IN THE MISSOURI SUPREME COURT

ERIC KRUGH and JOSEPH KRUGH

Appellants

v.

MILLSTONE MARINA SERVICE, L.L.C.

Respondent.

SC 85392

APPELLANT'S SUBSTITUE REPLY BRIEF

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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 ALLEGATIONS DO NOT SATISFY THE PLEADING REQUIREMENTS OF RULE 74.05(d).

A. RESPONDENT MILLSTONE MARINA'S *MOTION* FAILED TO SET FORTH A MERITORIOUS DEFENSE.

Respondent argues that in determining if it satisfied the "meritorious defense" requirement of Rule 74.05 (d), this Court must consider the alleged facts testified to at the evidentiary hearing. Respondent fails to cite any case law whatsoever in support of this argument. Furthermore, Respondent's argument is contrary to both Missouri case law and the plain language of Rule 74.05(d).

The pertinent part of Missouri Supreme Court Rule 74.05(d) states, "Upon **motion** stating facts constituting a 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, the **motion** itself must state facts constituting a meritorious defense. Missouri Courts have consistently held that 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).* As set forth in Appellant's first Brief, Respondent Millstone Marina's motion, affidavits and proposed answer failed to set forth facts constituting a meritorious defense. Consequently, Respondent failed to satisfy the pleading requirements of Rule 74.05(d) and its Motion to Set Aside should have been denied. See, *McClelland v. Progressive Casualty Insurance Company, 790 S.W.2d 490, 492 (Mo.App. 1990)*

In *McClelland*, the Court of Appeals 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 for setting the judgment aside, at an evidentiary hearing." (emphasis added). Thus, it is not enough for Respondent Millstone Marina to say that it established a meritorious defense at the evidentiary hearing. Respondent Millstone Marina was obligated to file a motion that satisfied the pleading requirements of Rule 74.05(d). Respondent failed to do so.

In support of its argument that it set forth a meritorious defense, Respondent emphasized in its Application for Transfer and again in its Brief that

"the motion to set aside was even supplemented after several depositions were taken in connection with the motion." See Respondent's Brief at 17. It is true that Respondent filed additional suggestions in support of its motion to set aside the default judgment. But the additional suggestions dealt solely with the issue of good cause. There was not even one paragraph devoted to the issue of meritorious defense. (L.F. 249-253). Consequently, the fact that the motion "was even supplemented after several depositions were taken" fails to support Respondent's argument that it satisfied the pleading requirements of Rule 74.05.

The pleading requirements of Rule 74.05 are analogous to the pleading requirements for a petition. In drafting a petition, plaintiffs must plead facts that demonstrate that they have a claim upon which relief can be granted. If plaintiffs fail to satisfy this requirement, then their petition may be dismissed for failure to state a claim upon which relief can be granted even after a judgment is entered. In that situation, plaintiffs are not entitled to point to evidence produced at trial to demonstrate that they **pled** a cause of action upon which relief could be granted. Rather, the Court merely looks at the four corners of the petition. See *Great American Acceptance Corp., v. Zwego, 902 S.W.2d 859, 863 (Mo.App. 1995)* and *Phillips v. Bradshaw, 859 S.W.2d 232 (Mo.App. 1993).*

Similarly, here, Respondent cannot rely on evidence it produced at a hearing to overcome the argument that it failed to satisfy the **pleading** requirements of Rule 74.05(d). Respondent states that it has found no Missouri Appellate decisions where a Trial Court decision to set aside a default judgment

was reversed after an evidentiary hearing had been held. Respondent overlooks *Ben F. Blanton Construction, Inc., v. Castle Hill Holdings XI, LLC, 109 S.W.3d 693 (Mo.App. 2003).*

The defendant in that case filed a motion to set aside the default judgment alleging three "meritorious defenses": 1) breach of contract and/or failure to perform conditions precedent, 2) payment, and 3) breach of warranty. Id. at 694. In its suggestions in opposition to the motion, Plaintiff alleged that the motion failed to recite specific facts supporting the alleged defenses. After holding a hearing on the motion, the trial court set aside the default judgment. Id. In its sole point on appeal, plaintiff argued that the defendant failed to state specific facts that would constitute a meritorious defense. The Court of Appeals agreed. Id.

In reversing the Trial Court, the Court of Appeals noted that "bare statements amounting to mere speculation or conclusions fail to meet the pleading requirement. To determine compliance with the pleading requirement, we look at allegations in the defaulting party's motion, and such other documents as affidavits, exhibits, and proposed answers." Id. at 695 (citations omitted). Because the defendant's motion and documents filed therewith failed to satisfy the pleading requirements of Rule 74.05, the Court of Appeals reversed the trial court. Thus, even when an evidentiary hearing is held, Courts look to the defendant's motion and documents filed therewith to determine if the pleading requirements of Rule 74.05(d) have been met. See also *Hughes v. Britt, 819 S.W.2d 381 (Mo.App. 1991)* cited at pages 20 through 23 of Appellant's first Brief.

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

In determining whether the defendant had set forth sufficient facts constituting a meritorious defense, the *Hughes* Court reviewed the defendant's motion, six affidavits and supporting memorandum. The Court found that "none of these documents set forth a specific recitation of particular facts which, if proven, would constitute a meritorious defense." Id. citing *McClelland, 790 S.W.2d at 494*. Again, even though an evidentiary hearing was held, the Appellate Court looked to the defendant's motion and documents filed therewith to determine if the pleading requirements of Rule 74.05(d) had been met.

B. RESPONDENT'S RELIANCE ON RULE 55.28 IS MISPLACED

In support of its argument that this Court should look to the testimony presented at the hearing, Respondent cites Missouri Supreme Court Rule 55.28. Respondent argues that "in this case, as any Trial Court is entitled to do under authority of Rule 55.28, the Trial Court conducted an evidentiary hearing…." See Respondent's Brief at page 23. This statement is incorrect for two reasons.

First, Missouri Courts have consistently held that a defaulting party is not entitled to an evidentiary hearing if they fail to satisfy the pleading requirements of Rule 74.05. See *Stradford v. Caudillo, 972 S.W.2d 483 (Mo.App. 1998)* where

the Court found that "entitlement to an evidentiary hearing on a motion to set aside a default judgment depends on meeting the pleading requirements of the rule." In *Stradford*, the Court found that the defendant set forth conclusions, not facts regarding its meritorious defense, and therefore, the defendant failed to meet the pleading requirements and was not entitled to an evidentiary hearing. Id. Thus, a Trial Court is not entitled to conduct an evidentiary hearing on a motion to set aside a default judgment unless the pleading requirements have been met. Here, like the defendant in *Stradford*, Respondent failed to satisfy the pleading requirements of Rule 74.05, and therefore, it was not entitled to a hearing.

Second, Respondent's statement is incorrect because Rule 55.28 itself requires that the motion be based on facts before the Court can hear the matter. The rule states in part, "when a motion is based on **facts** not appearing of record the Court may hear the matter on…oral testimony or depositions." As set forth in Appellant's first Brief, Respondent's motion was not based on facts and because it was not based on facts, Respondent was not entitled to an evidentiary hearing under Rule 55.28.

C. EVEN IF THE TESTIMONY OF BRUCE DOOLITTLE IS CONSIDERED, RESPONDENT FAILED TO DEMONSTRATE A MERITORIOUS DEFENSE.

The case law is clear that to meet the pleading requirements of Rule 74.05, Respondent was required to set forth in its Motion, proposed answer and affidavits, facts constituting a meritorious defense. Nonetheless, Respondent

urges this Court to look at the testimony of Bruce Doolittle which was elicited at the hearing on Respondent's motion. Even if Mr. Doolittle's testimony is considered, Respondent falls short of demonstrating a meritorious defense.

In its Brief, Respondent repeatedly cites testimony from Bruce Doolittle claiming that Lake Ozark did not ask Respondent to do various tasks on the boat at issue in this case. See Respondent's Brief at 25-27. All of the testimony set forth in Respondent's Brief was testimony during Mr. Doolittle's direct examination. When Mr. Doolittle was cross-examined, he admitted that he does not remember what was said by anybody from Lake Ozark about what they did or did not want done to the boat when it was brought in or taken out. (Tr. 73). Mr. Doolittle acknowledged that unless it was written down he could not remember what somebody asked to be done on the boat. (Tr. 73). Thus, Mr. Doolittle's testimony was not based on fact but on speculation. Mr. Doolittle further acknowledged that without seeing the boat, he could not and has not formed an opinion based on fact as to what caused the boat in this case to explode. (Tr. 72).

The Court will note that the testimony provided by Mr. Doolittle follows the specific allegations of negligence set forth in Plaintiffs' Petition. (L.F. 11-12 and Tr. 66). Mr. Doolittle was asked questions pertaining to the specific allegations of negligence in paragraphs 5(a) through 5(e) of Plaintiffs' Petition. However, counsel for Respondent stopped short of asking Mr. Doolittle questions regarding the specific allegations of negligence set forth in paragraphs 5(f) and 5(g) of Plaintiffs' Petition.

Appellants set forth in paragraph 5(f) of their Petition that Respondent failed to follow the manufacturer's recommended procedures for recommissioning the boat. Respondent did not demonstrate any defense whatsoever to that allegation. Mr. Doolittle was not asked one question about recommissioning the boat or the manufacturer's recommended procedures for recommissioning the boat. Respondent also failed to produce any facts demonstrating a meritorious defense to Appellants' allegation that Respondent failed to warn the users of the boat that the boat had not been check for fuel leaks prior to being released to the user. Again, Mr. Doolittle was not asked any questions regarding this specific allegation of negligence, and therefore, Respondent failed to set forth any facts demonstrating a meritorious defense to this allegation of negligence.

D. THE CASES CITED BY RESPONDENT ARE DISTINGUISHABLE FROM THE FACTS AT ISSUE HERE

In support of its argument that it demonstrated a meritorious defense, Respondent cites *Reed v. Reed, 48 S.W.3d 634 (Mo.App. 2001).* The most obvious distinction between *Reed* and this case is that *Reed* was a dissolution action. In deciding that case, the Court of Appeals noted that the discretion in denying a motion to set aside a default judgment is "**more restrictive** in divorce actions because there is practically no such thing as a divorce decree by confession and Courts disfavor default judgments in dissolution of marriage cases because of the State's interest in the welfare of the parties." Id. at 639 (emphasis added).

Despite the heightened standard, the Court of Appeals reversed the Trial Court's judgment for setting aside a default judgment because defendant's motion was not verified or otherwise supported by affidavits or sworn testimony. The Court of Appeals remanded the case to the Trial Court to hold an evidentiary hearing regarding the defendant's allegations that the amounts reflected in the plaintiff's Form 14 relating to the defendant's salary were incorrect and that the cost of health insurance and day care expenses for the children were also incorrect. Id. at 641.

A more significant distinction is the fact that both the plaintiff and defendant in ***Reed*** suggested to the Trial Court that an evidentiary hearing might be necessary. Id. at 642. Here, Appellants contested the evidentiary hearing from the moment that it began. Appellants objected to the evidentiary hearing before it started citing to the Trial Court *Stradford v. Caudillo*. (Tr. 5). Appellants objected again when Respondent began asking questions of Bruce Doolittle regarding facts that were not set forth in Respondent's motion, answer, or affidavits. (Tr. 63). In ***Reed***, the plaintiff did not contest the evidentiary hearing, but in fact suggested that one might be necessary. Thus, the holding in ***Reed*** is not applicable to the facts of this case.

Respondent also cites *Hoskin v. Younger Cemetery Corp., 838 S.W.2d 764 (Mo.App. 1992)* overruled on other grounds by this Court in *Cotleur v. Danziger*, *870 S.W.2d 234 (Mo.banc 1994).* In that case, the Trial Court overruled defendant's motion to set aside a default judgment. The Court of Appeals

reversed only on the ground that the Trial Court did not have an evidentiary hearing. The Court of Appeals expressed no opinion as to the merits of the motion; rather, the Court simply instructed the Trial Court to hold an evidentiary hearing "so that the Trial Court may determine the propriety of its default judgment given the mental disabilities of Younger Cemetery's president and the sole shareholder and her resulting failure to cooperate with the Younger Cemetery's attorney." Id. at 480.

The *Hoskin* opinion fails to set forth the allegations in the defendant's answer or the affirmative defenses raised by the defendant. Consequently, it is impossible to compare the allegations in that case to those set forth by Respondent in this case. Without such a comparison, it cannot be said that the *Hoskin* opinion supports or advances Respondent's argument.

Finally, Respondent cites *Partridge v. Anglin, 951 S.W.2d 737 (Mo.App. 1997).* In that case, the Court of Appeals reversed a Trial Court for setting aside a default judgment changing a child's name. The Court of Appeals found that the Circuit Court committed reversible error by granting Anglin's request to set aside the judgment without requiring Anglin to prove her allegations. Id. at 738. The Court noted that the defendant's motion was not verified or otherwise supported by affidavits or sworn testimony. Consequently, the Circuit Court had no basis for granting the motion.

The opinion does not set forth the facts stated in the motion or in any proposed answer or pleading to be filed in response to the name change request.

Consequently, it is impossible to determine if the facts set forth in those pleadings were similar in nature to those pled here. It is worth noting that the ***Partridge*** case was decided by the Western District, the same Court that determined in this matter that a meritorious defense had not been pled. Presumably, the Western District was aware of its ***Partridge*** opinion and recognized the differences between the facts here and the facts in the ***Partridge*** case.

E. 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. The evidence presented at the hearing cannot be considered in determining if Respondent satisfied the pleading requirements of Rule 74.05. And even if it is considered, the evidence was based on speculation, not facts, and therefore, falls short of demonstrating a meritorious defense. Furthermore, Respondent's evidence did not even address two of the allegations of negligence against it. For these reasons, 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.

A. RESPONDENT FAILED TO TAKE ANY ACTION PRIOR TO DEFAULT.

In its Brief, Respondent acknowledges that it failed to take any action whatsoever within thirty days after being served with the Summons. However, Respondent argues that it did take action "prior to default." Respondent equates "default" with "default judgment." (See Respondent's Brief at page 35). Respondent provides no legal authority for this position. Furthermore, Respondent's position is contrary to the Court's decision in *H.G.I v. M.E.C 961 S.W.2d 108, 117 (Mo.App. 1998)* where the Court stated:

> Once a petition has been filed with the court the defendant is required to file an answer within thirty days after the service of the summons and

petition. Rule 55.25. If the defendant fails to file an answer within the requisite thirty day period, the defendant is deemed in **default** and judgment may be entered against the defaulting party. (emphasis added).

Pursuant to *H.G.I v. M.E.C*, "default" occurs **not** when judgment is entered but when a defendant fails to answer within thirty days. Thus, by admitting that it failed to take any action within thirty days after being served, Respondent has admitted that it failed to take any action prior to its default.

B. THE POST-DEFAULT MISHANDLING OF THE LAWSUIT PAPERS SHOULD NOT BE CONSIDERED IN DETERMINING "GOOD CAUSE"

Because it has no excuse for failing to answer Appellants' petition within thirty days, Respondent argues that the Court should consider the mishandling of the lawsuit papers that occurred after Respondent was in default but prior to default judgment being entered. This argument is contrary to the Court's holding in *Great American Acceptance Corp. v. Zwego, 902 S.W.2d 859 (Mo.App. 1995).*

In *Zwego*, the defendant was served with 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 answer out of time. Defendant failed to appear and the Court entered 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 judgment entered as to liability, but did set aside the default judgment as to damages. Defendant appealed arguing that the Trial Court erred in failing to set aside the default judgment as to liability. Id. at 862. The Court of Appeals affirmed. Id.

The defendant stated several reasons why the judgment should be set aside. In mid-September, 1992, a member of his counsel'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 still born and was buried three days later. 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 did not abuse 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 23, 2000, and thirty days later

when the answer was due. Respondent failed to demonstrate "good cause" for the "*default itself*". Consequently, the Trial Court erred in setting aside the default judgment. Appellant's respectfully request that this Court reverse the Trial Court.

C. THE CASES RELIED ON BY RESPONDENT ARE NOT APPLICABLE

Respondent cites several cases in support of its argument that it demonstrated "good cause" for its default. The defendant in each case cited by Respondent took some action prior to defaulting. Such is not the case here. Consequently, the authorities relied on by Respondent are so factually dissimilar that they are not applicable to this case.

Respondent cites *Bell v. Bell, 849 S.W.2d 194 (Mo.App. 1993).* The most distinguishable fact in *Bell* is that the defaulting defendant in that case hired a lawyer prior to the time her answer was due. The defendant actually took some action within the thirty days that she had to answer. Such is not the case here. In addition, *Bell* is distinguishable in that it was a divorce case. This Court noted, "in a divorce case, there is practically no such thing as a divorce decree by confession and courts disfavor 'default judgments' in dissolution of marriage cases because of the state's interest and welfare of the parties." Id. at 198, quoting *Mosley v. Mosley, 744 S.W.2d 874, 878 (Mo.App. 1988).*

Respondent also relies on *Gibson v. Elley, 778 S.W.2d 851 (Mo.App. 1989).* Again, the most distinguishable fact in *Gibson* is that the defaulting defendant had

actually taken action to secure representation prior to the expiration of his answer period. Id. at 852-853.

Finally, Respondent relies on *Keltner v. Lawson*, *931 S.W.2d 477 (Mo.App. 1996).* In that case, the defendant was served with summons on February 22, 1995. The Court of Appeals noted that the defendant "promptly forwarded the summons and copy of the petition to his automobile insurance carrier." Id. at 478. In fact, the insurance company actually received the summons and petition two days after the defendant was served. Id. Such is not the case here.

Respondent Millstone Marina failed to take any action whatsoever until approximately two months after its time to answer had expired. Even when it did take action, Respondent failed to send the lawsuit papers to its insurance company as the defendant in *Keltner* did. Rather, Respondent Millstone Marina sent the lawsuit papers to its insurance agent. (L.F. 29, 41 and 290). Respondent sent the lawsuit papers to its agent even though its insurance policy required Respondent to send the lawsuit papers to its insurance company. (L.F. 248).

Citing the Trial Court's judgment, Respondent states at page 33 of its Brief, "once the suit was brought to Ms. Blazier's attention by plaintiff's counsel, she immediately forwarded it to her insurance agent requesting a defense and indemnity…." Nothing in the Trial Court's judgment indicates that Ms. Blazier "immediately" forwarded the lawsuit to her insurance agent. Even after being well beyond her time to answer plaintiffs' petition, Respondent waited about two weeks before faxing the lawsuit papers to her insurance agent. The Court noted in

its order, "it is unclear why the papers were not faxed to the agent until thirteen days later." (L.F. 290). Furthermore, there is no evidence in the Court's order or otherwise supporting Respondent's claim that it requested of its agent, "a defense and indemnity."

D. APPELLANTS HAVE NOT WAIVED ANY ARGUMENT

Respondent admits that it failed to take any action before its time to answer Appellant's petition expired. Now, in an attempt to overcome its failure, Respondent alleges that Appellants' waived their argument that Respondent failed to demonstrate "good cause" for its default. Respondent argues that the alleged waiver occurred when Appellants faxed a copy of the petition to Respondent on August 10, 2000. (See Respondent's Brief at page 38). This argument was first made to the Court of Appeals. Respondent cites no legal authority supporting its contention that the conduct at issue constituted a waiver.

"Waiver is the intentional relinquishment of a known right." *Mark Twain Bank v. Jackson, 901 S.W.2d 360, 363 (Mo.App. 1995).* "For waiver to be implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the right." Id. "To rise to the level of waiver, actions must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible." Id. Respondent told Appellants that she had not received any notice of the lawsuit. (Tr. 124). We now know this statement was untrue. Respondent requested Appellant fax it a copy of the petition and Appellants complied. This act of

accommodation, in light of Respondent's claim that it had not received any notice of the lawsuit, cannot be deemed "an intentional relinquishment of a known right."

At the time Appellant faxed the petition, Appellant did not know if a default judgment would be entered, if the Respondent would move to set it aside and/or what allegations Respondent would make if it did move to set aside the default judgment. Thus, it was impossible for Appellants to know what, if any, arguments it would raise in an attempt to defeat a motion, which may or may not be filed, to set aside a judgment, which may or may not be entered at the time it faxed a copy of the petition to Respondent. Accordingly, Appellants conduct did not rise to the level of "waiver."

E. RESPONDENT'S SWORN TESTIMONY REGARDING SERVICE

Respondent argues that Appellants' characterization of its registered agent "providing false testimony" regarding service is not supported by the record. See Respondent's Brief at 30. Respondent asserts that she simply did not remember being served. If Respondent simply did not remember being served, that is what she should have said. Instead, in her deposition, Respondent's registered agent provided sworn testimony as follows:

> Q: Okay. Had the Sheriff come out and served you with a Summons?
>
> A: No.
>
> Q: Are you sure of that or you just don't remember?
>
> A: **I am positive**. (L.F. 165) (emphasis added).

Then, on direct examination at the hearing, Respondent's registered agent testified as follows:

> Q: Were you personally served by Deputy Olmsted on May of 2000?
>
> A: No I was not.
>
> Q: Do you believe you would remember if a Deputy Sheriff came out to your business and provided you with a set of lawsuit papers?
>
> A: I would think so. That would be pretty important.
>
> …
>
> Q: Do you have any recollection of this Deputy being on the premises of your property?
>
> A: No.
>
> Q: Is that why you deny receiving the documents?
>
> A: Yes. (Tr. 123).

During cross-examination, Ms. Blazier stated that she was positive that she had not been personally served. (Tr. 141).

If Ms. Blazier did not recall if she had been served she should have said that she did not remember being served and that is all. She took that approach in her affidavit where she claimed "I have no recollection of receiving such documents." (L.F. 39). She did not deny service. But when it came to her deposition testimony, she testified that she was positive she had not been served.

(L.F. 165). And she told the Judge that she was positive that she had not been served. (Tr. 141).

F. RESPONDENT WAS PERSONALLY SERVED WITH THE LAWSUIT, AND THEREFORE, WAS "AWARE" THAT IT HAD BEEN SERVED.

In an attempt to persuade this Court that it did not ignore the summons and petition, Respondent argues that it was not aware of the lawsuit until plaintiff's attorney faxed her the summons and petition on August 10, 2000. Respondent argues, "Ms. Blazier simply cannot recall being served and, therefore, was not aware of the suit." (Respondent's Brief at 34). Not recalling being served with the lawsuit a year after being served does not demonstrate that Ms. Blazier was not aware of the lawsuit when she was served. As the Trial Court found, Ms. Blazier was in fact personally served by Morgan County Sheriff. Because she was personally served with the lawsuit, Ms. Blazier was aware of the suit. Ms. Blazier did nothing in response to the lawsuit within her thirty days to answer. It is rather incredible that Respondent would try to claim that it was not aware of a lawsuit that it had been personally served with.

On page 35 of its Brief, Respondent claims, "none of the cases cited by plaintiffs involve a situation where the defaulting defendant was simply unaware or did not remember that suit had been served." This suit does not involve a situation where the defaulting defendant was simply unaware of being served. The Respondent's registered agent was personally served with the lawsuit; thus,

Respondent was aware of being served. The trial found that Respondent did not remember being served, not that it was unaware that suit had been served. This situation is similar to that decided in *Phillips v. Bradshaw, 859 S.W.2d 232 (Mo.App. 1993).*

In that case, the defendant, like Respondent here, claimed that he was never served and offered no other explanation for ignoring the suit. Id. at 236. The Trial Court found that defendant had been served and denied his motion to set aside the default judgment. The Court of Appeals affirmed noting that "inasmuch as the Trial Court found defendant was served, defendant is left with no excuse for defaulting." Id. 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…." Id. at 237.

Similarly, here, the Trial Court did not believe that Respondent, Millstone Marina had not been served. Respondent, therefore, is left without any excuse for its default. Consequently, pursuant to the holding in *Phillips*, Respondent failed to establish good cause for its default.

G. CONCLUSION

Respondent ignored the summons and petition and failed to take any action within the time it had to file an answer. In an attempt to explain why it ignored the Summons and Petition, Respondent claims that it was unaware of the lawsuit. The Trial Court found that Respondent's registered agent was personally served with the lawsuit. Consequently, Respondent was aware of the lawsuit when its

agent was served; nonetheless, Respondent took no steps secure representation within the time it had to answer the petition. To overcome this failure, 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. Finally, Respondent's failure to be honest and forthright under oath further demonstrates reckless or intentional disregard for the judicial process. For these reason 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

For the foregoing reasons and the reasons set forth in Appellants' first Brief, Appellants respectfully request that this Court reverse the Trial Court and remand this case to the Trial Court with directions to reinstate the default judgment.

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CERTIFICATE OF SERVICE

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

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_____
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CERTIFICATION PURSUANT TO RULE 84.06

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2. This reply brief contains 6076 words in compliance with Rule 84.06(b).

3. This reply brief contains 718 lines.

4. The disc has been scanned and is virus free.

Christopher P. Sweeny