

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

POINTS RELIED ON 2

 Point I 2

 Point II 2

ARGUMENT 4

 Point I 4

 Point II 19

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases

A.D.D. v. PLE Enterprises, Inc., WD75270, 2013 WL 1964838
(Mo. Ct. App. May 14, 2013)..... 5, 20, 21

Barney v. Suggs, 688 S.W.2d 356 (Mo. banc 1985) 25

Blaisdell v. The William Pope, 19 Mo. 157 (1854)..... 9

Brandt v. Darman Trailer Sales, Inc., 569 P.2d 851 (1977)..... 11

C.W. ex rel Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009) passim

Di Vecchio v. Gimbel Brothers, 40 F.R.D. 311, 314 (W.D.Pa.1966) 16

Eagle Star Group v. Marcus, 334 S.W.3d 548 (Mo. App. 2010) 2, 4, 9, 13

English v. English, 592 S.W.2d 297 (Mo. App. 1979) 15

Fed. R. Civ. P. 4 16

Hill Behan Lumber Co. v. Bankhead, 884 S.W.2d 318, 324-25 (Mo. App. 1994)..... 16

Hirst v. Cramer, 195 S.W.2d 738 (Mo. banc 1946)..... 12, 13, 16

Hometown Lumber & Hardware, Inc. v. Koelling, 816 S.W.2d 914
(Mo. banc 1991) 13, 16

In re Marriage of Benz, 669 S.W.2d 274 (Mo. App. 1984)..... 4, 8, 9, 10

In re Marriage of Bradford, 557 S.W.2d 720 (Mo. App. 1977) [12–15] 15

Industrial Personnel Corporation v. Corcoran, 643 S.W.2d 816 (Mo. App. 1981) .. 14, 15

Jones v. Jones, 712 S.W.2d 465 (Mo. App. 1986)..... 11, 13

Kahn v. Mercantile Town Mutual Insurance Company, 128 S.W. 995
(Mo. banc 1910) passim

<i>Majewski v. Bender</i> 237 S.W.2d 235 (Mo. banc 1951)	9
<i>McClure v. Wells</i> , 46 Mo. 311 (Mo. banc 1870).....	8
<i>Nesler</i> , 692 S.W.2d 7 (Mo. App. 1985)	14
<i>Phares v. Div. of Employment Sec.</i> , 334 S.W.3d 175 (Mo. App. 2011).....	21
<i>Smith v. Sayles</i> , 637 S.W.2d 714 (Mo. App. 1982).....	3, 20, 23
<i>State v. Julius</i> , 664 S.W. 2d 31, 32 (Mo. App. 1984)	6, 11
<i>T.W.I. Investments, Inc. v. Pac. Aggregates, Inc.</i> , 726 S.W.2d 807 (Mo. App. 1987).....	14, 15
<i>Thompson v. Chicago, S. F. & C. Ry. Co.</i> , 110 Mo. 147, 19 S.W. 77	12
<i>Vonsmith v. Vonsmith</i> , 666 S.W.2d 424 (Mo. banc 1984).....	23
<i>Wyrough & Loser, Inc., v. Pelmor Laboratories, Inc.</i> , 376 F.2d 543, 546, n. 4 (3d Cir. 1967)	16
 Rules	
Fed. R. Civ. P. 4	19
Jackson County Local Rule 4.9.4.....	6
Mo. R. Civ. P. 54.13(a)	6
Mo. R. Civ. P. 54.13(b)(1)	6
Mo. R. Civ. P. 54.20.....	19
Mo. R. Civ. P. 54.20(a)(2).....	7, 14
Mo. R. Civ. P. 54.22.....	8, 14, 17
Mo. R. Civ. P. 54.22(a)	9
Mo. R. Civ. P. 74.03.....	25

Mo. R. Civ. P. 74.05(d).....	4
Mo. R. Civ. P. 74.06(b)(4)	5
Mo. R. Civ. P. 74.06(c)	5, 24

Other Authorities

2 C.J.S. <i>Process</i> § 144 at 764 (2005)	8
72 C.J.S. <i>Process</i> § 144 at 764 (2005)	8
72 C.J.S. <i>Process</i> § 105 at 737 (2005)	7
72 C.J.S. <i>Process</i> § 106 at 737-738 (2005).....	11
4A C.A. Wright & A.R. Miller, <i>Federal Practice and Procedure</i> § 1132 at 300 (3d ed. 2002).....	8

JURISDICTIONAL STATEMENT

Christianson adopts Goucher's jurisdictional statement.

POINTS RELIED ON

Point I

The circuit court correctly overruled Goucher's motion to set aside the default judgment under Rule 74.06 because the circuit court had personal jurisdiction over Goucher even though Christianson's private process server failed to notarize his return of service form. Specifically, the circuit court had personal jurisdiction over Goucher because Goucher concedes that Christianson properly served him, the process server's return of service form has no bearing on the court's jurisdiction to adjudicate Goucher's rights, and Rule 54.22 allowed Christianson to file an amended return to correct his original return of service form.

Kahn v. Mercantile Town Mutual Insurance Company, 128 S.W. 995, 997 (Mo. banc 1910)

C.W. ex rel Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

Eagle Star Group v. Marcus, 334 S.W.3d 548, 555 (Mo. App. 2010)

Point II

The circuit court correctly overruled Goucher's motion to set aside the default judgment on the basis that the judgment violates Goucher's due process rights because by defaulting Goucher waived any criticism of 1) Christianson's petition, 2) the evidence presented at the hearing, and 3) any lack notice of the entry of the judgment.

A.D.D. v. PLE Enterprises, Inc., WD75270, 2013 WL 1964838 (Mo. Ct. App. May 14, 2013)

Smith v. Sayles, 637 S.W.2d 714, 717 (Mo. App. 1982)

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ARGUMENT

Point I

The circuit court correctly overruled Goucher's motion to set aside the default judgment under Rule 74.06 because the circuit court had personal jurisdiction over Goucher even though Christianson's private process server failed to notarize his return of service form. Specifically, the circuit court had personal jurisdiction over Goucher because Goucher concedes that Christianson properly served him, the process server's return of service form has no bearing on the court's jurisdiction to adjudicate Goucher's rights, and Rule 54.22 allowed Christianson to file an amended return to correct his original return of service form.

Kahn v. Mercantile Town Mutual Insurance Company, 128 S.W. 995, 997 (Mo. banc 1910)

C.W. ex rel Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

Eagle Star Group v. Marcus, 334 S.W.3d 548, 555 (Mo. App. 2010)

See also In re Marriage of Benz, 669 S.W.2d 274, 278 (Mo. App. 1984)

Legal Argument

Generally, a defendant may move to set aside a default judgment by showing good cause and a meritorious defense. Rule 74.05(d). Rule 74.05, however, requires that the defendant file that motion within a year after the court's entry of the default judgment. *Id.* In this case, Goucher did not file his motion within a year. Given the passage of time, Goucher could not proceed under Rule 74.05(d).

Goucher, therefore, seeks to have the court set aside the default judgment under Rule 74.06(b)(4) on the basis that the default judgment is “void.” A Rule 74.06(b)(4) motion, which claims that a judgment is void, is not subject to any specific time limit, but the party must file it “within a reasonable time.” Rule 74.06(c).

Rule 74.06(b)(4) provides that a “court may relieve a party or his legal representative from a final judgment or order ... [if] the judgment is void.” *A.D.D. v. PLE Enterprises, Inc.*, WD75270, 2013 WL 1964838 (Mo. Ct. App. May 14, 2013). A court favors finality of a judgment so the court construes the concept of a void judgment narrowly. *Id.*

The court has held that a judgment is void under Rule 74.06(b)(4) only if the court that rendered the judgment lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law. *Id.* In this point, Goucher argues that the court should set aside the default judgment because the circuit court lacked personal jurisdiction over him.

Personal jurisdiction refers to the court’s power to require a person to respond to a legal proceeding that may affect that person’s rights. *C.W. ex rel Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). The U.S. Constitution’s due process clause governs the court’s power to do so. *Id.* When a court says that it lacks personal jurisdiction, the court means that the due process clause bars it from affecting the rights and interests of a particular person. *Id.* Among other things, the due process clause requires that the court conclude that the defendant has minimum contacts with the state and that the plaintiff served the defendant with notice of the lawsuit so that the defendant

had an opportunity to defend him or herself. Goucher's claim relates to the latter issue—whether or not Christianson properly served Goucher with notice of the lawsuit

a) **Goucher concedes that Christianson followed the proper method to serve him.**

The legal system fulfills the due process clause's notice requirement by requiring the plaintiff to serve the defendant with a copy of the summons and petition. *State v. Julius*, 664 S.W. 2d 31, 32 (Mo. App. 1984). In Missouri, a plaintiff serves an individual by delivering a copy of the summons and petition to the individual. Rule 54.13(b)(1). In Missouri, either an officer or a private process server may serve the other party. Rule 54.13(a).

Christianson filed his petition in Jackson County. Jackson County Local Rule 4.9 requires a party to file a written motion with the court requesting court approval for the appointment of a special process server. Jackson County also maintains a list of prequalified special process servers. Jackson County Local Rule 4.9.4. The court administrator's office may approve any process server on the list. *Id.*

In this case, Goucher concedes, or at least does not challenge the circuit court's findings, that:

- Christianson hired a private process server to serve Goucher;
- Christianson's attorney filed a motion asking the court to appoint the private process server as a special process server for the case;

- At the time of his appointment, the private process server was on Jackson County's prequalified list of special process servers;
- The court clerk then issued the summons and approved the special process server to serve the summons;
- The private process server actually served Goucher; and,
- Goucher had notice of the lawsuit and, thus, had an opportunity to defend himself in the lawsuit.

See Legal File, 99-100, circuit court's order denying Goucher's motion to set aside; Legal File, page 85, Goucher's affidavit, page 85; Legal File, page 88, Bruce Burnmeister's affidavit. Goucher, therefore, concedes that Christianson went through the proper channels to appoint a process server and that the process server properly served a copy of the petition and summons on Goucher.

Once the process server serves the party, the process server must "return" the service form to the circuit clerk. The return of service is the process server's statement certifying his or her actions to serve the defendant. 72 C.J.S. *Process* § 105 at 737 (2005). Under Missouri rules, a private process server must include an affidavit as to the time, place, and manner of service. Rule 54.20(a)(2). In this case, the parties agree that:

- The process server returned the service form;
- The process server included the time, place, and manner of service;
- The process server failed to have the return notarized when he originally returned it to the clerk's office; but,

- The circuit court allowed Christianson to file an amended return that included the process server's notarized affidavit; and,
- Christianson did file an amended return that corrected his defective original return.

See Legal File, 99-100, circuit court's order denying Goucher's motion to set aside; Legal File, page 119, circuit court's judgment noting that Christianson filed an amended return; Legal file, page 88, Bruce Burnmeister's affidavit. The parties dispute the legal effect of the circuit court's order allowing Christianson to amend his return of service form.

b) The law allows Christianson to amend the return to correct any defects in the original return.

When a return of service is defective, a party may generally amend the return to correct the defects or to conform to the truth and to statutory requirements. 72 C.J.S. *Process* § 144 at 764 (2005). The legislature and the Missouri Supreme Court have codified that principle in both section 506.190 and Rule 54.22. For example, Rule 54.22 grants the power to the court to allow a party to amend a return of service as long as the amendment will not materially prejudice the defendant's substantial rights. *See also In re Marriage of Benz*, 669 S.W.2d 274, 278 (Mo. App. 1984). Missouri courts have consistently followed this principle by allowing a party to amend a defective return of service. *McClure v. Wells*, 46 Mo. 311, 314 (Mo. banc 1870); *Kahn v. Mercantile Town Mutual Insurance Company*, 128 S.W. 995, 998 (Mo. banc 1910); *Majewski v. Bender*

237 S.W.2d 235, 237 (Mo. banc 1951); *Eagle Star Group v. Marcus*, 334 S.W.3d 548, 555 (Mo. App. 2010).

A party may amend his or her return even after the court enters judgment. *In re Marriage of Benz*, 669 S.W.2d 274, 278 (Mo. App. 1984). A party may amend the return even after the other party files a motion to set aside the judgment. *Blaisdell v. The William Pope*, 19 Mo. 157, 159 (1854). In fact, the commentators have gone as far as to say that a court should rarely refuse a party's request to amend his or her return of service. 4A C.A. Wright & A.R. Miller, *Federal Practice and Procedure* § 1132 at 300 (3d ed. 2002) (in commenting on the Federal Rule that serves as the source of current Rule 54.22(a) "A request ... for permission to amend the proof of service, as opposed to the process itself, rarely should be refused.").

In this case, the circuit court allowed Christianson to file an amended return. See Legal File, 99-100, circuit court's order denying Goucher's motion to set aside. Christianson did so and that amended return includes the private process server's affidavit. Legal File, page 119, circuit court's judgment finding that Christianson filed an amended return.

On appeal, Goucher makes no argument that the circuit court abused its discretion in allowing the amendment or that the amendment materially prejudiced Goucher's substantial rights. And, in fact, in this case, Goucher concedes that the private process server served him. See Goucher's brief, page 23 (conceding that "Goucher stated that he received notice of the suit[.]"); see also Legal File, page 85-86, Goucher's affidavit in

which he states that he was served). Thus, Goucher cannot establish that Christianson's amended return caused him any prejudice.

Instead of arguing that the circuit court abused its discretion in allowing Christianson to amend the return of service, Goucher claims that the circuit court lacked the jurisdictional power to enter the judgment and enter an order allowing Christianson to amend his return. Goucher reasons that, since the original return was defective, the circuit court never had jurisdiction to do anything except dismiss the petition. See Goucher's brief, generally pages 31-33. Goucher's argument ignores the fact that an amended return relates back to the date of the original return. Furthermore, Goucher's argument ignores the fact that a return of service has no effect on the court's jurisdiction.

c) **The court has held that an amendment to the return relates back to the date of the original return.**

When the court allows the party to amend the return of service, the court deems that the amended return relates back to the date of the original return. *Kahn*, 128 S.W. at 997; *In re Marriage of Benz*, 669 S.W.2d at 278. Under this rule, the court should deem that Christianson's amended return relates back to the date that the process server filed the original return. Thus, even under Goucher's theory, the circuit court had the jurisdiction to proceed with Christianson's case.

d) **Goucher improperly conflates the return of service with actual service and ignores the fact that the return of service has no effect on the court's jurisdiction**

The legal system fulfills the due process' notice requirement by requiring the plaintiff to serve the defendant with a copy of the summons and petition. *State v. Julius*, 664 S.W. 2d 31, 32 (Mo. App. 1984). Based on the purpose of service, it is self evident that the service of process—rather than a return or proof of service—is the jurisdictional requisite, and that the court acquires jurisdiction through proper service and not through the return of the service form. 72 C.J.S. *Process*, § 106 at 737-738. The moment that the plaintiff serves the defendant is the moment that the defendant has notice of the lawsuit and an opportunity to defend him or herself. At that moment, the plaintiff has satisfied the due process clause's requirement of notice.

Accordingly, in *Brandt v. Darman Trailer Sales, Inc.*, 569 P.2d 851, 852 (1977), the Arizona Court of Appeals said, "It is not the return but the fact of service which gives the court jurisdiction. The return is merely evidence by which the court may be informed that the defendant has been served." Of course, it is possible that the return of service is so defective that a court has no evidence that the person was served. See *Jones v. Jones*, 712 S.W.2d 465, 466 (1986). But that does not mean that the return of service form is a jurisdictional issue. The jurisdictional issue is still whether or not the plaintiff served the defendant. But, because the return is so defective, the plaintiff has no evidence that he or she satisfied his or her constitutional obligation to perfect service.

1. For centuries, the Missouri Supreme Court has recognized that only proper service—not the return of service—affect the circuit court's jurisdiction.

For example, in *Kahn v. Mercantile Town Mutual Insurance Co.*, the Missouri Supreme Court held that:

It was the service of the writ and petition upon the defendant, and not the return that gave the trial court jurisdiction over the person of the defendant. The return was merely evidence by which the court was informed that the defendant had been served.

Kahn v. Mercantile Town Mutual Insurance Co., 128 S.W. 995, 997 (1910).

Similarly, in *Hirst v. Cramer*, the Missouri Supreme Court held that only service—and not a defect in the service or the return of service—impacts the court’s jurisdiction to enter a judgment:

Where there is no service whatever, the court acquires no jurisdiction, and its judgment is void, but where the service is simply defective or irregular, the judgment rendered is not void, but only subject to being set aside by the Court which gave it, upon proper and reasonable application, or else reversed on appeal. *Thompson v. Chicago, S. F. & C. Ry. Co.*, 110 Mo. 147, 19 S.W. 77. ‘A defect in the form or matter of a summons or other process not absolutely destructive of its validity, or an irregularity or defect in the service of it upon defendant, although material and sufficient to cause the reversal of the judgment on a proper application, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment.

Hirst v. Cramer, 195 S.W.2d 738, 740 (1946).

And, the Missouri Supreme Court reaffirmed this principle in *Hometown Lumber & Hardware, Inc. v. Koelling*, when it held that a defect in the summons does not deprive the court of jurisdiction as long as it provided notice to the defendant:

[A] defect in the form of a summons does not render the summons fatal nor deprive a court of jurisdiction. *Hirst v. Cramer*, 195 S.W.2d 738, 740 (Mo. banc 1946); *See also Jones v. Jones*, 712 S.W.2d 465, 466 (Mo.App.1986). Inherent in our law has long been the concept that the underlying principle of a summons is to place a defendant on notice of an action filed against the defendant to enable the defendant to appear and defend against the action.

Hometown Lumber & Hardware, Inc. v. Koelling, 816 S.W.2d 914, 916 (Mo. banc 1991).

Missouri Supreme Court precedent is clear that a defect in the return of service has no bearing on the circuit court's jurisdiction over the defendant. Many court of appeals decisions have also followed this rule. *See Eagle Star Group v. Marcus*, 334 S.W.3d 548, 555 (Mo. App. 2010); *Jones v. Jones*, 712 S.W.2d 465, 466 (Mo. App. 1986).

Goucher concedes that these cases exist but maintains that they are distinguishable. For example, Goucher concedes that the *Kahn* court allowed the plaintiff to amend the return of service to correctly identify the defendant's officer who was served. *See Goucher's brief*, page 28. Similarly, Goucher concedes that, in *Eagle Star Group*, this court affirmed the trial court's opinion that a plaintiff could file an amended return when the original return identified the corporate officer's name incorrectly. *Id.*

Goucher maintains that these cases stand for the proposition that the court has the authority to allow an amended return of service to correct a scrivener's error. But, in this

case, Goucher believes that the court could not allow the amended return of service because the amendment concerned the plaintiff's failure to comply with the express language of Rule 54.20(a)(2). See Goucher's brief, page 29. In Goucher's view, the defect in this return is not the type of defect that a party can correct under Rule 54.22.

Goucher, however, cites to no language in *Kahn, Hirst, Hometown Lumber, or Eagle Star* to support that distinction, cites to no other cases that support that distinction, and presents no constitutional or policy reasons on why the court should adopt that distinction. And, Goucher's distinction makes no sense. An incorrect name on a return of service is no less a defect than an un-notarized return. Since Goucher concedes that a plaintiff may correct the former (an incorrect name), the court should use Goucher's concession and the same logic to conclude that the court may correct the latter (an un-notarized return).

Based on these cases, the court should affirm the circuit court's denial of Goucher's motion to set aside. Despite this case law, Goucher, however, asks the court to follow a line of appellate cases that have held the return of service affects the court's jurisdiction. Goucher cites *T.W.I. Investments, Inc. v. Pac. Aggregates, Inc.*, 726 S.W.2d 807 (Mo. App. 1987), *See v. Nesler*, 692 S.W.2d 7 (Mo. App. 1985), and *Industrial Personnel Corporation v. Corcoran*, 643 S.W.2d 816 (Mo. App. 1981) in support of his contention that a defective return of service deprived the circuit court of personal jurisdiction.

2. **Goucher's cases flow from *In Re Marriage of Bradford*, which cites no authority to support its dictum that the return of service affects the court's personal jurisdiction.**

Goucher is correct that these cases do hold that a court lacks personal jurisdiction over a person when the return of service lacks a sworn affidavit. Christianson will show that these cases originate from dictum in *In Re Marriage of Bradford* in which the court cites no authority for the proposition that a return of service is jurisdictional and ignores Missouri Supreme Court precedent.

T.W.I is the more recent case, and it relies on *Nesler* as its sole support for the proposition that a defective return of service deprives the circuit court of jurisdiction. *T.W.I.*, 726 S.W.2d at 809. The *Nesler* court relies on *Industrial Personnel Corporation* as its support. *Nesler*, 692 S.W.2d at 8.

The *Industrial* court did state that:

In the absence of the certification required by [Rule 54.20(b)(1)], the service is 'manifestly deficient' and does not confer personal jurisdiction over the defendant. *In re Marriage of Bradford*, 557 S.W.2d 720 (Mo. App. 1977) [12–15]; *English v. English*, 592 S.W.2d 297 (Mo. App. 1979) [1].

Industrial, 643 S.W.2d at 818. That court, therefore, relied on two cases: *English* and *Bradford*. But the *English* court cited only *Bradford* for its support. *English v. English*, 592 S.W.2d 297, 299 (Mo. App. 1979).

The *Bradford* court did hold that a defective return deprived the court of personal jurisdiction:

[B]ecause the return was deficient, the service of process was not effective to confer personal jurisdiction of the respondent upon the Missouri court, and defendant did not waive the defense of lack of personal jurisdiction by failing to raise that defense by timely motion. *Wyrrough & Loser, Inc., v. Pelmor Laboratories, Inc.*, 376 F.2d 543, 546, n. 4 (3d Cir. 1967); *Di Vecchio v. Gimbel Brothers*, 40 F.R.D. 311, 314 (W.D.Pa.1966).

In re Marriage of Bradford, 557 S.W.2d at 729.

The opinion contains that statement but does not support it with any case law—much less any Missouri case law. The cases cited by the *Bradford* court are two federal court cases discussing whether or not the defendant waived his jurisdictional argument. *Wyrrough & Loser, Inc., v. Pelmor Laboratories, Inc.*, 376 F.2d 543, 546, n. 4 (3d Cir. 1967) *Di Vecchio v. Gimbel Brothers*, 40 F.R.D. 311, 314 (W.D.Pa.1966). They do not provide support for the court’s holding that the return of service affects the court’s jurisdiction. Nor could these federal case do so since Federal Rule 4 very clearly states that the “[f]ailure to prove service does not affect the validity of service. The court may permit proof of service to be amended.” Fed. R. Civ. P. 4. See also *Hill Behan Lumber Co. v. Bankhead*, 884 S.W.2d 318, 324-25 (Mo. App. 1994) (Judge Grimm’s dissent in which he traces the evolution of these cases to this dictum in *Bradford*). And, neither *Bradford* nor any of the cases relying on *Bradford* explain or address the Missouri Supreme Court’s decisions in *Kahn*, *Hirst*, or *Hometown Lumber & Hardware*.

Furthermore, none of Goucher's cases cite or explain the effect of Rule 54.22, which allows the plaintiff to amend a defective return of service. If these courts were correct that the defective return of service stripped the circuit court of jurisdiction and prohibited the court from taking any action then the court could never use Rule 54.22 to allow a plaintiff to correct a defective return. Thus, if *Bradford* and the other cases were correct then the Missouri Supreme Court enacted a rule that no court could ever use.

3. Goucher's argument and cases rest on the same rationale that the Missouri Supreme Court rejected in Webb.

In *Webb*, the Missouri Supreme Court explained that Missouri has two types of jurisdiction: personal and subject matter. The *Webb* court noted that Missouri's constitution set forth the circuit court's subject matter jurisdiction in plenary terms by providing that "[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court." *Webb*, 275 S.W.3d at 253-54. The court explained that over time cases had recognized a third concept called jurisdictional competence, which parties often confused with subject matter jurisdiction. *Id.*

In that case, the statute, Missouri statute section 452.455.4, provided that a parent who is more than \$10,000 in arrears in payment of child support may not petition to modify a judgment of custody or visitation without posting a bond in the amount of the arrearage, or the legal fees of the custodial parent, whichever is greater, before filing the

petition.” See also *Webb*, 275 S.W.3d at 252. The *Webb* court noted that previous courts had labeled these types of statutes as a matter of subject matter jurisdiction or jurisdictional competence. *Id.* at 252.

The court observed that these types of jurisdictional arguments gave an incentive to parties to label every statutory restriction as a matter of jurisdictional competence. *Id.* at 254. In *Webb*, the court abolished these technical jurisdictional arguments by holding that the Missouri constitution gave subject matter jurisdiction to the circuit courts over all civil cases. The *Webb* Court reduced the issue of subject matter jurisdiction to one simple question: Does the circuit court have subject matter jurisdiction to hear the case under Article V, Section 14? If so, the circuit court has subject matter jurisdiction and the authority to hear the dispute. *Id.* at 254.

Although *Webb* dealt with subject matter jurisdiction, the Missouri Supreme Court’s reasoning applies to personal jurisdiction too. When a court says that it lacks personal jurisdiction, the court means that the constitutional principle of due process bars it from affecting the rights and interests of a particular person. *Id.* The court’s analysis of process of service as it relates to personal jurisdiction requires it to determine only if the defendant received his or her constitutionally required notice and an opportunity to defend him or herself in court.

In this case, Goucher concedes that he received his constitutionally required notice and opportunity to defend himself. He now seeks to undo that judgment by finding a “jurisdictional defect” in the return of service form—a defect that everybody agrees Christianson fixed when he filed an amended return form. Goucher’s use of this

technical violation of Rule 54.20 is no different than how a party would use statutory violations in an attempt to deprive a circuit court of subject matter jurisdiction. The Missouri Supreme Court abolished that practice in *Webb*. Based on the court's reasoning in *Webb*, this court should not allow Goucher to use a technical violation of Rule 54.20 to overturn Christianson's judgment.

Conclusion to Point I

The parties agree that Christianson properly served Goucher. Goucher has signed an affidavit attesting to service and notice of the lawsuit. Although Christianson's return of service form was defective, the circuit court allowed him to file an amended return to correct that defect. The court should conclude that Christianson's defect in his original return did not deprive the circuit court of personal jurisdiction.

Point II

The circuit court correctly overruled Goucher's motion to set aside the default judgment on the basis that the judgment violates Goucher's due process rights because by defaulting Goucher waived any criticism of a) Christianson's petition, b) the evidence presented at the hearing, and c) any lack notice of the entry of the judgment.

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C.W. ex rel Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

Legal argument

In this point, Goucher makes three arguments on why the court should set aside the default judgment: a) Christianson failed to allege a cause of action against Goucher and failed to present evidence to support his claims; b) the court awarded excessive damages; and c) Goucher did not receive notice of the default hearing.

a) **This court cannot set aside the default judgment on the basis that Christianson had no cause of action against Goucher.**

In his first subpoint, Goucher makes several allegations that Christianson's petition fails to state a cause of action against Goucher. For example, Goucher contends that Christianson's petition fails to state a cause of action because he violated Missouri law by pleading direct claims of negligent hiring and supervision against Goucher and vicarious claims against Goucher on the basis of *respondeat superior*. Christianson also claims that the circuit court erred in entering a default judgment because Christianson failed to admit evidence to support either of these claims. Goucher claims that Christianson's failure to state a cause of action meant that the circuit court did not have the subject matter jurisdiction to enter the judgment. Thus, Goucher claims that the judgment is void.

1) **The court should not address this argument since Goucher did not raise it below.**

Goucher did not raise this issue with the circuit court by including the issue in his motion to set aside the judgment. The court, therefore, should not consider the issue.

Phares v. Div. of Employment Sec., 334 S.W.3d 175, 177 (Mo. App. 2011).

2) **A plaintiff's failure to state a cause of action does not void the judgment.**

This court recently rejected similar arguments in *A.D.D. v. PLE Enterprises, Inc.*, WD75270, 2013 WL 1964838 (Mo. Ct. App. May 14, 2013). In *A.D.D.*, the defendant claimed that the circuit court's default judgment was void because the plaintiff failed to state a cause of action. The court held that, after the Supreme Court's opinion in *Webb*, the plaintiff's failure to state a cause of action had no bearing on the circuit court's subject matter jurisdiction. *Id.* at 5.

The *A.D.D.* court also held that a defendant could not take issues that the court would normally reject under the court's subject matter jurisdiction analysis and import those issues under the umbrella of a lack of procedural due process. *Id.* Thus, the court held that the plaintiff's failure to state a cause of action does not render a judgment void. *Id.* Rather, once a court enters a default judgment, the court held that it was not concerned with whether or not the petition states a cause of action but whether or not the defaulting party had notice of the grounds on which he or she was sued. *Id.* at 4.

3) **Christianson's petition stated a cause of action for negligence and negligent hiring and supervision and put Goucher on notice of those claims.**

In this case, Christianson's petition clearly put Goucher on notice that Christianson was suing him for negligence and negligent hiring, retention, and supervision. In the petition, Christianson alleges that Goucher's employee negligently rear-ended Christianson's vehicle. See generally Legal File, pages 38-47, Christianson's

petition. Christianson alleged that Goucher was vicariously liable for his employee's actions because his employee was operating the vehicle within the course and scope of his employment. *Id.* Furthermore, Christianson alleged that Goucher negligently hired, supervised, and retained his employee. *Id.* Christianson's petition clearly alleges that Goucher's direct and vicarious liability caused or contributed to cause the collision and Christianson's injuries.

4) Christianson did not need to present evidence to establish his right to a default judgment.

In this subpoint, Goucher also complains that Christianson failed to admit evidence to support either of his claims. Christianson, however, did not need to introduce this evidence. The entire purpose of Missouri's default rules is to eliminate the plaintiff's requirement to prove his or her case when the defendant defaults. *Smith v. Sayles*, 637 S.W.2d 714, 717 (Mo. App. 1982). In a negligence action, a defendant's default means that the defendant violated his or her duty of care to the plaintiff and caused the plaintiff's injuries. *Id.* At that point, the circuit court needs only to hold a hearing to determine the plaintiff's damages. *Id.* at 718. And, on appeal, the defendant may not challenge a default by arguing that the plaintiff did not introduce evidence of negligence.

Goucher defaulted when he failed to answer the petition. By defaulting, Goucher admitted Christianson's allegations of negligence in the petition. Goucher cannot now ask this court to set aside the default judgment because Christianson failed to introduce evidence of negligence.

b) The court cannot set aside the default judgment because the court awarded damages to Christianson that exceeded his petition and injuries.

In this subpoint, Goucher asks the court to set aside the default judgment because the court's damages award was not supported by the evidence at the hearing. Goucher fails to cite any law establishing that a court may set aside a default judgment because the court awarded damages to Christianson that exceed his injuries.

To support his point, Goucher cites only to *Vonsmith v. Vonsmith*, 666 S.W.2d 424, 426 (Mo. banc 1984) in which a judge who concurred in part and dissent in part stated that "[it might be argued that an egregious award is in excess of the prayer of the petition, so as to constitute an excess of jurisdiction, or is an 'irregularity' subject to review." Since this language was in the concurrence and dissent, it is not Missouri law and Goucher fails to cite any other cases establishing that a person can attack a default judgment for awarding excess damages.

Even if the court believes that Goucher may raise these issues, it should still deny his point. In this case, Goucher cannot attack the judgment on the basis that it is irregular. Rule 74.06(c) requires Goucher to raise any issue of the irregularity of the judgment within one year after the court entered judgment. Goucher concedes that he did not file his motion within that period. Thus, Goucher has waived this point.

Furthermore, Missouri law on jurisdiction establishes that the court had subject matter and personal jurisdiction in this case regardless of the court's damage award. Christianson notes above that the Missouri Supreme Court has eliminated these types of jurisdictional arguments. *Webb*, 275 S.W.3d at 254. . The Supreme Court held that a

circuit court has personal jurisdiction over a person as long as the court has abided by the due process clause. Under *Webb*, the circuit court had subject matter over Christianson's case because the court has subject matter over all civil cases. In point I, Christianson shows that the court had personal jurisdiction over him.

Finally, even if the court believes that court's entry of damages that exceeds a petition implicates the court's jurisdiction to enter judgment or implicates Goucher's due process rights, this court cannot set aside Christianson's default judgment on that basis. Goucher claims that the court's award exceeds the value of the evidence at the default hearing because Christianson established that he had medical expenses of only \$43,222.99. At the hearing, however, Christianson also established that he had permanent injuries to his shoulder, neck, and back and had permanent pain and suffering from those injuries. See generally trial transcript pages 7-31. This court heard that evidence and concluded that Christianson suffered damages in the amount of \$750,000. Goucher points out that the judgment is 17 times Christianson's economic damages. But, Goucher cites no law establishing that a judgment is void merely because it contains a significant award for non-economic damages.

c) **Christianson compiled with Missouri law on notice of default judgments.**

In this subpoint, Goucher claims that the court should change the law on default judgments and set aside Christianson's default judgment on the basis that Christianson

did not give notice of the amount of damages that he would seek and failed to give post-judgment notice of his judgment to Goucher.

Goucher, however, concedes that the Missouri Supreme Court has held that the law does not require a party to give notice of the damages that he will seek to the defaulting party even when the party's claim is unliquidated and the plaintiff has pleaded only for fair and reasonable damages. See *Barney v. Suggs*, 688 S.W.2d 356, 359-60 (Mo. banc 1985). Goucher seeks to have the courts revisit this rule. The constitution, however, requires that this court follow Missouri Supreme Court precedent.

Goucher also complains nobody gave notice of the court's entry of the default judgment to Goucher. Goucher admits that Supreme Court rule 74.03 provides that the court clerk is not required to serve a copy of a judgment on a defaulting party and that Supreme Court rule 74.03 supersedes any local Rules that may require notice. The constitution requires this court to follow Missouri Supreme Court rules. And, this rule makes sense in this case. Goucher concedes that Christianson served him with a copy of the lawsuit. Goucher, therefore, concedes that he had notice and an opportunity to defend himself at trial. Instead, he defaulted. This court does not need to reward Goucher's failure to appear at the trial. *Barney v. Suggs*, 688 S.W.2d 356, 360 (Mo. 1985). The circuit court, therefore, cannot set aside Christianson's default judgment for lack of notice.

Conclusion to Point II

In this point, Goucher asks the court to set aside Christianson's judgment on the basis that it is void. Goucher claims that the judgment is void because Christianson failed

to state a cause of action in his petition and the circuit court entered a judgment that exceeded his damages. Under Missouri law, neither of these claims, even if true, allow the court to overturn the circuit court's judgment. Furthermore, Christianson abided by all of Missouri Rules for service and notice.

CONCLUSION

This court should deny Goucher's appeal for the following reasons:

- The parties agree that Christianson properly served Goucher;
- Goucher has signed an affidavit attesting to service and notice of the lawsuit;
- Christianson's defect in his original return did not deprive the circuit court of personal jurisdiction;
- The circuit court had the authority to allow Christianson to amend his defective return of service; and,
- By defaulting, Goucher waived his right to complain about Christianson's petition or the evidence that Christianson introduced at the default hearing.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

I, Tom Hershewe, certify that:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. There are 6,805 words contained in this brief.

/s/Tom Hershewe
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CERTIFICATE OF SERVICE

I certify that on June 5, 2013, I electronically filed the foregoing utilizing the Court's CM/ECF system which will send notification of same to:

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