

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

IN THE JUSTICE COURT OF RECORD OF MISSOULA COUNTY, MONTANA

____ Plaintiff(s),
-vs-
____ Defendant(s).

Case No.: _____

Hon. _____

**DEFENDANT'S MOTION AND AFFIDAVIT
TO SET ASIDE DEFAULT JUDGMENT
(Possession)**

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 NEGLECT (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 my landlord 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:

- ☐ I thought the matter was resolved. This is why I thought it was resolved:

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

DEFENSES (check all that apply)

- ☐ 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:

- ☐ I moved out of the rental premises before the landlord ever filed the court complaint, and the court complaint is only for possession of the premises, not for any money owed. I moved out on _____(give date).

- ☐ The landlord's complaint was based on nonpayment of rent. After the landlord's complaint was filed in court, I paid the rent I owed in full, and the landlord accepted that money.

- ☐ I do not owe the amount that my landlord is suing me for. These are the reasons:

3. INJURY (check all that apply)

- ☐ This judgment, if allowed to stand, will be harmful to me and/or my family members. The harm includes:

- ☐ Losing my/our home
- ☐ Instability of having no permanent housing
- ☐ Risk of changing school districts for my/our children if we have to move
- ☐ Risk of losing access to transportation
- ☐ Other *[Tell the judge in your own words how this judgment (if allowed to stand) would hurt you or your family.]*:

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 of possession, until this case is decided on its merits. I further request any additional relief to which I may show myself entitled.

Respectfully submitted,

(Your signature)

(Print your name on the line above)
Defendant

STATE OF MONTANA)
):ss
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 _____

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

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)

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