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FILED  
DOUGLAS COUNTY  
DISTRICT COURT  
Christopher F. Burger #16056  
Bradley Finkeldei #19470  
STEVENSON & BRAND, L.L.P.  
P.O. Box 189  
Lawrence KS 66044  
(785) 843-0811 - Phone  
Attorneys for Defendant

JUN 18 P 3:34  
BY \_\_\_\_\_

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS**

JESSICA BROWN	)	
	)	
Plaintiff,	)	
v.	)	Case No. 2008-CV-000277
	)	
	)	Division No. 2
SHERRON COLLINS	)	
	)	
Defendant.	)	
	)	

Petition Pursuant to K.S.A. Chapter 60

**DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT AND/OR FOR LEAVE TO FILE ANSWER OUT OF TIME**

Defendant, Mr. Sherron Collins, appears through counsel Stevens & Brand LLP and requests that the Court set aside the default judgment entered on or about June 16, 2008, and grant him leave to file his answer out of time. In support, Mr. Collins states as follows:

**I. STATEMENT OF THE CASE**

A petition for civil damages arising from an alleged assault was filed on May 14, 2008, and a default judgment was taken on June 16, 2008.

**II. STATEMENT OF FACTS**

The pertinent facts are as follow:

1. The Petition was filed May 14, 2008.

2. The Petition seeks damages in excess of \$75,000. Petition para. 5.
3. The damages in the Petition are described as humiliation, severe emotional pain and mental anguish, which have caused lost income, past and future medical bills, and permanent medical, emotional and psychological damages. Petition para. 4.
4. The damages in the Petition are unliquidated damages. *See* Petition para. 5.
5. No return of service has yet been filed, but upon information and belief Mr. Collins was personally served.
6. Mr. Collins had previously hired a lawyer in the summer of 2007 in regard to Plaintiff's general allegations. Affidavit para. 3.
7. Mr. Collins thought that the lawyer was still representing him and would protect his interests. Affidavit paras. 4-6.
8. Mr. Collins' lawyer, however, had apparently terminated the attorney-client relationship in regard to Plaintiff.
9. Mr. Collins was unaware of this termination and did not know to seek substitute counsel. Affidavit paras. 7,8.
10. Mr. Collins did not engage in any of the inappropriate behavior alleged in Plaintiff's Petition. Affidavit para. 9.
11. No notice of the motion for default judgment was sent to Mr. Collins prior to its being entered on June 16, 2008.

III. QUESTION PRESENTED:

Should the default judgment be set aside?

#### IV. ARGUMENT AND AUTHORITIES

##### A. **Standards for determining whether to set aside a default judgment.**

A district court may set aside a default judgment “[f]or good cause shown” and “in accordance with K.S.A. 60-260(b).” K.S.A. 60-255(b). The quoted statute permits relief in instances of “mistake, inadvertence ... or excusable neglect.” K.S.A. 60-260(b)(1). Relief under KSA 60-260(b) is obviously not a matter of right, but rather is left to the sound discretion of the trial court. *Wilson v. Miller*, 198 Kan. 321, 323 (1967).

The grounds for consideration were originally outlined in *Jenkins v. Arnold*, 223

Kan. 298, 299-300, (1978), as follows:

- (1) The granting of relief from a default judgment under K.S.A. 60-260(b) rests in the sound discretion of the district court. (Reliance and Montez.)
- (2) The exercise of judicial discretion requires that a judge have due regard for what is just and fair under existing circumstances and that he not act in an arbitrary, fanciful, or unreasonable manner. (Reliance and Tyler.)
- (3) While there is a need to achieve finality in litigation, judicial discretion must not achieve that end in disregard of "what is right and equitable under the circumstances." (Montez.)
- (4) Defaults are not favored in law but become necessary when the inaction of a party frustrates the orderly administration of justice. (Reliance and Montez.)
- (5) In determining whether to set aside a default judgment, a court should resolve any doubt in favor of the motion so that cases may be decided on their merits. (Montez.)
- (6) A litigant should not be unnecessarily penalized for the simple neglect of his agent or counsel. (Montez.)
- (7) "Inexcusable neglect" is closely akin to "reckless indifference." It implies something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind. (Montez.)
- (8) "Excusable neglect" as used in K.S.A. 60-260(b) is not susceptible to clear definition. What constitutes excusable neglect under the statute must be determined on a case by case basis under the facts presented. (Reliance, Tyler, and Boyce v. Boyce, 206 Kan. 53, 476 P.2d 625.)
- (9) A motion to set aside a default judgment may be granted whenever the court finds:
  - (a) That the nondefaulting party will not be prejudiced by the reopening;
  - (b) That the defaulting party has a meritorious defense; and
  - (c) That the default was not the result of inexcusable neglect or a willful act. (Montez.)
- (10) In Reliance at page 117, the opinion cites 10 Wright and Miller, Federal Practice and Procedure, s 2685, and suggests the following factors to be considered in determining whether a default judgment should be entered:

- (a) The amount of money potentially involved;
  - (b) Whether material issues of fact or issues of substantial public importance are at issue;
  - (c) Whether the default is largely technical;
  - (d) Whether plaintiff has been substantially prejudiced by the delay involved; and
  - (e) Whether the grounds for default are clearly established or in doubt.
- (11) Where one of several defendants who is alleged to be jointly and severally liable defaults, judgment should not be entered against him until the matter has been adjudicated with respect to all defendants or all defendants have defaulted. (Reliance.)

Since *Jenkins*, the test has been more simply stated.

The Supreme Court has indicated that a trial court may grant relief under K.S.A. 60-260(b) if the court finds that (1) the nondefaulting party will not be prejudiced by the reopening, (2) the defaulting party has a meritorious defense, and (3) the default was not the result of inexcusable neglect or a willful act. *Automatic Feeder Co. v. Tobey*, 221 Kan. 17, 20, 558 P.2d 101 (1976).

*Midland Bank of Overland Park v Rieke*, 18 Kan App 2d at 835 (1993).

In the end, defaults are not favored in law. "In determining whether to set aside a default judgment, a court should resolve any doubt in favor of the motion so that cases may be decided on their merits. [Citation omitted.]" *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 495, 781 P.2d 1077 (1989), *cert. denied* 495 U.S. 932 (1990).

**B. Defendant meets his burden for the judgment to be set aside.**

The facts are sufficient to set aside the default judgment. The circumstances would dictate that Mr. Collins' confusion as to whether his counsel represented him in this matter should not prevent the case from being heard on the merits. He has taken no action to frustrate the orderly administration of justice, but rather has immediately caused this Motion to be filed so that the case can be heard.

The allegations are extremely serious and vulgar, and involve an unliquidated sum in excess of \$75,000.00. Mr. Collins deserves and needs his day in court to correct the impressions

made through Plaintiff's defamatory allegations, especially due to the technical nature of the default.

Addressing the three-part test:

**a. Plaintiff will not be prejudiced**

This is a personal injury action filed due to a purportedly imminent statute of limitations, not due to any other pressing prejudice. The filing date remains effective and setting aside the default judgment will cause no prejudice to Plaintiff. The lack of prejudice is further shown by the fact that this motion was filed within two days of the default having been entered.

**b. Mr. Collins has a meritorious defense.**

Attached to this pleading is a draft Answer which denies Plaintiff's allegations. Because of the unadorned nature of the allegations, there is little more to say than that Mr. Collins absolutely denies any and all of the improper conduct alleged in the petition. Unlike Plaintiff's unverified and unsupported Petition, Mr. Collins supports this fact with an attached affidavit.

**c. Mr. Collins' "neglect" is excusable.**

Although "excusable neglect" is not "susceptible to clear definition," it is closely akin to "reckless indifference" and "implies something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind." *Jenkins v. Arnold*, 223 Kan. at 299-300. The facts of this case reveal that Mr. Collins believed that he was represented in this matter and that his interests were being protected, and that no further effort was made by Plaintiff to notify Mr. Collins of the default setting despite her obligation to do so. (*See C below*). It is not reckless for a student to believe his counsel of many months remains his lawyer.

**C. Plaintiff's Failure to Comply with SCR 118(d) Requires that the Court Set Aside the Judgment.**

Separately, Plaintiff's failure to comply with SCR 118(d) requires the judgment to be set aside. Plaintiff's damages are unliquidated and she failed to give the mandatory notice. The default judgment is therefore voidable and must be set aside.

"The ten-day notice provisions of Rule 118(d) apply when default judgment is sought on any pleading of unliquidated damages." *Winner v. Flory*, 11 Kan.App.2d 263, 265, 719 P.2d 20 (1986). The rule provides:

Before any default judgment is taken in any action contemplated by this rule, the party seeking relief must notify the party against whom relief is sought of the amount of money for which judgment will be taken. Said notice shall be given by certified mail, return receipt requested, or as the court may order, at least ten (10) days prior to the date judgment is sought. Proof of service shall be filed and submitted to the court.

Under the text of Supreme Court Rule 118(d), Mr. Collins was entitled to notice of the amount of damages claimed and Plaintiff was obliged to file proof of such notice with the Court.

"[C]ompliance with Rule 118(d) is mandatory." *Universal Modular Structures, Inc. v. Forrest*, 11 Kan.App.2d 298, 300, 720 P.2d 1121 (1986). Failure to comply with the rule means the default judgment supporting consequential damages was voidable, 11 Kan.App.2d at 302, and also should be reversed given Mr. Collins' contest of that judgment. *See Lawless v. Cedar Vale Regional Hosp.*, 252 Kan. 1064, 1070, 850 P.2d 795 (1993) ("A voidable act is not void in itself but may be declared void usually at the option of an affected party.").


No notice was given, and the default is voidable. Mr. Collins contests the judgment, and it must be set aside.

V. CONCLUSION.

Mr. Collins has defaulted, but the default was "excusable" as that expression is defined at law, and no notice was given to him as required under SCR 118(d). The damages are unliquidated, the issues are contested, Plaintiff will suffer no prejudice, and the judgment should be set aside.

STEVENS & BRAND, L.L.P.

P.O. Box 189  
Lawrence KS 66044  
(785) 843-0811  
*Attorneys for Plaintiff*


By:   
\_\_\_\_\_  
Christopher F. Burger #16056  
Bradley Finkeldei #19470

**CERTIFICATE OF SERVICE**

I certify that on the 18<sup>th</sup> day of June, 2008, I caused to be sent by U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

James Wisler  
James L. Wisler Law Offices  
1311 Wakarusa Drive  
Suite 2200  
Lawrence KS 66049

And a chamber copy hand delivered to the Honorable Jack Murphy

  
\_\_\_\_\_  
Christopher F. Burger

Christopher F. Burger #16056  
Bradley Finkeldei  
STEVENS & BRAND, L.L.P.  
P.O. Box 189  
Lawrence KS 66044-0189  
(785) 843-0811 - Phone  
Attorneys for Defendant

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS**

JESSICA BROWN )  
 )  
 ) Plaintiff, )  
v. ) Case No. 2008-CV-000277  
 )  
 ) Division No. 2  
SHERRON COLLINS )  
 )  
 )  
 ) Defendant. )  
 )

Petition Pursuant to K.S.A. Chapter 60

**AFFIDAVIT OF SHERRON COLLINS**

STATE OF KANSAS )  
 )  
 ) ss:  
COUNTY OF DOUGLAS )

Sherron Collins, being duly sworn, states:

1. I am of legal age to make this affidavit and have personal knowledge of the facts contained herein.
2. I have been generally aware of Ms. Brown's claims since last summer.
3. I hired a lawyer last summer with regard to her claims.
4. I had thought that the lawyer was still representing me.
5. I had thought that the lawyer would get a copy of anything I received.
6. I had thought that he would take care of anything that needed to be done.
7. I was unaware that my lawyer sent me a letter stating that he did not represent me.
8. I was not fully aware of what was expected of me in a civil suit and what my



responsibilities were in that matter.

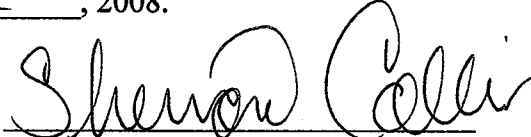
9. I am 100% innocent of any of the inappropriate behavior Ms. Brown alleges.

10. I apologize for this confusion and I intended no disrespect to the court.

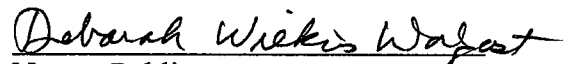
11. I have read the contents of this affidavit, and the facts stated in it are true.

Further, affiant sayeth not.

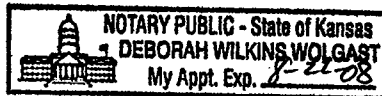
Dated this 18<sup>th</sup> day of June, 2008.

  
Sherron Collins

Subscribed and sworn to before me, a Notary Public, in and for said County and State on this 18<sup>th</sup> day of June, 2008.

  
Notary Public

My commission expires:



Christopher F. Burger #16056  
Bradley Finkeldei #19470  
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(785) 843-0811 - Phone  
Attorneys for Defendant

BOX 58

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS**

JESSICA BROWN

Plaintiff,

v.

SHERRON COLLINS

Defendant.

Case No. 2008-CV-000277

Division No.

Petition Pursuant to K.S.A. Chapter 60

**ANSWER AND COUNTERCLAIM**

Defendant, Mr. Sherron Collins, appears through counsel Stevens & Brand LLP and answers the Plaintiff's Petition as follows.

1. Mr. Collins is without sufficient information to admit or deny the averments contained in paragraph one, and therefore denies same.
2. Denied.
3. Denied.
4. All allegations regarding an "assault" and alleged resultant injuries are denied. Mr. Collins is without sufficient information to admit or deny the remainder of the averments contained in paragraph four, and therefore denies same.
5. Denied.

**AFFIRMATIVE DEFENSES**

6. Plaintiff has failed to state a claim upon which relief may be granted.

7. All averments not expressly admitted are hereby denied.
8. Mr. Collins reserves the ability to assert additional affirmative defenses as they become known through the course of discovery, up through pretrial.

### COUNTERCLAIM

Mr. Collins incorporates the allegations and responses from the pleadings as if stated herein.

#### Defamation

1. Plaintiff's allegations in her lawsuit are false, baseless, and made with the intention to make the public think less of him.
2. Plaintiff has conveyed false information to third parties.
3. The false information would tend to deprive Mr. Collins of the benefits of public confidence and social acceptance.
4. Mr. Collins has been harmed by Plaintiff's conduct.
5. Plaintiff's actions were intentional.

WHEREFORE, Defendant/Counterclaimant Mr. Collins requests that the Plaintiff's petition be seen plainly for what it is, and that the Court enter an award of money damages in an amount to be proven at trial, and for such other and further relief as the Court deems just and equitable.

#### Extreme and Outrageous Conduct

6. Plaintiff has made allegations of misconduct in her Petition which are completely false and baseless. These allegations are particularly egregious and damaging because of their subject matter.
7. This conduct is so outrageous in character and so extreme in degree that a reasonable member of the community would regard this conduct as utterly intolerable and going beyond all bounds of decency in a civilized community.
8. Mr. Collins has been harmed by Plaintiff's conduct.

9. Plaintiff's actions were intentional.

WHEREFORE, Defendant/Counterclaimant Mr. Collins requests that the Plaintiff's petition be seen plainly for what it is, and that the Court enter an award of money damages in an amount to be proven at trial, and for such other and further relief as the Court deems just and equitable.

STEVENS & BRAND, L.L.P.

P.O. Box 189  
Lawrence KS 66044  
(785) 843-0811  
*Attorneys for Defendant*

By: \_\_\_\_\_

Christopher F. Burger #16056  
Bradley Finkelden #9470

**DEMAND FOR TRIAL**

Mr. Collins hereby exercises his right to demand a trial by jury of twelve persons of all issues so triable.

**CERTIFICATE OF SERVICE**

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2008, I caused to be sent by U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

James W. Water  
James L. Water Law Offices  
1311 Wakarusa Drive  
Suite 2200  
Lawrence KS 66049

And a chamber copy hand delivered to the Honorable Jack Murphy

\_\_\_\_\_  
Christopher F. Burger