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Balancing Finality, Efficiency, and Truth When a Party Fails to Appear for Trial: Missouri Clarifies the Meaning of Otherwise Defend in Its New Default Judgment Rule

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Balancing Finality, Efficiency, and Truth When a Party Fails to Appear for Trial: Missouri Clarifies the Meaning of "Otherwise Defend" in Its New Default Judgment Rule

Cotleur v. Danziger[1]

I. INTRODUCTION

In Missouri, there has always been some confusion as to the name of the judgment entered when a party fails to appear for trial after participating in all other aspects of the litigation process.[2] However, prior to 1988, the Missouri Supreme Court Rules[3] and the holdings of the appellate courts[4] made clear that the judgment in such a case was treated as a "judgment on the merits" and not as a "default judgment."

In 1987, Missouri amended its rules governing default judgments, with changes becoming effective in 1988.[5] The amendments followed two articles which urged that the default judgment rules should be modified "to do greater justice between the parties without substantially sacrificing the principles of finality and efficiency."[6]

The language of the default judgment rule was changed slightly: the previous rule allowed an interlocutory judgment of default to be entered when a party failed to "file an answer or other pleading"[7] and the new rule allowed an interlocutory judgment of default or a default to be entered if a party "failed to plead or *otherwise defend.*"[8] The new rule gave a party who had a default judgment entered against him additional time to make a motion to

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1. 870 S.W.2d 234 (Mo. 1994).
2. *See infra* notes 37-40 and accompanying text.
3. Mo. Sup. Ct. R. 74.045 (1987). *See infra* notes 40-41 and accompanying text.
4. *See infra* note 34 and accompanying text.
5. MO. SUP. CT. R. 74.
6. Nanette K. Laughrey, *Default Judgments in Missouri*, 50 MO. L. REV. 841 (1985); Nanette K. Laughrey, *Balancing Finality, Efficiency, and Truth: A Proposed Reform of the Missouri Default Judgment Provisions*, 51 MO. L. REV. 63, 71 (1986). The title of this casenote is taken from Professor Laughrey's 1986 article.
7. Mo. Sup. Ct. R. 74.045 (1987).
8. MO. SUP. CT. R. 74.05 (emphasis added).

have the judgment set aside[9] and seemingly gave a new lower standard for granting relief.[10] These changes gave a party who failed to appear for trial an incentive to argue that the judgment entered against him was a default judgment under the new rule and not a judgment on the merits.[11]

While the Southern District of the Missouri Court of Appeals continued to treat a failure to appear for trial as a judgment on the merits,[12] the Eastern District held that when a party failed to appear at trial, this was a failure to "otherwise defend," so the judgment in such a case should be treated as a default judgment.[13]

In *Cotleur v. Danziger*, the Missouri Supreme Court held that a judgment entered when a party failed to appear for trial is not a default judgment, in what it termed a "policy decision" in favor of "the orderly conduct of judicial process and the stability of judgments."[14] The majority's opinion was met by a vigorous dissent which found that the new default judgment rule was meant to encompass a "wide range of failures on the part of counsel and parties" in order that a judgment would be on the merits "whenever possible."[15]

II. FACTS AND HOLDING

Katherine Marie Cotleur filed a petition for dissolution of marriage on June 5, 1990.[16] Andrew Carter Danziger filed an answer and a cross petition,[17] to which Cotleur filed a timely answer.[18] Cotleur's first attorney withdrew from the case by leave of the court.[19] Cotleur hired attorney L. Michael Kelly.[20] Kelly failed to enter his appearance in the action before Danziger's attorney secured a trial setting for September 25, 1991.[21] Unaware of Kelly's involvement, Danziger's attorney sent notice of the trial

9. *See infra* note 66 and accompanying text.
10. *See infra* notes 67-68, 81-82 and accompanying text.
11. *See infra* note 70 and accompanying text.
12. *See infra* notes 73-74 and accompanying text.
13. *See infra* notes 75-80 and accompanying text.
14. *See infra* notes 89-92 and accompanying text.
15. *See infra* notes 94, 99 and accompanying text.
16. *Cotleur*, 870 S.W.2d at 235.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* At the time Cotleur's first attorney withdrew, the parties had already participated in pretrial discovery.
21. *Id.*

setting to Cotleur.[22] Cotleur, in turn, informed Kelly of the trial setting.[23] No one appeared on Cotleur's behalf at the hearing.[24] However, the trial court proceeded with the hearing, and allowed Danziger to testify and offer exhibits.[25] In its decree entered September 30, 1991, the trial court "dissolved the marriage, apportioned property, and entered an order of joint physical and legal custody of the minor child."[26]

On October 25, 1991, Kelly entered his appearance and filed a motion to set aside the judgment, which he termed a "default judgment."[27] The motion was overruled on November 18, 1991, but the trial court did not state that its decision was based on a specific rule.[28] The trial court did state, however, that there was "no, absolutely no excusable neglect."[29]

On appeal, the Western District affirmed the property settlement and dissolution decree of the trial court, but remanded on issues relating to the minor children.[30]

On transfer to the Supreme Court of Missouri, Cotleur argued that the trial court had entered a default judgment against her and that the trial court had abused its discretion under Rule 74.05, which allows the trial court to set aside a default judgment if a party shows "good cause" and a "meritorious defense."[31] Cotleur based her assertion that a "default judgment" was entered on the fact that Rule 74.05(a) states a default judgment may be entered against a party who failed to plead or "otherwise defend," urging that "otherwise

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The court ordered Danziger to pay tuition for the private school the child attended in lieu of child support.

27. *Id.* Attached to and included in the motion was a copy of a social worker's report "expressing concerns of possible sexual interaction between the child and her father." *Id.* At the motion hearing on November 18, 1991, Kelly testified that he failed to appear at the September 25 hearing because he was out of town, that he thought the court date was only a docket call, and he had asked another attorney to appear to obtain a continuance. *Id.* at 235-36. The other attorney testified that he did not remember being asked to appear. *Id.* at 236.

28. *Id.*

29. *Id.* "Excusable neglect" is a ground for relief from a final judgment or order under MO. SUP. CT. R. 74.06, which is distinct from the rule which governs relief from a default judgment.

30. *Id.* Kelly filed an untimely appeal, which the Western District of the Missouri Court of Appeals dismissed. *Id.* Cotleur discharged Kelly, and the Western District reinstated Cotleur's appeal on motion by Cotleur's new attorney. *Id.*

31. *Id.*

defend" includes circumstances, like hers, where "a party actively participates in litigation, then fails to appear at a hearing or trial."[32]

The Supreme Court of Missouri affirmed, holding that "when a party files a petition, then files an answer to a cross-petition, but fails to appear for trial, the judgment is not a default judgement but, rather, is a judgment on the merits."[33]

III. LEGAL BACKGROUND

A. Distinguishing "Failure to Appear for Trial" from "Failure to File an Answer"

In Missouri, prior to 1988, the law was clear that when a party filed an answer or other pleading, but failed to appear for trial, the judgment entered against the party was a "judgment on the merits" and not a "default judgment."[34] At that time, the procedure for granting a default judgment was contained in Missouri Supreme Court Rule 74.045. It provided:

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32. *Id.* at 236-37. Cotleur also argued that "even though she may not otherwise come within the purview of Rule 74.05" the court must treat her case as a default because the rules pertaining to the setting aside of judgments are less rigorously applied where child custody is at issue. *Id.* at 237. Alternatively, Cotleur argued that the Western District abused its discretion because Rule 74.06(b) permits a judgment to be set aside for excusable neglect. *Id.* at 236. Cotleur argued she was not guilty of inexcusable neglect, and, because Kelly "abandoned the defense of the case without notice to her," his neglect was not imputable to her. *Id.*

33. *Id.* at 237. The court also held that in the facts and circumstances of this case (where there were no allegations of neglect of the minor child in Cotleur's petition or first amended petition; where at the time the motion to set aside was filed, Cotleur neither filed an affidavit nor testified regarding the child custody issue; and where there were no allegations that the trial court failed to view the allegations with respect to the child contained in the motion to set aside) the trial court did not abuse its discretion in refusing to set aside the judgment on the basis of allegations regarding the custody of the child. *Id.* Furthermore, the Supreme Court of Missouri held that when an attorney represents a client before and after a hearing at which he fails to appear, the attorney has not abandoned the client, abandonment being a narrow exception to the rule that the actions of a party's attorney are imputed to the client. *Id.*

34. *See, e.g.*, Ozark Mountain Timber Prods., Inc. v. Redus, 725 S.W.2d 640 (Mo. Ct. App. 1987); Ward v. Davis, 701 S.W.2d 192 (Mo. Ct. App. 1985); Meyerhardt v. Fredman, 131 S.W.2d 916 (Mo. Ct. App. 1939).

> If a defendant shall fail to file his answer or other pleading within the time prescribed by law or the rules of practice of the court, and serve a copy thereof upon the adverse party, or his attorney, when the same is required, an interlocutory judgment shall be given against him by default.[35]

Once a defendant filed an answer or other pleading, even if he later failed to appear for trial, any judgment entered against the defendant would not be governed by this rule, and, thus, would be a judgment on the merits.[36]

The distinction between the judgment entered when a party failed to appear for trial and a judgment entered when a party failed to file an answer or other pleading was, and is, nonetheless a source of confusion to attorneys and the courts.[37] The origin of the confusion may be found in the fact that a court does not hold an adversarial trial in either case. Because the two situations seem comparable, the term "default judgment" is often used interchangeably by attorneys to describe both cases.[38] Adding to the confusion, courts themselves frequently use the term "default judgment" to describe the judgment made when a party fails to appear for trial.[39] Furthermore, Rule 74.78 may contribute to this misnomer by requiring that notice be sent to parties who were not present when a judgment was entered, except parties who are "in default for failure to appear."[40]

The distinction between "failure to appear for trial" and "failure to file an answer" was not merely a matter of semantics.[41] As discussed in the next two sections, a party had a much more difficult time setting aside a default judgment than setting aside a judgment on the merits.[42]

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35. Mo. Sup. Ct. R. 74.045 (1987).

36. *Id.*

37. *See* Laughrey, *Default Judgments in Missouri*, *supra* note 6, at 844-45.

38. *See, e.g.*, Weber v. Hoesch, 603 S.W.2d 60, 61 (Mo. Ct. App. 1980). Both parties referred to the judgment of the trial court as a "default judgment" even though the defendant had entered his appearance, filed an answer, and been notified of the trial, but did not appear. *Id.*

39. *See, e.g.*, Murray v. Sanders, 667 S.W.2d 426 (Mo. Ct. App. 1984); Groves v. Hall, 628 S.W.2d 420 (Mo. Ct. App 1982).

40. Mo. Sup. Ct. R. 74.78 (1987). *See infra* notes 68-75 and accompanying text.

41. Laughrey, *Default Judgments in Missouri*, *supra* note 6, at 845.

42. *See infra* notes 43-65 and accompanying text.

B. Setting Aside a Default Judgment

Prior to 1988,[43] there were a number of methods by which a party could ask for a default judgment to be set aside, but none of these provided an easy means of gaining relief.[44]

Before an entry of a default judgment became final, a party could file a motion to set aside the judgment pursuant to Missouri Supreme Court Rule 75.01,[45] which allows the trial court to control a judgment for thirty days following its entry.[46] The rule provides that the trial court "may vacate, reopen, correct, amend or modify its judgment for good cause within that time."[47] It was unlikely that a party in default would be aware that a judgment had been entered against him because a party who was in default was not entitled to notice that a judgment had been entered against him.[48]

When a party did become aware of a default judgment within the thirty day period and was able to make a motion pursuant to Rule 75.01, the party still had to provide the court with a meritorious defense and "good cause." In order to show "good cause," a defaulting party had to show: (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.[49] The majority of courts held that a defendant who was negligent in causing the default could not show a "good excuse" in order to get relief under Rule 75.01.[50] Because in the majority of cases "good cause" for the default was not established on

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43. For a more in depth discussion of Missouri's default judgment rules prior to 1988, *see* Laughrey, *Default Judgments in Missouri, supra* note 6.

44. *See* Laughrey, *Default Judgments in Missouri, supra* note 6, at 848, who states, "While this arsenal [of procedural devices which may be used to set a default judgment aside] may seem plentiful, a closer look reveals that it is very difficult to set aside a default judgment in Missouri." Professor Laughrey provides a complete analysis of the six procedural devices that could be used to set aside or alter a final judgment by default. *Id.* at 847-57. Additionally, Professor Laughrey explains the procedure for setting aside an interlocutory order by default. *Id.* at 858-59.

45. MO. SUP. CT. R. 75.01 remains unchanged after 1988.

46. MO. SUP. CT. R. 75.01.

47. *Id.*

48. Mo. Sup. Ct. R. 74.78 (1987). *See infra* notes 53-60 and accompanying text. *Also see* Laughrey, *Default Judgments in Missouri, supra* note 6, at 843 n.10.

49. Laughrey, *Default Judgments in Missouri, supra* note 6 at 862 (citing Courtin v. McGraw Constr. Co., 639 S.W.2d 286 (Mo. Ct. App. 1982); Lester v. Dyer, 518 S.W.2d 213 (Mo. Ct. App. 1974)).

50. Laughrey, *Default Judgments in Missouri, supra* note 6, at 862 (citing Citizens Bank v. Gehl, 567 S.W.2d 423 (Mo. Ct. App. 1978); Tillman v. Deese, 488 S.W.2d 206 (Mo. Ct. App. 1972); Hamm v. Hamm, 437 S.W.2d 449 (Mo. Ct. App. 1969)).

a motion to vacate, and because the trial court had broad discretion to make the ruling, the appellate court was unlikely to set aside a default judgment.[51]

C. *Setting Aside a Judgment on the Merits Entered When a Party Failed to Appear for Trial*

In contrast, the procedural devices that govern[52] relief from a judgment entered upon a party's failure to appear for trial give a party a greater opportunity to have the judgment set aside. The Missouri Supreme Court Rules require that a party who fails to appear at trial be given notice that a judgment was entered against him.[53] Missouri Supreme Court Rule 74.78 (which has been repealed, but is substantially the same under Rule 74.03)[54] stated:

> Upon entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided in Rule 43.01 upon every party affected thereby who is *not in default for failure to appear* and who was *not present in court* in person or by attorney at the time of the entry of such order of judgment. If such notice is not given, said order or judgment shall be set aside for good cause shown upon written motion filed within six months from the entry of the order or judgment.[55]

Although the language "in default for failure to appear" has led one court to hold that Rule 74.78 does not provide for notice to a party who fails to appear at trial,[56] other courts have recognized that "in default for failure to appear" does not mean "failure to appear for trial."[57] In 1986, the Eastern District

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51. Laughrey, *Default Judgments in Missouri*, *supra* note 6, at 862.

52. The rules governing relief from a judgment on the merits that is entered when a party fails to appear at trial are discussed in the present tense because these rules remain intact after 1988, although there may be some slight changes, such as in the numbering the Missouri Supreme Court Rules.

53. Mo. Sup. Ct. R. 74.78 (1987).

54. MO. SUP. CT. R. 74.03 provides:

> Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 43.01 upon each party who is not in default for failure to appear and who was not present in court in person or by attorney at the time of the entry of such order or judgment. If such notice is not given, the order or judgment shall be set aside for good cause shown upon written motion filed within six months from the entry of the order or judgment.

55. Mo. Sup. Ct. R. 74.78 (1987) (emphasis added).

56. *Weber*, 603 S.W.2d at 61.

57. *See infra* notes 58-62 and accompanying text.

of the Missouri Court of Appeals explained that the purpose of the rule is to give notice to parties "not present in court" unless the party is also in default.[58] The Eastern District further explained that a party who files a responsive pleading but does not appear for court is not in default, so the party is entitled to notice under the Rule.[59] The Southern District explained the phrase "in default for failure to appear" by explaining that it is the same as language which appears in federal rules which "refers to parties who have never entered any appearance in the action, not to parties who have failed to answer the calendar or docket call."[60]

A party who is not present when judgment is entered and is not in "default" should receive notice that a judgment has been entered. Furthermore, a party who fails to appear for trial is often informed of the trial, and, therefore, knew or should have known, that a judgment would be entered in that party's absence.[61] In addition, a party who has actively participated in all other aspects of the trial is likely to hear that a judgment was entered in that party's absence.[62]

If a party does receive notice of a judgment entered pursuant to Rule 74.03 or receives notice in some other fashion within thirty days of entry of the judgment, a party may act under Rule 75.01 to have the judgment set aside.[63]

If the party does not receive notice required by Rule 74.03 (formerly Rule 74.78), the party can be granted relief from the judgment "for good cause shown" within six months.[64] A party can show good cause by showing that

58. Vetter & Assoc., Inc. v. Dimarco Corp., 733 S.W.2d 459, 461 (Mo. Ct. App. 1986). The *Vetter* court tried to distinguish *Weber* on the basis that the defendant received notice of the trial setting in *Weber* while defendant did not receive notice in *Vetter*. Distinguishing on this basis does not seem logical in that whether or not the defendant received notice of the trial setting is irrelevant in determining whether or not the party is in default. *Weber* can better be distinguished by recognizing that the *Weber* Court incorrectly defined the phrase "in default for failure to appear."

59. *Id.*

60. Herrin v. Straus, 810 S.W.2d 593, 597 (Mo. Ct. App. 1991).

61. *See, e.g., Cotleur*, 870 S.W.2d at 235 (Cotleur was given notice of the trial setting and she informed her attorney of this notice.); *Herrin*, 810 S.W.2d at 595 (Evidence in the record suggested that the Appellants' attorney sent them a letter advising them of the trial setting.).

62. *See, e.g., Vetter*, 733 S.W.2d at 461 (party who failed to appear for trial learned that judgment had been entered when the party received a cost bill from the circuit clerk).

63. MO. SUP. CT. R. 75.01.

64. MO. SUP. CT. R. 74.03; Mo. Sup. Ct. R. 74.78 (1987).

his right to appeal is prejudiced by the trial court's non-compliance with the Rule.[65]

D. New Rules in 1988

In 1987, the Supreme Court of Missouri adopted a new default judgment rule, Rule 74.05, effective January 1988, which liberalized the means by which a default judgment could be set aside.[66] The new rule makes it possible for the trial court to rule on a motion to set aside a default judgment for up to one year after the judgment is entered, thus allowing a party more time to discover that a default has been entered and to make a timely motion to set it aside. Additionally, the new rule appeared to some parties and courts to grant the trial court greater discretion to set aside a judgment than the trial court previously had under Rule 75.01,[67] even though Rule 75.01 has always given the trial court discretion to act on motions filed within thirty days after judgment.[68]

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65. Hammons v. Hammons, 680 S.W.2d 409, 410-11 (Mo. Ct. App. 1984). It seems likely that if the party received notice in some other manner the party would have difficulty arguing that his rights had been prejudiced by the lack of notice, because he would have been able to file a motion pursuant to Rule 75.01 despite the lack of notice under Rule 74.78.

66. MO. SUP. CT. R. 74.05(d), formerly 74.05(c) until 1994 when it was redesignated without change as 74.05(d), provides:

> Upon motion stating facts constituting a meritorious defense and for good cause shown, an interlocutory order of default or a default judgment may be set aside. The motion shall be made within a reasonable time not to exceed one year after the entry of the default judgment. Good cause includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process. An order setting aside an interlocutory order of default or a default judgment may be conditioned on such terms as are just, including a requirement that the party in default pay reasonable attorney's fees and expenses incurred as a result of the default by the party who requested the default.

67. *See, e.g.*, Schulte v. Venture Stores, Inc., 832 S.W.2d 13, 14 (Mo. Ct. App. 1992). In quoting the new rule, the court states, "This rule has broadened considerably the situations in which a court may find 'good cause' for setting aside a default judgment."

68. MO. SUP. CT. R. 75.01. An explanation for why the new Rule 74.05(c) was likely seen as giving an easier standard to set aside the judgment is the fact that trial courts acting under Rule 75.01 rarely did set aside judgments and created high barriers in case law to prevent default judgments from being set aside. *See supra* notes 50-51 and accompanying text.

Missouri Supreme Court Rule 74.06 was also adopted in 1987, effective January 1, 1988.[69] Rule 74.06 allows a party relief from a final judgment, but only in limited circumstances.[70]

Therefore, rules 75.01, 74.05, and 74.06 provide the procedural tools a party may use to ask that a judgment be set aside, depending on the timing of the motion and the type of judgment the party wants set aside.

The new default judgment rule also creates additional confusion between the judgment entered when a party fails to answer and the judgment entered when a party fails to appear for trial. Rule 74.05(a) states:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or *otherwise defend* as provided by these rules, upon proof of damages or entitlement to other relief, a judgment may be entered against the defaulting party. The entry of an interlocutory order of default is not a condition precedent to the entry of a default judgment.[71]

When the new rule was enacted, parties recognized the phrase "otherwise defend" as a change in the rule and began to argue that "otherwise defend" could include a failure to appear at trial.[72]

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69. MO. SUP. CT. R. 74.06 provides:

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

(c) A motion under subdivision (b) does not affect the finality of a judgment or suspend its operation. The motion shall be made within a reasonable time and for reasons (1) and (2) and (3) of subdivision (b) not more than one year after the judgment or order was entered . . . .

70. *Id.*

71. MO. SUP. CT. R. 74.05(a).

72. *See, e.g.*, Hoskin v. Younger Cemetary Corp., 838 S.W.2d 476, 477 (Mo. Ct. App. 1992) (The personal representative of a party who failed to appear filed a motion to set aside the judgment one year after it was entered. The party could not have made a timely motion under Rule 75.01.); *Schulte*, 832 S.W.2d at 14 (The party filed a motion to vacate or set aside the judgment which was ruled on within thirty days of the entry of the judgment, and thus should have been treated under Rule 75.01. However, believing that the new Rule 74.05 created an easier standard by which a judgment could be set aside, the Appellate Court analyzed the trial court's ruling under Rule 74.05.). *See also Cotleur*, 870 S.W.2d at 236-37.

In *Herrin v. Straus*, the Southern District of the Missouri Court of Appeals held that the judgment entered by the trial court in this case in which the plaintiffs failed to appear was a judgment on the merits and not a default judgment.[73] The plaintiffs, who failed to appear, received notice of the entry of final judgment one day after it was entered, and filed a "motion to set aside default judgment" seven days later.[74]

In contrast, the Eastern District of the Missouri Court of Appeals found that the new default judgment rule includes, within its definition, a failure to appear.[75] In *Schulte v. Venture Stores, Inc.*, the court stated that Rule 74.05 is applicable to a judgment in which a party has "failed to plead or otherwise defend."[76] On this basis the court stated that when Defendant failed to appear at trial, Defendant "failed to otherwise defend."[77] In *Hoskin v. Younger Cemetery Corp.*, the court stated that "strictly speaking" there was not a default judgment because an answer was filed before the attorney withdrew and no further action was taken in the case.[78] The court stated, however, that the default judgment rule was applicable.[79] The court explained that defendant failed to "otherwise defend" within the meaning of Rule 74.05(a) when the defendant "repeatedly failed to answer discovery, respond to sanctions, or appear at the default hearing."[80]

IV. THE INSTANT DECISION

A. Majority Opinion

In *Cotleur v. Danziger*, the Supreme Court of Missouri began its analysis by comparing Supreme Court Rules 74.05, 74.06, and 75.01, all of which provide procedural means to set aside judgments.[81] The court noted that Rule 75.01 allows the trial court to set aside a judgment for "good cause" before the judgment becomes final, Rule 74.05(c) allows a default judgment to be set aside for "'good cause' if the party can show 'facts constituting a meritorious defense,'" and Rule 74.06(b) allows for a judgment on the merits

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73. *Herrin*, 810 S.W.2d at 594-95.

74. *Id.*

75. *See, e.g.*, Hoskin v. Younger Cemetery Corp., Inc., 838 S.W.2d 476 (Mo. Ct. App. 1992); Schulte v. Venture Stores, Inc., 832 S.W.2d 13 (Mo. Ct. App. 1992).

76. *Schulte*, 832 S.W.2d at 14.

77. *Id.*

78. *Hoskin*, 838 S.W.2d at 479.

79. *Id.*

80. *Id.*

81. *Cotleur*, 870 S.W.2d at 236. (Chief Justice Covington wrote for the majority. Judges Benton, Price and Limbaugh concurred in the majority opinion.)

to be set aside if the party shows "excusable neglect."[82] The court implied that the standard for setting aside a judgment is lowest under Rule 75.01 and highest under Rule 74.06. The court then explained that Appellant Cotleur denominated the judgment in the present case as a default judgment because she recognized "that there is much greater liberality in reopening a judgment after a default than in reopening a judgment that comes after a hearing on the merits."[83]

The court next explored the history of default judgments in Missouri, noting that prior to 1988, Missouri uniformly interpreted the default judgment rule, Rule 74.045, as not allowing a default judgment to be entered where "a defendant filed an answer, but failed to appear for trial."[84] Rather, a judgment under these facts was a judgment on the merits, the court explained.[85]

The majority then noted that the court adopted a new default judgment rule, Rule 74.05(a), effective January 1, 1988, which provided that a default judgment may be entered when a party fails to plead or "otherwise defend."[86] The court then explained that Cotleur's argument turns on the interpretation of the phrase "otherwise defend," which Cotleur read to mean "and fails to defend in addition to filing pleadings, pretrial motions, challenges to such motions as service, jurisdiction, venue, and the sufficiency of prior pleading."[87] The court noted that "otherwise defend" has not been unanimously interpreted in other jurisdictions.[88]

The court next stated that interpretation of the language of the new default judgment rule "calls simply for a policy decision."[89] The court stated that having considered the effects of Cotleur's interpretation, the court rejects the "broad brush in favor of interests affecting the orderly conduct of judicial process and the stability of judgments."[90] The court then explained that its interpretation allows a party seeking affirmative relief, who follows the rules of civil procedure, to obtain a judgment which the party can rely on, absent a finding under Rule 74.06.[91]

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82. *Id.*

83. *Id.*

84. *Id.* (citing Mo. Sup. Ct. R. 74.045 (1987)).

85. *Id.* (citing Ozark Mountain Timber Prods., Inc. v. Redus, 725 S.W.2d 640 (Mo. Ct. App. 1987); Ward v. Davis, 701 S.W.2d 192 (Mo. Ct. App. 1985); Meyerhardt v. Fredman, 131 S.W.2d 916 (Mo. Ct. App. 1939)).

86. *Id.* (citing MO. SUP. CT. R. 74.05(a)).

87. *Id.*

88. *Id.* at 237.

89. *Id.*

90. *Id.*

91. *Id.* MO. SUP. CT. R. 74.06(b) provides circumstances under which a party

The court held that because the party filed a petition, then filed an answer to a cross-petition, but failed to appear for trial, the judgment is a judgment on the merits, not a default judgment under the language of the new default judgment rule.[92]

B. Dissenting Opinion

Judge Robertson, writing for the dissent, explained that he disagreed with the majority's holding that "otherwise defend" does not change the prior rule and that there was not a default judgment in this case.[93] In the dissent's view, "the new language of Rule 74.05(a) changed the rule to include a wide range of failures on the part of counsel and parties as bases for default judgments."[94]

The dissent explained that the Supreme Court of Missouri noted in *Sprung v. Negwer Materials* that default judgments are "particularly troubling" because of the fundamental and competing interests at stake.[95] These "interests" are the need for efficiency and finality, on one side, and the need to seek truth and justice between the parties, on the other.[96] The dissent then stated that the new default judgment rule attempts to accommodate the tension between the competing interests in two ways.[97] First, "otherwise defend" was added as a "deliberate policy choice" to lower procedural barriers to a judicial inquiry into a judgment entered when "a defendant does not plead, or does not appear for trial or otherwise defend."[98] The dissent asserted that such a reading would accommodate concerns that a judgment would be on the merits "whenever possible."[99] Second, the dissent asserted, the new default judgment rule adequately considers finality concerns in that Rule 74.05(c) only allows a default judgment to be set aside for "good cause" and upon "facts constituting a meritorious defense."[100]

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may receive relief from a judgment of order.

92. *Cotleur*, 870 S.W.2d at 237.

93. *Id.* (Judge Robertson, dissenting. Judges Holstein and Thomas concurred in the opinion of Judge Robertson.)

94. *Id.*

95. *Id.* at 239-40 (Robertson, J., dissenting) (citing Sprung v. Negwer, (incorrectly cited by Robertson as *Sprung v. Newger*) 727 S.W.2d 883, 886-87 (Mo. 1987), which cited Laughrey, *Default Judgments in Missouri*, *supra* note 6, at 843-44 (citations omitted)).

96. *Id.*

97. *Id.* at 240 (Robertson, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.* (citing MO. SUP. CT. R. 74.05(c), *renumbered as* 74.05(d)).

Next, the dissent attacked the majority for conceding that two interpretations of the rule were possible, yet choosing the interpretation which did not allow Appellant Cotleur a judicial determination of the merits of her claim.[101]

The dissent explained that the court's rules should foster justice rather than hinder it, and that concern is more important than the "interests affecting the orderly conduct of judicial process and the stability of judgments."[102] The dissent stated that this proposed interpretation does not detract from the orderly conduct of the judicial process and the stability of judgements, but in fact "fosters judicial economy and prompt resolution of claims."[103]

Judge Robertson stated that he would hold that a default judgment was entered in this case, and because the record did not reveal the reasons why Cotleur's motion to set aside the default judgment was overruled, he would remand to the trial court for the Rule 74.05(c) hearing to determine whether Cotleur had both "good cause for her failure to appear and a meritorious defense."[104]

V. COMMENT

When the Supreme Court of Missouri held that the language "otherwise defend" does not include a failure to appear for trial, the court did more than clarify the meaning of an ambiguous phrase. The court suggested that it was making a "policy decision" in favor of "the orderly conduct of judicial process and the stability of judgments."[105] The dissent criticized this approach, concluding that a judgment should be decided on the merits "whenever possible."[106] The dissent suggested that the interests of justice are not served by the court's opinion.[107] The dissent's criticism is misleading however, because it suggests that a party who fails to appear for trial is put in a worse position than a party who is in default. By actively participating in the case and through the Missouri Supreme Court Rules, a party who fails to appear for trial, in most every circumstance, is better able to have a judgment set aside than a party in default.[108] Because the mechanism already existed to allow a party who failed to appear for trial to have a judgment set aside, it was unnecessary to extend the scope of the new default

101. *Id.*
102. *Id.* (citing the majority opinion at 237).
103. *Id.*
104. *Id.* at 240-41 (Robertson, J., dissenting).
105. *See supra* notes 89-90 and accompanying text.
106. *See supra* note 99 and accompanying text.
107. *See supra* note 101 and accompanying text.
108. *See infra* notes 120-25 and accompanying text.

judgment rule. Additionally, there are more logical readings which may be attributed to the phrase "otherwise defend" which justify the decision reached by the majority.[109]

The *Cotleur* court recognized that the Missouri Supreme Court Rules provide increasingly difficult standards for a judgment to be set aside.[110] The court explained that Rule 75.01 requires the least showing to set aside a judgment, requiring only "good cause" for a trial court to set aside a judgment before it is final.[111] Rule 74.05 requires more, allowing a default judgment to be set aside only upon the showing of "good cause" and a meritorious defense.[112] Finally, the highest standard is set by Rule 74.06.[113]

These rules allow a court to reach the merits of the case in its quest to determine "truth," yet promote finality and efficiency by giving a party an incentive to ask for relief from a judgment in the earlier stages after a judgment is entered, before the parties begin to depend on the judgment as "final." Additionally, in making this determination, the *Cotleur* court explicitly recognized that it is easier to set aside a judgment during the first thirty days after its entry, under Rule 75.01, than it is to set the judgment aside under the new default judgment rule, Rule 74.05. This recognition is significant in that it gives an incentive to all parties, even those who have a default judgment against them, to make a motion under Rule 75.01 if the party has notice of the judgment within the thirty day period. In addition, this holding tells all trial courts that they have their greatest exercise of discretion under Rule 75.01, despite precedent[114] and despite the initial reactions of courts that Rule 74.05 provided an easier standard to have the judgment set aside.[115]

Missouri's new default judgment rule, Missouri Supreme Court Rule 74.05, responds to criticism that the past rules governing default judgments were too confusing and were applied so mechanically as to overlook the judicial system's primary goal, which is "to seek truth and do justice between the parties."[116] By giving a defaulting party up to one year after the entry of a default judgment to make a motion to set the judgment aside on the basis of a "good cause" with a showing of a "meritorious defense"[117] the new rule recognizes that a defaulting party does not receive notice that a default

109. *See infra* notes 137-42 and accompanying text.
110. *See supra* notes 81-83 and accompanying text.
111. *Cotleur*, 870 S.W.2d at 236.
112. *Id.*
113. *Id.*
114. *See supra* note 50 and accompanying text.
115. *See supra* note 67 and accompanying text.
116. *See supra* note 95 and accompanying text.
117. *See supra* note 66 and accompanying text.

judgment has been entered against him.[118] As a result of the lack of notice, a party often does not have an opportunity to make a motion to set aside a default judgment pursuant to Rule 75.01, which must be made and ruled on within thirty days of the entry of judgment.[119] However, in giving the party additional time to file a motion to set aside, Rule 74.05 makes the party in default meet a higher standard to gain relief.

These considerations are not necessary for a party who fails to appear for trial.[120] Such a party will likely learn of a judgment entered against him in time to make a motion pursuant to Rule 75.01 to have the trial court set aside a judgment entered in his absence.[121] Under Rule 75.01 the trial court maintains control over the judgment during the thirty days after the judgment.[122] So as long as a motion to set aside is made during the thirty day period and the trial court decides the motion during that thirty day period, the court has a great deal of discretion in ruling on the motion.[123] Additionally, if the party who failed to appear for trial were to make a motion for new trial, pursuant to Rule 78.04, which allowed the motion to be filed within thirty days after the judgment,[124] the trial court could make a ruling on the motion for up to ninety days after the motion was filed.[125]

To allow a party who failed to appear for trial to ignore notice that a judgment was entered against him or her and to allow that party up to a year to make a motion pursuant to Rule 74.05, which could have been made within thirty days under Rule 75.01, would be to ignore the objectives of finality of decisions and efficiency of the judicial process.

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118. *See supra* note 54 and accompanying text.

119. *See supra* note 48 and accompanying text.

120. See *supra* notes 53-63 and accompanying text for a description of the notice mechanisms that will allow a party who failed to appear for trial to learn that a judgment has been entered against him.

121. *Id.*

122. MO. SUP. CT. R. 75.01.

123. *See supra* note 63 and accompanying text.

124. MO. SUP. CT. R. 78.04. In 1993 the rule was amended to allow a party to make the motion within thirty days, rather than within fifteen days, as was necessary under the old rule. Because the Cotleur "trial" was in 1991, the old rules would apply to the time when the a motion for new trial would need to have been made.

125. MO. SUP. CT. R. 78.06. The trial court could grant relief for "good cause shown." MO. SUP. CT. R. 78.01. In Brooks v. Brooks, 800 S.W.2d 468, 470 (Mo. Ct. App. 1990), the appellant failed to appear for trial and filed a timely motion to set aside the judgment entered against him. The Eastern District of the Missouri Court of Appeals treated the motion as a motion for new trial and found that trial court had acted arbitrarily in its discretion in denying the appellant's motion, and ordered the judgment reversed and the cause remanded with instructions to set aside the judgment and reinstate the appellant's petition. *Id.* at 470-71.

An example of these issues can be seen in *Cotleur v. Danziger*. Although it is not clear from the facts of the appeal whether actual notice of the judgment was sent to Cotleur[126], it is clear that Ms. Cotleur was aware that a hearing had been scheduled for September 25, 1991.[127] Her attorney failed to make a motion to set aside the judgment until October 25, 1991, and the motion was not heard until November 18, 1991,[128] by which time the judgment was final and the trial court no longer had control pursuant to Rule 75.01.[129] Even though Cotleur's attorney likely became aware of the judgment soon after the September 25 court date, he waited until after the judgment was final to argue for relief before the trial court.[130] Had Cotleur's attorney realized that his motion would be treated under the higher standard of Rule 74.06, he would have had an incentive to file his motion immediately after he learned a judgment had been entered. The court is correct that such an incentive favors "the orderly conduct of judicial process and the stability of judgments."[131] Additionally, the decision favors finality of judgments, because a party who does not act quickly will face a higher standard, that of Rule 74.06, which makes it unlikely a judgment will be set aside.

The majority explained that Cotleur denominated the judgment that had been entered against her as a "default judgment" because she recognized "that there is much greater liberality in reopening a judgment after a default than in reopening a judgment that comes after a hearing on the merits."[132] Alone, this statement appears to say that a party who fails to appear for trial has a more difficult time getting a judgment set aside than a party against whom a default judgment has been entered. Actually, the court is explaining that a party in Cotleur's position, who did not act early enough to have her motion heard under Rule 75.01, would face a more stringent standard in obtaining relief from the judgment under Rule 74.06, than would a party in default under Rule 74.05.

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126. It is also not clear if Cotleur herself may have been present in the courtroom, so that notice to her would not have been necessary under MO. SUP. CT. R. 74.03.

127. *See supra* notes 22-23 and accompanying text.

128. *See supra* notes 27-28 and accompanying text.

129. MO. SUP. CT. R. 75.01. Today, under Rule 78.04, Cotleur could have made a timely motion for new trial which the trial court would have had jurisdiction to decide for 90 days after the October 25 filing. However, in 1991, a motion for new trial was not permissible after 15 days after judgment was entered, so any motion that Cotleur made after the 15 days, under Rule 75.01, had to be decided by October 25. Since Cotleur waited until October 25 to file the motion, it was improbable if not impossible for the motion to have been heard on that day.

130. *See supra* note 28 and accompanying text.

131. *See supra* note 90 and accompanying text.

132. *See supra* note 83 and accompanying text.

In stating that interpretation of the language of the default judgment rule called "simply for a policy decision,"[133] the majority missed an opportunity to explain that preserving "efficiency and finality interests" does not come at a cost of giving the party an opportunity to have the judgment set aside. A more accurate description of the court's decision would have included an explanation that a party who fails to appear for trial will receive, in some form, notice that a judgment has been entered, and will have an opportunity for the judgment to be set aside by making a motion under Rule 75.01, which provides the trial court the most discretion to set aside its judgment.

The dissenting opinion's major flaw is that it does not recognize a party's opportunity to have a judgment set aside under Rule 75.01. Judge Robertson advocated a reading of "otherwise defend" which would include a failure to appear for trial because such a reading would allow a judicial inquiry into the judgment so that a judgment could be decided on the merits "whenever possible."[134] In asking for such a reading, the dissent failed to realize that the party who failed to appear for trial already had an opportunity for that "judicial inquiry" under Rule 75.01, so it is not necessary to allow this opportunity again under Rule 74.05.

Additionally, Judge Robertson stated, "I find it difficult to believe that interpreting Rule 74.05 as I propose . . . detracts from the orderly conduct of the judicial process and the stability of judgments. Moreover, the interpretation I propose fosters judicial economy and the prompt resolution of claims."[135] This statement ignores the mechanisms the law provides to allow a party a judicial determination of whether the judgment should be set aside under Rule 75.01, as has been previously discussed. In fact, the interpretation that the dissent advocates promotes an inefficient judicial process and instability in judgments. Such an interpretation would allow a party to not appear for trial, receive notice that a judgment was entered, ignore that notice for up to a year, and still have an opportunity to have the judgment set aside on a showing of good cause and meritorious defense.

A party who can file a timely motion under Rule 75.01 would not be benefitted by the interpretation that would allow him to file a motion to set aside under Rule 74.05. The only circumstances in which a party who failed to appear for trial would benefit from this rule would be: (1) a party who ignored notice that a judgment had been entered until it was too late to file a motion and have it ruled on under Rule 75.01 and (2) a party who never received notice that a judgment was entered against him or her. As previously discussed, the court should not be concerned with expanding the opportunity for relief from the judgment for the party who received notice but ignored it.

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133. *See supra* note 89 and accompanying text.

134. *See supra* note 99 and accompanying text.

135. *Cotleur*, 870 S.W.2d at 240.

As for the party who did not receive notice, that party can seek relief under Rule 74.03 which allows the judgment to be set aside by filing a motion within six months of the judgment and showing good cause.[136]

The court's decision to not include failures to appear at trial within the meaning of "otherwise defend" in its new default judgment rule is supported by a more natural reading of the phrase, rather than a reading which includes every method by which a party might defend. The language of the original rule states that an interlocutory judgment on default is entered when a party fails to "file his answer or other pleading."[137] The language of the new rule states that judgment is entered against the defaulting party who "failed to plead or otherwise defend."[138]

A more logical meaning which might be attributed to the new phrase "otherwise defend" is to broaden the scope of the word "pleading," which is the word that is replaced. "Pleading" as used in Missouri Revised Statutes, Chapter 509, is distinct from a motion.[139] For example, Missouri Revised Statutes, Section 509.330 sets out the time allowed for making motions, and states that "motions and pleadings may be filed simultaneously . . . ."[140] Nonetheless, a party has always been able to prevent a default judgment in ways other than filing a pleading, such as filing a motion to dismiss, although the old default judgment rule only acknowledged that a default could be prevented by filing an "answer or other pleading."[141] It seems more logical that the word "pleading" was replaced by "otherwise defend" in order to recognize that a default judgment has, in practice, been prevented by filings other than pleadings, despite the language of the former rule. Additionally, because the phrase "otherwise defend" is so ambiguous, it does not seem logical that the phrase was meant to end the treatment of a failure to appear at trial as a default judgment, when such has been treated as a judgment on the merits for years.[142]

The *Cotleur v. Danziger* decision balanced the interests of maintaining efficiency of the judicial process and finality of judgments with the interest of reaching the merits of a case whenever possible. A party who fails to appear for trial is likely to receive notice of the judgment against him within enough time to file a motion to set the judgment aside and have it heard under Rule 75.01,[143] which allows the trial court the most discretion in granting relief.

136. *See supra* notes 64-65 and accompanying text.
137. Mo. Sup. Ct. R. 74.045 (1987).
138. MO. SUP. CT. R. 74.05.
139. MO. REV. STAT., Chapter 509.
140. MO. REV. STAT. § 509.330 (1994).
141. Mo. Sup. Ct. R. 74.045 (1987).
142. *See supra* note 34 and accompanying text.
143. *See also supra* notes 124-25.

Rule 74.05 does not provide an easier standard for the trial court to grant relief from a judgment than Rule 75.01, so a party is better served to make a motion under Rule 75.01. Additionally, the party who fails to appear for trial does not need the extended time period of Rule 74.05 to have the judgment set aside. To allow the party this flexibility would be to ignore the interests of "efficiency and finality."

VI. CONCLUSION

The *Cotleur* decision clarified that under the new default judgment rule, there is still a difference between a judgment entered when a party fails to appear for trial and a default judgment. The result of this decision is that a party who fails to appear for trial cannot use Rule 74.05 as a tool to ask for relief from a judgment. At first glance, this might seem to create a more difficult standard for a party who fails to appear for trial than for a party who is in default. However, because the party who failed to appear for trial will receive notice of the judgment against him, unlike a party in default, he will have the opportunity to ask for relief under the less stringent standard of Rule 75.01. If the party who failed to appear for trial were allowed to use the Rule 74.05 standard, he would not have as great an incentive to act quickly, thus jeopardizing the finality of decisions and the efficiency of the judicial process. By retaining the distinction between a default judgment and the judgment entered upon a failure to appear for trial, the Missouri Supreme Court successfully maintained the interests of reaching the merits of a case whenever possible, while preserving the efficiency of the judicial process and the finality of judgments.

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