

\_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Mailing Address)  
 \_\_\_\_\_ (City, State, Zip Code)  
 \_\_\_\_\_ (Phone Number)  
 \_\_\_\_\_ (Email Address)

**IN THE JUSTICE COURT OF RECORD OF MISSOULA COUNTY, MONTANA**

<p>_____ Plaintiff(s),</p> <p style="text-align: center;">-vs-</p> <p>_____ Defendant(s).</p>	<p>Case No.: _____</p> <p>Hon. _____</p> <p><b>DEFENDANT’S MOTION AND AFFIDAVIT TO SET ASIDE DEFAULT JUDGMENT</b></p>
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I, \_\_\_\_\_, defendant in this suit, file this motion to set aside the default judgment. In support of my motion, I show the Court as follows:

Rule 22 of the Montana Justice and City Court Rules of Civil Procedure allows the judge to “relieve a party from any judgment or other order taken against the party by mistake, inadvertence, surprise or excusable neglect...” if the request for relief is made within 30 days of judgment and is supported by affidavit showing good cause. This sworn motion serves as my affidavit. Rule 22 tracks the language of Rule 60(b) of the Montana Rules of Civil Procedure, which applies to district courts.

As the Montana Supreme Court held, “For good cause shown, the court may set aside an entry of default [under Rule 55(c)] and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” *In Re the Marriage of Winckler*, 2000 MT 116, ¶14, 299 Mont.428, 2 P.2d 229. The Montana Supreme Court has laid out four criteria that must be met in order to show good cause to set aside a default entered by the clerk:

- (1) the defaulting party proceeded with diligence;
- (2) the defaulting party’s neglect was excusable;
- (3) the defaulting party has a meritorious defense to

the claim; and (4) the judgment, if permitted to stand, will affect the defaulting party injuriously. *Winckler*, ¶15

In *Winckler*, the Court found that the pro se respondent met his burden to show that his neglect in failing to answer his wife's petition was excusable. In that case, Mr. Winckler misunderstood a letter from his wife's attorney and thought that the attorney would be sending him a proposed property settlement instead of proceeding to a default hearing. *Winckler*, ¶19.

I meet the four-part test set out in *Winckler* for setting aside a default, for these reasons:

### 1. DILIGENCE

I filed this motion as soon as I found out about the judgment. The judge signed the judgment on \_\_\_\_\_ (fill in date).

- (check if applicable)** I received a copy of the judgment in the mail, so I am allowed to add 3 days for mailing to the 30-day deadline. (Rule 6C of the Montana Justice and City Court Civil Procedure allows me to do that.) I am filing this motion within thirty-three days after the judge signed the Judgment.
- (check if applicable)** I did not receive a copy of the judgment in the mail. I found out about the judgment in another way. I am filing this motion within 30 days of the signing of the judgment.

### 2. EXCUSABLE NEGLIGENCE (check all that apply)

- I didn't intentionally ignore the lawsuit. These are the reasons that I didn't file a written answer with the Court, and/or didn't appear at the final hearing:
- I talked to the Plaintiff and thought we had made an agreement, and that I didn't have to respond to the lawsuit.
- I filed a written answer with the Court, but I never received a notice of trial from the Court.

I didn't file a written answer or appear at the trial because there was an emergency in my life. This is what happened:

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I thought the matter was resolved. This is why I thought it was resolved:\_\_\_\_\_

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Other (*write out your reasons, if not covered by the options above*):\_\_\_\_\_

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**DEFENSES**

I'm asking the Court to set aside this judgment because I have good defenses to what the Court ordered in the judgment. This is a summary of my defenses (I will provide more detail at the hearing:

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**3. INJURY**

This judgment, if allowed to stand, will be harmful to me and/or my familymembers.

The harm includes:

*Tell the judge in your own words how this judgment (if allowed to stand) would hurt you or your family.:*

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Under these circumstances, the Court is within its authority to set aside the default, as it did in *Winckler*. In *Winckler*, the Montana Supreme Court upheld the trial court’s decision to set aside the default. The Court found that Mr. Winckler’s default was unintentional, based upon his mistaken belief that dispute was in the process of being settled and no written answer was required. *Winckler*, ¶ 22. The Court reversed the district court’s denial of Mr. Winckler’s motion to set aside the default, finding that such denial was an abuse of discretion. *Winckler*, ¶ 23. Montana courts favor a dispute’s resolution on the merits rather than by default judgment. See e.g. *Winckler*, ¶ 23. In the interest of fairness, I ask the Court to set aside the default entered against me.

**Request for Relief**

I respectfully ask the Court to set aside and vacate the default judgment, and to proceed to hear the merits of the case and render a decision based on the merits of the case. I ask the Court to suspend enforcement of the judgment and any writ, until this case is decided on its merits. I further request any additional relief to which I may show myself entitled.

Respectfully submitted,

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*(Defendant signature)*

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STATE OF MONTANA )  
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COUNTY of \_\_\_\_\_ )

I, \_\_\_\_\_, after being first duly sworn upon my oath, state as follows:

I am over 18-year-old and fully competent to make this verification. Unless otherwise indicated, all statements of fact made in the foregoing motion are based on my personal knowledge and are true.

\_\_\_\_\_  
(Your signature)

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(SEAL)

Name (*printed*): \_\_\_\_\_  
Notary Public for the State of Montana.  
Residing at \_\_\_\_\_  
My Commission Expires \_\_\_\_\_

**Proof of Service**

*(to be filled out and signed in front of a notary)*

STATE OF MONTANA )  
 ):  
COUNTY OF \_\_\_\_\_ )

I sent, or am sending as soon as I have filed my Motion to Set Aside Default Judgment, a full and complete copy of my Motion to Set Aside Default Judgment to the Plaintiff by first class mail, postage prepaid on \_\_\_\_\_.  
*(date you mailed or are mailing the Motion)*

This is the address I am using to mail a copy of my Answer to the Plaintiff:

Name: \_\_\_\_\_  
*(Plaintiff's name – if Plaintiff's lawyer is the one who filed the court complaint, put the lawyer's name here)*

Address: \_\_\_\_\_  
*(Plaintiff's address – or Plaintiff's lawyer's address—from the top left corner of the Complaint)*

\_\_\_\_\_  
*(city) (state) (zip)*

Signature: \_\_\_\_\_  
*(sign your name)*

SIGNED AND SWORN to before me by \_\_\_\_\_ this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(SEAL)

\_\_\_\_\_  
Name *(printed)*: \_\_\_\_\_  
Notary Public for the State of Montana.  
Residing at \_\_\_\_\_  
My Commission Expires \_\_\_\_\_