MISSOURI SUPREME COURT

ERIC KRUGH and JOSEPH KRUGH

Appellants

v.

MILLSTONE MARINA SERVICE, L.L.C.

Respondent.

WD 61035

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the Honorable Peggy Stevens McGraw entered in the Circuit Court of Jackson County, Missouri. That Judgment set aside a Default Judgment that the Trial Court had previously entered against Respondent. In setting aside the Default Judgment, the Trial Court found that Respondent met the "meritorious defense" and "good cause" requirements of Supreme Court Rule 74.05.

The issues presented on appeal involve whether or not the Trial Court erred in finding that Respondent met the good cause and meritorious defense requirements of Rule 74.05. This Court granted transfer of this appeal on January 23, 2003, after opinion by the Missouri Court of Appeals, Western District reversing the Trial Court. This Court, therefore, has jurisdiction to hear this appeal. See Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04.

STATEMENT OF FACTS

I. INTRODUCTION

On May 25, 1998 Appellants Eric Krugh and his son Joseph were severely injured when the boat they were in exploded. (L.F. 5-15). The explosion occurred when the boat was started. The boat had been stored, winterized, de-winterized and recommissioned by Respondent Millstone Marina. (L.F. 7-8). Appellants filed this lawsuit against Respondent alleging that the boat exploded as a result of a leak in the fuel system and that Respondent was negligent in failing to check the fuel system and hoses for leaks; failing to check the ventilation ducts; failing to follow the manufacturer's recommended procedures for recommissioning the boat; and failing to warn users of the boat that the boat had not been inspected. (L.F. 7-8). Respondent was served but failed to file an answer to Appellants' petition and default judgment was entered. (L.F. 22-24).

Respondent filed a Motion to Set Aside the Default Judgment and requested a hearing. Appellants objected to the hearing because Respondent failed to set forth facts constituting a meritorious defense in its pleadings. (Tr. 5). The Court heard the matter despite Appellants objection and sustained Respondent's motion. This appeal followed. The issues to be decided on this appeal involve whether or not the Trial Court erred in finding that Respondent met the meritorious defense and good cause requirements of Missouri Supreme Court Rule 74.05. Thus, the statement of facts will be limited to those issues.

II. SERVICE OF SUMMONS AND PETITION AND RESPONDENT MILLSTONE MARINA'S RESPONSE

Appellants' First Amended Petition adding Respondent Millstone Marina Service, L.L.C. as a Defendant was filed on May 9, 2000. (L.F. 5). On May 23, 2000, Deputy Sheriff Nicole Olmstead served Respondent's registered agent, Carla Blazier, with the Amended Petition. (L.F. 16 and Tr. 168). Respondent failed to file an answer or take any other action in response to the Summons and Petition within the thirty days it had to answer. (L.F. 22 and Tr. 48, 97, 158-159).

A. Respondent's Registered Agent Denied Service and Denied Knowing Or Ever Meeting Deputy Sheriff Olmstead

In its Motion to Set Aside, Respondent's registered agent, Carla Blazier, stated that she had no recollection of being served. (L.F. 28 and 39). At the hearing on Respondent's Motion, she testified that she was not personally served by the process server, Deputy Sheriff Olmstead. (Tr. 123). Ms. Blazier claimed that she does not know and has never met Deputy Olmstead. (Tr. 141). Ms. Blazier had no explanation as to why Deputy Olmstead completed a Return of Service stating that Ms. Blazier had been served. (Tr. 123).

B. Deputy Sheriff Nicole Olmstead's Testimony

Deputy Sheriff Nicole Olmstead is employed by the Morgan County Sheriff's Department. Her primary responsibility is service of civil process. (Tr. 165). In the course of her work, Deputy Olmstead has served Ms. Blazier about six times. (Tr. 166). Deputy Olmstead knows Ms. Blazier because of the number

of times she has served her. (Tr. 166). Deputy Olmstead has been to Ms. Blazier's house and to the Marina. (Tr. 169-170). She has not served any female at Millstone Marina other than Ms. Blazier. (Tr. 171). Deputy Olmstead testified that there is no question that she served Carla Blazier on May 23, 2000. (Tr. 165 and 168-169).

C. The Trial Court Found That Respondent Had Been Served

The Trial Court found that Respondent's registered agent was served on May 23, 2000. (L.F. 290).

D. Respondent Millstone Marina Failed To Respond To The Summons

The Summons instructed Respondent that it must file its pleading to the Petition within thirty days after receiving the Summons and that if Respondent failed to do so, judgment by default could be taken against it. (L.F. 16). Respondent's registered agent testified that she understood what the legal term "default" meant. (Tr. 125). However, neither she nor anyone on behalf of Respondent Millstone Marina filed a pleading in response to Plaintiff's Amended Petition within thirty days. (L.F. 22). Neither Ms. Blazier nor anyone else on behalf of Respondent Millstone Marina attempted to contact a lawyer within thirty days after being served with the Summons. Ms. Blazier testified that she knew this was a liability claim that should be turned over to her insurance company. (Tr. 163-164). However, Respondent did not notify its insurance company or agent about the lawsuit within thirty days. (Tr. 48, 97 and 158-159).

III. POST-DEFAULT CONDUCT

On August 10, 2000, Appellants faxed Respondent a copy of the Petition and Return of Service. (L.F. 28). Respondent had an insurance policy which instructed Respondent to forward lawsuit papers to the insurance company. (L.F. 248). Respondent's insurance company was the Underwriters at Lloyd's. (L.F. 31). Respondent did not read its insurance policy, and did not forward the summons to Underwrites at Lloyds as directed by its policy. (Tr. 158-159).

On August 23, 2000, Respondent faxed the lawsuit papers to its insurance agent, William Veulemans at the Laurie Insurance agency. (L.F. 28 and 41). Ms. Blazier testified that she called Mr. Veulemans a couple days later; however, Mr. Veulemans testified that there was nothing in the file indicating that Ms. Blazier ever followed-up after faxing the lawsuit papers to him. (Tr. 118). Ms. Blazier admitted that she did not do anything to follow up after August of 2000. (Tr. 158). The Trial Court found that Ms. Blazier "did not make inquiry to insure that action was being taken on behalf of Millstone until she received notice that this Court had entered a default judgment." (L.F. 290-291).

Mr. Veulemans testified that he never told Ms. Blazier that he was taking any steps to alleviate the default position that she was in. (Tr. 117). He further testified that if the policy requires certain steps to be taken, then he would expect the insured to comply with the policy. (Tr. 117). He does encourage insureds to notify him if they are sued. (Tr. 108). However, Mr. Veulemans' Agency is not

an agent of Lloyds, and therefore, it is not authorized to accept lawsuit papers on behalf of Lloyds. (Tr. 97 and 107-108).

After receiving the lawsuit papers from Ms. Blazier, Laurie Insurance Agency faxed the papers to Bohrer, Croxdale & McAdoo, a wholesale insurance broker. On August 24, 2000 that broker sent the papers on to Stuckey & Company, another insurance broker. (L.F. 91). That broker then sent the papers to Reliance Insurance Company. (Tr. 26). Reliance Insurance Company, however, was not the liability insurer for Respondent. (Tr. 26). Dennis Stuckey testified that the papers should have been sent to Elliston, L.L.C. who is the agent for Lloyds. (Tr. 28-29).

On June 27, 2001 Bohrer, Croxdale & McAdoo notified Stuckey & Company that a default judgment had been entered against Respondent. Stuckey & Company then realized its error and notified Elliston, L.L.C. of the lawsuit and default judgment. Elliston then assigned the matter to Respondent's counsel for defense. (L.F. 252).

IV. DEFAULT JUDGMENT

On February 9, 2001, Appellants filed their Motion for Default Judgment against Respondent Millstone Marina. (L.F. 17-19). On March 29, 2001, the Trial Court took up for hearing Appellants' Motion. (L.F. 22). Prior to the hearing, Appellants moved the Court to sever their claims against Respondent Millstone Marina. That motion was sustained. (L.F. 22). The Court found that Millstone Marina had been served with the Summons, but failed to answer within thirty days

and was in default. (L.F. 22). Consequently, the Court entered default judgment against Respondent Millstone Marina.

In its Judgment, the Trial Court stated that having sustained the motion to sever the claims against Respondent Millstone Marina, the judgment against Respondent was final and there existed no just reason for delay of an appeal. (L.F. 23). No Appeal was taken. Approximately four months later, Respondent filed its Motion to Set Aside the Default Judgment. (L.F. 27-122).

V. ALLEGATIONS IN RESPONDENT'S MOTION, AFFIDAVITS, AND PROPOSED ANSWER REGARDING ITS "MERITORIOUS DEFENSE"

With respect to the issue of a meritorious defense, Respondent Millstone Marina made the following allegations in its Motion under the heading "Facts":

> 30. Millstone Marina Service, if given the opportunity, would present evidence disputing the allegations in the First Amended Petition regarding its duties and responsibilities of the boat in question during the time period alleged.
>
> 31. Upon information and belief, the boat in question was destroyed by fire, which calls into question the allegations in paragraph 3 of Count IV of the First Amended Petition that prior to the fire, the boat was in such condition that the fuel system was capable of leaking.

32. If given the opportunity, Millstone Marina could offer evidence of several alternative explanations for explosions to occur on boats, other than fuel systems capable of leaking. (L.F. 32).

On Page 9 of its Motion, under the heading "Meritorious Defense", Respondent stated:

> [Respondent] incorporates its proposed answer attached hereto as Exhibit 'F' as its meritorious defenses. Further, the affidavit of Carla Blazier states: 1) That defendant disputes the allegations regarding its duties and responsibilities for the boat in question during the time period alleged, and 2) that evidence of several alternative explanations for the explosion could be offered. (L.F. 35).

In its proposed answer, Respondent Millstone Marina responded to paragraphs 1 through 5 and 7 of Appellant's petition, by stating that "it is without information sufficient to form a belief as to [those] allegations." (L.F. 117). Respondent "denie[d] the allegations" in every other paragraph of Appellants' First Amended Petition. For its affirmative defenses, Respondent alleged that Appellants failed to state a claim upon which relief can be granted, and that "the negligence or fault of un-joined parties must be compared which bars or diminishes plaintiff's right to recovery herein." Respondent also asserted that the Missouri Joint and Several Liability scheme is unconstitutional. (L.F. 117-120).

Finally, in her affidavit attached to Respondent's Motion, Carla Blazier stated as follows with regard to Respondent's alleged "meritorious defense":

If given the opportunity, Millstone Marina Service would present evidence disputing the allegations in the First Amended Petition regarding its duties and responsibilities for the boat in question during the time period alleged.

If given the opportunity, through our knowledge and experience with the servicing of boats, we can provide evidence of several alternative explanations for explosions in boats, other than fuel systems capable of leaking, as alleged in the First Amended Petition. (L.F. 40).

VI. RESPONDENT'S FAMILIARITY WITH THE LEGAL SYSTEM AND HISTORY OF DEFAULTS

At the hearing on Respondent's Motion, Deputy Sheriff Olmstead testified that she had been to Respondent's business and its registered agent's home to serve them with various lawsuits. (Tr. 170). Respondent's registered agent, Ms. Blazier, testified that she understands that lawsuit papers are serious and need her attention. (Tr. 123). She further testified that she understood what the legal term "default" meant. (Tr. 135). Finally, she testified that she knew that this lawsuit involved a liability claim as opposed to a collection claim and that it should be turned into her insurance company. (Tr. 163-164). Despite this knowledge, Respondent did not file an answer or notify her insurance company of the lawsuit within thirty days of being served.

On direct examination, Ms. Blazier denied that she had ever been in default in a lawsuit before this one. (Tr. 125). During cross-examination, Ms. Blazier was confronted with three default judgments that had been entered against her:

a) She was sued for her business activities in Illinois. She was served with that lawsuit on July 11, 1999 and default judgment was entered against her. (Tr. 148-149).

b) Ms. Blazier identified Exhibit 17 as a lawsuit filed by the State of Missouri for not paying income taxes. A default judgment was entered in that case. (Tr. 151-153).

c) Finally, Ms. Blazier was confronted with a lawsuit filed against her and her husband by Jeff Melcher in 1998. The judgment entered in that case was a default judgment. (Tr. 143-144). Ms. Blazier was present in Court when that default judgment was entered. (Tr. 143).

Although Ms. Blazier acknowledged during cross-examination that prior judgments had been taken against Respondent Millstone Marina, she denied that any of the judgments were by default. (Tr. 142). Ms. Blazier was then confronted with two default judgments that had been entered against Respondent:

a) Millstone Waterways, Inc. sued Millstone Marina and a default judgment was entered against Respondent Millstone Marina in that lawsuit. (Tr. 146-147).

b) Ms. Blazier was also confronted with Exhibit 18 which was a lawsuit filed by Lakeland Petroleum Company. A default judgment was entered against Respondent in that lawsuit. (Tr. 155-157).

VII. JUDGMENT AND APPEAL

On November 9, 2001, the Trial Court granted Respondent Millstone Marina's Motion to Set Aside Default Judgment on the condition that Respondent Millstone Marina pay Appellants' expenses and attorney's fees. (L.F. 291). In sustaining Respondent's Motion, the Court found as follows: Carla Blazier, the Registered Agent for Respondent Millstone Marina, was served with the lawsuit on May 23, 2000 (L.F. 290); Ms. Blazier did not fax the lawsuit papers to her insurance agent until August 23, 2000 (L.F. 290); Ms. Blazier did not make inquiry to insure that action was being taken on behalf of Respondent Millstone Marina until she received notice that default judgment had been entered against Respondent Millstone Marina on March 29, 2001. (L.F. 290-291). Finally, the Court found that Ms. Blazier's act of faxing the lawsuit papers to her insurance agent was an accepted means of notifying the insurance company and was an indication of a good faith effort on her part to obtain representation. (L.F. 290).

With respect to Respondent's claim of "meritorious defense", the Court found that Appellants sustained their injuries during a boat explosion and that Respondent Millstone Marina winterized and de-winterized the boat prior to the explosion. However, the Court found that there was a question of fact as to

whether the actions or inaction of Respondent Millstone Marina caused the explosion, and therefore, found that Respondent Millstone had made a sufficient showing of a meritorious defense. (L.F. 291).

On December 1, 2001, pursuant to the Trial Court's request, Appellants filed their Motion for Attorneys' Fees and Expenses. On January 3, 2002, the Court entered its Order sustaining Appellants' Motion for Attorney's Fees and Expenses and ordered Respondent Millstone Marina to pay $9,000.00 to Appellants' counsel within thirty days from the date of the order. (L.F. 313). On January 30, 2002, Appellants' counsel received a $9,000.00 check from Respondent Millstone Marina. (The check has not been cashed and is being held pending the outcome of this appeal). On February 7, 2002, Appellants timely filed their Notice of Appeal. (L.F. 316).

POINT I

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT BECAUSE RESPONDENT FAILED TO SET FORTH IN ITS MOTION, AFFIDAVIT OR PROPOSED ANSWER "FACTS CONSTITUTING A MERITORIOUS DEFENSE" AS IS REQUIRED BY MISSOURI SUPREME COURT RULE 74.05(d) IN THAT RESPONDENT PRESENTED ONLY CONCLUSORY STATEMENTS THAT IT "WOULD" OR "COULD" PRESENT EVIDENCE "IF GIVEN THE OPPORTUNITY" AND THESE CONCLUSORY STATEMENTS DO NOT SATISFY THE PLEADING REQUIREMNTS OF RULE 74.05(d).

I. STANDARD OF REVIEW

This Point is to be reviewed under an abuse of discretion standard. A Trial Court abuses its discretion if its judgment is not supported by substantial evidence, is against the weight of the evidence, or is the result of a misapplication of the law. See *Fuller v. Ross, 68 S.W.3d 497, 500 (Mo.App. W.D. 2001).* Here, the Trial Court's finding that Respondent satisfied the "meritorious defense" requirement of Rule 74.05 was not supported by substantial evidence and resulted from a misapplication of the law.

II. ARGUMENT

"The generalization that the law favors a trial on the merits must be carefully applied to the facts of each case because 'the law defends with equal

vigor the integrity of the legal process and procedural rules, and thus does not sanction the disregard thereof.'" *Boatmen's First National Bank v. Krider, 844 S.W.2d 10, 12 (Mo.App. W.D. 1992)* quoting *Sprung v. Negwer Materials, Inc., 775 S.W.2d 97, 100 (Mo.banc 1989).*

To succeed on its motion to set aside the default judgment, Respondent Millstone Marina was required to state, in its motion, "facts constituting a meritorious defense...." See Missouri Supreme Court Rule 74.05(d). The pertinent part of Missouri Supreme Court Rule 74.05(d) states, "upon **motion** stating **facts** constituting meritorious defense and for good cause shown, an interlocutory order of default or a default judgment may be set aside." (emphasis added). Thus, pursuant to the plain language of the Rule, a **motion** itself must state facts constituting meritorious defense.

Missouri Courts have consistently found that "a movant seeking to set aside a default judgment must: 1) file a motion satisfying the pleading requirements of Rule 74.05(c) and 2) establish good cause at an evidentiary hearing." See *McClelland v. Progressive Casualty Insurance Co., 790 S.W.2d 490, 492 (Mo.App. 1990).* To determine compliance with the pleading requirements of Rule 74.05, Courts examine "the allegations in the motion and any affidavits, exhibits and proposed answers." See *Brants v. Foster, 926 S.W.2d 534, 536 (Mo.App. 1996)* citing *Magee v. Magee, 904 S.W.2d 514, 519 (Mo.App. 1995).*

In cases in which the meritorious defense is factual, "the Court should insist on a specific recitation of particular facts which, if proven, would constitute a

meritorious defense." Id. Conclusory allegations and speculation "fail to meet the requirement of pleading *facts*." *Bredeman v. Eno, 863 S.W.2d 24, 25 (Mo.App. W.D. 1993)* (emphasis original). Here, Respondent's motion, affidavits and proposed answer fail to set forth specific facts constituting meritorious defense, and therefore, the Trial Court erred in setting aside the default judgment.

A. Respondent's Motion To Set Aside Default Judgment Failed To State Facts Constituting A Meritorious Defense

On page seven of its Application for Transfer, Respondent claimed that it had alleged in its Motion to Set Aside that "it had no duty and: '(1) that defendant disputes the allegations regarding its duties and responsibilities for the boat in question during the time period alleged, and (2) that evidence of several alternative explanations for the explosion could be offered.'" Respondent did not allege that it "had no duty;" rather, on page 6 of its Motion to Set Aside Default Judgment, Respondent Millstone Marina stated under the heading "Facts" the following:

> 30. Millstone Marina Service, if given the opportunity, would present evidence disputing the allegations in the First Amended Petition regarding its duties and responsibilities of the boat in question during the time period alleged.
>
> 31. Upon information and belief, the boat in question was destroyed by fire, which calls into question the allegations in paragraph 3 of

Count IV of the First Amended Petition that prior to the fire, the boat was in such condition that the fuel system was capable of leaking.

32. If given the opportunity, Millstone Marina could offer evidence of several alternative explanations for explosions to occur on boats, other than fuel systems capable of leaking. (L.F. 32).

On Page 9 of its Motion to Set Aside Default Judgment, under the heading "Meritorious Defense", Respondent stated:

[Respondent] incorporates its proposed answer attached hereto as Exhibit 'F' as its meritorious defenses. Further, the affidavit of Carla Blazier states: 1) That defendant disputes the allegations regarding its duties and responsibilities for the boat in question during the time period alleged, and 2) that evidence of several alternative explanations for the explosion could be offered. (L.F. 35).

The above quoted portions of Respondent's motion represent the entire sum of Respondent's statements with regard to a "meritorious defense." Respondent's motion failed to state any **facts** constituting a meritorious defense; rather, its statements are mere conclusions. As stated above, such conclusory allegations are not sufficient to satisfy the burden of demonstrating a "meritorious defense." *Bredeman, 863 S.W.2d at 25*.

In *Bredeman*, the defendant was served with summons and failed to answer within thirty days. Approximately 3 months after the defendant had been served,

plaintiff obtained a default judgment. Id. at 25. Defendant filed a motion to set aside the default judgment and, with regard to his "meritorious defense", stated:

> Defendant believes that he has good and meritorious defenses to the cause of action stated in plaintiff's petition in that defendant believes that if the matter were litigated, the defendant would prevail on some of the items of damage, and that defendant was not given credit in this default hearing for all offsets and payments made by defendant. Id.

The Trial Court denied the motion and denied the defendants an evidentiary hearing on their motion. Id. The Court of Appeals affirmed.

The Court of Appeals noted that entitlement to an evidentiary hearing on a motion to set aside a default judgment depends on meeting the pleading requirements of Rule 74.05. "Under the explicit terms of Rule 74.05(c), a motion to set aside a default judgment must state *facts* constituting both a meritorious defense and a good cause for the default." Id. (emphasis original). The Court held that the defendant's "belief" about the existence of a meritorious defense without supporting facts failed to satisfy the explicit terms of Rule 74.05. The Court concluded that defendant's allegations amounted to conclusions and speculation insufficient to support a "meritorious defense." Id. Consequently, the defendant was not entitled to an evidentiary hearing nor was he entitled to have the default judgment set aside. Id.

Similarly, here, Respondent's conclusory allegations in its motion that it "could" or "would" present various evidence, "if given the opportunity," fails to

satisfy the "meritorious defense" requirement of Rule 74.05. While stating that it "would" or "could" present evidence of various defenses, Respondent Millstone Marina failed to set forth any such evidence. Thus, pursuant to the holding in *Bredeman*, the Trial Court erred in setting aside the default judgment. Additionally, and for the reasons set out below, the Motion's incorporation of Respondent's proposed answer and Ms. Blazier's affidavit did not aid Respondent in establishing a "meritorious defense."

B. Respondent's Affidavit Failed To State Facts Demonstrating A Meritorious Defense

In her affidavit, Carla Blazier stated as follows with regard to Respondent's alleged "meritorious defense":

> If given the opportunity, Millstone Marina Service would present evidence disputing the allegations in the First Amended Petition regarding its duties and responsibilities for the boat in question during the time period alleged.
>
> If given the opportunity, through our knowledge and experience with the servicing of boats, we can provide evidence of several alternative explanations for explosions in boats, other than fuel systems capable of leaking, as alleged in the First Amended Petition. (L.F. 40).

These statements by Carla Blazier are mere conclusions. Although Ms. Blazier states that Respondent "would" or "can" present evidence or facts of a meritorious defense, she does not set forth any such evidence or facts. Thus, Respondents

affidavit fails to meet the "meritorious defense" requirement of Rule 74.05. See, *Bredeman, 863 S.W.2d 24* and *Hughes v. Britt, 819 S.W.2d 381 (Mo.App. 1991).*

In *Hughes*, the defendants failed to answer and a default judgment was entered. The Trial Court denied defendants' motion to set aside the default judgment and the Court of Appeals affirmed finding that the defendants did not set forth sufficient facts to constitute a meritorious defense. Id. at 383.

The lawsuit in *Hughes* arose out of a trip and fall accident. The plaintiff claimed that her shoe caught in a hole on the defendant's steps. In their motion to set aside the default judgment and the six affidavits attached thereto, the defendants attempted to establish several defenses. Id.

The *Hughes* defendants first alleged that they had no knowledge of the defect. However, the Court of Appeals noted that none of the defendants' affidavits stated that they had examined the steps. Similarly, here, Respondent did not allege in any affidavit that it had examined the boat. The *Hughes* Defendants further alleged that they questioned that the fall occurred on their property. However, defendants did not state any facts or give any reason why they have this question, nor did they state any facts which indicated the plaintiff fell elsewhere. As a third defense, the defendants stated that they questioned the nature and extent of plaintiff's injuries. Defendants again failed to present any fact showing that plaintiff was not injured or that her injuries were less than claimed. Defendants further alleged that plaintiff would have known of the dangerous condition. Again, no facts were set forth showing why plaintiff would have known of the

condition. As a final defense, defendants alleged "plaintiff's damages, if any, were caused by plaintiff's own negligence and comparative fault." Defendants again failed to set forth any facts showing how the plaintiff contributed to her injuries. Id.

The *Hughes* Court found that defendants' allegations contained numerous conclusions but failed to state "facts constituting a meritorious defense." The Court concluded that neither defendants' motion nor the six affidavits filed in support thereof set forth "a specific recitation of particular facts which, if proven, would constitute a meritorious defense." Consequently, the Court of Appeals affirmed the Trial Court's order denying defendant's motion to set aside the default judgment. Id. at 383-384.

Like the affidavits in *Hughes*, Ms. Blazier's affidavit fails to set forth any facts. Although Ms. Blazier claimed that Respondent would present evidence disputing the allegations regarding its duties and responsibilities, she does not present any facts as to what respondent's duties and responsibilities are. Furthermore, Ms. Blazier's allegation that Respondent "can provide evidence of several alternative explanations for explosions in boats" is not even relevant. The issue is how the boat involved in this case exploded; any "explanations for explosions in boats" generally proves nothing about how or why the boat in this case exploded. Even if the allegation was relevant, Ms. Blazier failed to set forth any facts demonstrating an alternative explanation for the boat explosion. If the six affidavits in *Hughes* were not sufficient to establish a meritorious defense, then

Ms. Blazier's affidavit in this case was also insufficient. The Trial Court failed to follow this established Missouri precedent, and therefore, it erred in setting aside the default judgment.

See also, *Harris v. Mitchell Transport, Inc., 812 S.W.2d 183 (Mo.App. 1991).* In *Harris*, the Trial Court denied defendant's motion to set aside default judgment and the Court of Appeals affirmed. In affirming the decision, the Court of Appeals found that the defendant had failed to set forth sufficient facts demonstrating a meritorious defense. In its affidavit, the defendant stated its defense as follows: "It is uncertain whether a vehicle owned and operated by [defendant] was actually involved in an accident with plaintiff's vehicle." Id. at 184. The defendant failed to state any facts or provide any reasons why it was "uncertain" that its vehicle was not involved in the accident. The Court of Appeals found that the defendant's "bare statement that it didn't know whether the accident actually occurred is merely speculation," and thus, "defendant's motion fail[ed] to state 'facts constituting a meritorious defense.'" Id.

C. Respondent's Proposed Answer Failed To Set Forth Any Facts Constituting A Meritorious Defense.

In its proposed Answer, Respondent Millstone Marina responded to paragraphs 1 through 5 and 7 of Appellants' Petition by stating that "it is without information sufficient to form a belief as to [those] allegations." (L.F. 117). Respondent "denie[d] the allegations" in every other paragraph in Counts I through VI of Appellants' First Amended Petition. For its affirmative defenses,

Respondent stated the legal conclusion that Appellants failed to state a claim upon which relief can be granted, and that "the negligence or fault of un-joined parties must be compared which bars or diminishes plaintiff's right to recovery herein." Respondent also asserted the legal conclusion that the Missouri Joint and Several Liability scheme is unconstitutional. (L.F. 120). These allegations are mere conclusions, and therefore, Respondent failed to meet the requirement of pleading *facts* demonstrating a meritorious defense. See *Bredeman, 863 S.W.2d 24* and *Hughes, 819 S.W.2d 381* (discussed in detail above).

Like the defendants in *Hughes*, Respondent failed to set forth any facts supporting its denials or affirmative defenses. Respondent's allegation that "the negligence or fault of un-joined parties must be compared which bars or diminishes plaintiff's right to recovery herein" is similar to the defendant's allegation in *Hughes* that "plaintiff's damages, if any, were caused by plaintiff's own negligence and comparative fault." The Court of Appeals in *Hughes* noted that Defendants failed to set forth any facts showing how the plaintiff contributed to her injuries. Consequently, the Court of Appeals found that the allegation was conclusory and failed to state "facts constituting a meritorious defense." Id. at 383-384. Similarly, here, Respondent's affirmative defenses failed to set forth any facts, and therefore, failed to demonstrate a "meritorious defense." Id.

III. CONCLUSION

Because Respondent Millstone Marina failed to set forth in its Motion, affidavit or answer specific facts demonstrating a meritorious defense, the Trial Court abused its discretion in granting Respondent's motion. See *Brants v. Foster, 926 S.W.2d 534, 537 (Mo.App. W.D. 1996)* where the Court of Appeals stated that granting a motion to set aside a default judgment is an abuse of discretion "where a meritorious defense has not been stated." Thus, Appellants respectfully request that this Court reverse the Trial Court and reinstate the default judgment.

POINT II

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO SET ASIDE DEFAULT JUDGMENT BECAUSE RESPONDENT FAILED TO SHOW GOOD CAUSE FOR ITS FAILURE TO FILE A TIMELY ANSWER TO APPELLANTS' PETITION; THE TRIAL COURT SPECIFICALLY FOUND THAT RESPONDENT WAS SERVED WITH SUMMONS AND PETITION ON MAY 23, 2000, BUT RESPONDENT TOOK NO ACTION UNTIL AUGUST 23, 2000 AND RESPONDENT FAILED TO PRODUCE ANY EVIDENCE AS TO WHY IT TOOK NO STEPS TO RESPOND TO APPELLANTS' PETITION WITHIN THE THIRTY DAYS IT HAD TO ANSWER.

I. STANDARD OF REVIEW

This point is to be reviewed under an abuse of discretion standard. A Trial Court abuses its discretion if its decision is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. See *Boatmen's First National Bank v. Krider, 844 S.W.2d 10, 11 (Mo.App. 1992).* Here, the Trial Court's finding that Respondent satisfied the "good cause" requirement of Rule 74.05 was not supported by substantial evidence, and therefore, the Trial Court erred in setting aside the default judgment.

II. ARGUMENT

"The generalization that the law favors a trial on the merits must be carefully applied to the facts of each case because 'the law defends with equal

vigor the integrity of the legal process and procedural rules, and thus does not sanction the disregard thereof.'" Id. at 12 citing *Sprung v. Negwer Materials, Inc.*, *775 S.W.2d 97, 100 (Mo.banc 1989).* To prevail on a motion to set aside a default judgment, the defaulting party must establish "good cause" for its default. See Missouri Supreme Court Rule 74.05(d). Respondents failed to produce substantial evidence demonstrating good cause for its default, and therefore, the Trial Court erred in setting aside the default judgment.

In its Application for Transfer, Respondent claimed, "the Court of Appeals did not question whether Millstone satisfied the 'good cause' pleading requirement." (See Respondent's Application for Transfer at page 6 n.3). The Court of Appeals did not address the issue of good cause because it found that Respondent Millstone failed to allege specific facts constituting a meritorious defense. Therefore, it was unnecessary to address the issue of good cause. (See Court of Appeals Opinion at 6).

A. Respondent Did Not Produce Any Evidence Demonstrating Good Cause For Its Failure To File an Answer Within Thirty Days of Being Served

On May 23, 2000, Deputy Sheriff Nicole Olmstead served Respondent's registered agent, Carla Blazier, with the Summons and Amended Petition. (L.F. 16 and Tr. 168). The Summons instructed Respondent that it must file its pleading to the Petition within thirty days after receiving the Summons and that if it failed to do so, judgment by default could be taken. (L.F. 16). Respondent's registered

agent, Ms. Blazier, testified that she understood what the legal term "default" meant. (Tr. 125). In fact, Respondent and Ms. Blazier had defaulted on several lawsuits prior to this one. (Tr. 143-156). Ms. Blazier was present in Court when one of the prior default judgments was entered against her. (Tr. 143). Thus, Respondent's registered agent was familiar with the legal process, and specifically, default judgments.

Despite its prior experience with default judgments and the admonition in the summons, Respondent Millstone Marina failed to file an answer to Plaintiff's Amended Petition within thirty days. (L.F. 22). Respondent did not even attempt to contact a lawyer within thirty days after being served with the Summons. Respondent's registered agent acknowledged that she knew that this lawsuit involved a liability claim, and therefore, should be turned into Respondent's insurance company. (Tr. 163-164). Nonetheless, she failed to take any steps to notify Respondent's insurance agent or company of the lawsuit within thirty days. (Tr. 48, 97 and 158-159).

Other than claiming that it was never served, Respondent offered no explanation for its failure to file an answer, hire a lawyer or send the lawsuit to its insurance company within thirty days of being served. The Trial Court found that "Carla Blazier, one of the principals in Millstone and its registered agent, was served with the lawsuit on May 23, 2000." (L.F. 290). Implicit in this finding is that the testimony of Respondent's registered agent was untrue. Thus, not only did Respondent's registered agent ignore the Summons and Petition, she also

provided false testimony to hide her conduct. This is certainly conduct meant to impede the judicial process, and therefore, the Trial Court erred in setting aside the Default Judgment. See Missouri Supreme Court Rule 74.05(d).

Even if this Court does not believe Respondent's registered agent intentionally provided false testimony, Respondent has failed to demonstrate any cause, much less, good cause for its failure to take any action whatsoever within thirty days after being served. Thus, the Trial Court erred in setting aside the default judgment. See *Great Southern Savings & Loan Assoc. v. Wilburn, 887 S.W.2d 581 (Mo.banc 1994).*

In *Great Southern Savings & Loan*, default judgment was entered against the defendants for failure to answer within thirty days. Both defendants moved to set the default judgment aside. One defendant claimed that he had delivered the summons and petition to an attorney prior to the expiration of his time to answer. The attorney, however, was unable to represent the defendant. The defendant then attempted to hire another attorney. That attorney informed the defendant that his representation was conditioned upon the defendant delivering to him the case file. Because the defendant did not attempt to obtain his case file from the first attorney until four days after the answer period had expired, the Trial Court found that defendant failed to establish good cause. Id. at 583-584.

In affirming the Trial Court's decision, this Court noted that the defendant failed to even hire a lawyer by the end of his answer period. The Court further

found that that failure alone supported the Trial Court's conclusion that the defendant "recklessly or intentionally impeded the judicial process." Id.

Respondent's conduct in this case is even more egregious than the defendant's conduct in *Great Southern Savings & Loan*. The defendant in *Great Southern Savings & Loan* attempted on at least two occasions to hire a lawyer before the end of his answer period. Nonetheless, because he had not actually hired a lawyer before the end of his answer period, the Court found that there was no good cause to set aside the default judgment. Here, Respondent failed to even attempt to hire a lawyer before the end of its answer period. Although Respondent knew that this was a liability claim and should be turned over to its insurance company, it never even checked its own insurance policy to determine the appropriate method of notifying its insurance company about service of the lawsuit papers. (Tr. 158-159). If the defendant in *Great Southern*, who attempted on two occasions to hire a lawyer before the end of his answer period, did not establish good cause, then Respondent, who failed to make any attempt at all to hire a lawyer before the end of its answer period, did not establish good cause.

See also *Stradford v. Caduillo, 972 S.W.2d 483 (Mo.App. W.D. 1998).* In that case, the defendant failed to hire a lawyer until months after her answer period had ended. Id. at 486. The defendant claimed that she did not hire a lawyer within the answer period because she was a single parent with four children, did not realize that she could turn the matter over to her insurance company, was concerned about being laid off at her job, and did not have any money. Id. The

Trial Court found that these explanations did not amount to good cause for ignoring plaintiff's petition. Id. The Court of Appeals affirmed stating:

> When a litigant chooses to ignore or act in reckless disregard of the rules and procedures set out for the orderly administration of the judicial process, he cannot then be heard to complain when he receives no relief under its rules, particularly Rule 74.05(d).

Similarly, here, Respondent ignored the summons of the Court and Appellants' petition, and took no action whatsoever within the thirty days it had to file an answer. Respondent claimed that it had not been served; however, the Trial Court did not believe this claim and found that Respondent had been served. (L.F. 290). Respondent offered no other explanation as to why it failed to take any action in response to the summons and Appellants' petition until months after its answer period had ended. The defendant in *Stradford* did not know that she could turn the matter over to her insurance company; here, Respondent knew but failed to do so before it was in default. If the reasons provided by the defendant in *Stradford* were not sufficient to demonstrate good cause for ignoring the summons, then Respondent, offering no explanation at all, did not demonstrate "good cause" for ignoring the summons. Thus, Appellants respectfully request that this Court reverse the Trial Court and remand this case so that the default judgment can be reinstated.

Finally, see *Phillips v. Bradshaw, 859 S.W.2d 232 (Mo.App. 1993).* In *Phillips*, the defendant failed to answer plaintiff's petition within thirty days and a

default judgment was entered. The defendant's only excuse for defaulting was that he was never served. Defendant offered no other explanation for ignoring the summons. Id. at 236. The Trial Court found that the defendant had been served and denied his motion to set aside the default judgment. Id.

In affirming the Trial Court, the Court of Appeals noted that "inasmuch as the Trial Court found defendant was served, defendant is left with no excuse for defaulting." Id. at 236. Consequently, the Court held, "because defendant's only excuse for default was disbelieved by the Trial Court, we hold defendant failed to establish good cause for his default." Id. at 237. Similarly, here, Respondent's only excuse for failing to file an answer within thirty days was that it had not been served. The Trial Court did not believe Respondent and found that it had been served. Respondent, therefore, is left without any excuse for its default.

B. Respondent's Conduct After It Was In Default Cannot Establish Good Cause For Its Default

Three months after the summons and petition were served on the Respondent, Appellants informed Respondent that it was in default. (L.F. 28, 31-32 and 35-36). Thirteen days after receiving this information, Respondent delivered the lawsuit papers to its insurance agent. (L.F. 28, 41 and 290). Respondent took no other action. (Tr. 118, 158-159 and L.F. 290). Respondent's act of delivering the lawsuit papers to its agent **after** it was in default cannot demonstrate good cause for its default. See *Klaus v. Shelby, 42 S.W.3d 829 (Mo.App. 2001).*

In *Klaus*, default judgment was entered against the defendant for failing to respond to plaintiff's petition. Within days of the default judgment, defendant moved to set the default judgment aside. Defendant claimed that his attorney did not receive notice of the lawsuit until after the time to answer had passed. However, defendant gave no explanation as to why he failed to respond to the petition or why his attorney did not receive notice of the lawsuit before the time to answer had passed. Id. at 831. The Trial Court granted defendant's motion to set aside; the Court of Appeals reversed. Id. at 833.

On appeal, the plaintiff argued that defendant's showing of good cause was inadequate because defendant's motion did not set forth why he failed to hire an attorney, file a responsive pleading, or take any other affirmative action prior to default. Id. at 831. The Court of Appeals agreed and found that "the absence of evidence in the record of defendant's good cause for not taking any action **prior to** default reflects his intentional or reckless design to impede the judicial process." Id. at 832 (emphasis added). The Court further found that while defendant's attorney may have acted promptly after receiving notice of the default, the defendant was not excused for ignoring his responsibility prior to defaulting. Id. The Court recognized that if defendant had offered any reasonable evidence of good cause of his failure to answer prior to default, the Trial Court would not have abused its discretion in setting aside the default judgment. However, because defendant did not provide any such evidence, the Court of Appeals reversed. Id.

Similarly, here, Respondent offered no explanation whatsoever for its failure to take any action within the thirty days it had to answer Appellants' Petition. Respondent was served with the Summons and Petition on May 23, 2000; however it failed to take any action until August 23, 2000 (approximately 2 months after its time to answer had expired). (L.F. 16, 28, 41, 290 and Tr. 168). Like the defendant in *Klaus*, Respondent Millstone Marina has failed to provide evidence of any cause, much less good cause as to why it failed to take any action within the thirty days it had to answer.

In its motion and at the hearing on its motion, Respondent focused almost exclusively on the action it took **after** its time to answer had expired. The defendant in *Klaus* took a similar approach. In *Klaus*, the defendant argued that the Court should be receptive to mistakes that are discovered quickly and acted upon promptly. Id. at 832. The Court of Appeals responded stating, "defendant cannot rely on the timely manner in which his attorneys filed the motion as his justification for not taking any affirmative action in the matter for 4 months." Id. Similarly, here, Respondent cannot rely on the action it took **after** being notified that it was in default as justification for not taking any affirmative action in the matter for three months after it had been served with Summons and Petition. See also, *Great Southern Savings & Loan Assoc. v. Wilburn*, *887 S.W.2d 581 (Mo.banc 1994)* discussed above and *Great American Acceptance Corp. v. Zwego*, *902 S.W.2d 859 (Mo.App. 1995).*

In *Zwego*, the defendant was served with a summons on August 14, 1992. Id. at 863. Defendant failed to file an answer within thirty days and on October 10, 1992, plaintiff filed a motion for default judgment. Defendant's attorney then filed a motion to file an answer out of time. A hearing was scheduled on both the motion for default judgment and the motion to file an answer out of time. Defendant failed to appear and the Court entered a default judgment. Less than a month later, defendant filed his motion to set aside the default judgment. Id. The Trial Court denied defendant's motion to set aside the default entered as to liability, but did set aside the default as to damages. Defendant appealed arguing the Trial Court erred in failing to set aside the default as to liability. Id. at 862. The Court of Appeals affirmed. Id.

In its argument to the Court of Appeals, the defendant urged several reasons why the judgment should be set aside. In mid-September, 1992, a member of the defendant's attorney's three person firm left the firm and left his case load behind. In October, another member of the firm resigned which left the defendant's attorney with the firm's entire case load. Later in October, the attorney's infant son was stillborn. Id. at 863.

The Court of Appeals acknowledged that the defendant's attorney's failure to appear at the hearing on October 29th may have been influenced by the personal tragedies of his life. Id. However, the Court found that "the events giving rise to the *default itself* occurred way before this time." Id. (emphasis original). The Court further noted that there were "no facts given to explain why nothing was

done by Zwego's attorney between service on August 14th, 1992 and thirty days later when the answer was due." Id. It appeared to the Court that there was no reason why an answer was not filed when due. Consequently, the Court found that the Trial Court had not abused its discretion in refusing to set aside the default judgment against the defendant. Id.

Similarly, here, there were no facts given to explain why nothing was done by Respondent between service on May 23rd, 2000 and thirty days later when the answer was due. The Respondent was well aware of the legal process and in particular default judgments. Respondent and its registered agent had been involved in at least five prior lawsuits which ended in default judgments. (Tr. 143-153). Respondent's registered agent was present in the Courtroom when one of the prior default judgments was entered. (Tr. 143). Thus, Respondent knew that if it failed to answer Appellants' petition, a default judgment would be entered. Nonetheless, it took no action within thirty days after being served and has failed to demonstrate good cause for the *default itself*. Consequently, the Trial Court erred in setting aside the default judgment and Appellants respectfully request that this Court reverse the Trial Court.

C. Even If Respondent's Post-Default Conduct Is Considered, It Does Not Demonstrate Good Cause

Even if this Court considers the actions Respondent took after its answer period had ended, Respondent has failed to establish "good cause." After being advised that it was in default, Respondent waited thirteen days before faxing the

lawsuit papers to its insurance **agent**. (L.F. 29, 41 and 290). However, Respondent's policy required it to send lawsuit papers to the insurance **company**. (L.F. 248). Neither the insurance agent, nor his employees told Respondent that they would take care of the Court papers or retain an attorney. (L.F. 188-189 and 191). Nonetheless, Respondent never checked to see if the lawsuit was being handled or if the default position it had put itself in had been remedied. (L.F. 290 and Tr. 118, 158-159). In fact, Respondent took no action whatsoever after faxing the lawsuit papers to the insurance agent. (Tr. 118, 158-159).

Although Ms. Blazier claimed that she followed up with Respondent's insurance agent after faxing the lawsuit papers, the insurance agent denied any such follow-up and the Trial Court found that Ms. Blazier "did not make inquiry to insure that action was being taken on behalf of Millstone until she received notice that this Court had entered a default judgment." (L.F. 290-291).

In sum, two months after its answer period had expired Respondent delivered the lawsuit papers to its insurance agent even though the Respondent's policy directed it to deliver its lawsuit papers to the insurance company. Respondent took no other action. This conduct, occurring after Respondent's answer period had expired, should not be considered; however, even if it is, it does not amount to "good cause." See *Boatmen's First National Bank v. Krider*, *844 S.W.2d 10 (Mo.App. W.D. 1992).*

In *Krider*, Boatmen's filed its petition on a note and guarantee against Mr. Krider and his former wife, Mrs. Adams. Mrs. Adams was served with summons

and petition; however, she did not respond. Id. at 11. Default judgment was entered against Mrs. Adams and she subsequently filed a motion to set aside the default judgment. Mrs. Adams testified that her ex-husband, her ex-husband's divorce attorney and a friend who was a magistrate judge, all told her that the matter would be taken care of and she need not appear. Id. at 12. The Trial Court found that Mrs. Adams failed to demonstrate "good cause" and denied her motion to set aside the default judgment. The Court of Appeals affirmed. Id.

In affirming the Trial Court, the Court of Appeals first noted that "the generalization that the law favors a trial on the merits must be carefully applied to the facts of each case because '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 *Sprung v. Negwer Materials, Inc., 775 S.W.2d 97, 100 (Mo.banc 1989).* The Court further noted that "where a default results from the defendant's negligence and careless attitude toward the petition and summons, the Trial Court is **obligated** to deny a motion to set aside the default." Id. citing *Robson v. Willers, 784 S.W.2d 893, 896 (Mo.App. 1990)* (emphasis added). The Court of Appeals concluded that Mrs. Adams was reckless in relying on assurances from persons other than the party who had brought the suit against her. Thus, her reason for not appearing did not constitute good cause; she simply ignored the summons and refused to appear. Id.

Similarly, here, Respondent's conduct in purportedly relying on its insurance agent to handle the lawsuit papers was reckless, especially in light of the

Respondent's policy which directed Respondent to deliver the lawsuit papers to the insurance company. Furthermore, Respondent's insurance agent testified that neither he nor his employees made any assurances to Respondent that the legal predicament that Respondent was in would be taken care of. (L.F. 188-189 and 191). Thus, if the conduct of Mrs. Adams in the *Krider* case who had been assured that the matter would be taken care of did not constitute "good cause," then Respondent's conduct in relying on its insurance agent who made no such assurances certainly did not constitute "good cause."

D. Respondent's Post-Default Conduct Further Demonstrates Its Disregard For The Judicial Process.

Citing *State v. White, 847 S.W.2d 929, 933 (Mo.App. 1993)* Respondent urged the Court of Appeals to consider Respondent's conduct subsequent to its default to determine Respondent's "mental state." Respondent's subsequent conduct only further demonstrates its reckless or intentional disregard for the judicial process.

For example, at the evidentiary hearing, Respondent's registered agent testified under oath that she had not been served with summons and petition. (Tr. 123). Morgan County Deputy Sheriff Nicole Olmstead testified that she had served Respondent's registered agent. (Tr. 165 and 168-169). The Trial Court did not believe Respondent's registered agent and found that she had been served. (L.F. 290). By implication, the Trial Court found that Respondent's registered agent was being less than honest when she testified under oath that she had not

been served. Failing to tell the truth while under oath further demonstrates Respondent's attempt to impede the orderly administration of justice.

Respondent's registered agent, Carla Blazier, further testified that she had never been in default in a lawsuit before this one. (Tr. 125). During cross-examination, Ms. Blazier was confronted with three default judgments that had been entered against her. (Tr. 143-144, 148-149, and 151-153). The judgments demonstrated the Ms. Blazier had not testified honestly during her direct examination. Ms. Blazier also claimed on cross-examination that no default judgments had ever been entered against Respondent Millstone Marina. (Tr. 142). Ms. Blazier was then confronted with two default judgments that had been entered against Respondent Millstone Marina. (Tr. 146-147 and 155-157). Ms. Blazier was again less than candid with the Court.

Finally, Ms. Blazier testified under oath that she called her insurance agent a couple days after she faxed the lawsuit papers to him; however, the agent testified that there was nothing in his file indicating that Ms. Blazier ever followed-up after faxing the lawsuit papers. (Tr. 118). The Trial Court found that Ms. Blazier "did not make inquiry to insure that action was being taken on behalf of Millstone until she received notice that this Court had entered a default judgment." (L.F. 290-291). Again, by implication, the Trial Court must have found that Respondent's registered agent was being less than honest.

As this Court articulated in *Sprung v. Negwer Materials, Inc.*, *775 S.W.2d 97, 100 (Mo.banc 1989)*, "the law defends with … vigor the integrity of the legal

process and procedural rules, and thus does not sanction the disregard thereof." Here, Respondent Millstone Marina ignored the summons of the Court by failing to take any action whatsoever within the thirty days it had to answer Appellant's Petition. Respondent then tried to cover-up its failure by denying it had been served. Even while under oath Respondent's registered agent repeatedly failed to be honest and forthright with the Court. This conduct demonstrates Respondent's disregard for "the integrity of the legal process and procedural rules," and therefore, the Trial Court erred in setting aside the default judgment

III. CONCLUSION

Respondent failed to demonstrate good cause for ignoring the Summons of the Court and failing to timely file an answer to Appellants' Petition. Respondent and its registered agent know the meaning of default, are experienced in litigation and have had several default judgments taken against them. Nonetheless, Respondent took no action whatsoever until three months after being served with Summons. In an attempt to explain why it ignored the Summons and Petition, Respondent denied it was served. The Trial Court did not believe Respondent and based on the testimony of the Deputy Sheriff found that Respondent had been served. Respondent offered no other explanation for ignoring the Summons and Petition. No cause cannot equate to good cause.

Respondent relied on post-default events to demonstrate good cause for its default. The case law does not support a finding of good cause based on post-default events. Even if it did, Respondent failed to establish good cause. After

being advised that it was in default, Respondent waited thirteen days to fax the papers to its insurance agent. Respondent never sent the lawsuit papers to its insurance company even though that is what it was required to do under the terms of its policy. Respondent took no other action, nor made any additional inquiries. This conduct demonstrates Respondent's reckless attitude and defeats any claim of good cause.

Finally, Respondent's failure to be honest and forthright during her testimony at the hearing further demonstrates reckless or intentional disregard for the judicial process. Respondent's registered agent denied being served; the Court found that she was. Respondent's registered agent claimed that she followed up with the insurance agent; the Court found that she did not. Respondent's agent denied that she or Respondent ever had a default judgment entered against them; the evidence showed that they were responsible for at least five default judgments.

Respondent who was served with the summons and petition took no action at all within the thirty days it had to answer. Then, when questioned about its failure to take any action, Respondent provided testimony under oath that was less than honest. The Trial Court erred in finding that Respondent satisfied the good cause requirement of Rule 74.05 and Appellants respectfully request that this Court reverse the Trial Court and reinstate the default judgment.

CONCLUSION

Pursuant to Missouri Supreme Court Rule 74.05, the Trial Court could sustain Respondent's Motion to Set Aside the Default Judgment only if Respondent demonstrated "good cause" and "facts constituting a meritorious defense." Respondent failed to satisfy either of these requirements, and therefore, the Trial Court erred in sustaining Respondent's Motion.

Respondent made conclusory allegations that "if given the opportunity," it "would" present facts or evidence in defense of Appellants petition; however, Respondent did not state any such facts. Respondent's conclusions were not sufficient to satisfy the meritorious defense requirement of Rule 74.05, and therefore, the Trial Court erred in setting aside the default judgment.

Although Respondent denied being served, the Trial Court found that Respondent was served with Summons and Petition on May 23, 2000. Respondent offered no other explanation whatsoever as to why it ignored the Petition for three months. Thus, Respondent failed to demonstrate good cause. The post-default events Respondent relied on should not be considered; however, even if they are, they do not demonstrate good cause. After Appellants informed Respondent that it was in default, Respondent waited thirteen days to send the papers to its insurance agent. Respondent ignored the terms of its insurance policy which required Respondent to send the lawsuit papers to its insurance company. And Respondent did nothing after faxing the lawsuit to its agent. This conduct demonstrates, at a minimum, Respondent's reckless disregard.

Finally, Respondent failed to be honest and forthright while testifying under oath in the Trial Court. Respondent's registered agent denied being served; the Court found that she was. Respondent's registered agent claimed that she followed up with the insurance agent; the Court found that she did not. Respondent's agent denied that she or Respondent ever had a default judgment entered against them; the evidence showed that they were responsible for at least five default judgments. This conduct demonstrates Respondent's disregard for "the integrity of the legal process and procedural rules," and therefore, the Trial Court erred in setting aside the default judgment

WHEREFORE, for the foregoing reasons, Appellants respectfully request that this Court reverse the Trial Court's judgment and remand this case to the Trial Court so that it can reinstate the Default Judgment.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a disc and two (2) copies of the foregoing were duly mailed, postage prepaid, this ___ day of September, 2003, to:

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CERTIFICATION PURSUANT TO RULE 84.06

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Christopher P. Sweeny