ED109396

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JOHN SOLOMON,

Respondent,

v.

ST. LOUIS CIRCUIT ATTORNEY

Appellant.

Appeal from the St. Louis City Circuit Court,
The Honorable Christopher McGraugh, Circuit Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

The Appellant, St. Louis Circuit Attorney, ("the OCA") asserts in its Jurisdictional Statement that it has appealed (1) the July 31, 2020 order issued by the trial court ("the Interlocutory Default Judgment"), (2) the November 4, 2020 order issued by the trial court ("the November 4th Order"), and (3) the November 30, 2020 judgment issued by the trial court ("the Final Judgment"). App. Br. at 1. The Respondent, John Solomon, wishes to correct the OCA's inaccurate description of each of these rulings and its notice(s) of appeal. As this section will explain, only the Final Judgment is properly before this Court in this appeal.

In the proceedings below the OCA defaulted by failing file a timely responsive pleading either to Solomon's original Petition, which Solomon filed on January 10, 2020, or to his First Amended Petition, which Solomon filed on June 9, 2020. Solomon filed a written motion for default judgment on April 6, 2020, then made an oral motion for default judgment during a hearing held on July 28, 2020. The trial court entered the Interlocutory Default Judgment on July 31, 2020, the purpose of which is to prevent a party in default from belatedly raising an answer or defense against their opponent's claims. *Smith v. Sayles*, 637 S.W.2d 714, 717 (Mo. App. W.D. 1982). The Interlocutory Default Judgment in this case is "interlocutory" in part because it did not resolve all of the outstanding issues before the trial court—the trial court has

never finalized the civil penalties, costs, and attorney fees that will be due to Solomon, and although the Final Judgment ordered OCA to produce the records Solomon requested for an in camera review, D42, p. 8; A16, the trial court has not required the OCA to actually turn over any of the public records. Although the OCA makes the Interlocutory Default Judgment the focus of its First Point Relied On, neither this ruling nor the judicial decisions that led to it are properly before the Court in this appeal.

In most contexts, Missouri courts lack jurisdiction to consider an appeal unless the trial court has issued a final judgment that resolves all disputed issues for all of the parties to the lawsuit, with nothing left for future determination.[1] *Crest Const. II, Inc. v. Hart*, 439 S.W.3d 246, 249 (Mo. App. W.D. 2014). But Missouri Supreme Court Rule 74.05(d)[2] creates an exception to this general rule and establishes a process through which parties in default may file a motion asking a trial court to set aside the default judgment or interlocutory order of default entered against them; such a motion is treated as an *independent action* for purposes of appeal. Since a Rule 74.05(d) motion to set aside is independent of the primary case in which the default judgment was entered, the appellate courts' jurisdiction to review the trial court's

[1] This is one reason the Court lacks jurisdiction to review matters related to the Interlocutory Default Judgment.
[2] All rule references are to the Missouri Supreme Court Rules, as updated, unless otherwise noted.

determinations is limited to *the motion to set aside*; this jurisdiction does not generally extend to matters concerning the trial court's decision to grant a default judgment in the first place, nor to the substance of the default judgment. *See Martin v. Martin*, 196 S.W.3d 632, 635 (Mo. App. W.D. 2006); *see also Leonard v. Leonard*, 112 S.W.3d 30, 37 (Mo. App. W.D. 2003) ("The direct appeal of a default judgment is not permitted").[3] Missouri courts have held that before a party may appeal a trial court's grant or denial of a motion to set aside a default judgment, the trial court must first denominate its decision regarding the motion to set aside as a "judgment" or "decree;" the absence of a writing so denominated deprives this Court of jurisdiction to consider an appeal based on that decision. *Cook v. Griffitts*, 498 S.W.3d 855 (Mo. App. W.D. 2016).

The Final Judgment is the only one of the three rulings below that qualifies for this Court's review. Although the OCA treats the November 4th Order and the Final Judgment separately (and it attempted to appeal them separately), the primary difference between the two is that the trial court did not designate the November 4th Order as a "judgment or "decree," meaning that this Court has no jurisdiction to review that order. D38, p. 1. Indeed,

[3] This is another reason that the Court lacks jurisdiction to review issues related to the Interlocutory Default Judgment—even if it was a final, appealable judgment (and it is not), it is simply not subject to direct appeal.

Solomon's November 20, 2020 letter to Judge McGraugh, D59, p. 1, brought this precise point to the trial court's attention, which is why on November 30, 2020, the trial court reiterated its reasons for denying the OCA's Motion to Set Aside, but this time denominated its filing as an "Order and Judgment."[4] D42, p. 1; A9. It is this, the Final Judgment, and its denial of the OCA's Motion to Set Aside the Interlocutory Default Judgment that is the proper—and should be the *exclusive*—focus of the instant appeal. The Court lacks jurisdiction to address any matters other than those raised by the Final Judgment.

There are other distinct reasons that the Interlocutory Default Judgment is not properly before this Court. Rule 81.04(a) requires an appellant's notice of appeal to "specify… the judgment, decree, or order appealed from." An appellate court's jurisdiction is thus limited to review of the decision[s] specified in the notice of appeal. *Cone v. Kolesiak*, 571 S.W.3d 644, 651 (Mo. App. W.D. 2019). The Court of Appeals must disregard an appellant's arguments in regard to a trial court ruling that was neither identified by nor attached to the notice of appeal. *See In Interest of: B.P.*, 547

[4] Where a trial court has neglected to designate as a "judgment" an order denying a motion to set aside a default judgment, it is preferable for the trial court to reissue such an order with the proper designation rather than to attempt to designate the original order as a judgment, nunc pro tunc. *See Kelly-Patel v. Wensel*, 588 S.W.3d 604, 608 (Mo. App. E.D. 2019).

S.W.3d 785, 788 (Mo. App. W.D. 2018); *Burton v. Klaus*, 455 S.W.3d 9, 13 (Mo. App. E.D. 2014). The OCA filed two notices of appeal in this case, neither of which indicates that the OCA intended to appeal any aspect of the Interlocutory Default Judgment, nor did either notice of appeal include an attached copy of that judgment. D40; D41; D43; D44. As such, this Court lacks jurisdiction to rule on any issues related to the Interlocutory Default Judgment. Consequently, because the OCA's First Point Relied On centers entirely on the question of whether the trial court erred in entering the Interlocutory Default Judgment rather than allowing the OCA to file an answer out of time, this Court lacks jurisdiction to review the First Point Relied On.

STATEMENT OF FACTS

On July 5, 2019, John Solomon submitted to the St. Louis Circuit Attorney's office a request for open public records seeking "all records of contacts between Circuit Attorney Kimberly Gardner and her staff with the following individuals and entities from Jan. 6, 2017 through July 3, 2019: Scott Faughn; Al Watkins; Jeffrey E. Smith; JES Holdings LLC; Jeff Smith; The Missouri Workforce Housing Association; George Soros; Michael Vachon; Soros Fund Management; The Safety and Justice PAC; Open Society Foundation; Scott Simpson; Katrina Sneed; Phil Sneed; State Rep. Stacy Newman; State Rep. Jay Barnes." The scope of the inquiry included, but was

not limited to, calendar entries, phone messages, texts, emails, encrypted app chats, letters, and long-distance toll records. D3. The OCA's office refused to produce these records. D8.

Solomon filed this lawsuit on January 10, 2020, asking the trial court to require the OCA to produce the requested records as required by the Sunshine Law. D2; D24, p. 2; D42, p. 1; A9. The OCA was served with a summons and copy of the Petition and all exhibits on February 19, 2020, when Deputy Sheriff Lynn Webbe personally delivered those documents to Lopa Blumenthal in the OCA's office at 1114 Market Street, Room 401, St. Louis, Missouri. D1, p. 6; D24, p. 2. Pursuant to Rule 55.25, the OCA was required to respond to the instant lawsuit no later than March 20, 2020. D24, p. 2. The OCA failed to respond within the timeframe permitted by Rule 55.25(a). D24, p. 2. Solomon waited until April 6, 2020, to file his Motion for Default Judgment. D24, p. 2. On May 15, 2020, Solomon sent the OCA notice that he would present his Motion for Default Judgment for a hearing on June 5, 2020. D1, p. 7; D48. On May 29, 2020, Solomon sent the OCA another notice that he would present his Motion for Default Judgment for a hearing on June 5, 2020. D1, p. 7; D49. At 12:36 a.m. on the morning of June 5, 2020, the OCA filed a Motion for Leave to File Out of Time, a proposed Motion to Dismiss, and a memorandum of law in support of the proposed Motion to Dismiss. D14; D15; D16; D24, p. 2. The OCA did not notice either motion for hearing, nor did it

ask the trial court to rule on either motion. D24, p. 2.

In the course of the June 5, 2020 hearing[5] the trial court denied Solomon's Motion for Default Judgment and granted Solomon leave to file a First Amended Petition. D24, p. 3. Although Rule 55.33 would normally have required a party to respond to an amended pleading "within ten days after service of the amended pleading," the trial court exercised its discretion to give the OCA additional time, ordering the OCA to file an answer within thirty days of receiving Solomon's First Amended Petition. D24, p. 2-3. Solomon filed his First Amended Petition on June 9, 2020, and the OCA acknowledged receiving the First Amended Petition on that date. D24, p. 3. The OCA still failed to file a timely response to Solomon's lawsuit. D24, p. 3. In light of the OCA's failure, on July 13, 2020, Solomon filed a Motion for Judgment on the Pleadings. D21. Two days later, the OCA filed essentially the same Motion to Dismiss it had filed on June 5; that motion was not accompanied by a Motion for Leave to File Out of Time. D18; D42, p. 5; A13. Solomon filed a Motion to Strike the OCA's Motion to Dismiss, noting that it was untimely. D20. At the July 28, 2020 hearing on Solomon's motion, Blumenthal did not claim that OCA's failure to timely file an answer was accidental or inadvertent; she said she *chose* not to file the answer because, she claimed, there were issues

[5] The OCA chose not to provide the Court with a copy of the transcript from this hearing.

regarding Solomon's pleading that she wanted to address before filing the answer. Tr. at pp. 3:17-4:5; 5:6-10; 8:17-22; 16:13-15. Blumenthal orally requested leave to file OCA's answer out of time. Tr. at pp. 9:10; 9:21. The trial court denied the request. Tr. at 9:11; 12:8-10; 17:25-18:2. Solomon asked the trial court to reconsider its prior denial of his Motion for Default Judgment. Tr. at pp. 15:4-8; 15:19-22. The trial court stated that it took Solomon's request "as an oral motion for default judgment… and I'm going to grant that request for default judgment." Tr. at pp. 17:18-22.

The trial court entered the Interlocutory Default Judgment against the OCA on July 31, 2020. D24. The trial court expressly found that the OCA's "refusal to comply with the Missouri Supreme Court Rules and this Court's June 5, 2020 Order was reckless, dilatory, and intentional." D24, p. 3, ¶ 13. The trial court further found that the OCA "lacked any good cause for its failure to timely file a responsive pleading in this matter, nor was it the result of any excusable neglect." D24, p. 3, ¶ 14. The Interlocutory Default Judgment awarded Solomon costs and reasonable attorney fees associated with the lawsuit; it ordered Solomon within fourteen days to submit materials in support of the costs and attorney fees he was requesting and ordered the OCA to file arguments in opposition "no later than seven days after" Solomon submitted those materials. D24, p. 5. Solomon filed materials in support of the requested costs and attorney fees on August 14, 2020. D1, p. 9; D50; D51; D52;

D53; D54; D55. Although the court-ordered response was due on August 21, 2020, the OCA never filed anything in opposition to these materials. D1, p. 9. The Interlocutory Default Judgment also ordered the OCA "to search for and produce to Solomon… all records responsive to Solomon's July 5, 2019 Sunshine Law request, and to do so within thirty days of the entry of [the] Judgment." D24, p. 5. Although the order required production of the records by August 30, 2020, the OCA neither produced any responsive records nor offered any explanation as to why it did not do so. D1, p. 9. On September 1, 2020, the OCA having failed to comply with the court-ordered August 30, 2020 deadline, Solomon filed a Motion for Civil Contempt. D1, p. 9; D56.

Three days later, on September 4, 2020, the OCA filed its Motion to Set Aside Default Judgment; the motion itself did not allege any specific facts, but the OCA submitted three affidavits, two other exhibits, and a memorandum in support of its motion. D27; D28; D29; D30; D31; D32; D33. The OCA's Exhibit E was an affidavit of Attorney Blumenthal. D32. In her affidavit, Blumenthal admitted having been served with Solomon's initial petition. D32, p. 2. Although Blumenthal asserted that the failure to file a timely response was due to "clerical error," in the following sentence she also stated that, having investigated the situation, she was "unable to determine what occurred." D32, pp. 2-3. Blumenthal admitted receiving Solomon's First Amended Petition on June 9, 2020. D32, p. 2. Blumenthal's affidavit stated

that she filed OCA's Motion to Dismiss on July 15, 2020, but made no mention of having prepared an answer to Solomon's First Amended Petition. D32, p. 4. After a hearing on the OCA's Motion to Set Aside,[6] the trial court entered the November 4th Order denying the OCA's motion. D38. In a letter to the court dated November 20, 2020, Solomon noted that the OCA could not properly appeal the November 4th Order because it was not denominated as a "judgment" and asked the trial court to re-issue the denial of the OCA's Motion to Set Aside in a format that would be appealable. D59, p. 1. The trial court entered the Final Judgment on November 30, 2020. D42. In the Final Judgment the trial court reiterated its finding that the OCA's conduct had "recklessly impeded the judicial process" and that it had showed "a consciously chosen course of action with knowledge of facts that would disclose the danger of the [OCA's] actions to a reasonable person." D42, p. 5; A13. The trial court found that the OCA "consistently fails to act in this case unless [Solomon] seeks relief" and "the record contradicts a finding of mistake or inadvertence." D42, p. 5-6, A13-A14. The OCA timely filed this appeal. D43.

STANDARD OF REVIEW

Appellate review is limited to those issues put before the trial court. *Country Mutual Ins. Co. v. Matney*, 25 S.W.3d 651, 654 (Mo. App. W.D. 2000).

[6] The OCA chose not to provide the Court with a copy of the transcript from this hearing.

On appeal a party "must stand or fall" by the theory on which they submitted their case in the court below; they are bound by the position they took in the trial court. *Phelan v. Rosener*, 511 S.W.3d 431, 442 (Mo. App. E.D. 2017). An appellate court "can only review the case upon those theories." *Reese v. Ryan's Family Steakhouses, Inc.*, 19 S.W.3d 749, 752 (Mo. App. S.D. 2000). "An issue not presented to the trial court is not preserved for appellate review." *Barner v. The Mo. Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. W.D. 2001).

The Court of Appeals reviews a trial court's decision to deny a Rule 74.05(d) motion to set aside a default judgment for abuse of discretion. *Vogel v. Schoenberg*, 620 S.W.3d 106, 111 (Mo. App. W.D. 2021). An appellate court will only reverse a trial court's denial of a motion to set aside default judgment if the challenged ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the Court's sense of justice and indicates that the trial court did not carefully consider the case. *O'Neill v. O'Neill*, 460 S.W.3d 51, 55 (Mo. App. E.D. 2015). If reasonable persons can differ about the propriety of the action taken by the trial court, it cannot be said that the trial court abused its discretion. *State v. Brandolese*, 601 S.W.3d 519, 533 (Mo. banc 2020).

Rule 74.05(d) only authorizes a trial court to set aside an interlocutory order of default or default judgment where a movant has stated "facts constituting a meritorious defense and… good cause" for the default; the party

seeking to set aside the default judgment bears the burden of proving *both* the "meritorious defense" and "good cause" elements. *Vogel* at 111. Failure to prove either element requires a reviewing court to deny the motion to set aside a default judgment. *Id.* For the purposes of this appeal, Solomon does not dispute that the OCA filed its Motion to Set Aside in a reasonable time and that it sufficiently alleged a potentially meritorious defense; the primary issue before the Court is whether the trial court abused its discretion in concluding that the OCA had failed to carry its burden of proving that it had "good cause" for failing to timely file an answer to Solomon's First Amended Petition. *See id.* at 111 n3. In the context of reviewing a trial court's denial of a motion to set aside default judgment, an appellate court must defer to the trial court's determinations of credibility, viewing the evidence and permissible inferences therefrom in the light most favorable to the judgment and disregarding all contrary evidence and inferences. *Morris v. Wallach*, 440 S.W.3d 571, 578-79 (Mo. App. E.D. 2014). Particularly when it comes to the question of whether a defaulting party's conduct was excusable or reckless, appellate courts must defer to the trial court's determination unless the issue is beyond reasonable debate. *See Paes v. Bear Comm., LLC*, 568 S.W.3d 52, 58 (Mo. App. W.D. 2019); *First Community Bank v. Hubbell Power Sys., Inc.*, 298 S.W.3d 534, 539 (Mo. App. S.D. 2009). Pursuant to Rule 74.05(d), "'good cause" includes honest mistakes, but it does not include conduct that is intentionally or recklessly

designed to impede the judicial process. *See Doe v. Hamilton*, 202 S.W.3d 621, 623 (Mo. App. E.D. 2006). Where a party has consciously chosen a course of action when a reasonable person would know that doing so would put them at risk of default, the party cannot show the "good cause" necessary to justify setting aside a default judgment. *See Vogel* at 113-114; *Coble v. NCI Bldg. Sys., Inc.*, 378 S.W.3d 443, 448 (Mo. App. W.D. 2012).

ARGUMENT

I. The OCA's First Point Relied On addresses an issue that is not properly before the Court and also fails on the merits.

In its First Point Relied On the OCA argues that the trial court abused its discretion in denying its "motion for leave," but OCA's brief cleverly obscures both the context in which it made this motion, and the intended focus of the motion. In the Facts section of its brief the OCA asserts that Blumenthal was seeking leave to file the *motion to dismiss*,[7] which it had attempted to file on July 15, 2020. App. Br. at 3; D18. By asserting that the OCA has sought leave to file its *motion to dismiss*, the OCA has attempted to obscure the fact that it never filed any answer to Solomon's First Amended Petition while also suggesting that the Court's sense of justice should be shocked that the trial court would deny leave to file a document the OCA proffered "only" six days

[7] A virtual carbon-copy of the motion to dismiss it first attempted to file in the wee hours of June 5, 2020. *Compare* D14 and D16 to D18 and D19; *see also* D42, p. 5; A13.

after its answer was due on July 9, 2020. App. Br. at 8. But a close look at the record reveals that the OCA's argument is just a ruse because it *never* asked the trial court for leave to file that carbon-copy motion to dismiss.

The transcript of the July 28, 2020 hearing reveals that when Blumenthal asked, "Can we ask for leave to file?", she was seeking leave to file the *answer* that OCA had been ordered to file within thirty days of receiving the First Amended Petition. D13; Tr. at 8:13-9:10 ("I have the answer. It's prepared. It's ready."). After the judge explained that he would deny the oral motion, Blumenthal again focused her response on the never-filed *answer*. Tr. at 9:20-25 ("Well, I have the answer ready. If you will grant me leave, I can have it today."). When the judge asked Solomon's counsel to respond to the OCA's oral motion, the judge repeatedly described it as a motion to file the OCA's *answer* out of time. Tr. at 10:25-11:1; 12:8-10; 17:25-18:2. And finally, the order the trial court entered on July 28, 2020, specified that the OCA's oral request was for "leave to file an answer out of time." D23, p. 1.

So, although the OCA's brief argues that the trial court erred by denying it leave to file the *motion to dismiss*, the record unambiguously demonstrates that OCA did not present that issue to the trial court. The Court of Appeals will not consider arguments raised for the first time on appeal and will not convict a trial court of error for an issue not presented for its determination.

Jacoby v. Hamptons Community Assoc., Inc., 602 S.W.3d 869, 873 (Mo. App. E.D. 2020). The remainder of this section will address the other flaws of the OCA's First Point Relied On, but this reason alone should be sufficient to deny this point.

A. The OCA's First Point Relied On violated Rule 84.04(e).

Rule 84.04(e) requires appellants "for each claim of error" to "include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved; and the applicable standard of review." Compliance with Rule 84.04 is mandatory. *Terpstra v. State*, 565 S.W.3d 229, 241 (Mo. App. W.D. 2019). Failure to comply with this requirement impedes meaningful appellate review by improperly requiring the Court to supplement the Appellant's brief with its own research and to assume the role of advocate. *Marck Industries, Inc. v. Lowe*, 587 S.W.3d 737, 745 (Mo. App. S.D. 2019). The OCA's initial brief violated Rule 84.04(e) by failing to include a statement describing whether or how it preserved the error alleged in the First Point Relied On.

B. Where a party in default seeks leave to file a pleading out of time it must show that its failure to timely file was due to "excusable neglect."

This Court has recently affirmed that, pursuant to Rule 44.01(b)(2), where a party in default asserts that a trial court improperly denied a motion for leave to file a pleading out of time, that party bears the burden of

demonstrating that their failure to file the pleading in a timely manner was due to "excusable neglect." *Irvin v. Palmer*, 580 S.W.3d 15, 22 (Mo. App. E.D. 2019). If a party fails to file a timely pleading due to its own carelessness, inattention, or willful disregard of the court's processes, Missouri courts cannot attribute that failure to "excusable neglect." *Id*. Demonstrating excusable neglect is a *higher burden* than proving an action was not recklessly designed to impede the judicial process, which is the standard required to show "good cause" sufficient to set aside a default judgment under Rule 74.05(d). *Holmes v. Union Pacific Railroad Co.*, 617 S.W.3d 853, 860 (Mo. banc 2021). Proving excusable neglect requires the party in default to present evidence sufficient to persuade the Court that its failure to file a timely pleading was due to "some unexpected or unavoidable hinderance or accident," rather than mere "carelessness, inattention, or willful disregard for the court's process[.]" *See id*.

In *Holmes* the appeal centered on a party's contention that a trial court had abused its discretion by overruling a motion for leave to file a pleading out of time. The plaintiff in that case filed in April 2018 a wrongful death lawsuit on behalf of a decedent's estate, but faced dismissal of her pleading because she had not been declared the personal representative of the decedent's estate. *Id*. at 855-56. A local rule required the plaintiff to respond to the defendant's motion to dismiss within ten days, by December 31, 2018,

and the plaintiff failed to do so. *Id*. at 856. On January 25, 2019, more than a month after the defendant filed their motion to dismiss, the plaintiff sought leave to file a response out of time, claiming to have been unaware of the deadline imposed by the local rule. *Id*. Although the defendant pointed out that plaintiff's counsel *must* have been aware of the deadline, the trial court nevertheless entered an order on March 4, 2019, giving the plaintiff thirty days within which to file an amended petition that would cure the defects in the initial pleading. *Id*. The plaintiff failed to file her amended pleading by April 3, 2019, the deadline established by the trial court's March 4, 2019 order. *Id*. On April 10, 2019, the plaintiff filed a motion for leave to file her amended petition out of time, claiming that her failure to meet the court's deadline was the result of "excusable neglect." *Id*. The trial court denied the motion for leave and dismissed the matter. *Id*. at 857. On appeal, the Missouri Supreme Court unanimously held that because the record supported a conclusion that the plaintiff's failure to timely file her amended pleading was not the result of "an unexpected or unavoidable hindrance, accident, or mishap," the trial court had not abused its discretion in denying the plaintiff's motion for leave to file a pleading out of time. *Id.* at 861.

Just like the plaintiff in *Holmes*, the OCA has not identified any "hinderance," "accident" or "mishap" (unavoidable or otherwise) that prevented it from filing an answer to the First Amended Petition and, indeed,

the record before the Court could not support such an argument. To the contrary, the transcript OCA included in the record shows that OCA's counsel claimed that she prepared an answer to the First Amended Petition, but *chose* not to file it by the court-ordered date. Tr. at pp. 3:17-20; 3:25-4:5; 5:8-10; D42, pp. 5-6. After the trial court asked why OCA had failed to file its answer by the date the court had ordered, OCA's counsel continued to assert that she had *chosen* not to file the answer because there were other issues she wanted to address before filing it. Tr. at pp. 8:3-22; 10:15-16; 16:13-15; *see also* App. Br. at 9. OCA's counsel even specifically refuted the notion that her failure to file the answer in a timely manner was the result of any sort of "neglect" when she claimed, "I have prepared this diligently." Tr. at 9:24-25.

Furthermore, the affidavit Blumenthal submitted in support of OCA's Motion to Set Aside made no effort to claim that OCA's failure to comply with the trial court's order to file an answer to the First Amended Petition within thirty days of receiving it was the result of any "unexpected or unavoidable hinderance or accident." The trial court gave the OCA a clear, unambiguous order to "answer Plaintiff's Amended Petition within thirty days of receipt." D13; D42, p. 4; A12. Blumenthal acknowledged receiving the First Amended Petition on June 9, 2020. D24, p. 3, ¶ 10; D32, p. 3, ¶ 11; D42, p. 5; A12. Despite actual knowledge that it had received Solomon's First Amended Petition on June 9, 2020, the OCA did not file an answer to that pleading. D24, p. 3, ¶ 11;

D42, p. 5; A12. The OCA never offered any suggestion—either to the trial court below or to this Court—that "some unexpected or unavoidable hinderance or accident" prevented it from filing an answer to the First Amended Petition. Where a party in default has not even attempted to present evidence that would show that its failure to file an answer was the result of "excusable neglect," this Court has no basis whatsoever for finding that the trial court abused its discretion in denying that party's motion for leave to file its answer out of time.

In summary, this Court should refuse to consider the OCA's First Point Relied On because (1) it is not properly before the court and (2) OCA violated Rule 84.04 by failing to include a statement identifying how it preserved for review the issue it asserted in its First Point Relied On. But if this Court decides to reach the merits of the First Point Relied On, the record makes amply clear that OCA's failure to file a timely answer to the First Amended Petition was a deliberate, strategic choice—which is the polar opposite of "excusable neglect." Thus, this Court should reject the OCA's First Point Relied On and affirm the trial court's denial of the OCA's Motion to Set Aside the default judgment.

II. The Trial Court did not misapply the law in entering default judgment against the OCA. (Responding to the OCA's Second Point Relied On.)

The most important fact regarding the OCA's Second Point Relied On is that at the time of the July 28, 2020 hearing, OCA was indisputably in default for failure to file a timely response to Solomon's First Amended Petition. D27, p. 6 (admitting that OCA not only failed to file a timely response to Solomon's Original Petition, but that it "also failed to file a timely responsive pleading to the Amended Petition."). A party that has been served with a petition and has failed to file a timely response within the time required by the Missouri Supreme Court Rules *is in default*. *Irvin*, 580 S.W.3d at 20-21. The trial court gave the OCA a clear, unambiguous order to "answer Plaintiff's Amended Petition within thirty days of receipt."[8] D13; D42, p. 5; A12. Blumenthal acknowledged receiving the First Amended Petition on June 9, 2020. D24, p. 3, ¶ 10; D32, p. 3, ¶ 11; D42, p. 5; A12. Despite actual knowledge that it had received Solomon's First Amended Petition on June 9, 2020, and the generous amount of time the trial court granted for the purpose of preparing its response, the OCA fell into default because it *never* filed an answer to the First Amended Petition. D24, p. 3, ¶ 11; D42, p. 5; A12.

Once a party is in default, its only option before the entry of a default judgment is to seek leave to file an answer out of time. *Id*. at 22. The question

[8] Rule 55.33(a) usually requires a party in the OCA's position of receiving an amended pleading to file a response within ten days. The trial court exercised its discretion to grant the OCA far more time to prepare and file an answer.

of whether to grant or deny such a request is left to the discretion of the trial court. *Id.* A party that asks a trial court to set aside a default judgment bears the evidentiary burden of proving that they are entitled to the relief requested. *Morris v. Wallach*, 440 S.W.3d 571, 576 (Mo. App. E.D. 2014). As discussed above, the trial court did not abuse its discretion in denying the OCA leave to file an untimely answer. In light of this denial and the OCA's concomitant inability to cure its default, the question becomes whether the trial court erred in entering the Interlocutory Default Judgment against the OCA.

During the July 28, 2020, hearing Solomon pointed out that OCA was in default and asked for the judge to act accordingly. Tr. at 11:4-22; 15:4-22; 17:13-17. The judge agreed that OCA was in default and said he was taking Solomon's statement "as an oral motion for default judgment[.]" Tr. at 17:18-22. The trial court then granted Solomon's motion for default judgment and entered the Interlocutory Default Judgment. Tr. at 17:21-22; D23; D24. The OCA's Second Point Relied On asserts that, although the OCA acknowledged in its Motion to Set Aside that it *was in default* for failure to file an answer to Solomon's *First Amended Petition*, the trial court lacked authority to enter the Interlocutory Default Judgment against the OCA. .

A. The OCA's Second Point Relied On violated Rule 84.04(e).

Rule 84.04(e) requires appellants "for each claim of error" to "include a concise statement describing whether the error was preserved for appellate

review; if so, how it was preserved; and the applicable standard of review." Compliance with Rule 84.04 is mandatory. *Terpstra*, 565 S.W.3d at 241. Failure to comply with this requirement impedes meaningful appellate review, improperly requiring the Court to supplement the Appellant's brief with its own research and tasking it with assuming the role of advocate. *Marck Industries*, 587 S.W.3d at 745. The OCA's initial brief violated Rule 84.04(e) by failing to include a statement describing whether or how it preserved the error alleged in the Second Point Relied On.

B. The OCA stated an inapplicable, incorrect standard of review in regard to its Second Point Relied On.

For the Standard of Review in its Second Point Relied On, the OCA relied solely upon Rule 74.06(b). App. Br. at 10. Rule 74.06(b) merely authorizes a party to *file a motion* that, under certain specified circumstances, would allow a *trial court* to relieve it from a final judgment.[9] This Rule does not authorize Missouri's appellate courts to entertain arguments that were not first presented to the trial court in the sort of motion that Rule 74.06(b) authorizes. The OCA never filed with the trial court any motion pursuant to Rule 74.06(b), nor did it cite Rule 74.06(b) in its Motion to Set Aside or in the suggestions it filed in support of that motion. D27; D33. Because the OCA

[9] Rule 74.06(d) also authorizes a party to file a separate action "to set aside a judgment for fraud upon the court."

never invoked Rule 74.06(b) below, this rule has no possible application to the instant appeal.

To be clear, Rule 74.05(d)—the vehicle that the OCA actually chose to pursue this action— does not authorize courts to consider any and every argument a party in default might seize upon as a basis for avoiding the consequences of its default; the Rule only authorizes a trial court to set aside an interlocutory order of default or default judgment "[u]pon stating facts constituting a meritorious defense and… good cause" for the default. *See* Rule 74.05(d); *Vogel* at 111. The Appellant's Brief represents the first time the OCA attempted to invoke Rule 74.06(b), attempting to shoehorn in a novel argument that the trial court's entry of the Interlocutory Order of Default violated the principles of *due process*. App. Br. at 10. This Court will not consider arguments raised for the first time on appeal and will not convict a trial court of error for an issue not presented for its determination. *Jacoby* at 873. This reason alone should be sufficient to deny the OCA's Second Point Relied On.

Solomon has articulated the proper standard of review for an appeal from a trial court's denial of a motion to set aside default judgment above at pages 17 to 20, but will add that this Court is bound to affirm the trial court's judgment unless the OCA demonstrates both that the trial court committed reversible error *and* that the error prejudiced the OCA. *See* Rule 84.13(b);

Burns v. Granger, 613 S.W.3d 800, 803 (Mo. App. W.D. 2020) (finding no prejudice to appellant even though court heard motion to dismiss on fewer than five days' notice). To determine the existence of prejudice warranting reversal this Court compares what did occur with what would have occurred if the trial court had conformed the challenged decisions to the appellant's preferences. *See Casework, Inc. v. Hardwood Assoc., Inc.*, 466 S.W.3d 622, 628 (Mo. App. W.D. 2015).

C. Rule 74.05(b) does not require a plaintiff to file a written motion as a prerequisite for a trial court's entry of an interlocutory order of default.

Rule 74.05 governs default judgments in Missouri courts. Rule 74.05(b) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, an interlocutory order of default may be entered against that party." Although it may be *customary* for a court to wait for a party to make a motion before entering an interlocutory order of default as authorized by this rule, nothing in the text of this rule makes the trial court's authority to enter such an order contingent on the plaintiff filing a written motion. The *only* prerequisite for entry of an interlocutory order of default is a party's failure to plead or otherwise defend as provided by the Missouri Supreme Court Rules. This Court should not read into this Rule a requirement the Missouri Supreme Court has not chosen to impose. Because Rule 74.05(b) expressly authorizes a

trial court to enter an interlocutory order of default against a party that has failed to file a timely response in accordance with the Rules, and because the OCA unquestionably failed to file a timely response to Solomon's First Amended Petition in accordance with the Rules, the trial court did not abuse its discretion in entering the Interlocutory Default Judgment against the OCA.

D. Rule 44.01(d) is inapplicable to this case because a motion for default judgment may be heard ex parte and a party in default is not entitled to any notice of default proceedings.

Rule 44.01(d) states in relevant part that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by law or by order of the court." The OCA's Second Point Relied on implies that in light of Rule 44.01(d), Rule 74.05 *only* allows a trial court to enter default judgment against a defendant if a plaintiff has first filed a *written* motion *and* has given the defendant five days' notice of a hearing on the motion. App. Br. at p. 10. This position is directly contradicted by both the text of Rule 44.01(d) and longstanding precedent regarding default proceedings. The rule's plain text only imposes this requirement on motions that are made in writing, and it does not apply to motions "which may be heard ex parte." Under Missouri law "ex parte" refers to "[a] judicial proceeding, order, injunction, etc.… [which] is taken or granted at the instance and for the

benefit of one party only, and without notice to, or contestation by, any person adversely interested." *State ex rel. Gardiner v. Dickmann*, 157 S.W. 1012 (Mo. App. 1913). For nearly a century Missouri courts have recognized that procedures allowing for default judgments exist "for the benefit of the plaintiff and not for the benefit of the defaulting defendant[.]" *Casper v. Lee*, 245 S.W.2d 132, 141 (Mo. banc 1952); *Davis v. Moore*, 610 S.W.2d 665, 671 (Mo. App. E.D. 1980); *Cornoyer v. Opperman Drug Co.*, 56 S.W.2d 612, 613 (Mo. App. 1933). It is also firmly established under Missouri law that a party in default has *no right* to receive notice when the opposing party asks the trial court to enter default judgment. *Irvin* at 20 (party in default has no right to notice of default proceedings); *Doe v. Hamilton*, 202 S.W.3d 621, 624 (Mo. App. E.D. 2006) (same); *see also Agnello v. Walker*, 306 S.W.3d 666, 671 n4 (Mo. App. W.D. 2010) (affirming that Missouri law does not require parties to notify opponents when filing motion for default). Thus, a motion for an interlocutory order of default or for a default judgment is a textbook example of amotion "which may be heard ex parte." The text of Rule 44.01(d) does not require any advance notice to the party in default, which fits neatly with the abundance of Missouri appellate cases affirming that a party in default has no right to be notified of default proceedings.

E. The OCA cannot demonstrate that it would be prejudiced by any error the trial court may have committed in entering the Interlocutory Default Judgment.

The OCA has not demonstrated and cannot demonstrate that they were prejudiced by any of the alleged errors it identified in its Second Point Relied On. In considering the question of prejudice, this Court's responsibility is to compare what did occur in the trial court with what would have occurred if the trial court had conformed the challenged decisions to the appellant's preferences. *See Casework, Inc.* at 628. To the extent that the OCA has argued that Solomon was required to file a written motion for default judgment and to give the OCA at least five days' notice prior to a hearing being held on such a motion, the question is whether the OCA could have avoided default if Solomon followed OCA's prescribed course of action. It would not have.

The OCA has acknowledged that it was in default for failure to timely file an answer to Solomon's First Amended Petition. D27, p. 6 (admitting that OCA not only failed to file a timely response to Solomon's Original Petition, but that it "also failed to file a timely responsive pleading to the Amended Petition."). Once a party is in default, its only option before entry of a default judgment is to seek leave to file an answer out of time. *Irvin* at 22. The question of whether to grant or deny such a request is left to the discretion of the trial court. *Id.* The OCA did, in fact, request leave to file its answer out of time. Tr. at 9:10. The trial court denied that request due to its conclusion that the OCA had been "reckless, intentional, and dilatory" in disobeying the trial

court's order to file an answer to the First Amended Petition within thirty days of receiving it. Tr. at 9:1-19; D23; D24, pp. 2-3, ¶¶ 9-14. The OCA has not offered any reason to believe that the trial court might have changed its mind about granting leave to file the answer to the First Amended Petition out of time if only the judge had required Solomon first to file another written motion for default judgment and then wait at least five additional days before having another hearing. Given the trial court's unambiguous conclusion that the OCA's conduct had "recklessly impeded the judicial process," D42, p. 5; A13, there is no basis for believing that the trial court would have offered the OCA yet another opportunity to escape the consequences of its decisions. The OCA would have remained unable to remedy its default even if the trial court had required Solomon to file a second written motion for default judgment, wait at least five days, and then hold another hearing. As such, the OCA cannot bear its burden of demonstrating that it was prejudiced by the errors it alleged in connection with its Second Point Relied On. *See Burns*, 613 S.W.3d at 803 (finding no prejudice to appellant even though court heard motion to dismiss on fewer than five days' notice). The Court should reject the OCA's Second Point Relied On and affirm the trial court's denial of the OCA's Motion to Set Aside the default judgment.

III. The Trial Court did not abuse its discretion in finding that the OCA had failed to demonstrate "good cause" for its failure to file an answer to the First Amended Petition (Responding

to the OCA's Third Point Relied On).

The one issue that is properly before the Court in this appeal is the OCA's contention that it demonstrated "good cause for its failure to timely respond to the Amended Petition[.]" Although Solomon does not concede that the OCA actually has a "meritorious defense" to all of the Sunshine Law violations Solomon alleges, he acknowledged before the trial court[10] that the affidavits the OCA presented included allegations sufficient to indicate the existence of seemingly legitimate issues that could be decided on the merits. *See Hanlon v. Legends Hospitality, LLC*, 568 S.W.3d 528, 533 (Mo. App. E.D. 2019). Thus, the sole issue in regard to the OCA's Third Point Relied On is whether the trial court abused its discretion in ruling that the OCA had not presented evidence sufficient to carry its burden of proving "good cause" for its failure to file any answer to Solomon's First Amended Petition.

A. The record in this case does not support a conclusion that the trial court abused its discretion in finding no "good cause" for the OCA's failure to file an answer to the First Amended Petition.

Rule 74.05(d) allows a trial court to set aside a default judgment only if the defendant files a motion stating facts that constitute ***both*** a "meritorious defense" and "good cause" for setting aside the default judgment. *Dozier v. Dozier*, 22 S.W.3d 308, 312 (Mo. App. W.D. 2007). "'Good cause' includes a

[10] D35, p. 4.

mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05(d). If a defendant fails to establish either "a meritorious defense" or "good cause" for setting aside the default judgment, the trial court is required to deny the motion. *Paes,* 568 S.W.3d at 58.

"[A] party moving to set aside a default judgment has the burden of proof to convince the trial court that they are entitled to relief." *Irvin*, 580 S.W.3d at 23. Where a party has consciously chosen a course of action when a reasonable person would know that doing so would put them at risk of default, the party cannot show the "good cause" necessary to justify setting aside a default judgment. *See Vogel* at 113-114; *Coble*, 378 S.W.3d at 448. Argument of counsel is insufficient to establish either a meritorious defense or good cause for setting aside the default judgment. *Id*. at 23-24. In the context of reviewing a trial court's denial of a motion to set aside default judgment, an appellate court must defer to the trial court's determinations of credibility, viewing the evidence and permissible inferences therefrom in the light most favorable to the judgment and disregarding all contrary evidence and inferences. *Morris*, 440 S.W.3d at 578-79. Particularly when it comes to the question of whether a defaulting party's conduct was excusable or reckless, appellate courts must defer to the trial court's determination unless the issue is beyond reasonable debate. *See Paes*, 568 S.W.3d at 58; *First Community Bank*, 298 S.W.3d at 539.

B. The OCA failed to demonstrate "good cause" for its failure to file a timely answer to the First Amended Petition.

As the party moving to have a default judgment set aside, the OCA bore the evidentiary burden of showing the requisite "good cause" necessary to justify setting aside the Interlocutory Default Judgment. *New LLC v. Bauer*, 586 S.W.3d 889, 895 (Mo. App. W.D. 2019) (noting that this principle is "well-established"). Where a party has the burden of proof for a claim that is denied, the trier of fact has the right to believe or disbelieve that party's evidence—even if it is uncontradicted or uncontroverted. *White v. Dir. of Rev.*, 321 S.W.3d 298, 305 (Mo. banc 2010). If the trier of fact does not believe the evidence of the party bearing the burden, it can find for the other party even if the other party does not offer any evidence at all. *Id.* Specifically in the context of a denial of a motion to set aside a default judgment, this Court has noted that a trial court is free to disbelieve statements made by a moving party in affidavits, particularly where they fail to indicate the extent to which the affiant attempted to investigate the alleged "good cause" for failing to file a timely responsive pleading. *See Coble*, 378 S.W.3d at 448-49. If reasonable persons can differ as to the propriety of a trial court's determination that a party in default failed to establish "good cause" as required by Rule 74.05(d), an appellate court cannot conclude that the trial court abused its discretion. *See id.* at 451.

Rule 75.04 defines "good cause" as "a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 75.04(d). This Court has held that in the context of this rule "reckless" means that a person has chosen their course of action, "either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to a reasonable person." *Mullins v. Mullins*, 91 S.W.3d 667, 670 (Mo. App. W.D. 2002). In assessing whether a party's actions were "reckless" within the meaning of this rule, this Court has also specifically noted that attorneys familiar with litigation practice must know that default judgment could be entered against a party that fails to timely file an answer or other responsive pleading. *First Community Bank*, 298 S.W.3d at 540. The Court held that an attorney's inaction under such circumstances "amounts to more than 'just the negligent mishandling of paperwork' or 'inadvertence'", but rather it "indicates a conscious choice. . . and suggests recklessness designed to impede the judicial process." *Id.* at 540-41.

The OCA is the top law enforcement agency in the City of St. Louis, staffed with many competent, experienced attorneys. Both the office as a whole and the attorney representing OCA during the proceedings below were *absolutely* aware of the consequences for failing not only to timely file responsive pleadings, but also for refusing to comply with court orders. "A lawyer is charged during the progress of a cause with the duty, and in fact

presumed, to know what is going on in [their] case." *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97, 100 (Mo. banc 1989).

The OCA admits that Attorney Blumenthal was served with the summons and Petition in this case on February 19, 2020, but the OCA did not file a responsive pleading by the deadline imposed by Rule 55.25. D24, p. 2; D42, p. 5; A12. Blumenthal eventually filed an affidavit in which she claimed to have prepared a responsive pleading to the Petition, but she did not claim to have done so prior to March 20, 2020, when such a response was due. D32, pp. 2-3, ¶ 7. Blumenthal's affidavit hypothesized that her failure to timely file a responsive pleading was the result of some unspecified "clerical error," *which she immediately admitted she could not substantiate or explain*.[11] D32, p. 3, ¶ 7. Blumenthal claimed that she had not been receiving notices of filings in the case, D32, p. 3, ¶ 8, but the record shows that Solomon mailed the OCA a copy of his Motion for Default Judgment as well as two different notices

[11] Compare Blumenthal's lack of an explanation with this Court's description in *Coble* of the movant's affidavit as "vague, provid[ing] virtually no detail concerning the 'investigation' he conducted, and offer[ing] no explanation as to what actually happened" to cause the default at issue in that case. *Coble* at 449; *see also Beckman v. Miceli Homes, Inc.*, 45 S.W.3d 533, 542 (Mo. App. E.D. 2001) (discussing inadequacy of movant's affidavits to satisfy burden of showing "good cause" for default).

regarding the June 5 hearing[12]—all of which were also available for review on CaseNet. D42, p. 5; A13.

The absence of any "good cause" for the OCA's failure to file a timely answer to the Original Petition is magnified by what transpired after the June 5 hearing. The Order the Court entered on June 5, 2020, expressly commanded the OCA "to answer Plaintiff's Amended Petition within thirty days of receipt." Blumenthal admits receiving the First Amended Petition on June 9, 2020. D24, p. 3; D42, p. 5; A12. The unambiguous language of the Court's order required her to file an Answer within thirty days.[13] ***She simply chose not to***. Tr. at pp. 3:17-20; 3:25-4:5; 5:8-10; 8:3-22; 10:15-16; 16:13-15; D42, pp. 5-6; *see also* App. Br. at 9.

Blumenthal attempts to blame her failure to respond on not having received a notification from CaseNet that the Amended Petition was filed. But the Court's order required the OCA to file an answer within thirty days "*of receipt*," so even if Blumenthal could not have simply looked at CaseNet and

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[12] Solomon mailed a copy of the Motion for Default Judgment to the OCA on April 6, 2020. D10, p. 6. He mailed a copy of the first Notice of Hearing on May 15, 2020. D48, p. 2. He mailed a copy of the second Notice of Hearing on May 29, 2020. D49, p. 2. Missouri courts have "resolutely" affirmed that, due to the OCA's default, Solomon had no obligation to provide *any* of these notices. *Irvin*, 580 S.W.3d at 20.

[13] The "Docket Entries" page for this case on CaseNet show the entry of the Court's June 5, 2020 Order and the filing of Solomon's First Amended Petition on June 9, 2020.

seen that the Amended Petition had indeed been filed the same day she acknowledged receiving it, her alleged ignorance about the filing cannot excuse her violation of the Court's order. When the OCA failed to file an answer within thirty days as ordered by the Court, Solomon filed a Motion for Judgment on the Pleadings. Two days later, on July 15 (six days after the court-ordered answer was due), Blumenthal (untimely) filed a virtual carbon copy of the same (untimely) motion to dismiss she had filed in June. *Compare* D14 and D16 to D18 and D19; *see also* D42, p. 5; A13. To be clear, the OCA could have filed that carbon copy motion to dismiss *at any time* after receiving the First Amended Petition. Doing so sooner rather than later would have at least indicated a good faith intention to expedite the resolution of the case that had been going nowhere for months. But instead, the OCA *chose* to hold on to it rather than to file it quickly, further dragging out the litigation.

Missouri courts maintain that once properly served a party who defaults is charged with notice of *all proceedings in the case*, regardless of whether or not they have actual notice of those proceedings. *Irvin*, 580 S.W.3d at 20. As noted above, attorneys in this state have an additional duty to "vigilantly follow" the progress of their cases and courts *presume* that an attorney is aware of the developments in their cases. *Sprung* at 100. The OCA itself is an entity awash in attorneys and it was being represented by an attorney who was "responsible for defending civil suits filed against the OCA under the

Sunshine Act." D32, p. 2, ¶ 5. Thus, this Court has no alternative but to conclude that the OCA was aware of each of the developments in this case, including the various deadlines established by the Missouri Supreme Court Rules and the trial court's direct orders—and also that the OCA was fully aware of the consequences that would attend failure to meet those deadlines.

Nevertheless, the facts before the trial court showed that the OCA *repeatedly* ignored these deadlines. It ignored the March 20, 2020 deadline for responding to the Original Petition. It ignored the court-ordered July 9, 2020 deadline for filing an answer to the First Amended Petition. It ignored the court-ordered August 21, 2020 deadline for filing an opposition to Solomon's materials supporting his claim for attorney fees. And it ignored the court-ordered August 30, 2020 deadline for producing records to Solomon. That the OCA ignored all of these deadlines even though it knew full well that failure to meet them would put the OCA at risk of default judgment (and potentially even contempt of court) is the very *definition* of recklessness designed to impede the judicial process.

At the July 28, 2020 hearing the trial court gave the OCA ample opportunity to explain its failures to file timely responsive pleadings, directly—and repeatedly!—asking Blumenthal to explain *why* the OCA had not filed an answer in compliance with the trial court's order. Tr. at pp. 7:17-21; 7:25-8:4; 10:11-14. Blumenthal never answered the Court's question, other

than to suggest that OCA would file an answer if the trial court granted it leave to do so out of time. If there had indeed been good cause for the delay, Blumenthal could have offered it during that hearing. But even months later when Blumenthal filed an affidavit in support of the OCA's Motion to Set Aside, she *still* no reason for the failure to timely file an answer to the First Amended Petition that could be considered "good cause" as Missouri courts have interpreted that phrase.

Based on the record before it and the totality of the circumstances in this case, the trial court had a thoroughgoing basis for doubting the credibility of the OCA's claims of "good cause" and for concluding that the OCA's failure to file any answer to the First Amended Petition "recklessly impeded the judicial process" and revealed "a consciously chosen course of action with knowledge of facts that would disclose the danger of [the OCA's] actions to a reasonable person." D42, p. 5; A13. Indeed, in light of Blumenthal's repeated statements that her failure to file an answer to the First Amended Petition was a *choice*, the record before this Court "contradicts a finding of mistake or inadvertence." D42, p. 5; A13. The OCA did not and cannot satisfy its burden of showing that the trial court abused its discretion in denying the OCA's Motion to Set Aside the Interlocutory Default Judgment. As such, the Court should reject the OCA's Third Point Relied On and affirm the trial court's denial of the OCA's Motion to Set Aside the default judgment.

CONCLUSION

This Court is not a liberty to review the record and simply draw its own conclusions about why the OCA was unable to file a single timely responsive pleading, despite being given a second chance and an extra thirty days to do so. This Court is obliged to defer to the trial court's determinations as to the credibility of OCA's statements. It must view the evidence and the permissible inferences therefrom in the light most favorable to the trial court's judgment, disregarding all contrary evidence and inferences. Particularly when it comes to the question of whether the OCA's conduct was excusable or reckless, this Court is required to defer to the trial court's determination *unless the issue is beyond reasonable debate*. The trial court, having watched up-close for months as the OCA ignored deadline, after deadline, after court-imposed deadline, emphatically concluded that the OCA's failure to file a timely answer—despite being given a second chance and additional time in which to do so—"shows *a consciously chosen course of action*" pursued with full knowledge of the potential consequences. D42, p. 5; A13. The trial did not just find that the record was insufficient to meet the OCA's burden of proof, it actually "contradicts a finding of mistake or inadvertence." D42, p. 5; A13. In light of the deference this Court owes to the trial court's determinations as to the credibility of the OCA's witnesses, the record in this case gives the Court no choice but to affirm the trial court's denial of the OCA's Motion to Set Aside.

Respectfully submitted,

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RULE 84.06(C) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 365 and contains 10,445 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 13,950 limit set by Local Rule 360(a)(1)). The font is Century Schoolbook, double-spacing, 13-point type.

I hereby certify that on June 9, 2021, I electronically filed the foregoing with the Clerk of the Missouri Court of Appeals, Eastern District, by using the Electronic Filing System, and that a copy will be served by the Electronic Filing System upon those parties indicated by the Electronic Filing System.

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