In the Missouri Court of Appeals
Eastern District

DIVISION TWO

JOHN SOLOMON,	)	No. ED109396
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	2022-CC00080
	)	
ST. LOUIS CIRCUIT ATTORNEY,	)	Honorable Christopher E. McGraugh
	)	
Appellant.	)	Filed: January 25, 2022

The St. Louis Circuit Attorney ("Defendant") appeals the judgment denying its motion to set aside a default judgment entered in favor of John Solomon ("Plaintiff") on Plaintiff's amended petition alleging Defendant committed violations of chapter 610 of the Missouri Revised Statutes ("the Sunshine Law" or "Sunshine Law").[1] The trial court's judgment denying Defendant's motion to set aside the default judgment ordered that, *inter alia*, (1) "Defendant shall produce to Plaintiff . . . a list that identifies every document responsive to Plaintiff's Sunshine Law [r]equest";[2] (2) "Defendant shall . . . produce to the [c]ourt . . . a copy of every document responsive to Plaintiff's Sunshine Law [r]equest as well as a copy of the foregoing

[1] *See Strake v. Robinwood West Community Improvement District*, 473 S.W.3d 642, 643 (Mo. banc 2015) (similarly referring to chapter 610 of the Missouri Revised Statutes as "the Sunshine Law") (internal quotations omitted).
[2] As explained in detail in Section I.E. of this opinion, the trial court's judgment also ordered Defendant's list identifying every document responsive to Plaintiff's Sunshine Law request to contain specific information for every responsive document.

list"; and (3) "Thereafter, the [trial] [c]ourt will conduct an in camera review of the records and assess Defendant's claims of privilege."

Defendant raises a total of three points on appeal. Defendant's first and second points claim the trial court improperly entered the underlying default judgment on Plaintiff's amended petition. Defendant's third point asserts the trial court erred in denying its motion to set aside the default judgment.

In addition, Plaintiff has filed a motion for attorney's fees on appeal, which has been taken with the case.

For the reasons discussed below, we hold that all of Defendant's points on appeal have no merit, and we grant Plaintiff's motion for attorney's fees on appeal. Accordingly, we affirm the trial court's judgment denying Defendant's motion to set aside the default judgment, and we remand the cause for further proceedings consistent with this opinion and the following specific directions. On remand, and in accordance with the trial court's judgment denying Defendant's motion to set aside the default judgment, (1) "Defendant shall produce to Plaintiff . . . a list that identifies every document responsive to Plaintiff's Sunshine Law [r]equest"; (2) "Defendant shall . . . produce to the [c]ourt . . . a copy of every document responsive to Plaintiff's Sunshine Law [r]equest as well as a copy of the foregoing list"; and (3) "Thereafter, the [trial] [c]ourt [shall] conduct an in camera review of the records and assess Defendant's claims of privilege." *See* footnote 2 and Section I.E. of this opinion. Additionally, we direct the trial court on remand to determine the appropriate amount of attorney's fees on appeal to award Plaintiff and enter judgment accordingly.

I. BACKGROUND

The relevant facts and procedural posture of this case pertain to: (A) Plaintiff's request for open, public records under the Sunshine Law; (B) Plaintiff's initial petition against Defendant, Defendant's failure to timely respond, and the hearing on Plaintiff's written motion for default judgment on the initial petition; (C) Plaintiff's amended petition, Defendant's failure to timely respond, and the hearing on, *inter alia*, Plaintiff's oral motion for default judgment on the amended petition; (D) the trial court's interlocutory default judgment on Plaintiff's amended petition, and Defendant's motion to set aside the default judgment; and (E) the trial court's judgment denying Defendant's motion to set aside the default judgment.

A. Plaintiff's Request for Open, Public Records Under the Sunshine Law

On July 5, 2019, Plaintiff submitted to Defendant's office an open, public records request pursuant to the Sunshine Law seeking:

> [A]ll 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[;] [and] State Rep. Jay Barnes[.]

The scope of the inquiry included, but was not limited to, "all calendar entries, phone messages, text messages, emails, encrypted app chats, letter correspondence[,] and long-distance toll records in the possession of [Defendant's office]."

Defendant subsequently refused to produce any records pursuant to Plaintiff's Sunshine Law request. In denying Plaintiff's request, Defendant specifically claimed all of the requested records related to the two previous criminal cases against former Missouri Governor Eric Greitens. Defendant also maintained all of Plaintiff's requested records constituted either, (1)

official records pertaining to the Greitens criminal cases which are closed under section 610.105.1 RSMo 2016[3] because the criminal cases were dismissed by nolle prosequi; or (2) "[ ] communication[s] between the Circuit Attorney and her attorneys and legal team working for her on legal matters[,]" which according to Defendant, "[are] both privileged and subject to work product regardless of whether the case or investigation is open or closed."

B. Plaintiff's Initial Petition Against Defendant, Defendant's Failure to Timely Respond, and the Hearing on Plaintiff's Written Motion for Default Judgment on the Initial Petition

On January 10, 2020, Plaintiff filed his initial petition against Defendant alleging Defendant committed purposeful violations of the Sunshine Law by failing to search for and/or produce open, public records responsive to Plaintiff's request. Defendant was served with a summons, a copy of the initial petition, and all exhibits to the petition on February 19, 2020, when a deputy sheriff personally delivered the documents to Assistant Circuit Attorney Lopa Blumenthal ("Ms. Blumenthal") at Defendant's office in the City of St. Louis."[4]

Accordingly, Defendant was required to file a responsive pleading to the initial petition within thirty days after February 19, 2020, i.e., by March 20, 2020. *See* Missouri Supreme Court Rule 55.25(a) (2020). However, Defendant failed to file a timely responsive pleading to Plaintiff's initial petition.

On April 6, 2020, Plaintiff filed a motion for default judgment on the initial petition, and Plaintiff noticed the motion for a hearing to be held on June 5, 2020. After midnight on June 5 – the day of the scheduled hearing on Plaintiff's motion for default judgment on the initial petition

[3] Section 610.105.1 RSMo 2016 provides in relevant part that: "If the person arrested is charged but the case is subsequently nolle prossed [or] dismissed . . ., official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in subsection 2 of this section and section 610.120 [RSMo] and except that the court's judgment or order or the final action taken by the prosecutor in such matters may be accessed . . .."

[4] At all times relevant to this case, Ms. Blumenthal was a licensed attorney whose responsibilities included "defending civil suits filed against [Defendant] under the Sunshine [Law]."

and seventy-seven days after a responsive pleading was due on Plaintiff's initial petition – Defendant filed a motion to dismiss and a motion for leave to file the motion to dismiss out of time. Defendant did not notice either motion for a hearing, and Defendant did not request the trial court to rule on either motion.

The trial court held a hearing on Plaintiff's motion for default judgment on the initial petition on June 5, 2020. At the hearing, Plaintiff made an oral motion for leave to file an amended petition against Defendant. On June 5, the trial court entered an order denying Plaintiff's motion for default judgment on the initial petition; granting Plaintiff's motion for leave to file an amended petition by consent of Defendant; and requiring Defendant to file a responsive pleading to Plaintiff's amended petition "within thirty days of receipt" ("the trial court's June 5, 2020 order").

C. Plaintiff's Amended Petition, Defendant's Failure to Timely Respond, and the Hearing on, *Inter Alia*, Plaintiff's Oral Motion for Default Judgment on the Amended Petition

On June 9, 2020, Plaintiff filed his amended petition against Defendant alleging Defendant committed purposeful violations of the Sunshine Law by failing to search for and/or produce open, public records responsive to Plaintiff's request. The amended petition requested the court to require Defendants to search for and produce such records; to award Plaintiff a civil penalty; and to award Plaintiff attorney's fees and costs of litigation.

It is undisputed Defendant received Plaintiff's amended petition on June 9, 2020.[5] Accordingly, pursuant to the trial court's June 5, 2020 order, Defendant was required to file a responsive pleading to the amended petition within thirty days after June 9, 2020, i.e., by July 9,

[5] It is also undisputed Plaintiff filed his amended petition on June 9, 2020.

2020. However, Defendant failed to file a timely responsive pleading to Plaintiff's amended petition.

On July 13, 2020, Plaintiff filed a motion for judgment on the pleadings on his amended petition. Then, on July 15 – six days after a responsive pleading was due on Plaintiff's amended petition – Defendant filed a motion to dismiss Plaintiff's amended petition that was substantively identical to the motion to dismiss Defendant had filed on June 5. Notably, Defendant's July 15 motion to dismiss was not accompanied by a written motion for leave to file it out of time, Defendant did not notice the motion to dismiss for a hearing, and Defendant did not request the trial court to rule on the motion to dismiss.

On July 15, Plaintiff filed a motion to strike Defendant's motion to dismiss the amended petition, and Plaintiff later noticed the motion for strike for a hearing to be held on July 28, 2020.

At the July 28 hearing, Plaintiff withdrew his motion for judgment on the pleadings. Plaintiff also made an oral motion asserting he was entitled to a default judgment on his amended petition, which the trial court granted. Although Plaintiff characterized his oral motion as a motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition, the trial court characterized Plaintiff's oral motion as, *inter alia*, an oral motion for default judgment on the amended petition.

At the July 28 hearing, Defendant's counsel, Ms. Blumenthal, did not claim that Defendant's failure to file a timely answer to the amended petition was accidental or inadvertent; instead, she stated she chose not to file an answer because she claimed there were issues regarding the amended petition that she wanted to address before filing an answer. Ms. Blumenthal orally requested leave to file Defendant's answer out of time and claimed the answer was "ready," but the trial court denied the request. Additionally, this Court's review of the

transcript of the July 28 hearing shows that Ms. Blumenthal did not orally request leave to file Defendant's motion to dismiss the amended petition out of time.[6]

D. The Trial Court's Interlocutory Default Judgment on Plaintiff's Amended Petition, and Defendant's Motion to Set Aside the Default Judgment

On July 31, 2020, the trial court entered an interlocutory default judgment against Defendant on Plaintiff's amended petition, finding "[Defendant] is in default due to its reckless, dilatory, and intentional refusal to file a timely responsive pleading" ("default judgment" or "underlying default judgment"). The trial court's default judgment also found Defendant purposefully violated the Sunshine Law; ordered Defendant to search for and produce to Plaintiff open, public records responsive to Plaintiff's Sunshine Law request within thirty days; awarded Plaintiff a civil penalty in the amount of $5,000.00; awarded Plaintiff reasonable attorney's fees and costs associated with the lawsuit; ordered Plaintiff to submit materials in support of the attorney's fees and costs he was requesting within fourteen days; and ordered Defendant to file any arguments in opposition to the reasonableness of the amount of Plaintiff's requested attorney's fees "[n]o later than seven days after" Plaintiff submitted his materials in support.

On August 14, 2020, Plaintiff filed a request for $21,280.00 in attorney's fees and $992.46 in litigation expenses as well as materials in support of the request. Defendant never filed any arguments in opposition to the request.

Then, on September 1, 2020, Plaintiff filed a motion for civil contempt against Defendant based on Defendant's failure to comply with the portion of the default judgment ordering Defendant to search for and produce all records responsive to Plaintiff's Sunshine Law request within thirty days of the trial court's July 31 default judgment.

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[6] As previously indicated, Defendant's motion to dismiss the amended petition was untimely filed on July 15, 2020 without an accompanying written motion for leave.

Defendant subsequently filed a motion to set aside the default judgment on the amended petition. Defendant's motion to set aside claimed there were so-called "procedural irregularities" with the entry of the default judgment because, (1) the default judgment was allegedly based on Plaintiff's motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition; and (2) Defendant did not have any notice that any motion requesting a default judgment on the amended petition would be heard at the July 28, 2020 hearing.

Defendant's motion to set aside the default judgment on the amended petition also asserted Defendant had good cause for setting aside the default judgment; maintained Defendant had a meritorious defense to Defendant's amended petition; and contended Defendant brought the motion to set aside in a timely fashion after the default judgment was entered. In support of Defendant's motion and Defendant's claim that it had shown good cause for setting aside the default judgment, Defendant filed, *inter alia*, an affidavit of Assistant Circuit Attorney Ms. Blumenthal.[7]

E. The Trial Court's Judgment Denying Defendant's Motion to Set Aside the Default Judgment

After a hearing, the trial court entered a judgment denying Defendant's motion to set aside the default judgment on the amended petition on November 30, 2020.[8] The trial court found "Defendant's arguments d[id] not show a procedural deficiency in the [c]ourt['s] grant[ ] [of] [Plaintiff's] oral [m]otion for [d]efault [j]udgment." The trial court also determined Defendant was not entitled to relief because it had not demonstrated good cause for failing to

[7] The specific averments in Ms. Blumenthal's affidavit with respect to the issue of good cause will be discussed in relevant part below in Section II.B.3. of this opinion.
[8] The trial court's judgment also denied Plaintiff's motion for civil contempt.

timely respond to the amended petition.[9] Additionally, the trial court's judgment specifically ordered that, *inter alia*:

> Defendant shall produce to Plaintiff . . . a list that identifies every document responsive to Plaintiff's Sunshine Law [r]equest. The list should specify: (1) the type of record (email, long distance toll record, text message, calendar entry, etc.); (2) which member(s) of Defendant's staff (including the Circuit Attorney, if applicable) participated in the communication; (3) the entity identified in Plaintiff's Sunshine Law request with whom Defendant on members of Defendant's staff communicated; (4) the date and time of the communication; and (5) the basis for any privilege that Defendant claims as justification for withholding or redacting the record[;] [and]
>
> . . . Defendant shall . . . produce to the [c]ourt . . . a copy of every document responsive to Plaintiff's Sunshine Law [r]equest as well as a copy of the foregoing list. Thereafter, the [c]ourt will conduct an in camera review of the records and assess Defendant's claims of privilege.

Defendant appeals.

II. DISCUSSION

Defendant raises a total of three points on appeal arguing the trial court improperly entered the underlying default judgment on Plaintiff's amended petition and that the trial court erred in denying its motion to set aside the default judgment.

In addition, Plaintiff has filed a motion for attorney's fees on appeal, which has been taken with the case.

A. Whether the Trial Court Improperly Entered the Underlying Default on Plaintiff's Amended Petition

Defendant's first and second points on appeal claim the trial court improperly entered the underlying default judgment on Plaintiff's amended petition. For the reasons discussed below, we disagree.

[9] The trial court's specific findings on this issue will be discussed in relevant part below in Section II.B.3. of this opinion.

1. General Law and Standard of Review

Ordinarily, a party may not directly appeal a trial court's entry of a default judgment. *General Credit Acceptance Co., LLC v. Reese*, 375 S.W.3d 264, 265 (Mo. App. E.D. 2012). "However, an appeal of a default judgment is appropriate where a party, as [Defendant] did here, sought to have the default judgment set aside." *See id.* The issue of whether a trial court had the authority to enter a default judgment is a question of law that this Court reviews *de novo*. *Id.*

A trial court has the authority to enter a default judgment for a plaintiff when a defendant "has failed to plead or otherwise defend as provided by [Missouri Supreme Court] [R]ules." *See* Missouri Supreme Court Rule 74.05(b) (2020) (effective from December 31, 2006 to the present)[10] (providing in relevant part: "When 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. After entry of an interlocutory order of default, a default judgment may be entered"). In other words, a trial court has the authority to enter a default judgment for a plaintiff where a defendant has failed to file a timely response to the plaintiff's petition. *See id.*; *Capital One Bank USA v. Khan*, 359 S.W.3d 578, 580 (Mo. App. E.D. 2012) ("[a] default judgment occurs, and its entry is considered proper, when a party has failed to answer a pleading or otherwise defend"); *cf. Faris v. Dewitt*, 947 S.W.2d 847, 851 (Mo. App. S.D. 1997) (a default judgment is improper where a defendant files a timely response to a plaintiff's petition).

2. Analysis and Defendant's Specific Arguments on Appeal

In this case, the trial court had the authority to enter a default judgment on Plaintiff's amended petition because Defendant failed to file a timely response thereto. *See id.* The trial

[10] All further references to Rule 74.05 are to the version of the Rule effective from December 31, 2006 to the present.

court's June 5, 2020 order required Defendant to file a responsive pleading to Plaintiff's amended petition "within thirty days of receipt." It is undisputed Defendant received Plaintiff's amended petition on June 9, 2020, and therefore, was required to file a responsive pleading thereto by July 9, 2020. Defendant did not file a timely responsive pleading to Plaintiff's amended petition; instead, the only responsive pleading filed by Plaintiff was a motion to dismiss filed six days late on July 15, 2020.

Despite Defendant's admitted failure to filing a timely response to the amended petition, Defendant argues on appeal that the trial court improperly entered the underlying default judgment because, (a) the court erred in denying Defendant leave to file its motion to dismiss out of time; (b) the court erred in denying Defendant leave to file its answer out of time; (c) the court's decision was erroneously based on Plaintiff's motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition; and (d) the entry of default judgment was made without proper notice under Rule 44.01(d).

a. Defendant's Argument that the Trial Court Erred in Denying Defendant Leave to File its Motion to Dismiss Out of Time

We first address Defendant's contention that the trial court improperly entered the underlying default judgment because the court erred in denying Defendant leave to file its motion to dismiss the amended petition out of time.

Our Court will not consider an argument that was not presented to the trial court and made for the first time on appeal. *Jacoby v. Hamptons Community Association, Inc.*, 602 S.W.3d 869, 873 (Mo. App. E.D. 2020). "The foundation of this principle rests upon our firmly held position that we will not convict a trial court of error for an issue not presented for its determination." *Id.* (citation and internal quotations omitted). Therefore, an argument not presented to the trial court is waived for purposes of appellate review. *Id.*

In this case, the record shows Defendant never requested the trial court grant leave to file its motion to dismiss the amended petition out of time. Defendant's motion to dismiss the amended petition was filed on July 15, 2020, the motion to dismiss was not accompanied by a written motion for leave to file it out of time, and this Court's review of the transcript of the July 28, 2020 hearing on Defendant's oral motion for default judgment shows that Ms. Blumenthal did not orally request leave to file Defendant's motion to dismiss the amended petition out of time. Because Defendant did not request the trial court grant leave to file its motion to dismiss the amended petition out of time, Defendant's argument on appeal that it was improperly denied leave to file the motion to dismiss out of time was not preserved for appellate review, is waived, and will not be considered by this Court. *See id.*

b. Defendant's Argument that the Trial Court Erred in Denying Defendant Leave to File its Answer Out of Time

We next address Defendant's claim that the trial court improperly entered the underlying default judgment because the court erred in denying Defendant leave to file its answer to the amended petition out of time. This argument was preserved for appellate review because at the July 28, 2020 hearing, Ms. Blumenthal orally requested leave to file Defendant's answer to the amended petition out of time and the trial court denied the request. *Cf. id.*

"[A] [trial] court generally has the authority to expand time periods for filing certain pleadings." *Holmes v. Union Pacific Railroad Co.*, 617 S.W.3d 853, 859 (Mo. banc 2021). Missouri Supreme Court Rule 44.01(b) (2020) (effective from December 31, 2006 to the present)[11] provides in relevant part:

> *When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion* (1) with or without motion or notice order

[11] All further references to Rule 44.01 are to the version of the Rule effective from December 31, 2006 to the present.

> the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or *(2) upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]*

Rule 44.01(b) (emphasis added).

Where, as in this case, there is no dispute a defendant failed to meet a trial court's deadline for filing a responsive pleading to an amended petition, a trial court has the authority to allow a defendant leave to file such a pleading under Rule 44.01(b)(2) if: (1) the defendant provides notice of the request for leave to file the responsive pleading out of time; (2) the defendant makes a motion for leave to file the responsive pleading out of time; and (3) the defendant demonstrates the failure to timely file the responsive pleading was the result of excusable neglect ("the rule providing the trial court with the authority to grant leave to file a pleading out of time" or "the rule"). *See* Rule 44.01(b)(2); *Inman v. St. Paul Fire & Marine Ins. Co.*, 347 S.W.3d 569, 576 (Mo. App. S.D. 2011) ("[n]otably, Rule 44.01(b) imposes notice and motion requirements, as well as a showing of excusable neglect when the prescribed period has already expired") (citing *Allison v. Tyson*, 123 S.W.3d 196, 204-05 (Mo. App. W.D. 2003)).

A trial court's decision whether to grant or deny leave to file a responsive pleading out of time is reviewed for an abuse of discretion. *Jamestowne Homeowners Ass'n Trustees v. Jackson*, 417 S.W.3d 348, 359 (Mo. App. E.D. 2013); *see also Inman*, 347 S.W.3d at 577 (similarly holding). "An abuse of discretion occurs where the trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration." *Bangert v. Rees*, 634 S.W.3d 658, 662 (Mo. App. E.D. 2021).

In this case, because Ms. Blumenthal made an oral motion for leave to file Defendant's answer out of time at the July 28, 2020 hearing, Defendant met requirement number (2) of the

rule providing the trial court with the authority to grant leave to file a pleading out of time. However, Defendant failed to show requirement number (1) of the rule because it failed to provide any notice to Plaintiff and the court of the request for leave to file the answer out of time. *See* Rule 44.01(b)(2); *Inman*, 347 S.W.3d at 576; *see also Allison*, 123 S.W.3d at 204-05.

Moreover, Defendant also failed to show requirement number (3) of the rule providing the trial court with the authority to grant leave to file a pleading out of time, i.e., that the failure to timely file the responsive pleading was the result of excusable neglect. *See id*. As recently held by the Missouri Supreme Court:

> Excusable neglect is the failure to act not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident. Excusable neglect is an action attributable to mishap and not the result of indifference or deliberate disregard. Importantly, demonstrating excusable neglect is a higher burden than proving an action was not recklessly designed to impede the judicial process as required to show good cause [for setting aside a default judgment].

Holmes, 617 S.W.3d at 860 (internal citations and quotations omitted); *see also* Rule 74.05(d).

In this case, the record before the trial court at the time the court denied Defendant's oral motion for leave to file the answer to the amended petition out of time showed the following: Defendant failed to file a timely responsive pleading to Plaintiff's initial petition; Defendant did not file a responsive pleading (a motion to dismiss) to the initial petition until after midnight on the day of the scheduled hearing on Plaintiff's motion for default judgment on the initial petition and seventy-seven days after a responsive pleading was due on Plaintiff's initial petition; Defendant did not notice for a hearing the motion to dismiss the initial petition or its motion for leave to file the motion to dismiss out of time; although the trial court's June 5, 2020 order required Defendant to file a responsive pleading to Plaintiff's amended petition "within thirty days of receipt," and it is undisputed Defendant received the amended petition on June 9, 2020,

Defendant failed to file a timely responsive pleading to Plaintiff's amended petition; when Defendant finally filed a responsive pleading (a motion to dismiss) to the amended petition six days after it was due, the filing only occurred after Plaintiff filed a motion for judgment on the pleadings; Defendant's motion to dismiss the amended petition was not accompanied by a written motion for leave to file it out of time, Defendant did not notice the motion to dismiss for a hearing, and Defendant did not request the trial court to rule on the motion to dismiss; Defendant's motion to dismiss the amended petition was substantively identical to the motion to dismiss Defendant had previously and untimely filed in response to the initial petition; Ms. Blumenthal did not claim Defendant's failure to file a timely answer to the amended petition was accidental or inadvertent, but instead stated she chose not to file an answer because she claimed there were issues regarding the amended petition that she wanted to address before filing an answer; and Ms. Blumenthal did not explain to the court why any alleged issues regarding the amended petition could not have previously been addressed or raised to the trial court before the responsive pleading was due.

Based on this whole record, we hold the trial court did not err in finding Defendant's failure to file a timely response to Plaintiff's amended petition was not the result of an unexpected or unavoidable hindrance, accident, or mishap, but was instead the result of Defendant's carelessness, inattention, and deliberate disregard. *See Holmes*, 617 S.W.3d at 861 (similarly holding). In other words, the record supports a finding that Defendant failed to demonstrate excusable neglect. *See id.* at 860-61.

In sum, because Defendant failed to provide any notice to Plaintiff and the court of the request for leave to file the answer out of time and because the record supports a finding that Defendant failed to demonstrate excusable neglect, the trial court did not abuse its discretion in

refusing to extend the deadline for Defendant to file a response to Plaintiff's amended petition out of time. *See* Rule 44.01(b)(2); *Inman*, 347 S.W.3d at 576-77; *Allison*, 123 S.W.3d at 204-05; *see also Bangert*, 634 S.W.3d at 662; *Jamestowne Homeowners Ass'n Trustees*, 417 S.W.3d at 359.

c. Defendant's Argument that the Trial Court's Decision was Erroneously Based on the Plaintiff's Motion "to [R]econsider" His Previous Motion for Default Judgment Filed on the Initial Petition

We next address Defendant's assertion that the trial court improperly entered the underlying default judgment because the court's decision was erroneously based on Plaintiff's motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition. This argument has no merit because the record shows the trial court based its entry of default judgment on the amended petition on Plaintiff's oral motion for default judgment.

The transcript of the July 28, 2020 hearing demonstrates Plaintiff made an oral motion asserting he was entitled to a default judgment on the amended petition, and although Plaintiff characterized his oral motion as a motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition, the trial court characterized Plaintiff's oral motion as, *inter alia*, an oral motion for default judgment on the amended petition. Defendant has failed to cite to any controlling legal authority indicating a party cannot file an oral motion for default judgment or indicating that a trial court is without the authority to construe a motion such as Plaintiff's in this case as an oral motion for default judgment. Moreover, we can find no such legal authority, and instead hold that "[w]hile a written motion [for default judgment] is preferred, an oral motion in open court is sufficient." *See Williams v. Zellers*, 611 S.W.3d 357,

363 (Mo. App. E.D. 2020) (similarly holding with respect to a motion to set aside an interlocutory order of default).[12]

Based on the foregoing, Plaintiff's argument alleging the trial court's entry of default judgment was erroneously based on Plaintiff's motion "to reconsider" his previous motion for default judgment filed on Plaintiff's initial petition has no merit.

d. Defendant's Argument that the Entry of Default Judgment was Made without Proper Notice to Defendant Under Rule 44.01(d)

We next consider Defendant's argument that the trial court improperly entered the underlying default judgment without proper notice to Defendant under Rule 44.01(d). *See* Rule 44.01(d) (providing 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 court rule or by order of the court") (emphasis added).

Defendant's reliance on Rule 44.01(d) is misplaced for two reasons. First, the plain language of Rule 44.01(d) demonstrates it only applies to *written* motions, *see id*., and in this case, Plaintiff's motion for default judgment on the amended petition was an *oral* motion in open court, which we previously held is sufficient.

Second, and more importantly, the plain language of Missouri Supreme Court Rule 43.01(a) (2020) (effective from December 31, 2006 through the present)[13] and Missouri case law demonstrate that Rule 44.01(d) does not apply to a motion for default judgment based on a party's failure to file a timely responsive pleading. Rule 43.01(a), which discusses when service

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[12] *See also Chapman v. Commerce Bank of St. Louis*, 896 S.W.2d 85, 87 (Mo. App. E.D. 1995) (similarly holding with respect to a motion raising the issue of a court's lack of personal jurisdiction due to ineffective service); *King v. Clifton*, 648 S.W.2d 193, 196 (Mo. App. S.D. 1983) (similarly holding with respect to a motion for directed verdict).
[13] All further references to Rule 43.01 are to the version of the Rule effective from December 31, 2006 to the present.

of motions and notices is required, explicitly provides that "[n]o service need be made on parties in default for failure to appear[.]" Rule 43.01(a). In other words, a plaintiff is not required to provide notice of default proceedings to a party such as Defendant who is in default for failure to timely file a responsive pleading. *See id.*; *Irvin v. Palmer*, 580 S.W.3d 15, 20-21 (Mo. App. E.D. 2019) ("in Missouri it is well settled that it is the failure to file a responsive pleading that causes a party to be in 'default for failure to appear'" under Rule 43.01); *Agnello v. Walker*, 306 S.W.3d 666, 670-71, 671 n.3 (Mo. App. W.D. 2010) (citing Rule 43.01(a) and *Doe v. Hamilton*, 202 S.W.3d 621, 624 (Mo. App. E.D. 2006) for the proposition that "[t]here [is] no requirement that a party in default for failure to appear be provided notice of the filing of motions or written notice of hearings"). A defendant in default for failure to file a responsive pleading does not have the right to notice of default proceedings because "once a defendant is served, he is charged with notice of all subsequent proceedings in the case." *Agnello*, 306 S.W.3d at 670-71, 671 n.3 (citing *Doe*, 202 S.W.3d at 624).

In sum, because Defendant did not have a right to notice of the default proceedings under the Missouri Supreme Court Rules and Missouri case law, Defendant's argument that the entry of default judgment was made without proper notice to Defendant has no merit.

3. Conclusion to Defendant's First and Second Points on Appeal

Based on the foregoing, the trial court did not improperly enter the underlying default judgment on Plaintiff's amended petition. Defendant's first and second points on appeal are denied.

B. Whether the Trial Court Erred in Denying Defendant's Motion to Set Aside the Default Judgment

In Defendant's third and final point on appeal, Defendant asserts the trial court erred in denying Defendant's motion to set aside the default judgment. For the reasons discussed below, we disagree.

1. Standard of Review, General Law, and the Issue in this Point on Appeal

Our Court reviews a trial court's ruling on a motion to set aside a default judgment for an abuse of discretion. *Irvin*, 580 S.W.3d at 23. As previously stated, "[a]n abuse of discretion occurs where the trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration." *Bangert*, 634 S.W.3d at 662.

While our Court affords a trial court broad discretion in granting a motion to set aside a default judgment and only narrow discretion in denying such a motion, a party moving to set aside a default judgment has the burden of proof to convince the trial court that it is entitled to relief. *Irvin*, 580 S.W.3d at 23. "And, although the law favors a trial on the merits, such a generalization must be carefully applied to the facts of each case in the interest of justice; for, the law defends with equal vigor the integrity of the legal process and procedural rules and, thus, does not sanction the disregard thereof." *Id.* (citing, *inter alia*, *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97, 100 (Mo. banc 1989)).

In order for a moving party to set aside a default judgment under Rule 74.05(d), the party must demonstrate, (1) a meritorious defense to the lawsuit; (2) good cause for failing to file a timely responsive pleading; and (3) that the motion to set aside was filed within a reasonable time not to exceed one year after the entry of the default judgment. *Irvin*, 580 S.W.3d at 23; Rule 74.05(d). "However, a motion to set aside a default judgment does not prove itself and

must be verified or supported by affidavits or sworn testimony produced at the hearing on the motion." *Irvin*, 580 S.W.3d at 23 (emphasis in original) (citation and internal quotations omitted).

In this case, it is undisputed for purposes of appeal that Defendant's motion to set aside the default judgment demonstrated a meritorious defense to the lawsuit and that its motion to set aside was filed within a reasonable time not to exceed one year after the entry of the default judgment on the amended petition. Accordingly, the only issue in this point on appeal is whether the trial court erred in finding Defendant did not demonstrate good cause for failing to file a timely responsive pleading to the amended petition. *See Irvin*, 580 S.W.3d at 23; Rule 74.05(d).

2. Relevant Law and Standard of Review Pertaining to "Good Cause" Under Rule 74.05(d)

Rule 74.05(d) defines "[g]ood cause" as "includ[ing] a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05(d). Appellate courts liberally interpret the phrase "good cause" "'to include good-faith mistakes, and even negligence, in failing to timely answer' in order to 'prevent a manifest injustice or to avoid a threatened one.'" *Vogel v. Schoenberg*, 620 S.W.3d 106, 111 (Mo. App. W.D. 2021) (quoting *Hanlon v. Legends Hospitality, LLC*, 568 S.W.3d 528, 532 (Mo. App. E.D. 2019) (citation omitted)). Negligence in failing to timely file a responsive pleading "occurs if a party's inadvertence, incompetence, unskillfulness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency." *Vogel*, 620 S.W.3d at 112 (quoting *Piva v. Piva*, 610 S.W.3d 395, 401 (Mo. App. E.D. 2020) (citation omitted)).

On the other hand, recklessness, which does not constitute good cause under Rule 74.05(d), "includes making a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose

the danger to a reasonable man." *Vogel*, 620 S.W.3d at 111-12 (citations and internal quotations omitted). "Intentional indifference, meaning that an individual does not care about the consequences of his or her actions, can also constitute recklessness." *Vogel*, 620 S.W.3d at 112 (citations and internal quotations omitted). "In other words, recklessness involves a deliberate choice to risk the possibility of a default judgment." *Id.*

In reviewing a trial court's determination of whether a party established good cause under Rule 74.05(d), we review the evidence in the light most favorable to the trial court's ruling, and we only consider whether there was a sufficient factual basis for the trial court's determination under the totality of the circumstances. *Piva*, 610 S.W.3d at 400-01; *Turner v. Gateway Bobcat of Missouri Inc.*, 450 S.W.3d 444, 450 (Mo. App. W.D. 2014). Furthermore, "in deciding whether good cause has been established, a trial court is free to 'disbelieve statements made by a moving party in its affidavits.'" *Coble v. NCI Bldg. Systems, Inc.*, 378 S.W.3d 443, 449 (Mo. App. W.D. 2012) (quoting *Beckmann v. Miceli Homes, Inc.*, 45 S.W.3d 533, 542 (Mo. App. E.D. 2001)).

3. Analysis of the Trial Court's Decision

In this case, the trial court determined Defendant had not demonstrated good cause for failing to timely respond to the amended petition. Viewing the evidence in the light most favorable to the trial court's decision, there was a sufficient factual basis for the trial court's determination under the totality of the circumstances in this case. *See Piva*, 610 S.W.3d at 400-01; *Turner*, 450 S.W.3d at 450.

In Ms. Blumenthal's affidavit filed in support of Defendant's motion to set aside the default judgment, she alleged she had prepared a motion to dismiss to the initial petition and it was not timely filed because of a "clerical error"; she "investigated the source of the error and [ ]

[was] unable to determine what occurred"; and she "note[d] that the coronavirus pandemic was beginning . . . and many employees of [Defendant] were working remotely[.]" Because the affidavit is vague, provides no detail concerning Ms. Blumenthal's "investigat[ion]," and does not allege or explain how employees working remotely would cause a court filing to be unable to be timely made, the trial court could have reasonably been skeptical of Blumenthal's affidavit. *See Coble*, 378 S.W.3d at 449 (similarly finding). Furthermore, "[n]othing required the trial court to believe the factual assertions in [Mrs. Blumenthal's] affidavit[.]" *See id.*; *see also Beckmann*, 45 S.W.3d at 542.

Regarding Defendant's failure to file a timely response to Plaintiff's amended petition, Ms. Blumenthal's affidavit alleged she received a proposed order from Plaintiff's counsel after the June 5, 2020 hearing but did not receive notice from the court's electronic filing system that any order had been signed and filed; admitted she received the amended petition on June 9, 2020; stated she did not receive notice from the court's electronic filing system that the amended petition had been filed; averred she was aware she was not receiving notices of other filings in the case in April and May of 2020; and stated she had filed Defendant's motion to dismiss the amended petition one or two days after she became aware on July 13 or 14 of 2020, through social media and a subsequent review of Case.net, that Plaintiff had filed a motion for judgment of the pleadings on his amended petition.

The trial court's judgment denying Defendant's motion to set aside the default judgment found Defendant failed to establish good cause for failing to file a timely response to the amended petition because the trial court's June 5, 2020 order required Defendant's to file a response "within thirty days of receipt"; because Ms. Blumenthal admitted she received a copy of the amended petition on June 9, 2020; because the trial court's June 5, 2020 order required a

responsive pleading to be filed within thirty days of receipt and not within thirty days of filing, even if Ms. Blumenthal did not receive notice from the electronic filing system of the amended petition being filed, Defendant was still required to respond within thirty days of receiving the amended petition on June 9, 2020; and because Ms. Blumenthal could and should have checked Case.net on her own under the circumstances of this case, especially where Ms. Blumenthal's affidavit stated she was aware she was not receiving other notices in the case in April and May of 2020.

Additionally, the trial court's judgment found the record contradicted a finding of mistake or inadvertence because at the July 28, 2020 hearing on Plaintiff's oral motion for default judgment, Ms. Blumenthal told the court she had prepared an answer to the amended petition but chose not to file it because she claimed there were issues regarding the amended petition that she wanted to address before filing an answer. The trial court's judgment denying Defendant's motion to set aside the default judgment also found "Defendant consistently fail[ed] to act in this case unless Plaintiff s[ought] relief."

Under these circumstances, which are supported by the record, the trial court could have reasonably found the failure of Ms. Blumenthal (a licensed attorney responsible for defending civil suits filed against Defendant under the Sunshine Law) to file a timely responsive pleading to the amended petition was not an act of negligence but instead was a deliberate, conscious, and reckless choice to risk the possibility of a default judgment. *See Vogel*, 620 S.W.3d at 111-12 (holding recklessness "includes making a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to a reasonable man" and "recklessness involves a deliberate choice to risk the possibility of a default judgment") (citations and internal quotations omitted); *First*

Community Bank v. Hubbell Power Systems, Inc., 298 S.W.3d 534, 540-41 (Mo. App. S.D. 2009) (indicating a licensed attorney familiar with litigation practice knew or should have known of the risk of the possibility of a default judgment if a timely responsive pleading was not filed). Therefore, the trial court did not err in determining Defendant did not demonstrate good cause for failing to timely respond to the amended petition. *See id.*; *see also* Rule 74.05(d).

4. Conclusion as to Defendant's Third Point on Appeal

Based on the foregoing, the trial court did not abuse its discretion in denying Defendant's motion to set aside the default judgment. *See Irvin*, 580 S.W.3d at 23; Rule 74.05(d); *see also Bangert*, 634 S.W.3d at 662. Defendant's third point on appeal is denied.

C. Plaintiff's Motion for Attorney's Fees on Appeal

We now turn to Plaintiff's motion for attorney's fees on appeal, which has been taken with the case. Plaintiff's motion seeks attorney's fees pursuant to section 610.027.4 RSMo 2016 (effective from August 28, 2004 to the present)[14] and this Court's E.D. Rule 400.[15]

Section 610.027.4 allows a plaintiff who has obtained a trial court judgment involving a purposeful violation of the Sunshine Law to recover reasonable attorney's fees that were necessary to defend or otherwise enforce the judgment. *See Chasnoff v. Mokwa*, 466 S.W.3d 571, 584 (Mo. App. E.D. 2015) (similarly holding); section 610.027.4 (providing in relevant part that "[i]f [a] court finds that there was a purposeful violation of [the Sunshine Law], then the court shall order the payment by such body . . . reasonable attorney fees to any party successfully establishing such a violation"); *see also Strake v. Robinwood West Community Improvement*

[14] All further references to section 610.027 are to the version of the statute effective from August 28, 2004 to the present.

[15] This Court's E.D. Rule 400 provides in relevant part: "Any party claiming an amount due for attorney's fees on appeal pursuant to contract, statute or otherwise and which this court has jurisdiction to consider, must do so before submission of the cause."

District, 473 S.W.3d 642, 643 (Mo. banc 2015) (referring to chapter 610 of the Missouri Revised Statutes as "the Sunshine Law") (internal quotations omitted).

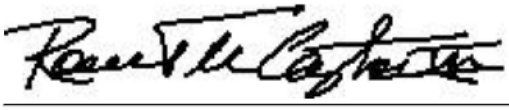
In this case, the trial court's default judgment found Defendant purposefully violated the Sunshine Law. It was necessary for Plaintiff to defend this underlying judgment when Defendant filed a motion to set it aside and appealed the trial court's denial of that motion. Accordingly, Plaintiff's request for attorney's fees is granted. *See Chasnoff*, 466 S.W.3d at 584; *see also* section 610.027.4; *Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 402 (Mo. App. E.D. 2007) ("[r]efusing to compensate an attorney for the time reasonably spent on appellate work defending the judgment below would be inconsistent with the intent of the legislature, which provided for recovery of fees") (citation omitted).

Although our Court has the "authority to allow and fix the amount of attorney's fees on appeal, we exercise this power with caution, believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." *Stark Liquidation Co.*, 243 S.W.3d at 402 (citation omitted). Accordingly, we grant Plaintiff's motion for attorney's fees on appeal and remand with directions to the trial court to determine the appropriate amount of attorney's fees on appeal to award Plaintiff and enter judgment accordingly. *See id.* (similarly finding).

III. CONCLUSION

The trial court's judgment denying Defendant's motion to set aside the default judgment on Plaintiff's amended petition is affirmed, and Plaintiff's motion for attorney's fees on appeal is granted. Additionally, we remand the cause for proceedings consistent with this opinion and the following specific directions. On remand, and in accordance with the trial court's judgment denying Defendant's motion to set aside the default judgment, (1) "Defendant shall produce to

Plaintiff . . . a list that identifies every document responsive to Plaintiff's Sunshine Law [r]equest"; (2) "Defendant shall . . . produce to the [c]ourt . . . a copy of every document responsive to Plaintiff's Sunshine Law [r]equest as well as a copy of the foregoing list"; and (3) "Thereafter, the [trial] [c]ourt [shall] conduct an in camera review of the records and assess Defendant's claims of privilege." *See* footnote 2 and Section I.E. of this opinion. Additionally, we direct the trial court on remand to determine the appropriate amount of attorney's fees on appeal to award Plaintiff and enter judgment accordingly.



ROBERT M. CLAYTON III, Presiding Judge

Colleen Dolan, J., and
Thomas C. Clark, II, J., concur.