesis of this article that the Missouri courts have not adequately balanced these competing interests in the context of default judgments. *Barney v. Suggs* is just one case in a long series of decisions which demonstrate that the Missouri courts have overemphasized the importance of efficiency and finality and have demonstrated an increasing disregard for the importance of the judicial system's mission to seek the truth. Our present treatment of default judgments has also produced unnecessary confusion for lawyers and the courts alike.

II. DEFINING A DEFAULT JUDGMENT

When a party does not file a responsive pleading that is required by the rules, the court can enter a default judgment against him.[15] A true default judgment can only occur in this manner. While the courts frequently use the term "default judgment" to describe a judgment that is obtained after a party does not appear for trial or when the pleadings of a party have been stricken by the court as punishment for refusing to comply with a discovery order,[16] these are not true default judgments. Rather the courts presume in these cases that the party has failed to appear or respond to the court's order because the evidence would be adverse to him and in favor of his opponent. The courts, therefore, conclude that these cases are determined on the merits and not by

---

12 *Id.* at 362 (Welliver, J., dissenting).

13. Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule,* 30 HASTINGS L.J. 41, 69 (1978).

14. Moore & Rogers, *Federal Relief from Civil Judgments,* 55 YALE L.J. 623 (1946); Comment, *Relief from Default Judgments Under Rule 60(b)—A Study of Federal Case Law,* 49 FORDHAM L. REV. 956, 957-58 (1981).

15. MO. SUP. CT. R. 74.045; Hayes v. Hayes, 677 S.W.2d 933, 934 (Mo. App., S.D. 1984); *In Re* Marriage of Dickey, 553 S.W.2d 538, 539 (Mo. App., K.C. 1977); State *ex rel.* Jones v. Reagan, 382 S.W.2d 426, 430 (Mo. App., St. L. 1964). While MO. SUP. CT. R. 74.045 states that a default can be entered against any party that has not filed a responsive pleading, most defaults occur because the defendant has not filed a timely answer.

16. *See, e.g.,* Davidson v. Commerce Bank of Mexico, 667 S.W.2d at 477-78; Murray v. Sanders, 667 S.W.2d 426, 429 (Mo. App., W.D. 1984); Groves v. Hall, 628 S.W.2d 420, 421 (Mo. App., W.D. 1982); Caldwell Paint Mfg. Co. v. Lebeau, 591 S.W.2d 1, 5 (Mo. App., E.D. 1979).

default.[17]

The distinction is not merely a matter of semantics. A default judgment cannot be directly appealed. A defendant must file a motion to set aside the judgment and then appeal from the court's ruling on that motion.[18] In contrast, a judgment that occurs because a party fails to appear at trial can be appealed directly, even if a motion to set aside has not been filed.[19] Similarly, if a defendant's pleadings have been stricken for refusing to follow a direct order of the court, he is still entitled to notice that a final judgment has been entered against him.[20] However, if the defendant does not file a timely answer, he receives no further notice from the court.[21] This article will focus primarily on those defaults that occur because a party has failed to file a required pleading within the time permitted by the rules.

III. Obtaining a Default Judgment

Missouri Supreme Court Rule 74 provides that a default judgment is rendered in a two-step process. First, the court is authorized to enter an interlocutory judgment by default against a party who has failed to respond to a pleading within the time prescribed by rule.[22] This interlocutory judgment is necessary to prevent the defaulting party from filing a responsive pleading.[23] When the interlocutory order is timely, the defendant will be precluded from filing an answer or contesting liability in any other manner.[24] The plaintiff's claim is deemed to be conclusively established.[25] In the absence of an interloc-

17. Jewell v. Jewell, 484 S.W.2d 668, 672 (Mo. App., K.C. 1972); Hamm v. Hamm, 437 S.W.2d 449, 452 (Mo. App., Spr. 1969).

18. Barney v. Suggs, 688 S.W.2d at 358.

19. Hayes v. Hayes, 677 S.W.2d 933, 935 (Mo. App., S.D. 1984) (and cases cited therein).

20. Hammons v. Hammons, 680 S.W.2d 409, 410 (Mo. App., E.D. 1984).

21. *See supra* note 10 and sources cited therein.

22. Mo. Sup. Ct. R. 74.045.

23. Sumpter v. J.E. Sieben Constr. Co., 492 S.W.2d 150, 154 (Mo. App., K.C. 1973); Cornoyer v. Oppermann Drug Co., 341 Mo. App. 637, 638, 56 S.W.2d 612, 613 (St. L. 1933).

24. The importance of the interlocutory order of default has been demonstrated in the recent case of State *ex rel.* Landmark KCI Bank v. Stuckey, 661 S.W.2d 58 (Mo. App., W.D. 1983). The court of appeals set aside the final default judgment because there was insufficient evidence in the record to support the award of damages. In remanding the case to the trial court, the Western District held that the defendant would be entitled to a new hearing only on the issue of damages. The defendant was not entitled to contest his liability because the plaintiff had obtained an interlocutory order of default and the appeals court was unwilling to set it aside. Only if the interlocutory order of default had been set aside could the defendant have contested the merits of the plaintiffs' claim as well as the damage issue. *See also* Cooper v. Anschutz Uranium Corp., 625 S.W.2d 165, 171 (Mo. App., E.D. 1981).

25. If there is a specific statute that requires proof of the claim to the court, then an evidentiary hearing is required to establish the defendant's liability to the plaintiff. This would be a rare occurrence. Sumpter v. J.E. Sieben Constr. Co., 492

utory order of default the trial court has the discretion to permit the defendant to file his answer out of time.[26] If this occurs, the plaintiff loses the right to take a default.[27] Furthermore, an untimely answer filed without the court's permission will prevent the taking of a default judgment unless the plaintiff first moves to strike the untimely answer.[28] In contrast, once the interlocutory order is entered, the defendant cannot file an answer until the order of default is set aside.[29] An answer filed after the interlocutory order of default has been granted is a nullity.[30]

The interlocutory judgment, however, is not a final judgment from which appeal or execution may follow.[31] To obtain a final "judgment by default" the court must next assess the damages that the complainant is entitled to.[32] If the amount of the damages are ascertainable from a written instrument, the court is directed to rely upon that written instrument to assess damages.[33] In all other instances, there must be a hearing at which the party seeking relief is required to present sufficient proof to justify the court's final decree.[34] While the interlocutory judgment precludes the defendant from contesting his liability at this hearing, he may still attempt to mitigate damages or show that

---

S.W.2d at 155.

26. Mo. Sup. Ct. R. 44.01(b)(1); Jones v. First Union Bancorporation, 646 S.W.2d 412 (Mo. App., W.D. 1983). Mo. Sup. Ct. R. 44.01(b) provides that leave to file out of time should be granted only if the defendant can establish that his tardiness is the result of excusable neglect. In this context, excusable neglect means: "The course of action taken by a reasonably prudent person under the same or similar circumstances." 15 C. Wheaton, Missouri Practice § 44.01-02 at 36-38 (1976).

27. *See* G.H. Kursar, D.O., Inc. v. Fleischer, 602 S.W.2d 870 (Mo. App., E.D. 1980). In Kaiser v. Pearl, 670 S.W.2d 915 (Mo. App., E.D. 1984), the Eastern District Court of Appeals held that a plaintiff could even waive his right to require the defendant to file an answer. In that case, the plaintiff did not request the interlocutory order of default until the day of trial. By proceeding with discovery, the plaintiff waived her right to have the defendant file an answer and was not entitled to a default.

28. Trader's Bank of Kansas City v. Cherokee Inv. Co., 642 S.W.2d 122 (Mo. App., W.D. 1982). *But compare* Great Western Trading Co. v. Mercantile Trust Co., 661 S.W.2d 40, 44 (Mo. App., E.D. 1983).

29. *See* Mo. Sup. Ct. R. 74.05 for the proper procedure for setting aside an interlocutory order of default.

30. Courtin v. McGraw Constr. Co., 639 S.W.2d 286, 287 (Mo. App., E.D. 1982).

31. State *ex rel.* Aubuchon v. Jones, 389 S.W.2d 854, 859-60 (Mo. App., St. L. 1965); State *ex rel.* Eichorn v. Luten, 561 S.W.2d 435, 436 (Mo. App., St. L. 1978); Mo. Sup. Ct. R. 74.09, 74.10.

32. Smith v. Sayles, 637 S.W.2d 714, 717-18 (Mo. App., W.D. 1982). The trial court is authorized to enter an interlocutory order of default and to assess damages at the same time. The plaintiff does not need to make two appearances to secure a final judgment. Young v. Smith, 648 S.W.2d 916, 918 (Mo. App., S.D. 1983); Fawkes v. National Refining Co., 341 Mo. 630, 633, 108 S.W.2d 7, 10 (1937).

33. Mo. Sup. Ct. R. 74.09.

34. Mo. Sup. Ct. R. 74.10; O'Connor v. Quiktrip Corp., 671 S.W.2d 17, 19 (Mo. App., W.D. 1984).

plaintiff has suffered no damages at all.[35] Both the plaintiff and defendant are entitled to present their evidence on this issue to a jury.[36]

As a practical matter, the defendant who is in default will neither request a trial by jury nor even attend the hearing on damages. This is because he is unlikely to have any notice that a hearing has been scheduled. Missouri Supreme Court Rule 43.01 specifically provides that a party in default is not entitled to receive notice of subsequent actions in the case.[37] In the absence of a local rule that requires notice to a party in default,[38] or a courtesy call by opposing counsel, the defendant will not know that the damage issue has been scheduled for hearing.

IV. Setting Aside a Default Judgment

Once the defaulting party discovers that a final judgment has been entered against him, he is faced with the task of trying to convince a court to set the judgment aside. In Missouri, there are six procedural devices that can be used to alter or set aside a final judgment by default.[39] They are: (1) a separate suit in equity,[40] (2) a nunc pro tunc order,[41] (3) a petition for review pursuant to Supreme Court Rule 74.12-74.17,[42] (4) a motion in the nature of

---

35. Romanus v. American Triad Land Co., 675 S.W.2d 122, 126 (Mo. App., W.D. 1984).

36. State *ex rel.* Landmark KCI Bank v. Stuckey, 661 S.W.2d at 61. The right to have a jury assess damages after default was derived from the common law practice of calling a jury by a writ of inquiry to assess damages where the defendant failed to appear. Sumpter v. J.E. Sieben Constr. Co., 492 S.W.2d at 155.

37. *See also* Courtin v. McGraw Constr. Co., 639 S.W.2d at 288; Harriman v. Household Fin. Corp., 608 S.W.2d 117, 118 (Mo. App., S.D. 1980). Supreme Court Rule 43.01 does require the court to send notice to a party in default if an amended pleading is filed that changes the prayer for relief. This is because a default judgment can be no larger than the original prayer for relief of which the defendant had notice. O'Connor v. Quiktrip Corp., 671 S.W.2d at 19; Rubbelke v. Aebli, 340 S.W.2d 747, 752 (Mo. 1960).

38. *But cf.* Korn v. Ray, 434 S.W.2d 798, 806 (Mo. App., St. L. 1968) (local rule requiring notice to a party in default was invalid because it conflicted with Mo. Sup. Ct. R. 43.01(a) which does not require notice).

39. Citizens Bank & Trust v. Mitchell, 652 S.W.2d 202, 204 (Mo. App., W.D. 1983); Diekmann v. Associates Discount Corp., 410 S.W.2d 695, 700 (Mo. App., St. L. 1966). These remedies, except for Supreme Court Rule 74.12, are equally available to set aside or modify a default or non-default judgment. These remedies are discussed in greater detail in Comment, *Procedure—Setting Aside Final Judgments in Missouri*, 28 Mo. L. Rev. 281 (1963). Please refer to this excellent article for cases decided prior to 1963.

40. Human Dev. Corp. v. Wefel, 527 S.W.2d 652 (Mo. App., St. L. 1975).

41. A nunc pro tunc order is not used to set aside a default judgment. It can only be used to correct the judgment to accurately reflect what the judge ordered. For a discussion of the nunc pro tunc order, *see* Comment, *supra* note 39, at 282-83.

42. Osage Inv. Co. v. Sigrist, 298 Mo. 139, 250 S.W. 39 (1923); Jackson v. Wheeler, 567 S.W.2d 363 (Mo. App., St. L. 1978).

a writ of error coram nobis,[43] (5) a motion to set aside for irregularity,[44] and (6) a motion to set aside for fraud.[45]

If the defendant learns of the default before the judgment is final, there are two additional ways to have the default set aside. Missouri Supreme Court Rule 74.045 provides that an "interlocutory judgment on default" can be set aside for good cause at any time before damages are assessed or final judgment is entered.[46] Once damages are assessed, this remedy is no longer available.[47] The defendant would then have to rely on Missouri Supreme Court Rule 75.01 to set the judgment aside. Missouri Supreme Court Rule 75.01 provides that for thirty days after a judgment is entered, the trial court has the right to vacate the judgment for good cause.[48] While this arsenal may seem plentiful, a closer look reveals that it is very difficult to set aside a default judgment in Missouri.

A. *Petition for Review Pursuant to Missouri Supreme Court Rule 74.12 to 74.17*

Missouri Supreme Court Rule 74.12 to 74.17 provides that a defendant who is served by publication or some other form of constructive service, has three years to set the judgment aside.[49] His petition for review must be verified and must demonstrate good cause for vacating the judgment.[50] To show good cause he need only prove that (1) he was not personally served, (2) he did not file a responsive pleading or in any other way make an appearance, and (3) he has a meritorious defense.[51] The courts have held that once these prerequisites are shown, the trial court must set aside the default judgment. It is not a matter of discretion.[52]

The courts have very strictly limited this remedy to cases where the de-

---

43. *In re* Marriage of Benz, 669 S.W.2d 274 (Mo. App., E.D. 1984).

44. ABC Fireproof Warehouse Co. v. Clemans, 658 S.W.2d 28 (Mo. 1983) (en banc).

45. Lincoln Steel v. Mid-Continent Nat'l Bank, 646 S.W.2d 809 (Mo. App., W.D. 1982).

46. O'Connell v. Dockery, 102 S.W.2d 748 (Mo. App., St. L. 1937); Lancaster v. Simmons, 621 S.W.2d 935 (Mo. App., W.D. 1981).

47. See *infra* text accompanying notes 127-28.

48. Arthur v. Evangelical Deaconess Soc'y, 615 S.W.2d 438, 441 (Mo. App., E.D. 1981).

49. Young v. Smith, 648 S.W.2d at 918; Zbryk v. B.F. Goodrich Co., 344 S.W.2d 138, 140 (Mo. App., K.C. 1961) (applying Mo. Rev. Stat. § 511.170 and § 511.200 (1959), predecessor to current Rules 74.12 and 74.17). This rule cannot be used to attack a dissolution order. Godsy v. Godsy, 565 S.W.2d 726, 733 (Mo. App., K.C. 1978). It is can be used, however, to attack an order for child support, maintenance, or child custody. *In re* Marriage of Benz, 669 S.W.2d at 277 n.1.

50. Osage Inv. Co. v. Sigrist, 298 Mo. at 145, 250 S.W. at 40-41.

51. Mo. Sup. Ct. R. 74.12-.16; Jackson v. Wheeler, 567 S.W.2d at 369.

52. Jackson v. Wheeler, 567 S.W.2d at 369; Dillbeck v. Johnson, 344 Mo. 845, 129 S.W.2d 885 (1939).

fendant is served by publication.[53] The rule cannot be used to set aside a judgment on the grounds that the defendant never received actual notice of the suit because the sheriff's return showing personal service is false.[54] Nor can it be used to set aside a default because the summons was left at the defendant's home or office, and no one called it to his attention.[55] Furthermore, even if the defendant has been served by publication, relief will still be denied if the defendant has made an appearance before the court. In *Detroit Tool and Engineering Co. v. Martin*,[56] the defendants were served by publication but failed to file an answer within the time permitted by the rules. Before the court granted plaintiff's motion for a default judgment, the defendants submitted a purported answer to the court. Subsequently, the court entered an order of default and the defendants moved to set the judgment aside and to obtain leave to file their answer out of time. They argued that Rule 74.12 was applicable because they had been served by publication. The court denied relief, finding that the defendants had appeared in the case by attending the hearing on their motion to set aside the judgment. The untimely answer filed by their attorney also constituted an appearance even though it was insufficient to prevent the default. Had the defendants taken no action, they could have had the judgment vacated merely by showing service by publication and a meritorious defense. Because they tried to correct the default, they lost their right to exercise this simple remedy.[57]

B. *Petition to Set Aside for Irregularity—Missouri Supreme Court Rule 74.32*

The petition to set aside for irregularity is a common law remedy that is used to correct procedural errors that appear on the face of the record.[58] At common law, this remedy could be used at any time to set aside a final judg-

53. In Estate of Kennedy v. Menard, 690 S.W.2d 465, 468 (Mo. App., E.D. 1985), the court held that MO. SUP. CT. R. 74.12 is never available to a defendant who was personally served.

54. Underwood v. Underwood, 463 S.W.2d 915 (Mo. 1971). The court held that the defendant's remedy, if any, was against the sheriff who had filed the false return. Since this case, MO. SUP. CT. R. 54.22 has been changed by legislative action to provide that the return can be amended to show the true facts of service. The rule now permits the court to set aside a judgment for the reason that the return was inaccurate. L. 1984, p. 792, H.B. No. 947 § 1, eff. Aug. 13, 1984.

55. Barker v. Friendly Am., Inc., 606 S.W.2d 457, 459 (Mo. App., W.D. 1980). Some question on this issue may still exist. *See* Comment, *supra* note 39, at 285-86. Paradoxically, if the defendant is served by publication but has actual notice of the suit, he can still have the judgment set aside pursuant to 74.12. Miners' Bank v. Kingston, 204 Mo. 687, 700, 103 S.W. 27, 30 (1907).

56. 641 S.W.2d 177 (Mo. App., S.D. 1982).

57. The court did not discuss earlier decisions in Missouri which have held that 74.12 is a remedial measure that should be liberally construed to ensure that a defendant served by publication will have his day in court. *See* Chilton v. Cady, 298 Mo. 101, 112, 250 S.W. 403, 407 (1923); Jackson v. Wheeler, 667 S.W.2d at 369.

58. Barney v. Suggs, 688 S.W.2d at 358; Comment, *supra* note 39, at 287.

ment. In Missouri, its application has been limited by Missouri Supreme Court Rule 74.32 which provides that a judgment cannot be set aside for irregularity unless the motion is filed within three years after the judgment is rendered.[59] The remedy contemplated by Rule 74.32 is very narrow.[60] First, the petition to set aside for irregularity can only be used to correct procedural errors. Under Rule 74.32 an "irregularity" sufficient to warrant setting aside a judgment exists if there is a "want of adherence to some prescribed rule or mode of procedure, consisting either in omitting to do something that is necessary for the due and orderly conduct of the suit, or doing it in an unreasonable time or an improper manner."[61]

A procedural irregularity justifying relief was found in the recent case of *ABC Fireproof Warehouse Co. v. Clemans*.[62] The court held that the judgment was premature because an administrative appeal was pending at the time the case was filed in the circuit court. Since the plaintiff had acknowledged in his petition that there was an appeal pending before the tax commission, the trial judge should have stayed the court case until the administrative process was completed. Instead, the trial judge granted a judgment by default. The court of appeals held that the judgment was premature and this was a procedural irregularity apparent on the face of the record. Therefore, the judgment was properly set aside pursuant to Rule 74.32. A judgment is also premature if it is entered before the court has ruled on a defendant's motion to dismiss the plaintiff's petition.[63] The court's failure to dispose of the defendant's motions before entry of judgment is a procedural irregularity patent on the face of the record and Rule 74.32 is the proper remedy.

Supreme Court Rule 74.32 cannot be used to set aside a judgment procured by fraud.[64] This would require factual proof outside the record and Rule 74.32 can only correct procedural errors which are apparent on the face of the record.[65] For this reason, a trial judge is not even required to have a hearing on a Rule 74.32 petition.[66] The record itself must demonstrate that a proce-

---

59. Walker v. DePaul Hosp., 682 S.W.2d 156, 158 (Mo. App., E.D. 1984); State *ex rel.* Brooks Erection & Constr. Co. v. Gaertner, 639 S.W.2d 848 (Mo. App., E.D. 1982).

60. State *ex rel.* Brooks Erection & Constr. Co. v. Gaertner, 639 S.W.2d at 850.

61. State *ex rel.* State Highway Comm'n v. Livingston, 594 S.W.2d 651, 654 (Mo. App., E.D. 1980) (citing McDaniel v. Lovelace, 439 S.W.2d 906, 910 (Mo. 1969), quoting from Wooten v. Friedberg, 355 Mo. 756, 765, 198 S.W.2d 1, 7 (1946)).

62. 658 S.W.2d 28 (Mo. 1983) (en banc).

63. Traders Bank of K.C. v. Cherokee Inv. Co., 642 S.W.2d 122, 124 (Mo. App., W.D. 1982); Chenoweth v. LaMaster, 342 S.W.2d 500, 502 (Mo. App., Spr. 1961).

64. Stewart v. Stewart, 693 S.W.2d 305 (Mo. App., E.D. 1985) (dictum); Jeffrey v. Kelly, 146 S.W.2d 850 (Mo. App., K.C. 1940).

65. *See* Comment, *supra* note 39, at 287.

66. Estate of Kennedy v. Menard, 690 S.W.2d 465, 470 (Mo. App., E.D. 1985). The court has little or no discretion when ruling on a 74.32 motion. The error either exists as a matter of law or it doesn't. The court is not required to make any

dural irregularity has occurred, so an evidentiary hearing would serve no purpose. For the same reason, Supreme Court Rule 74.32 cannot be used to contradict the record. While the rule can be invoked to set aside a judgment if there is nothing in the record to show that the defendant was served with notice as required by law,[67] it cannot be used to prove that notice was not given when the record states that it was.[68] Neither can it be used to correct judicial errors.[69] If the plaintiff introduces inadmissible hearsay evidence to prove his claim for damages, this is at most a judicial error, not a procedural error.[70] Likewise, if the trial judge enters a final judgment which is unsupported by the evidence, he commits a judicial error, not a procedural error, so Rule 74.32 cannot be used to set the judgment aside.[71] Nor can the petition to set aside for irregularity be used to show that the plaintiff failed to state a claim upon which relief can be granted. In *Casper v. Lee*,[72] the Missouri Supreme Court acknowledged that there was some confusion on this issue[73] but went on to hold that: "[A] judgment rendered upon a petition which failed to state a cause of action would indicate judicial error in the judgment, but it 'would not justify setting it aside as irregular. . . .' "[74]

C. *A Motion in the Nature of a Writ of Error Coram Nobis*[75]

Supreme Court Rule 74.32 remedies procedural defects apparent on the

---

factual findings. Salle v. Holland Furnace Co., 337 S.W.2d 87, 90 (Mo. 1960).

67. Susman v. Hi-Fi Fo-Fum, Inc., 597 S.W.2d 680 (Mo. App., E.D. 1980).

68. Casper v. Lee, 362 Mo. 927, 245 S.W.2d 132 (1952) (en banc). *But cf.* Groves v. Hall, 628 S.W.2d 420 (Mo. App., W.D. 1982), in which the court held that although the record alleged that notice had been given to the defendant it also showed that notice was not timely. The record had to be read as a whole, so relief was granted in that case.

69. O'Brien v. Johnson, 636 S.W.2d 398, 399 (Mo. App., E.D. 1982).

70. Estate of Kennedy v. Menard, 690 S.W.2d at 468-69.

71. The court will presume that the evidence presented at the hearing on damages is sufficient. Barney v. Suggs, 688 S.W.2d at 359; Head v. Ken Bender Buick Pontiac, 452 S.W.2d 596, 598 (Mo. App., St. L. 1970).

72. 362 Mo. 927, 245 S.W.2d 132 (1952) (en banc); *see also* ABC Fireproof Warehouse Co. v. Clemans, 658 S.W.2d 28 (Mo. 1983) (en banc).

73. *See* Lester v. Dyer, 518 S.W.2d 213, 218 (Mo. App., K.C. 1974); McCrosky v. Burnham, 282 S.W. 158 (Mo. App., K.C. 1926).

74. Casper v. Lee, 362 Mo. at 943, 245 S.W.2d at 140 (citing State *ex rel.* Ozark County v. Tate, 109 Mo. 265, 270, 185 S.W. 1088, 1089 (1892)). It has, however, been held that it is a procedural irregularity if the final judgment awards damages in excess of what is permitted by law. In Rook v. John F. Oliver Trucking Co., 505 S.W.2d 157 (Mo. App., St. L. 1973), the court set aside the damage portion of the default judgment because it awarded attorney fees to the plaintiff. Attorney fees had been requested in the plaintiff's petition but there was no statutory authority for the award.

75. There is a lack of clarity in the cases on how to refer to this remedy. Some courts refer to the writ of error coram nobis. Defford v. Zurheide-Hermann, Inc., 536 S.W.2d 804 (Mo. App., St. L. 1976). Other courts refer to a "motion in the nature of a writ of [error] Coram Nobis." Askew v. Brown, 450 S.W.2d 446 (Mo. App., K.C.

face of the record. In contrast, the common law writ of error coram nobis corrects factual[76] errors that can only be shown by proof outside the record.[77] The writ initiates an independent action[78] which permits a defendant to introduce evidence to show that the judge was not aware of all the relevant facts when he entered the judgment.[79] The party seeking redress must be able to demonstrate that they also were unaware of these facts and with the exercise of due diligence could not have learned of the facts prior to judgment.[80]

The application of the writ is quite limited. First, the granting of the writ is a matter of discretion. It is not a writ of right.[81] Second, it can only be used to correct those factual errors that relate to the trial court's jurisdiction.[82] The writ will not lie for every factual error that affects the judge's decision. The writ should be granted only when the factual error "go[es] to the right of the court to proceed, and . . . entirely defeats the power of the court to attain a valid result in the proceeding."[83]

The primary use of the writ in default cases is to vacate a judgment on the grounds that the defendant was not properly served with process. For example, if the plaintiff has fraudulently induced the sheriff to file a false return, the writ will issue to set the resulting default aside.[84] This problem was re-

---

1970). Still others have coined the phrase "a motion to set aside for error of fact." Townsend v. Boatmen's Nat'l Bank, 148 S.W.2d 85 (Mo. App., St. L. 1941). *See* Burchett v. Burchett, 572 S.W.2d 494, 498 (Mo. App., K.C. 1978) (contains a discussion of proper terminology).

76. The writ of error coram nobis will not lie to correct mistakes of law. Walker v. DePaul Hosp., 682 S.W.2d 156, 159 (Mo. App., E.D. 1984). In Degraffenreid v. Curtwright, 652 S.W.2d 310 (Mo. App., W.D. 1983), the plaintiff tried to use the writ to vacate an order dismissing her petition. The plaintiff complained that the court had made a mistake of fact when it entered the judgment because the court was unaware of a Missouri Supreme Court decision which was handed down just two days prior to the order of dismissal. The plaintiff contended that the new case would have had a bearing on the judge's decision to dismiss her petition. The Western District Court of Appeals held that at the most this was a mistake of law and not fact. The writ was not intended to correct mistakes of law and relief was properly denied. *Id.* at 311.

77. *See* Daffin v. Daffin, 567 S.W.2d 672 (Mo. App., K.C. 1978); Comment, *supra* note 39, at 290.

78. State *ex rel.* Bank of Skidmore v. Roberts, 232 Mo. App. 1220, 1224, 116 S.W.2d 166, 169 (K.C. 1938).

79. Jacobsmeyer v. National Emergency Disaster Corp., 676 S.W.2d 843 (Mo. App., E.D. 1984).

80. Zahorsky v. Zahorsky, 543 S.W.2d 258 (Mo. App., K.C. 1976); Defford v. Zurheide-Hermann, Inc., 536 S.W.2d at 810.

81. Owens v. Vesely, 620 S.W.2d at 432.

82. Francois v. Francois, 612 S.W.2d 794 (Mo. App., E.D. 1981); Hub State Bank v. Wyatt, 589 S.W.2d 372 (Mo. App., W.D. 1979).

83. Casper v. Lee, 362 Mo. 927, 944, 245 S.W.2d 132, 141-42 (1952) (en banc) (quoting Kings Lake Drainage Dist. v. Winkelmeyer, 228 Mo. App. 1102, 1107, 62 S.W.2d 1101, 1103 (St. L. 1933)).

84. Prior to the amendment of Rule 54.22, a return of service filed by a Missouri sheriff was conclusive proof of the facts stated therein and could not be attacked directly or collaterally. The exception to this rule was when there was proof that the

cently addressed in the case of *In re Marriage of Benz*,[85] an action for marriage dissolution filed by the wife. The sheriff's return showed that service had been made by leaving a copy of the summons at the defendant's house with his sister. In fact, the summons had been left with the petitioner-wife, who masqueraded as the defendant's sister when the sheriff arrived to serve the summons. If the court had been aware of this fact, the default judgment could not have been entered. The court would have had no power to proceed.

The writ can also be used to set aside a default if the summons is served by a private process server and the return showing personal service is false[86] or the defendant is served when he is insane or incompetent and no guardian has been appointed to represent him.[87] Similarly, the writ can issue to set aside a default if the plaintiff requests service by publication but does not inform the court that the defendant's address is known, thereby preventing personal service as required by law.[88]

The writ will not lie if the defendant has in any way been negligent.[89] In *Askew v. Brown*,[90] a default judgment was entered after the defendant's attorney did not file a timely answer. When the defendant learned of his attorney's negligence, he applied for a writ of error coram nobis alleging that he had never received notice that a hearing on the default was scheduled. In support of his motion, he called as a witness the trial judge who had originally entered the default judgment. The judge testified that he would not have granted the default judgment if he had known that the defendant did not have personal knowledge that the matter was scheduled for hearing. The judge explained that he was under the impression that notice had been given. The court of appeals held that the writ would not lie in this case. The attorney's negligence is imputable to his client so the factual error made by the judge did not affect his power to proceed.

In *Boyer v. Fisk*,[91] the defendants asserted that the default judgment should be set aside because they had been informed by a clerk that they would receive notice before any further action was taken in the case. In reliance on that statement, the defendants did not file an answer. After the default judgment was entered, they filed a writ of error coram nobis to set the judgment

---

plaintiff fraudulently induced the false return or knowingly took advantage of it. Orgill Bros. & Co. v. Rhodes, 669 S.W.2d 302 (Mo. App., S.D. 1984); Roberts v. King, 641 S.W.2d 475 (Mo. App., E.D. 1982).

85. 669 S.W.2d 274 (Mo. App., E.D. 1984).

86. See v. Nesler, 692 S.W.2d 7 (Mo. App., E.D. 1985). The writ can also be used to attack a false return of service if process was served out of state. Germanese v. Champlin, 540 S.W.2d 109 (Mo. App., St. L. 1976).

87. Norman v. Young, 301 S.W.2d 820 (Mo. 1957). *But see* Young v. Smith, 648 S.W.2d 916 (Mo. App., S.D. 1983).

88. Burchett v. Burchett, 572 S.W.2d 494 (Mo. App., K.C. 1978).

89. Owens v. Vesely, 620 S.W.2d at 432; Jacobsmeyer v. National Emergency Disaster Corp., 676 S.W.2d at 844.

90. 450 S.W.2d 446, 448-50 (Mo. App., K.C. 1970).

91. 623 S.W.2d 28, 29-30 (Mo. App., E.D. 1981).

aside, alleging that the judge was unaware that they had been told by the clerk that they would receive notice of the trial setting. The writ was denied on the grounds that the defendants' reliance on the clerk's statement was unjustified. The clerk had no authority to speak for the court, and the defendants did not diligently monitor their litigation.[92]

D. *Separate Suit in Equity*

Historically, the writ of error coram nobis invoked the jurisdiction of the court at law to correct a judgment based on factual errors. The petition to set aside by a separate suit in equity invoked the equity jurisdiction of the court.[93] The difference was substantial prior to the merger of law and equity, but is of less significance today.[94] The courts frequently treat a writ of error coram nobis as a separate suit in equity and vice-versa, regardless of how the suit is designated by the complainant.[95] Ignoring labels, the courts focus on the nature of the remedy being sought.[96]

The separate suit in equity can be used to set aside a default judgment that is the result of mistake,[97] accident,[98] surprise,[99] or extrinsic fraud.[100] For

---

92. Theoretically, the writ of error coram nobis cannot be used to avoid a judgment procured by fraud unless the court's jurisdiction is affected. The court in Daffin v. Daffin, 567 S.W.2d 672, 676 (Mo. App., K.C. 1978), traced the historical differences between the writ of error coram nobis and the separate suit in equity to set aside for fraud. The court concluded that at one time the technical distinctions between these two remedies were ignored and the writ was permitted to raise the question of fraud. Later decisions reinstituted the distinction, making the writ unavailable to set aside a judgment procured by fraud. The courts have sometimes ameliorated this rule by treating a writ of error coram nobis as a separate suit in equity when procedural unfairness would not result. Francois v. Francois, 612 S.W.2d at 796; Koeller v. Koeller, 589 S.W.2d 620, 622 (Mo. App., E.D. 1979). *See* J.R. Watkins Co. v. Hubbard, 343 S.W.2d 189, 192-95 (Mo. App., K.C. 1961); Comment, *supra* note 39, at 299-305 (discussion of the motion to set aside judgments for fraud).

93. *Daffin*, 567 S.W.2d at 676.

94. J.R. Watkins Co. v. Hubbard, 343 S.W.2d at 195-97.

95. Kranz v. Centropolis Crusher, Inc., 630 S.W.2d 136, 139-40 (Mo. App., W.D. 1982); S____ v. S____, 490 S.W.2d 344, 350 (Mo. App., K.C. 1973).

96. Hamm v. Hamm, 437 S.W.2d 449, 452 (Mo. App., Spr. 1969).

97. A mistake is "an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but *without negligence*, . . ." 2 POMEROY'S EQUITY JURISPRUDENCE 1708 (quoted in Hamm v. Hamm, 437 S.W.2d at 453).

98. An accident is "an unforeseen occurrence affecting a person injuriously and not due to his own negligence." Cherry v. Wertheim, 25 S.W.2d 118, 121 (Mo. App., St. L. 1930). In that case the defendant's wife forgot to give him the summons which had been left at their house. This was held to be a sufficient grounds for setting the default aside. *Id.* at 121-22.

99. Surprise is "an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection." Peers v. Davis' Adm'rs, 29 Mo. 184, 190 (1859).

100. *See infra* text accompanying footnotes 104-16.

example, if a court clerk makes a mistake by not properly recording a motion filed by the defendant, the ensuing default judgment can be set aside by a separate suit in equity.[101] If service of process is made at a location where the defendant no longer resides, a separate suit in equity can be used to vacate the default on the grounds of mistake.[102] When both the defendant and his attorney are prevented by illness from filing an answer, a separate suit in equity has been used to set the default aside on the grounds of accident.[103]

The petition in equity is most frequently used to set aside default judgments which have been procured by fraud. Not all judgments infected with fraud can be vacated. It is well settled that extrinsic fraud must be shown before the judgment will be set aside; intrinsic fraud is not sufficient to justify relief.[104] Extrinsic and intrinsic fraud have been distinguished as follows:

> The fraud against which a court in equity will relieve must have related, not to the propriety of the judgment itself, but to the manner in which it was obtained. By this we mean that the fraud must have been extrinsic or collateral to the matters which either were or could have been presented and adjudicated in the original proceeding, and not merely intrinsic in the sense of having pertained to the merits of the cause before the court. . . .[105]

This limitation on equitable relief has been imposed to effect the public policy that litigation must end.[106] Perjury is an example of intrinsic fraud.[107] When a spouse commits perjury at the hearing to divide marital property, the fraud relates only to the merits of the controversy. Once the judgment becomes final, the defendant will not be permitted to relitigate this issue in a separate suit in equity.[108] Any other rule would substantially undermine the finality of judgments. Intrinsic fraud also occurs when fabricated documents are introduced in evidence,[109] or when the plaintiff conceals evidence from the court which is relevant to the merits of the case.[110]

Extrinsic fraud occurs when the defendant is prevented from having his

---

101. Krashir v. Grezzaid, 326 Mo. 606, 31 S.W.2d 984 (1930).

102. Flexter v. Flexter, 684 S.W.2d 589, 592 (Mo. App., E.D. 1985); Kranz v. Centropolis Crusher, Inc., 630 S.W.2d 136, 139-40 (Mo. App., W.D. 1982).

103. Jackson v. Chestnut, 151 Mo. App. 275, 131 S.W. 747 (K.C. 1910).

104. Barker v. Friendly Am., Inc., 606 S.W.2d 457, 459 (Mo. App., W.D. 1980).

105. Martin v. Martin, 549 S.W.2d 542, 543 (Mo. App., St. L. 1977) (quoting Venegoni v. Giudicy, 238 S.W.2d 17, 18 (Mo. App., St. L. 1951)).

106. Daffin v. Daffin, 567 S.W.2d at 678.

107. Fadler v. Gabbert, 333 Mo. 851, 63 S.W.2d 121, 130 (1933); Barker v. Friendly Am., Inc., 606 S.W.2d 457 (Mo. App., W.D. 1980).

108. Portell v. Portell, 643 S.W.2d 18, 21 (Mo. App., E.D. 1982); LaBarge v. LaBarge, 627 S.W.2d 647, 648 (Mo. App., E.D. 1981); Koeller v. Koeller, 589 S.W.2d 620, 623 (Mo. App., E.D. 1979).

109. In Lincoln Steel v. Mid-Continent Nat'l Bank, 646 S.W.2d 809 (Mo. App., W.D. 1982), the plaintiff allegedly submitted forged documents to the court and suborned testimony in support of their claim for damages. This was deemed to be intrinsic fraud and not a basis for setting the judgment aside. *Id.* at 811-12.

110. Hemphill v. Hemphill, 316 S.W.2d 582, 586 (Mo. 1958); McKelburg v. Whitman, 545 S.W.2d 89, 91 (Mo. App., Spr. 1976).

case heard by the court through no fault of his own.[111] In *Diehl v. Diehl*,[112] the plaintiff promised the defendant that no default would be taken while the parties were negotiating a settlement. In contravention of this promise, the plaintiff moved for default when the time for filing an answer had passed. This is extrinsic fraud because it is collateral to the merits of the case and prevents the defendant from ever having his case heard before the court. Extrinsic fraud also occurs when the plaintiff conceals the pendency of the suit by hiding the summons,[113] or by initiating service by publication when the defendant's address is known to the plaintiff,[114] or by serving the summons at a residence where plaintiff knows the defendant will not receive it.[115]

In at least one instance, the court has found that the failure to disclose facts can be extrinsic fraud permitting relief. Actual concealment is not required. In *Daffin v. Daffin*,[116] the court found that because of the confidential relationship between a husband and wife, the husband had an obligation to disclose to the wife all of the property that was subject to division by the dissolution court. By failing to do so he had committed an act of extrinsic fraud. The husband was also guilty of extrinsic fraud by representing that the separation agreement was for the wife's benefit and that the husband's lawyer would protect the wife's interests as well as the husband's interests.

Even if an excuse for the default can be shown, equitable relief will not be granted if the defendant has in any way been negligent in permitting the default to be entered.[117] The strictness with which this rule is applied is illustrated by the case of *Harriman v. Household Finance Corp.*[118] In *Harriman* the summons was left at the defendant's home with the defendant's wife. She lost the summons, but belatedly informed the defendant that the suit had been filed. Thereafter, the defendant contacted the circuit clerk's office and spoke with an unidentified employee. The defendant understood from that conversation that he was not required to appear in court at that time, and he assumed that he would receive additional notice before any further action was taken in the case. The court of appeals held that the defendant was negligent because he did not consult an attorney and did not secure a copy of the lost summons. The default could not be set aside.[119]

---

111. Fadler v. Gabbert, 333 Mo. 851, 869, 63 S.W.2d 121, 130 (1933); Boyer v. Church, 573 S.W.2d 444, 447 (Mo. App., St. L. 1978).

112. 630 S.W.2d 264, 265 (Mo. App., W.D. 1982).

113. Hub State Bank v. Wyatt, 589 S.W.2d 372 (Mo. App., W.D. 1979).

114. Burchett v. Burchett, 572 S.W.2d 494, 498 (Mo. App., K.C. 1978).

115. Boyer v. Church, 573 S.W.2d 444, 447 (Mo. App., St. L. 1978).

116. 567 S.W.2d 672, 678-79 (Mo. App., K.C. 1978).

117. Massa v. Anderson, 691 S.W.2d 496, 497 (Mo. App., E.D. 1985).

118. 608 S.W.2d 117, 118-19 (Mo. App., S.D. 1980).

119. The *Harriman* case is distinguishable from Cherry v. Wertheim, 25 S.W.2d 118 (Mo. App., St. L. 1930), in which the court set a default aside because the defendant's wife forgot to tell him that the summons had been served by the sheriff. In that case the defendant never learned about the lawsuit. His failure to investigate could not be labeled negligence. *Id.* at 121.

Equitable relief will also be denied if the defendant's attorney has been negligent. The attorney's negligence is imputed to his client.[120] In *Stewart v. Stewart*,[121] the defendant's attorney Yatkeman had tried to contact the plaintiff's attorney Dubinsky on several occasions but Dubinsky did not return Yatkeman's calls. Yatkeman finally spoke with the secretary in Dubinsky's office to see if the case could be continued. Dubinsky's secretary told the defendant's attorney that the case would be continued. In reliance on the secretary's statement, Yatkeman took no further action. The secretary was wrong and the hearing on the default took place as scheduled. At that hearing the plaintiff's attorney did not notify the court that the defendant was represented by an attorney who had been trying unsuccessfully to get in touch with Dubinsky. The defendant later filed a motion to set the default aside for irregularity which was granted by the trial court. The appellate court reversed and reinstated the default. It concluded that the defendant's attorney was negligent in failing to file a pleading in the case to protect his client's interests. Furthermore, it was not reasonable for the defendant's attorney to rely on the secretary's promise to continue the case because the secretary had no authority to reset the case as this would constitute the unauthorized practice of law.

An agent's negligence is also imputable to his principle. In *Barker v. Friendly American, Inc.*,[122] process was served on the registered agent of the corporate defendant. The agent was ill at the time and did not promptly refer the summons to his corporate contact. A default was taken after the time for filing an answer had passed. The court found that equitable relief was not available to set the judgment aside because the defendant's default was caused by its agent's negligence.[123]

---

120. Fulton v. I.T.&T. Corp., 528 S.W.2d 466, 469 (Mo. App., St. L. 1975), *cert. denied*, 424 U.S. 913 (1976).

121. 693 S.W.2d 305 (Mo. App., E.D. 1985). The defendant in this case had filed a Rule 74.32 motion to set the judgment aside. The court noted that this was the wrong procedural device to attack a final judgment on the grounds that it had been procured by fraud. *Id.* at 307. The proper procedural device would have been a separate suit in equity. The court considered the merits of the defendant's request even though the incorrect procedural device was used.

122. 606 S.W.2d 457, 459-60 (Mo. App., W.D. 1980).

123. Some exceptions to these harsh rules have been developed. If the defendant's attorney has abandoned the case without notifying the defendant, then the attorney's negligence will not be imputable to his ex-client. Murray v. Sanders, 667 S.W.2d at 429; Schoenhoff v. Owens, 564 S.W.2d 273, 275-76 (Mo. App., St. L. 1978). Mere dereliction of duty does not constitute abandonment. Massa v. Anderson, 691 S.W.2d at 497; Weber v. Hoesch, 603 S.W.2d 60, 61 (Mo. App., E.D. 1980); Rucher v. Thrower, 559 S.W.2d 40, 41-42 (Mo. App., St. L. 1977).

Negligence will not be imputed to a defendant who reasonably relied on a third party to arrange the defense of the case. Whitledge v. Anderson Air Activities, Inc., 276 S.W.2d 114, 116-17 (Mo. 1955). The negligence of the third party which resulted in the default judgment will not preclude a suit in equity to set the judgment aside. An agent or employee, however, cannot be classified as a third party. In Distefano v. Kansas City S. Ry. Co., 501 S.W.2d 551, 552-53 (Mo. App., K.C. 1973), an employee mislaid the summons which he had been given to arrange legal representation for the

E. *Motion to Set Aside an Interlocutory Order by Default*

The petition for review (74.12), the petition to set aside for irregularity (74.32), the writ of error coram nobis, the separate suit in equity, and the motion to set aside for fraud are the only remedies available after a default judgment becomes final.[124] If the defendant learns of the default before final judgment, there are two additional remedies that may be used to set aside the default.

First, Missouri Supreme Court Rule 74.05 provides that the court can set aside an interlocutory order of default at any time before damages are assessed or the judgment becomes final.[125] This rule reflects the two-step process for obtaining a default judgment. The trial court can enter an interlocutory order of default if the defendant fails to file a timely answer. This interlocutory order prevents the defendant from filing an answer or contesting liability in any other manner.[126] Final judgment, however, does not occur until damages have been assessed. If defendant learns of the default after the interlocutory order has been granted but before damages have been assessed, then Rule 74.05 is the proper remedy to vacate the default. There has, however, been some confusion concerning the timeliness of a motion to set aside the interlocutory order of default when it is filed after damages have been assessed. In *Kallash v. Kuelker*,[127] the Eastern District Court of Appeals held that Supreme Court Rule 74.05 permits the trial court to vacate an interlocutory order of default even after damages have been assessed. The court of appeals reasoned that a court's judgment cannot become final until thirty days after it is entered. Even though damages have been assessed, the judgment is not final and, therefore, Rule 74.05 is applicable.

In *Sullenger v. Cooke Sales & Service Co.*,[128] the supreme court in dicta reached a different conclusion. In that case, the 74.05 motion was filed thirteen days after damages were assessed. While the judgment was not final, the court held that the 74.05 motion was untimely because the damages had been assessed before the motion was filed. This decision seems more consistent with the language of the rule. Damages can never be assessed after the judgment is final. If the rule means that the defendant can have the judgment set aside at any time before it is final, then the specific reference to assessment of damages

---

railroad and the engineer who was named as a defendant. The resulting default judgment could not be set aside because the negligence of the employee was imputable to the defendants. The court refused to accept the argument that this employee was a third party entrusted by the defendant to secure legal representation.

124. Citizens Bank & Trust Co. v. Mitchell, 652 S.W.2d 202, 204-06 (Mo. App., W.D. 1983); Diekmann v. Associates Discount Corp., 410 S.W.2d 695, 697-98 (Mo. App., St. L. 1966).

125. Mo. Sup. Ct. R. 74.05.

126. *See supra* text accompanying footnotes 23-30.

127. 347 S.W.2d 467, 469-72 (Mo. App., St. L. 1961).

128. 646 S.W.2d 85, 87 n.2 (Mo. 1983) (en banc); *see also* M.S. Conway Constr. Co. v. Prudential Ins. Co., 682 S.W.2d 56 (Mo. App., W.D. 1984).

would be superfluous. To give meaning to all of the language of the rule, it would be better to conclude that assessment of damages or a final judgment, whichever occurs first, will prevent the defendant from seeking relief pursuant to Rule 74.05.

Assuming a timely motion has been filed, an order of default can be set aside if good cause is demonstrated.[129] There are few appellate court decisions, however, that have addressed the question of what constitutes good cause in this context.[130] In *O'Connell v. Dockery*,[131] the St. Louis Court of Appeals held that an interlocutory order of default could be set aside only after the defendant demonstrates that he has a good excuse for the default and that he has a meritorious defense to the plaintiff's petition. In the absence of such a showing, it would be an abuse of discretion for the interlocutory order to be vacated.[132] This is the same showing that must be made to set aside a judgment by a separate suit in equity or pursuant to Supreme Court Rule 75.01.[133] It is therefore arguable that those cases which interpret the meaning of good cause in the context of a separate suit in equity or pursuant to Supreme Court Rule 75.01 would be equally applicable to a motion to vacate an interlocutory order of default. If so, then the default cannot be set aside if the defendant negligently failed to file a timely answer.[134]

F. *Motion to Set aside a Default Pursuant to Supreme Court Rule 75.01*

Even if the defendant is unable to rely on Missouri Supreme Court Rule 74.05 because damages have been assessed, he might still be able to set aside the default judgment pursuant to Missouri Supreme Court Rule 75.01. That rule provides that a trial court retains control over its judgments for thirty days after they are entered.[135] At any time during that thirty day period, the

---

129. MO SUP. CT. R. 74.05.

130. One reason that there are so few appellate decisions on this issue is because the interlocutory order of default and the damage hearing often occur at the same time. It is more efficient for plaintiff's attorney to make only one appearance before the court. The case law is clear that it is proper to enter both an interlocutory order of default and a judgment on damages at the same time. Young v. Smith, 648 S.W.2d 916, 918-19 (Mo. App., S.D. 1983); Davis v. Moore, 610 S.W.2d 665, 671 (Mo. App., E.D. 1980). When this occurs, the defendant does not have any time in which to file an application to set aside the interlocutory order of default prior to the time that damages are assessed. While a number of cases are annotated by VERNONS ANNOTATED MISSOURI RULES for Rule 74.05, they are primarily 75.01 cases that involve default judgments.

131. 102 S.W.2d 748 (Mo. App., St. L. 1937).

132. *Id.* at 751.

133. Courtin v. McGraw Constr. Co., 639 S.W.2d 286 (Mo. App., E.D. 1982); Human Dev. Corp. v. Wefel, 527 S.W.2d 652 (Mo. App., St. L. 1975).

134. Harriman v. Household Fin. Corp., 608 S.W.2d at 118-19; Ward v. Cook United, Inc., 521 S.W.2d 461 (Mo. App., K.C. 1975).

135. Citizens Bank & Trust v. Mitchell, 652 S.W.2d 202 (Mo. App., W.D. 1983). This rule is equally applicable to default and non-default judgments.

court can vacate or modify a judgment for good cause.[136] The origin of this rule can be traced to the common law right of a trial judge to set aside a judgment at any time during the term in which it was rendered.[137] Rule 75.01 alters this common law rule by limiting the power of the court to thirty days after judgment is rendered.

When the motion is filed within that thirty day period makes a significant difference in how it will be treated. If it is filed within fifteen days of judgment, it will be treated as a motion for new trial.[138] The judge then has ninety days to rule on the motion to vacate.[139] At any time within that ninety day period he can grant a new trial. If he makes no ruling on the motion, the judgment becomes final at the conclusion of the ninety day period.[140] On the other hand, if the motion is filed between the sixteenth day and the thirtieth day, then it is treated as a mere suggestion to the court to set aside the judgment on its own initiative.[141] The judge must act by the thirtieth day to set the judgment aside because his power is exhausted at that time.[142] An order vacating the judgment after thirty days is void.[143]

These time differentials have sometimes caused defendants fatal confusion. In *Caldwell Paint Manufacturing Co. v. Lebeau*,[144] the defendant filed a motion to vacate the judgment more than fifteen days following judgment. On the twenty-ninth day following judgment, the trial court granted the motion and vacated the judgment. Eighteen days later, the plaintiff convinced the trial court to reinstate the judgment because the plaintiff had never received notice of the court's intent to vacate and this deprived the plaintiff of due process of law. Eight days after the judgment was reinstated, the defendant filed a notice of appeal. The court of appeals ruled that the defendant's notice of appeal was untimely and the court of appeals, therefore, had no jurisdiction to review the case. The court of appeals reasoned that the trial judge's order setting the judgment aside was void because it was made without notice to the plaintiff. The judgment, therefore, became final on the thirtieth day and the notice of appeal had to be filed within ten days thereafter. The appellate court recognized that the defendant may have been misled when the trial court set aside the judgment. Once that occurred, the defendant had no reason to appeal be-

136. Mo. Sup. Ct. R. 75.01.

137. Wooten v. Friedberg, 355 Mo. 756, ____, 198 S.W.2d 1, 5 (1946); Harrison v. Weisbrod, 358 S.W.2d 277, 281 (Mo. App., Spr. 1962).

138. State *ex rel.* Stoffer v. Moore, 628 S.W.2d 637 (Mo. 1982) (en banc); J & J Window Sales v. Mueller, 567 S.W.2d 153 (Mo. App., St. L. 1978).

139. Gorzel v. Orlamander, 352 S.W.2d 675 (Mo. 1961).

140. State *ex rel.* Stoffer v. Moore, 628 S.W.2d at 643.

141. Murray v. Saunders, 667 S.W.2d 426 (Mo. App., W.D. 1982).

142. State *ex rel.* Campbell v. Anderson, 536 S.W.2d 200, 202 (Mo. App., St. L. 1976).

143. Davidson v. Commerce Bank of Mexico, 667 S.W.2d 477 (Mo. App., E.D. 1984); Volume Servs. v. C.F. Murphy & Assocs., 656 S.W.2d 785 (Mo. App., W.D. 1983).

144. 591 S.W.2d 1 (Mo. App., E.D. 1979).

cause his request had been granted. Nonetheless, the trial court's order was void and the judgment became final long before the defendant's notice of appeal was filed.[145]

Regardless of whether the motion to vacate is treated as a motion for new trial or a suggestion to the court to set aside the judgment on its own initiative, the judgment should not be vacated except for good cause.[146] What constitutes good cause is not capable of exact definition.[147] It has been held that the power conferred by Rule 75.01 to vacate the judgment is no less than nor greater than the power that the trial judge had at common law to modify his judgments during the term of court.[148] Applying this principle in *Altman v. Werling*,[149] the Springfield Court of Appeals concluded that the trial judge could set a judgment aside pursuant to Rule 75.01 "for any reason that may have occurred to him and no reason at all would have had to be stated for such action."[150]

This statement of the *Altman* court seems overly broad in light of the requirement in Rule 75.01 that good cause must be shown before the judgment can be set aside. While it is true that the trial judge has very broad discretion to either grant or deny the motion to vacate,[151] his discretion is not

145. For a similar problem see Chatman v. Civic Center Corp., 682 S.W.2d 31 (Mo. App., E.D. 1984). In State *ex rel.* Diners' Fin. Corp. v. Swink, 434 S.W.2d 593 (Mo. App., St. L. 1968), the Eastern District Court of Appeals identified another trap for the unwary. In that case (which involved a consent judgment and not a default), the defendant had filed a motion to vacate after the fifteenth day. The trial court specifically granted the motion. The court of appeals held that the trial court was without jurisdiction to grant the motion after the fifteenth day because it could no longer be treated as a motion for new trial but merely a suggestion to the court to set aside the judgment on its own initiative. *Id.* at 595. If in fact the court was not acting on its own initiative, but was instead expressly granting the defendant's motion, then the action of the trial court was erroneous. In other words, if the court makes reference to the motion to vacate when it sets the judgment aside, there is a risk that it has acted beyond its powers. But if it does not mention the motion, then there is nothing in the record to contradict the fiction that it is only acting on its own initiative. This rigid interpretation of Rule 75.01 has been rejected in most cases and the courts have been quite liberal in treating the motion to vacate as a mere suggestion even if the court's order refers to the defendant's motion. Murray v. Sanders, 667 S.W.2d at 430; State *ex rel.* Stoffer v. Moore, 628 S.W.2d at 643; Kirtz v. Advanced Instruments, 581 S.W.2d 868, 870 (Mo. App., E.D. 1979). The courts have thereby sidestepped the technically correct argument that a motion to vacate filed after the fifteenth day is untimely.

146. B____ L____ C____ (K) v. W____ W____ C____, 568 S.W.2d 602, 605 (Mo. App., K.C. 1978); State *ex rel.* Diner's Fin. Corp. v. Swink, 434 S.W.2d 593 (Mo. App., St. L. 1968).

147. Kollmeyer v. Willis, 408 S.W.2d 370, 381 (Mo. App., Spr. 1966).

148. Midstates Equip. Corp. v. Hobart Welders Sales & Serv., 233 S.W.2d 757, 758 (Mo. App., St. L. 1950).

149. 509 S.W.2d 787 (Mo. App., Spr. 1974).

150. *Id.* at 788.

151. Courtin v. McGraw Constr. Co., 639 S.W.2d 286 (Mo. App., E.D. 1982); Schoenhoff v. Owens, 564 S.W.2d 273 (Mo. App., St. L. 1978); Uldrich v. Tharp, 547 S.W.2d 498, 499 (Mo. App., Spr. 1977).

unlimited.[152] When the requisite showing of good cause has not been made, the trial court's decision to vacate the judgment has in fact been reversed as an abuse of discretion.[153]

While many cases have held that good cause is not capable of exact definition, they have also held that a default judgment can only be set aside pursuant to Rule 75.01 if the defendant has shown (1) a good excuse for his failure to file a timely answer, (2) a meritorious defense, and (3) no undue prejudice to the plaintiff if the judgment is set aside.[154]

What constitutes a good excuse for a default is largely a question of interpretation. In general, two approaches to this question can be discerned from the cases which have addressed it. The vast majority of the cases have held that a good excuse cannot be demonstrated if the defendant has in any way been negligent in causing the default.[155] This line of cases applies the same criteria for setting aside a default judgment pursuant to Rule 75.01 as is applied when the defendant files a separate suit in equity for relief.[156] In *Young v. Smith*,[157] the court refused to set aside a default judgment entered against an 84-year-old defendant who was personally served with process. The defendant apparently understood that the papers were important because he put them in a box for safekeeping until he could ask a relative what to do with them. The court concluded that because he could read the summons and knew that it was important, he was not incompetent at the time he received it and should have responded within the time permitted by the rules. He was negligent so the trial court was justified in refusing to grant the 75.01 motion. This was so even though there was a later determination by the trial court that a guardian ad litem should be appointed to represent the defendant on his request to have the default set aside.

In *Metts v. Metts*,[158] the defendant sought to have the judgment set aside on the grounds that she did not appear for trial because her attorney had instructed her that it was unnecessary. Her attorney alleged that he didn't appear because of health problems. The court refused to accept this as a valid excuse because defendant's attorney did not notify either the court or opposing

152. In Hall v. McConey, 152 Mo. App. 1, 4, 132 S.W. 618, 621 (Spr. 1910), the appeals court held that this discretion is "not a mental discretion to be exercised ex gratia but a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice."

153. *Swink*, 434 S.W.2d 593.

154. Courtin v. McGraw Constr. Co., 639 S.W.2d 286 (Mo. App., E.D. 1982); Lester v. Dyer, 518 S.W.2d 213 (Mo. App., K.C. 1974).

155. Citizens Bank of Univ. City v. Gehl, 567 S.W.2d 423 (Mo. App., St. L. 1978); Tillman v. Deese, 488 S.W.2d 206 (Mo. App., K.C. 1972); Hamm v. Hamm, 437 S.W.2d 449 (Mo. App., Spr. 1969).

156. *See supra* notes 133-34. *But cf.* Kollmeyer v. Willis, 408 S.W.2d at 382; Murray v. Sanders, 667 S.W.2d at 429 (court held that the principles applicable to a suit in equity were not the principles applicable to a 75.01 motion).

157. 648 S.W.2d 916 (Mo. App., S.D. 1983).

158. 625 S.W.2d 896 (Mo. App., E.D. 1981).

counsel of his health problems. His negligence was imputed to his client and the request to set the default aside was therefore properly denied.

The court has also held that an insured will be held vicariously liable for the negligence of its insurance company. In *Ward v. Cook United, Inc.*,[159] the defendant forwarded the petition and summons to its insurance carrier. The insurance company acknowledged receipt of the documents and expressly agreed to defend. An agent of the insurance company, however, mislaid the papers and a default judgment eventually ensued. The court refused to set aside the default judgment on the grounds that the insurance company and not the defendant had been negligent.

Similarly, the negligence of an employee will be imputed to his employer. In *Sullenger v. Cooke Sales & Service Co.*,[160] the petition was served on the president of the defendant company. He referred the matter to an employee. The employee tried to reach the plaintiff but wasn't able to do so. Even though the employee was recuperating from surgery, the court held that the employee should have called the president to tell him that the employee was unable to reach the plaintiff. The court also noted that the president was negligent in failing to contact the corporation's attorney, who would have known that an answer had to be filed.

A second line of cases have interpreted more liberally the good excuse requirement. These cases have recognized that the court should be guided by the remedial purpose of Rule 75.01,[161] and should construe it to prevent manifest injustice as well as to avoid a threat of manifest injustice.[162] These cases emphasize that it is the policy of the judicial system to try a case on its merits so long as harmful delays can be avoided.[163] In *Vaughn v. Riley*,[164] the court recognized that the term default by definition seems to imply that someone has been at fault for permitting the judgment to be entered. The court aptly noted that Rule 75.01 was not designed to censure wrong but to right it. The focus should be on whether there is a good reason for excusing the default in the interest of justice. Where there is evidence that the defendant's conduct was intentionally or irresponsibly designed to impede judicial process, relief should not be given. On the other hand, the interests of justice are adversely affected when a litigant's right to a court hearing is denied merely because he makes a mistake.

In *Vaughn*, the court held that it was proper to set aside the judgment even though the defendant had failed to appear for trial. The attorney for the plaintiff and the attorney for the defendant had a long and friendly relation-

159. 521 S.W.2d 461 (Mo. App., K.C. 1975).
160. 646 S.W.2d 85 (Mo. 1983) (en banc).
161. Kollmeyer v. Willis, 408 S.W.2d 370 (Mo. App., Spr. 1966); *see also* Grimm v. Sinnett, 567 S.W.2d 418 (Mo. App., St. L. 1978).
162. Vaughn v. Ripley, 416 S.W.2d 226, 228 (Mo. App., K.C. 1967).
163. Lester v. Dyer, 518 S.W.2d 213 (Mo. App., K.C. 1974); Kollmeyer v. Willis, 408 S.W.2d 370 (Mo. App., Spr. 1966).
164. 416 S.W.2d 226 (Mo. App., K.C. 1967).

ship. The case had dragged on for six years. After the plaintiff had set the case for trial, the defendant's attorney learned that his client could not appear on that date. He requested the plaintiff to postpone the case for six days. The plaintiff's attorney expressly refused to grant the request. The defendant's attorney concluded that the plaintiff's attorney must be joking although there was no objective sign that a joke was intended. The defendant's attorney merely assumed that the case would be continued so he took no further action. The court held that this was a justifiable excuse for not appearing and affirmed the trial court's order setting the judgment aside.

In *Lambert Brothers, Inc. v. Tri City Construction Co.*,[165] the defendant's attorney received notice from the plaintiff's attorney that the defendant was in default. Prior to this notice the relationship between the attorneys had been very cordial and technical compliance with the rules had not always been demanded. Apparently, the plaintiff's good humor was waning because he notified the defendant that "I did not want to take a default judgment without first having given you notice that you were in default."[166] After receiving the plaintiff's letter, the defendant's attorney took no further action. A default was entered approximately three weeks after the plaintiff notified the defendant that his answer was past due. The defendant filed a motion to set aside, claiming that he had been very busy with other matters and that he did not believe that the plaintiff would take a default without giving him notice that a default had been requested. The court concluded that in light of their past dealing, the defendant's attorney had made a good faith mistake when he misinterpreted the intentions of the plaintiff. The order setting aside the judgment was, therefore, justified.

In *Arthur v. Evangelical Deaconess Society*,[167] a malpractice claim was filed against the defendant. During preliminary negotiations, the plaintiff's attorney sent the defendant a copy of the petition that the plaintiff intended to file. The defendant forwarded the proposed petition to its insurance carrier. Later, the defendant was served with a summons and a second copy of the petition. These documents were not forwarded to the insurance carrier because the defendant thought it unnecessary having already sent one copy of the petition. The court of appeals acknowledged that it was the defendant's failure to notify their insurance carrier that caused the default to occur. They went on to hold that because the defendant's actions were not intentionally designed to impede the work of the court, the $750,000 judgment could properly be set aside.

The courts in *Vaughn*, *Lambert Brothers*, and *Evangelical Deaconess* seem to look at whether the defendant's failure to respond was intentionally designed to impede the progress of the case. In contrast, the majority of the cases focus on whether someone has been at fault regardless of their good

165. 514 S.W.2d 838 (Mo. App., Spr. 1974).
166. *Id.* at 840.
167. 615 S.W.2d 438 (Mo. App., E.D. 1981).

faith. If the defendant or his agent has failed to exercise reasonable care to respond to the court's summons, then the default judgment will not be set aside.

In addition to showing a good excuse for the default, a defendant must also demonstrate that he has a meritorious defense to the plaintiff's claim.[168] It would be pointless to set the default aside if there was no reasonable likelihood that the defendant could win on the merits. Most cases have held that a mere statement that the defendant has a meritorious defense is not sufficient.[169] In *State ex rel. Diners Financial Corp. v. Swink*,[170] the court held that the facts constituting the proposed defense must be set forth in detail so that the court may judge whether it is meritorious and sufficient.[171]

This rule has not always been strictly applied. In *Schoenhoff v. Owens*,[172] an allegation that the property in dispute was just junk was held sufficient to contest the plaintiff's claim for damages. In *Lester v. Dyer*,[173] the court held that the defendant had stated a meritorious defense when he alleged in his answer that the plaintiff's petition should be dismissed because it did not state a cause of action for which relief could be granted. Similarly, in *Murray v. Sanders*,[174] the court held that an answer by the party in default which generally denied the allegations of the plaintiff's petition was sufficient to establish a meritorious defense. The court noted that it would be more "satisfying and more persuasive" if additional details had been provided but concluded that since it was the "serious purpose" of the defendant to resist the claim of the plaintiff, it would be appropriate to set the default judgment aside. These cases demonstrate that a very minimal showing is necessary to establish a meritorious defense. Once a good excuse for the default is shown, little else is needed to convince the court to set the judgment aside.[175]

V. Appeal from Default Judgments

A default judgment cannot be directly appealed.[176] In fact, no appeal is possible unless the defendant has first filed a motion to vacate the judgment

168. Gorzel v. Orlamander, 352 S.W.2d 675 (Mo. 1961); Schoenhoff v. Owens, 564 S.W.2d 273 (Mo. App., St. L. 1978); Luce v. Anglin, 535 S.W.2d 504 (Mo. App., K.C. 1976); Cole v. Cole, 462 S.W.2d 172 (Mo. App., St. L. 1970).

169. J & J Window Sales, Inc. v. Mueller, 567 S.W.2d 153 (Mo. App., St. L. 1978); Eilers v. Kodner Dev. Corp., 513 S.W.2d 663, 667 (Mo. App., St. L. 1974); Linneman v. Whitley, 402 S.W.2d 76, 78 (Mo. App., K.C. 1966).

170. 434 S.W.2d 593 (Mo. App., St. L. 1968).

171. *Id.* at 596.

172. Schoenhoff v. Owens, 564 S.W.2d 273 (Mo. App., St. L. 1978).

173. 518 S.W.2d 213 (Mo. App., K.C. 1974).

174. 667 S.W.2d 426 (Mo. App., W.D. 1982).

175. *But cf.* Patterson v. Fitzgibbon Discount Corp., 339 S.W.2d 301 (Mo. App., St. L. 1960) (example of where default was not set aside because no meritorious defense could be shown).

176. Vonsmith v. Vonsmith, 666 S.W.2d 424 (Mo. 1984) (en banc).

with the trial court.[177] The defendant can then appeal the trial court's ruling on the motion to vacate,[178] but he cannot appeal the default judgment itself. This procedure makes it unlikely that the appellate court will interfere with the trial court's ruling on the defendant's request to set the default aside because the trial court has a great deal of discretion to grant or deny the relief requested by the defendant.[179] Only when the trial court has acted arbitrarily and capriciously will reversal occur.[180] Hence, a defendant in default has a very limited opportunity to have his case reviewed by the appellate courts.

The rationale for the rule forbidding direct appeal of a default judgment was first explained in *Vonsmith v. Vonsmith*.[181] The court of appeals held in *Vonsmith* that the rule serves to ensure that there will be a proper allocation of responsibility between a court of appeals and the trial court. If the defendant is permitted to raise his objections to the trial court's decision for the first time on appeal, the court of appeals will be assuming original, not appellate, jurisdiction. Furthermore, litigation is an adversarial process. If the defendant does not assume that role at the trial level, he should not be permitted to do so on appeal. The trial court "cannot be said to have committed an error when . . . [its] judgment was never called into exercise, and the point of law was never taken into consideration. . . ."[182] By requiring the defendant first to file a motion to vacate, the trial court is permitted to review its decision before the matter is submitted to the court of appeals.

---

177. Barney v. Suggs, 688 S.W.2d 356 (Mo. 1985) (en banc).

178. If the court refuses to set a default aside, its decision is appealable immediately because the judgment is final. L.J. Ross Co. v. Vaughn, 683 S.W.2d 643 (Mo. App., E.D. 1984); Haller v. Shaw, 555 S.W.2d 703 (Mo. App., K.C. 1977). Normally an order setting aside the default is not immediately appealable. State *ex rel.* Aubuchon v. Jones, 389 S.W.2d 854 (Mo. App., St. L. 1965); Kallash v. Kuelker, 347 S.W.2d 467 (Mo. App., St. L. 1961). There is no final judgment from which the plaintiff can appeal because once the default is set aside, the case resumes as if the default had never occurred. Schreier v. Schreier, 625 S.W.2d 644, 647 (Mo. App., E.D. 1981); B____ L____ C____ (K) v. W____ W____ C____, 568 S.W.2d 602 (Mo. App., K.C. 1978). On the other hand if the court purports to set aside a default more than thirty days after judgment, the court's order is immediately appealable because the judgment was final on the thirtieth day. There is no case which can be automatically resumed. Casper v. Lee, 362 Mo. 927, 245 S.W.2d 132 (1962) (en banc); Diekmann v. Associates Discount Corp., 410 S.W.2d 695, 697 (Mo. App., St. L. 1966); *see also* Jacobsmeyer v. National Emergency Disaster Corp., 676 S.W.2d 843 (Mo. App., E.D. 1984) (appeal form court's error granting the writ to error coram nobis was proper).

179. Smilely v. Cardin, 655 S.W.2d 114, 116 (Mo. App., S.D. 1983); Hinson v. Hinson, 518 S.W.2d 330, 332 (Mo. App., St. L. 1975).

180. Masterson v. Nielson, 678 S.W.2d 5 (Mo. App., S.D. 1984); Hayes v. Hayes, 671 S.W.2d 423, 425 (Mo. App., E.D. 1984). This is the same standard which is applicable when the court of appeals reviews a trial court's order granting or denying equitable relief. Robyn Marketing v. Fjelstead, 693 S.W.2d 239 (Mo. App., S.D. 1985); M.S. Conway Constr. Co. v. Prudential Ins. Co., 682 S.W.2d 56, 58 (Mo. App., W.D. 1984); Human Dev. Corp. v. Wefel, 527 S.W.2d 652, 655 (Mo. App., St. L. 1975).

181. 666 S.W.2d 424 (Mo. 1984) (en banc).

182. *Id.* at 424 (quoting Gelston v. Hoyt, 13 Johns. 561, 566-67 (1816)).

The *Vonsmith* rule has been sharply criticized. In *Barney v. Suggs*,[183] three of the seven Missouri Supreme Court judges dissented, perceiving that the penalty paid by Dr. Suggs for not filing an answer was too harsh. Judge Blackmar argued that Missouri Revised Statutes section 512.020 permits an appeal from "any final judgment in the case."[184] He reasoned that there is nothing in that statute which excludes default judgments. Judge Donnelly in his concurring opinion countered this argument by pointing to the language of section 512.020 which requires that the appeal be taken to a court "having appellate jurisdiction."[185] Judge Donnelly concluded that a court of appeals does not have appellate jurisdiction unless a motion to vacate has been filed. He reasoned that all allegations of error must first be raised at the trial level before they can be reviewed on appeal. This is a jurisdictional prerequisite to appellate review. When a default judgment occurs, no allegations of error are raised at the trial level unless a motion to vacate has been filed.

Judge Blackmar suggested that some aspects of a default judgment should be reviewable pursuant to the plain error rule even if a motion to vacate has not been filed. For example, Supreme Court Rule 74.10 requires the trial judge to conduct a hearing on damages before a final default judgment can be entered. Sufficient evidence must be adduced at that hearing to justify the court's final order.[186] It would be plain error if the trial court ordered damages unsupported by the evidence. Blackmar argued that the sufficiency of the evidence in a default case should therefore be subject to appellate review pursuant to the plain error rule even if a motion to vacate had never been filed.

Judge Donnelly disagreed. He acknowledged that plain errors can be raised in a case which is properly before the appellate court. Some issue, however, has to be preserved for appeal before the plain error rule would permit appellate review of those issues not preserved for appeal. When a motion to vacate the judgment has not been filed in a default case, no issue has been preserved for appeal so the plain error rule could not be invoked.[187]

---

183. 688 S.W.2d at 362-67.
184. MO. REV. STAT. § 512.020 (1978).
185. Barney v. Suggs, 688 S.W.2d at 361.
186. *See supra* note 34 and accompanying text.
187. Judge Donnelly's reasoning suggests a way to avoid in part the requirement in *Vonsmith* that a motion to set aside is a prerequisite to appeal in default cases. The *Vonsmith* court held that there was an exception to the general rule that default judgments cannot be appealed. *Vonsmith*, 666 S.W.2d at 427. If the defendant alleges that the trial court lacked subject matter jurisdiction or that the petition failed to state a claim upon which relief can be granted, he may raise these issues for the first time on appeal even if it is a default judgment that has been entered. The notice of appeal would, of course, have to be timely but a motion to set aside would not be a prerequisite. *Id.* at 427. Combining Donnelly's logic and the exception to the *Vonsmith* rule, a defendant could appeal directly on the ground that the plaintiff's petition failed to state a claim on which relief could be granted and the court could then properly consider anything that constituted plain error. By this roundabout method, the sufficiency of the evidence to support the court's award of damage might be considered.

The requirement that a defendant must file a motion to vacate the default judgment before appealing seems to be a logical way to allocate responsibility between the trial court and the court of appeals. It does not, however, address the underlying problem in default cases. One is left with the impression after reading *Vonsmith* and *Suggs* that all would have been well for the defendants in those cases if they had just followed the rules and sought relief in the trial court before filing the appeal. The facts in the *Suggs* case demonstrate the fallacy of this conclusion.

By the time Dr. Suggs learned about the default, it was too late for him to file a motion to vacate the judgment pursuant to Supreme Court Rule 75.01. If a timely motion to vacate had been filed, the trial court could have reviewed the sufficiency of the evidence and that issue could ultimately have been reviewed by the court of appeals.[188] This avenue of relief, however, was foreclosed to Dr. Suggs because he did not receive notice of the default until after the judgment became final.[189] At that point, the trial court could not set the judgment aside even if the trial judge agreed that there was insufficient evidence to support the judgment. The petition to set aside for irregularities cannot be used to test the sufficiency of the evidence,[190] nor can the writ of error coram nobis or a petition in equity.[191] Relief pursuant to Supreme Court Rule 74.12 was also unavailable because the doctor was personally served.[192] While the court in *Barney v. Suggs* focuses on the correct way to obtain appellate review of a default judgment, the underlying problem was the rigid rules applicable to setting aside default judgments.

This problem is tacitly recognized in both the dissenting opinions of Judge

---

188. In O'Connor v. Quiktrip Corp., 671 S.W.2d at 17, a $20,000 judgment was entered in favor of the plaintiff who contended that she had become ill after she ate a sandwich which she purchased from the defendant. There was no allegation in the plaintiff's complaint that she had incurred permanent injuries and she did not prove permanent injury at the hearing on damages. The court of appeals concluded as a matter of law that the damages were not supported by the evidence in the record. Getting sick on a sandwich is not worth $20,000. *Id.* at 19. In State *ex rel.* Landmark Bank v. Stuckey, 661 S.W.2d 58 (Mo. App., W.D. 1983), the Western District Court of Appeals granted a writ of mandamus to set aside the damage portion of the default judgment because there was insufficient evidence to justify it. The mistake warranted extraordinary relief.

189. In *Suggs*, it was alleged that the plaintiff's attorney intentionally waited until the time for appeal had passed before contacting the defendant to collect on the judgment. Brief for the Appellant, Dr. Suggs at 6. The plaintiff's attorney denied the allegation. *See* Reply Brief for the Appellant Dr. Suggs at 7, *Suggs*.

190. See *supra* note 71.

191. The writ of error coram nobis is not the proper remedy to review judicial errors. Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103 (Mo. 1937). A judgment based on insufficient evidence is a judicial error. Head v. Ken Bender Buick Pontiac, 452 S.W.2d 596 (Mo. App., St. L. 1970). Courts of equity will not review matters which were actually presented to the court or could have been presented to the court. Overton v. Overton, 37 S.W.2d 565 (Mo. 1931); Daffin v. Daffin, 567 S.W.2d 672 (Mo. App., K.C. 1978); *In re* Kerr, 547 S.W.2d 837 (Mo. App., St. L. 1977).

192. *See supra* text accompanying footnotes 53-56.

Blackmar and Judge Welliver. Those judges argued that if a direct appeal was not permitted, then Rule 74.32 should be liberalized to permit the trial court to review the sufficiency of the evidence on which the award of damages was based. Even Judge Donnelly recognized that the inflexible rules developed to deal with defaults could work an injustice. In his concurring opinion he advocated a change in the Supreme Court Rules to require that notice of the hearing on damages should be given to the party in default. These judges recognized that the rule forbidding direct appeal of a default judgment would make more sense if the defendant had a reasonable opportunity to secure relief from the trial court. It seems more logical to liberalize the treatment of defaults at the trial level than to address these inequities for the first time on appeal. If, however, the rules concerning defaults are not liberalized, the *Vonsmith* rule precludes meaningful review by the appellate court. The defendant is unlikely to learn of the default in time to file a motion to vacate and even if he does, the trial court's ruling on the motion must be arbitrary and capricious before the appellate court will grant relief.

VI. CONCLUSION

In part one of this article, the focus has been on the law which governs default judgments. That law has proven to be confusing to lawyers and judges alike. For example, in the case of *In re Marriage of Bradford*,[193] the defendant filed a motion to vacate pursuant to Supreme Court Rule 74.12. After the defendant realized that Rule 74.12 was only applicable when service had been by publication, his motion had to be amended to invoke the equitable jurisdiction of the court. The defendant's confusion was even more pronounced in the case of *Estate of Kennedy v. Menard*.[194] The attorney for the defendant first filed a motion to set the judgment aside pursuant to Supreme Court Rule 74.12. The plaintiff filed a motion to dismiss on the grounds that Rule 74.12 is only available when service of process is by publication. The defendant then amended the motion and alleged that the judgment was a product of perjury and there was insufficient evidence to support it. Neither of these issues are properly raised by a motion to vacate under Rule 74.12. The trial court recognized that the defendant's motion was defective but went on to treat the motion as if it had been made pursuant to Supreme Court Rule 74.32, granting relief because a procedural irregularity existed. The plaintiff appealed and the defendant sought review under Supreme Court Rules 74.045 and 74.05. These rules, however, only deal with interlocutory orders of default and were inapplicable in the case because damages had already been assessed at the time the motion to vacate had been filed.

Because lawyers are confused, the appellate courts sometimes have trouble deciphering what relief was requested in the trial court. In *Citizens*

193. 557 S.W.2d 720 (Mo. App., Spr. 1977).
194. 690 S.W.2d 465 (Mo. App., E.D. 1985).

Bank & Trust Co. of Rock Port v. Mitchell,[195] the court of appeals noted that the defendant's post-judgment motion "most closely resembles a petition under rule 74.15,"[196] but found that service had been made personally so relief was not available. In the case of *Young v. Smith*,[197] the court of appeals also had trouble gleaning from the record what relief had been requested by the defendant. The appellate court held that a Rule 74.05 motion could not have been intended because damages had already been assessed. The court noted there was some language in the petition that sounded like a Rule 74.32 motion but no procedural irregularity could be identified. There was other language in the petition that sounded like Rule 74.12 was being invoked but personal service had been accomplished so that remedy was also unavailable.[198]

In response to this confusion, the courts have learned to look at the substance of the allegations contained in the defendant's motion to vacate and to ignore the defendant's labeling of the motion. This approach was eloquently explained by Judge Titus in *Hamm v. Hamm*:

> A Chinese proverb admonishes that '[t]he beginning of wisdom is to call things by their right name,' but our courts, in a display of preference for the Bard of Avon, [what's in a name?] often observe a pleading is to be judged, not by it's appellation, but by its subject matter. . . .[199]

This approach was followed in *Krantz v. Centropolis Crusher, Inc.*,[200] where the court held that a motion to vacate could be treated as an action in equity or as a writ of error coram nobis even though neither remedy was specifically requested by the defendant. In *Askew v. Brown*,[201] the defendant said that his motion was a writ of error coram nobis, but the court held that it was in fact an action in equity to vacate the judgment.

The courts have so freely ignored the label attached to the defendant's motions to vacate that the formal distinctions between post-judgment remedies are beginning to fade. For example, a writ of error coram nobis cannot be used to allege fraud as a grounds for vacating a judgment; the proper remedy is a separate suit in equity. This distinction, however, is essentially repealed *sub silentio* when the courts are willing to review an allegation of fraud raised by a

---

195. 652 S.W.2d 202 (Mo. App., W.D. 1983).
196. *Id.* at 204.
197. 648 S.W.2d 916 (Mo. App., S.D. 1983).
198. In Hamm v. Hamm, 437 S.W.2d 449 (Mo. App., Spr. 1969), the court of appeals observed: "While we are uncertain as to what particular type of motion Donald intends his to be, we are acquainted with several varieties of motions to set aside judgments which his is not." *Id.* at 452. In cases like this, where the remedy sought cannot be clearly identified, the appellate court will sometimes eliminate all remedies that a party might have asserted. For example in Godsy v. Godsy, 565 S.W.2d 726 (Mo. App., K.C. 1978), the court identified all the remedies that the defendant might have invoked to vacate a final default judgment and went on to explain why none of those remedies could be used.
199. Hamm v. Hamm, 437 S.W.2d at 452.
200. 630 S.W.2d 136 (Mo. App., W.D. 1982).
201. 450 S.W.2d 446 (Mo. App., K.C. 1970).

writ of error coram nobis without even mentioning that the wrong remedy has been requested.[202]

It is not only the lawyers who have been confused by the array of remedies available to vacate a default judgment. The courts have also made mistakes. In *Diehl v. Diehl*,[203] the Western District Court of Appeals held that a motion to set aside a default judgment "is covered by Rule . . . [74.32] . . . which allows for the setting aside of the default judgment within three years after the final judgment is rendered. . . . [T]hus the trial court's jurisdiction did not lapse after the thirty-days following the judgment entry."[204] This was an incorrect statement of the law and was expressly retracted by the Western District Court of Appeals in *State ex rel. Duncan v. Mauer*.[205] The court acknowledged in that case that a trial court loses control over the judgment thirty days after it is entered. While the defendant had three years to set aside the judgment for irregularity, pursuant to Supreme Court Rule 74.32, this is an independent action, not a continuation of the case which produced the judgment being attacked.

Even the Missouri Supreme Court has added to the confusion. *Barney v. Suggs*[206] involved two separate appeals: one from the default judgment itself, and one from the trial court's refusal to grant the writ of error coram nobis or the application for equitable relief. The supreme court first held that the defendant could not appeal the default judgment directly because no motion to vacate had been filed in the trial court. The supreme court went on to hold that the trial court properly denied the writ of error coram nobis and the request for equitable relief in that the trial court "had already lost jurisdiction because the default judgment had become final due to the passage of time."[207] This statement misconceives the purpose of post-judgment remedies. The very function of the writ of error coram nobis, the separate suit in equity, the Rule 74.32 motion, and the Rule 74.12 motion is to permit a trial court to vacate a judgment after the case is final, and the trial court's jurisdiction to vacate pursuant to Rule 75.01 has been exhausted.

The writ of error coram nobis and the suit in equity are separate and independent actions,[208] not merely a continuation of the case which resulted in the judgment that is being collaterally attacked.

---

202. *See* Francois v. Francois, 612 S.W.2d 794, 796 (Mo. App., E.D. 1981); Koeller v. Koeller, 589 S.W.2d 620 (Mo. App., E.D. 1979); Martin v. Martin, 549 S.W.2d 542 (Mo. App., St. L. 1977).

203. 630 S.W.2d 264 (Mo. App., W.D. 1982).

204. *Id.* at 265.

205. 683 S.W.2d 287 (Mo. App., W.D. 1984).

206. 668 S.W.2d 356 (Mo. 1985) (en banc).

207. *Id.* at 358.

208. Citizen's Bank & Trust Co. v. Mitchell, 652 S.W.2d 202, 204 (Mo. App., W.D. 1983); Lincoln Steel v. Mid-Continent Nat'l Bank, 646 S.W.2d 809 (Mo. App., W.D. 1982); Barker v. Friendly Am., Inc., 606 S.W.2d 457 (Mo. App., W.D. 1980); J.R. Watkins Co. v. Hubbard, 343 S.W.2d 189 (Mo. App., K.C. 1961).

> [It] is true that rulings on motions to vacate for irregularity, both patent on the face of the record and in the nature of coram nobis, have sometimes been designated "special order after final judgment;" yet a motion to vacate makes a direct attack upon the judgment and is an independent proceeding, instituted by motion instead of a petition. Such motion takes the place of a petition and becomes a pleading from which the issues are gauged. Thus the proceeding assumes the dignity of a separate lawsuit, and denial of the motion constitutes a final judgment in itself.[209]

Because it is a separate lawsuit, an answer must be filed when a writ of error coram nobis is requested or equitable relief sought,[210] and if the trial court grants the request to vacate the judgment, an immediate appeal is possible.[211] In contrast, if the trial court vacates the judgment pursuant to Supreme Court Rule 75.01 an immediate appeal is not possible; the original case continues as if no default had ever occurred. The trial court's decision to set the default aside cannot be reviewed on appeal until the case is tried on the merits and an appeal from the final judgment is filed.[212] When a judgment is vacated in response to a writ of error coram nobis or a separate suit in equity, however, there is no case which can be resumed as if the default had never occurred. The original case is final and the separate action to attack it collaterally can be fully reviewed by the court of appeals before the defendant has a right to start all over.[213]

The mere passage of time, therefore, is not a basis for saying that a trial court lacks jurisdiction to hear a writ of error coram nobis or a separate suit in equity. In fact, the supreme court seems to acknowledge in *Barney v. Suggs* that some kinds of post-judgment motions could be heard by the trial court even though the default was final because of the passage of time. This is implied from the supreme court's willingness to review the trial court's ruling on Dr. Suggs' request to vacate the default as "an *independent* motion for relief under Rule 74.32."[214] If the trial court had jurisdiction to hear a Rule 74.32 motion because it was an independent action, then it also had jurisdiction to hear the writ of error coram nobis and the suit in equity. They are also independent actions. In fact, the Rule 74.32 motion must be filed within three years of judgment, but no such arbitrary time limit is applicable to the writ of error coram nobis or the separate suit in equity which theoretically can be

---

209. *In re* Jackson's Will, 291 S.W.2d 214, 220 (Mo. App., Spr. 1956).

210. Gregg v. Johnston, 546 S.W.2d 754, 756 (Mo. App., K.C. 1977).

211. Citizen's Bank & Trust Co. v. Mitchell, 652 S.W.2d 465 (Mo. App., E.D. 1985); Diekmann v. Associates Discount Corp., 410 S.W.2d 695, 697 (Mo. App., St. L. 1966).

212. Haller v. Shaw, 555 S.W.2d 703 (Mo. App., K.C. 1977); Dennis v. Jenkins, 422 S.W.2d 393 (Mo. App., K.C. 1967).

213. Casper v. Lee, 362 Mo. 927, 245 S.W.2d 132 (1962) (en banc); Jacobsmeyer v. National Emergency Disaster Corp., 676 S.W.2d 843 (Mo. App., E.D. 1984).

214. Barney v. Suggs, 668 S.W.2d at 358.

filed decades after the judgment becomes final.[215] The trial court in *Suggs*, therefore, had jurisdiction to consider the writ and request for equitable relief even though the default was final.

Why have defaults and post-judgment remedies generated such confusion? A partial answer can be found in the structure of Supreme Court Rule 74. The rule is broken into seventy-nine short sub-parts with captions that make it difficult to determine which rules relate to the same subject and which do not. Only by reference to case law can this labyrinth be navigated. That process is sometimes impeded by the manner in which the annotations and digests are organized. Cases which relate to Supreme Court Rule 75.01 are sometimes annotated under Supreme Court Rule 74.05. Likewise, cases invoking equitable relief can be found in the annotation to Rule 74.12 which deals only with the right of a defendant to set aside a final judgment when service of process has been by publication. A second defect in Rule 74 is that it does not address most of the remedies that are available to set aside a final judgment in Missouri. The writ of error coram nobis, the separate suit in equity, and the motion to vacate for fraud are not even mentioned. While Supreme Court Rule 74.32 puts a three year limitation on the common law petition to set aside for irregularity, Rule 74.32 does not explain the parameters of that common-law remedy or even acknowledge that the rule relates to a common-law remedy rather than some other remedy specifically discussed elsewhere in the rules.

The proponents of the Missouri Rules of Civil Procedure envisioned a single set of rules which would govern the administration of the court system in Missouri. When practitioners had to rely upon statutes and case law to glean the rules of procedure, time was wasted and mistakes were more likely to occur.[216] The pitfalls inherent in such a system are still evident in Rule 74. The members of the Supreme Court Rules Committee acknowledged this when they urged the supreme court to correct the rule because it had become a "litigation breeder."[217] Rule 74 is also a malpractice trap, particularly for the inexperienced lawyer; when judges are confused by a topic, the inexperienced lawyer is especially vulnerable to costly mistakes. Most would agree that there is ample evidence to justify prompt action by the Missouri Supreme Court. The real question is how to improve Rule 74.

The situation can be substantially improved by merely correcting the structure of Rule 74. When making the necessary structural changes in Rule 74, however, the supreme court should also re-examine how default judgments are handled by the Missouri courts. In the past our courts have developed a pattern of mechanically applying the default judgment rules without consider-

215. Fadler v. Gabbert, 63 S.W.2d 121, 129 (1933) (equitable relief will not be granted if the defendant is guilty of laches); Hughes v. Neely, 332 S.W.2d 1 (Mo. 1960).

216. Comment, *supra* note 39, at 291.

217. Report on Proposed Rule 74—Judgments Orders and Proceedings Thereon, August 1979, prepared by the Missouri Supreme Court Rules Committee.

ing their underlying policy justifications. For example, if a defendant refuses to comply with the trial court's discovery orders, the defendant's pleadings can be stricken and judgment ordered for the plaintiff. The defendant, however, is still entitled to notice that a final judgment has been entered against him.[218] On the other hand, if a defendant fails to answer because his employee forgets to forward the summons to the insurance carrier, he is entitled to no notice of the court proceedings or the final judgment entered in his absence.[219] Why is the party who is negligent subjected to more punitive treatment than the party who is in direct defiance of the court?

This punitive treatment of the party in default is also reflected in the *Vonsmith* rule. A party in default is not permitted to appeal directly the judgment on the theory that the trial court should examine alleged errors in its judgments before the case is reviewed by the court of appeals.[220] In contrast, if a defendant fails to appear for trial and a judgment is entered against him, he is entitled to a direct appeal although a motion to vacate was never filed with the trial court.[221] The trial judge in that case has never had an opportunity to examine alleged errors any more than in the case where the defendant is in default. Neither process is adversarial; yet the *Vonsmith* rule only applies to the party in default. The underlying justifications for the *Vonsmith* rule are equally applicable to the case where the defendant fails to appear for trial and the case where the defendant fails to file an answer, yet the courts will not extend the *Vonsmith* rule beyond default judgments. It seems that even the courts recognize the punitive nature of the rules relating to default judgment and will use mechanical distinctions to limit their application.

The mechanical and punitive nature of the default judgment rules was particularly apparent in *Barney v. Suggs*.[222] The supreme court held that the appeals court had no jurisdiction to review the default because a timely motion to vacate had not been filed. It also held that the trial court had no jurisdiction to hear the defendant's motion to set aside the judgment because the trial court lost jurisdiction as soon as the appeal was filed. In reaching this decision the supreme court relied on prior Missouri cases which held that an issue cannot be pending before the court of appeals and the trial court at the same time. Once an appeal is filed, the trial court loses jurisdiction. This rule insures a proper allocation of power between the courts of appeal and the trial court and prevents conflicting and confusing orders.[223] This rule would have made sense in the context of *Barney v. Suggs* if the supreme court had been willing

218. Hammons v. Hammons, 680 S.W.2d 409, 410-11 (Mo. App., E.D. 1984).
219. Barney v. Suggs, 668 S.W.2d 356 (Mo. 1985) (en banc); *see also supra* discussion at note 10.
220. Vonsmith v. Vonsmith, 666 S.W.2d 424 (Mo. 1984) (en banc).
221. Hayes v. Hayes, 677 S.W.2d 933, 935 (Mo. App., S.D. 1984) (and cases cited therein).
222. 668 S.W.2d 356 (Mo. 1985) (en banc).
223. Geislemann v. Stegman, 470 S.W.2d 522 (Mo. 1971); State *ex rel.* Brooks Erection and Constr. Co. v. Gaertner, 639 S.W.2d 848.

to assume jurisdiction over the default judgment itself; but when the court refused to assume appellate jurisdiction there was no possibility that the same issue could be considered by the trial court and the appellate court simultaneously. Under these circumstances there is no justification for holding that the trial court lacked jurisdiction to grant post-judgment relief. While the rationale for the rule did not fit the *Barney v. Suggs* case, it was applied mechanically without recognition that, "[w]hen the reason for a rule of law fails, the rule fails."[224]

Part II of this article will consider whether this punitive treatment of defaults in Missouri is fair and justified by public policy.[225] It will also make a proposal to restructure Rule 74 to minimize the confusion which surrounds default judgments in Missouri.

224. Rathjen v. Reorganized School Dist. R-II, 284 S.W.2d 516, 522 (Mo. 1955) (en banc).

225. Part II will appear in volume 51:1 of the MISSOURI LAW REVIEW.