SC 85392

In the

MISSOURI SUPREME COURT

ERIC and JOSEPH KRUGH,

Appellants

v.

MILLSTONE MARINA SERVICE, L.L.C.

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Division 8
Before the Honorable Peggy Stevens-McGraw

RESPONDENT'S SUBSTITUTE BRIEF

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ADDITIONAL STATEMENT OF FACTS

For the most part, respondent Millstone does not dispute the facts stated by appellants as they accurately reflect which transactions occurred on certain dates, and the testimony of particular witnesses. Appellants have painted the facts and drawn inferences in a light most favorable to them, inferences that must be resolved in favor of Millstone. *See e.g. Gaffigan v. Wahley,* 600 S.W.2d 195, 198 (Mo. App. 1980). To the extent appellants make inferences from the facts where there are contrary inferences favoring Millstone, those are discussed in the argument portion of this brief.

In addition, pursuant to *Rule 84.04(f),* respondent sets forth additional facts regarding the evidence of a meritorious defense and a good cause excuse for not timely answering which were presented at the hearing. Appellants failed to mention any of these facts, instead incorrectly contending that these cannot be considered in support of the trial court's discretionary ruling in favor of Millstone.

1. Testimony of Bruce Doolittle and evidence showing a meritorious defense.

In addition to considering the Motion to Set Aside Default Judgment, and the supporting and opposing suggestions, the trial court conducted an evidentiary

hearing on the motion. (L.F. 290). Live testimony of several witnesses was heard and documentary evidence admitted. (*See*, generally, Tr. 3-4).

Bruce Doolittle, service manager for Millstone, has been working on boats for 15 to 20 years. (Tr. at 58:12-23). He testified about the procedure for "winterizing" and "de-winterizing" a boat and the work done on the boat involved in this suit. Winterizing a boat consists of draining the water out of the engine block, disconnecting the water cooling hoses and plugs to allow for drainage, and placing anti-freeze into the engine block. (Tr. at 60:8-61:6). It does not include any other tasks than those described above. (Tr. at 61:7-10). De-winterizing a boat consists of reinstalling the plugs, reconnecting the hoses and charging the battery, and allowing the boat to warm-up to make sure that it will not overheat. (Tr. at 61:19-23). It does not include any other tasks than those described above. (Tr. at 61:23-25).

Millstone was asked to winterize two boats and store them for the winter. (Tr. at 63:21-25). Hearing Exhibit 9 is the winterizing order for the boat in question for October of 1997. (Tr. at 62:3-12)(attached as appendix). Hearing Exhibit 10 is the de-winterizing order for the boat in question for April of 1998. (Tr. at 64:10-16)(attached as appendix).

Millstone was only asked to de-winterize the boat in question. (Tr. at 65:1-14). It was not asked by the owner of the boat to check the fuel system for leaks (Tr. at 66:1-5), to check the fuel lines and hoses for cracks or other signs of deterioration (Tr. at 66:6-8), or to check the fuel line fittings, carburetor mounting

fasteners, or fuel pump mounting fasteners for tightness. (Tr. at 66:9-12). Millstone was not asked by the owner to check to condition of the ventilation ducts and clamps. (Tr. at 66:13-15). Millstone was not asked to check the fuel tank vent on the outside of the hull for obstruction (Tr. at 66:16-18), or to do any general work by the owner, such as looking the boat over or inspecting it to see if any work needed to be done (Tr. at 66:19-22). None of these procedures, which appellant contends Millstone had a duty to perform, are part of winterizing or de-winterizing a boat. (Tr. at 67:8-12). Millstone was only asked to winterize and de-winterize the boat. (Tr. at 62:3-12; Tr. at 65:1-14).

The fuel line on the boat in question is not readily visible and is located below the flooring. It is not visible during winterization or de-winterization. (Tr. at 69:21-70:1). During winterizing or de-winterizing, respondent would have no reason to remove the flooring to have access to the fuel tank and lines. (Tr. at 70:21-24).

2. Additional evidence of a good cause excuse for failure to timely file an answer.

The Court record shows that Carla Blazier was personally served on May 23, 2000 as registered agent for Millstone. (L.F. at 16). But Ms. Blazier does not remember being served or what happened to the suit paperwork immediately after service. (L.F. at 39, ¶3; Tr. 123; and L.F. 290). The trial court found that this testimony was true. (L.F. 290).

On or about August 10, 2000, J.D. Johnson from the office of plaintiffs' attorney, Turner & Sweeny, faxed a copy of the First Amended Petition and Return of Service to Carla Blazier at Millstone Marina Service and requested that Ms. Blazier forward it to Millstone's insurer. (LF at 52-65; Tr. at 124:25-125:13). Ms. Blazier testified that she did not recall plaintiffs' attorney telling her that Millstone was in default, but clearly understood that he wanted her to send the suit papers to the insurance company. (Tr. 125). Ms. Blazier further testified that after she was contacted by plaintiffs' attorney, she was "very upset" about not being aware of the suit, and "obviously I got on the phone and took care of it." (Tr. 124). She advised plaintiffs' attorney that his call was her first notice of suit, and understood that he wanted her to send them to her insurance company. (Tr. 125). In fact, Ms. Blazier testified that plaintiffs' attorney "was very adamant about me getting it [the suit papers] to my insurance company (Tr. 125). After she faxed the petition to her agent, the Laurie Insurance Agency (L.F. 39, ¶5), Ms. Blazier called plaintiffs' attorney to confirm that she had in fact forwarded the paperwork. (Tr. 126).

Ms. Blazier forwarded the suit papers to Laurie Insurance Agency, so that the insurance company would handle the matter. (L.F. at 39, ¶5). Laurie Insurance Agency received the Summons and First Amended Petition on or about August 23, 2000 and forwarded it to Bohrer, Croxdale & McAdoo, the Managing General Agent, located in Springfield, Missouri. (L.F. 51; 249-250). On August 24, 2000, Debra Shelton of Bohrer, Croxdale & McAdoo transmitted the claim by

fax to Stuckey and Company, the broker, so that the insurance company providing coverage could be notified for defense of the claim. (L.F. at 108; L.F. at 91, ¶6). Stuckey and Company's function was to receive the claim notice from the producing agent (Bohrer in this case) and transmit it to the appropriate adjuster. (L.F. 250). Elliston is the proper adjuster in this case and should have received the suit papers. (L.F. 250). Elliston was appointed and serves as the representative of Certain Underwriters at Lloyd's, the insurance syndicate that wrote the policy for Millstone. (L.F. 250-251).

Stuckey and Company did not transmit the suit papers from the *Krugh* lawsuit to Elliston, despite the notice received by Stuckey and Company in August, 2000. (L.F. at 116, ¶5; 249-253). Stuckey and Company is not an agent for Certain Underwriters at Lloyd's for the policy issued to Millstone Marina Service. (L.F. at 116, ¶4). Instead, Stuckey and Company mistakenly sent the suit papers to Reliance, a prior insurer, who did not notify Stuckey of the mistake until eleven months later. (L.F. 250-251). After Ms. Blazier received notice of the default judgment and faxed it to her agent in late June, 2001, Stuckey and Company finally notified Elliston of the claim on July 10, 2001. (L.F. 252, 290). If contacted at the time the notice was received in August, 2000, the Underwriters at Lloyd's would have provided a defense to John and Carla Blazier immediately. (L.F. at 116, ¶6).

POINTS RELIED ON

I. The trial court did not abuse its discretion by sustaining Millstone's motion to set aside the default judgment because the motion asserted sufficient facts of a "meritorious defense" permitting the trial court to conduct an evidentiary hearing and consider further evidence supporting the "meritorious defense," namely that Millstone had no duty to make the boat repairs plaintiffs claim Millstone should have made. The Rule 74.05(d) pleading standard for a "meritorious defense" is not the same, nor should it be, as the heightened standard for establishing "good cause."

Primary authority relied on:

- *Reed v. Reed*,
  48 S.W.3d 634, 639 (Mo. App. W.D. 2001)
- *Hoskin v. Younger Cemetery Corp*.,
  838 S.W.2d 476 (Mo. App. E.D. 1992)
- *Yerkes v. Asberry*,
  938 S.W.2d 307, 309 (Mo. App. E.D. 1997)
- *Rule 55.28*

II. The trial court did not abuse its discretion by sustaining Millstone's motion to set aside because there was substantial evidence to support the court's finding regarding "good cause" in that Millstone did not

recklessly or intentionally impede the judicial process, but gave the suit papers to its insurer for handling before default and the insurer subsequently failed to timely retain defense counsel and answer.

Primary authority relied on:

- *Gibson v. Elly*,

  778 S.W.2d 851 (Mo. App. W.D. 1989)

- *Keltner v. Lawson*,

  931 S.W.2d 477 (Mo. App. S.D. 1996)

- *Bell v. Bell*,

  849 S.W.2d 194 (Mo. App. W.D. 1993)

ARGUMENT

I. The trial court did not abuse its discretion by sustaining Millstone's motion to set aside the default judgment because the motion asserted sufficient facts of a "meritorious defense" permitting the trial court to conduct an evidentiary hearing and consider further evidence supporting the "meritorious defense," namely that Millstone had no duty to make the boat repairs plaintiffs claim Millstone should have made. The Rule 74.05(d) pleading standard for a "meritorious defense" is not the same, nor should it be, as the heightened standard for establishing "good cause."

A. The standard of review is abuse of discretion.

Respondent agrees that the trial court's finding that a meritorious defense exists – a requisite to setting aside a default judgment under Rule 74.05(d)—is reviewed under an abuse of discretion standard. *See Fuller v. Ross*, 68 S.W.3d 497, 500 (Mo.App. W.D. 2001). "The decision to set aside a default judgment lies within the trial court's discretion." *Yerkes v. Asberry*, 938 S.W.2d 307, 309 (Mo. App. E.D. 1997). "Because of the law's distaste for default judgments, the circuit court is allowed greater discretion in granting a motion to set aside a default judgment than it is in denying such a motion." *Reed v. Reed*, 48 S.W.3d 634, 639 (Mo. App. W.D. 2001).

Here, the trial court granted Millstone's motion to set aside, and deserves the broadest discretion in doing so.

The trial court's finding that Millstone "made a sufficient showing that it has a meritorious defense"[1] may not be disturbed unless there is an absence of "substantial evidence" to support the finding. *Fuller*, 69 S.W.2d at 500. In determining whether substantial evidence exists, this Court "shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses." *Rule 84.13(d)(2).* Moreover, the evidence is to be viewed in a light most favorable to the lower court's decision. *See Gaffigan v. Wahley*, 600 S.W.2d 195, 198 (Mo. App. E.D. 1980). Some evidence and facts might tend to contradict one another, but such contradiction does not prevent the evidence from being substantial. *State v. Beckett*, 858 S.W.2d 856, 857 (Mo.App. W.D. 1993*).* If the evidence supports two contrary findings, the factual determination of the lower court must be upheld. *Trusler v. Tate*, 941 S.W.2d 794, 797 (Mo.App. W.D. 1997).

[1] (L.F. 291.)

B. The trial court did not abuse its discretion by permitting an evidentiary hearing and considering further evidence of a "meritorious defense."

Plaintiffs contend that Millstone's quite detailed motion to set aside, which was supported by multiple affidavits and a proposed answer,[2] did not sufficiently allege a "meritorious defense" and, thus, did not meet Rule 74.05's pleading requirements. As a result, plaintiffs argue that the trial court abused its discretion by permitting an evidentiary hearing on the motion and must ignore all of the "meritorious defense" evidence presented at the hearing in making its discretionary ruling to set aside the default. This Court must decide first whether Millstone stated sufficient "facts constituting a meritorious defense" in its motion to warrant an evidentiary hearing and then, even if it did not, whether the trial court has discretion under Rule 55.28 or otherwise to permit an evidentiary hearing and consider further facts and evidence presented to arrive at its ruling. There can be no doubt that the hearing evidence satisfies the requirement to assert facts showing a "meritorious defense," and plaintiffs do not challenge that issue.

[2] (L.F. 27-122). The motion to set aside was even supplemented after several depositions were taken in connection with the motion. (L.F. 249-289).

1. Pleading a "meritorious defense" is not a "high hurdle" and does not require a detailed factual recitation, especially where the defense is one of law.

In its motion, Millstone alleged that "if given the opportunity," it could present evidence that the duties plaintiffs claimed it breached (*e.g*. fix leaks in the fuel system) were not among its responsibilities when it was hired to "winterize" and "de-winterize" a boat that later exploded injuring plaintiffs. Specifically, Millstone denied it had any duty to plaintiffs[3] and asserted: "(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. 32, ¶¶ 30, 31; and L.F. 35). At the evidentiary hearing, live testimony, further affidavits and exhibits were presented showing, among other things, that the procedures plaintiff contends Millstone had a duty to perform were not part of the job Millstone was hired to do, "winterizing" or "de-winterizing" a boat. (*See, e.g*., Tr. at 67:8-12, 62:3-12, 65:1-14; and discussion, *infra*, at pp. 21-24).

To require a more detailed factual recitation in the initial motion would create a new heightened pleading standard for the "meritorious defense" element, rejecting the well-established rule that a defaulting party need only demonstrate "an arguable theory that would defeat the plaintiff's claim." *Reed, supra*, citing *In*

[3] *See* Answer, at ¶119. (L.F. 119); and First Amended Petition, ¶¶4-5 (L.F. 60).

re Marriage of Balough, 983 S.W.2d 618, 623 (Mo. App. S.D. 1999). It is true that where the defense "is factual, as opposed to a defense which is a matter of law, e.g., that the judgment is void, the court should insist on a specific recitation of facts which, if proven, would constitute a meritorious defense." *McClelland v. Progressive Casualty Ins. Co*., 790 S.W.2d 490, 494 (Mo. App. 1990). But several intermediate appellate cases also acknowledge there is no "universally accepted standard," and that this element "is not intended to impose a 'high hurdle,' but is designed to allow the case to be decided on the merits where there are legitimate issues to be considered." *See, e.g., Yerkes v. Asberry*, 938 S.W.2d 307 (Mo. App. 1997); and *Bredeman v. Eno,* 863 S.W.2d 24, 26 (Mo. App. 1993)(the party in default "need not present a defense in detail").

The defense here is a matter of law, that is, Millstone had no duty to fix the leaks (if any) in the fuel system as part of "winterizing" or "de-winterizing" the boat. Thus, contrary to plaintiffs' contention, there is no heightened pleading requirement that a detailed factual recitation be included in Millstone's motion.

In prior appellate opinions, allegations of a "meritorious defense" were far more general and vague than Millstone's allegations here and yet, in those cases, an evidentiary hearing was warranted. In *Reed*, a dissolution action, the court analyzed in some detail the pleading requirements for both elements of Rule 74.05(b). *Reed*, 48 S.W.3d at 641. As to the "meritorious defense" element, the *Reed* court determined that the motion would meet the requirements "by indicating the desire to present evidentiary matters to the trial court that would be properly

considered in dividing the marital property or assessing child support or maintenance, if those evidentiary matters could have materially affected" the judgment. *Id*. Instead of detailed factual allegations, the *Reed* unverified motion to set aside "generally alleged that the amount of child support awarded was excessive and that the judgment was 'patently unfair to Respondent,'" with no supporting affidavits or other evidence. *Id*. At the hearing on the motion, counsel for respondent elaborated on the specific factual allegations supporting the defense by way of oral argument, but no evidence of those facts was submitted. *Id*. On appeal, the court concluded that the general allegations "sufficiently asserted a potentially meritorious defense to warrant an evidentiary hearing," and remanded with instructions to the trial court to "conduct a proper [evidentiary] hearing." *Id*. at 641-642.

In *Hoskin v. Younger Cemetery Corp*., 838 S.W.2d 476 (Mo. App. E.D. 1992), the defaulting defendant was entitled to an evidentiary hearing where its motion simply asserted that in addition to affirmative defenses in an answer, it had "additional (but unspecified) meritorious defenses available to it, the damages awarded were excessive and not grounded in fact". *Id*. at 478-480. These bare conclusions were sufficient to trigger the right to an evidentiary hearing. *See also Partridge v. Anglin*, 951 S.W.2d 737, 739 at n.2 (Mo. App. W.D. 1997)(general unsupported allegations that respondent did not consent or have notice of judgment changing child's last name to his biological father's were "sufficient allegations of fact" to warrant an evidentiary hearing, and in fact require one,

before setting aside the judgment; thus, case remanded with instructions for the trial court "to conduct a proper hearing.").

Compare the general unsupported "meritorious defense" allegations in *Reed, Hoskins* and *Partridge* —all sufficient to warrant an evidentiary hearing—to those asserted by Millstone in its motion to set aside (L.F. 32, 35). The *Reed* defendant generally asserted that the amount of child support awarded was "excessive" and "unfair." *Reed,* 48 S.W.3d at 641. The *Partridge* defendant generally asserted that the judgment was entered without notice or consent. *Partridge*, 951 S.W.2d at 739. The *Hoskins* defendant simply alleged it had "additional (but unspecified) meritorious defenses." *Hoskins*, 838 S.W.2d at 478. Supported by multiple affidavits and a proposed answer, Millstone denied it had done any work on the fuel system or had any duty to repair it in connection with "winterizing" or "de-winterizing" the boat, and further alleged that it desired to present evidence supporting these facts. (L.F. 32, 35, 117-122). Quite clearly, these are material facts that, if true, are likely to affect the substantive result as they are dispositive of the duty element of plaintiff's case.

A fair reading of the "meritorious defense" allegations in Millstone's motion in light of the standard set by *Reed, Hoskins* and *Partridge* and the "distaste for default judgments," should only result in the conclusion that an evidentiary hearing was warranted here, too. Compared side-by-side, it is simply unfair to arrive at different conclusions on whether the pleading requirement has been satisfied.

2. A trial judge should have the right to conduct an evidentiary hearing and consider the evidence in support of the motion to set aside.

Probably because of the "greater discretion"[4] due the trial court in granting a motion to set aside than in denying one, there are few appellate opinions involving a trial court's decision to set aside a default judgment.[5] In two we could locate that involve the issue of "meritorious defense," discussed above, the trial judge was criticized for setting aside the judgment based on general allegations of a "meritorious defense" without first holding an evidentiary hearing. Both of these cases were remanded "to conduct a proper hearing**."** *Reed,* 48 S.W. 3d at 642; and *Partridge,* 951 S.W.2d at 739. There is no Missouri appellate decision that we could locate where the trial court set aside a default judgment *after an evidentiary hearing* and, on appeal, the appellate court held that the trial judge abused her discretion by considering evidence of a "meritorious defense" presented at the hearing.

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[4] *See Reed, supra*, 48 S.W.2d at 639.

[5] In all but one case cited by plaintiffs, the appellate review involved whether the trial court abused its discretion in denying the motion to set aside, not in granting it as it the case here. In *Brants v. Foster*, 926 S.W.2d 534 (Mo.App. W.D. 1996), the trial court granted the motion to set aside, which was reversed on appeal. However, there were no affidavits or a proposed answer attached to the motion, and there was no evidentiary hearing.

Rule 55.28 expressly authorizes a trial court to hear evidence on motions through affidavits, oral testimony or depositions, including motions to set aside default judgments under Rule 74.05. That rule says:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but *the court may direct that the matter be heard wholly or partly on oral testimony or depositions.*

See also Ray v. Lake Chevrolet-Oldsmobile, Inc., 714 S.W.2d 928 (Mo. App. 1986)(applying Rule 55.28 to proceeding on motion to set aside default judgment; court held that unopposed affidavit submitted with motion constituted competent evidence and must be considered).

In this case, as any trial court is entitled to do under authority of Rule 55.28, the trial court conducted an evidentiary hearing in which live testimony, further affidavits and other documentary evidence detailing Millstone's defenses was submitted. (*See, e.g*., Tr. at 67:8-12, 62:3-12, 65:1-14; and discussion, *infra*, at pp. 21-24). After hearing this evidence, the trial court was convinced that Millstone had presented facts supporting a "meritorious defense," and set aside the default judgment. (L.F. 291). There is no reason that the appellate court should not defer to the trial court's "greater discretion" in granting the motion to set aside. And, more importantly, that discretion should include the trial judge's right to conduct an evidentiary hearing and consider the evidence presented in arriving at her ruling.

Plaintiffs cite *Bredeman v. Eno,* 863 S.W.2d 24, 25 (Mo. App. W.D. 1993) as support for the argument that Millstone is not entitled to an evidentiary hearing. But it is important to note that the *Bredeman* court denied the motion to set aside and denied the request for a hearing. Thus, the appellate court's review was limited to deciding whether it was an abuse of discretion to deny a request for a hearing based on a review of the allegations in the defaulting party's motion to set aside, the affidavits and proposed answer. *Bredeman* does not address the discretion of the trial to conduct a hearing under Rule 55.28 or the propriety of considering facts presented at a hearing, which is at issue here. *Bredeman* is not controlling.

3. Millstone presented ample evidence of meritorious defense: Millstone's work on the boat was limited to "de-winterizing," and it had no duty to recommission or do a general safety or maintenance inspection.

As noted, the party seeking to demonstrate a meritorious defense need only make a showing of an arguable theory of defense. *In re Marriage of Balough,* 983 S.W.2d 618, 623 (Mo. App. S.D. 1999)*; Yerkes,* 938 S.W.2d at 309. Any factor likely to materially affect the substantive result of the case is the common meaning of a meritorious defense. *Balough,* 983 S.W.2d at 623. It is not a 'high hurdle,' but is designed to allow the case to be decided on the merits where there are legitimate issues to be considered. *Id.* The meritorious defense requirement is satisfied when movant sets forth allegations that, if supported by evidence later

found to be credible by a fact-finder, would defeat plaintiff's claim. *Id.* To present a meritorious defense, the party in default need not present extensive evidence. *Yerkes,* 938 S.W.2d at 309 (citing, *Bredeman v. Eno,* 863 S.W.2d 24, 26 (Mo.App. W.D. 1993)). "It is not for the court to decide whether [respondent] should prevail on his defense . . . Whether or not a jury *would* so find is not a proper determination for this court." *Gibson v. Elly*, 778 S.W.2d 851, 855 (Mo.App. W.D. 1989)*(emphasis in original).*

At the evidentiary hearing, Millstone put on live testimony and documentary evidence supporting its "meritorious defense" that it had not done any work on the fuel system, and that it had no duty to repair the fuel system in connection with "winterizing" or "de-winterizing" the boat. Bruce Doolittle, Millstone's service manager, who has worked on boats for 15 to 20 years (Tr. at 58:12-23), provided the following testimony, which supports respondent's meritorious defense:

- Winterizing a boat consists of draining the water out of the engine block, disconnecting the water cooling hoses and plugs to allow for drainage, and placing anti-freeze into the engine block. (Tr. at 60:8-61:6).
- Winterizing a boat does not include any other tasks than those described above. (Tr. at 61:7-10).
- De-winterizing a boat consists of reinstalling the plugs, reconnecting the hoses and charging the battery, and allowing the boat to warm-up to make sure that it will not overheat. (Tr. at 61:19-23).

- De-winterizing a boat does not include any other tasks than those described above. (Tr. at 61:23-25).
- Hearing Exhibit 9 is the winterizing order for the boat in question for October of 1997. (Tr. at 62:3-12)(Attached as appendix).
- Millstone was asked to winterize two boats and store them for the winter. (Tr. at 63:21-25).
- Hearing Exhibit 10 is the dewinterizing order for the boat in question for April of 1998. (Tr. at 64:10-16)(Attached as appendix).
- Millstone was asked to de-winterize only the boat in question. (Tr. at 65:1-14).
- Millstone was not asked by the owner of the boat to check the fuel system for leaks. (Tr. at 66:1-5).
- Millstone was not asked by the owner of the boat to check the fuel lines and hoses for cracks or other signs of deterioration. (Tr. at 66:6-8).
- Millstone was not asked by the owner of the boat to check the fuel line fittings, carburetor mounting fasteners, and fuel pump mounting fasteners for tightness. (Tr. at 66:9-12).
- Respondent was not asked by the owner to check to condition of the ventilation ducts and clamps. (Tr. at 66:13-15).
- Respondent was not asked to check the fuel tank vent on the outside of the hull for obstruction. (Tr. at 66:16-18).

- Respondent was not asked to do any general work by the owner, such as looking the boat over (inspecting it) to see if any work needed to be done. (Tr. at 66:19-22).
- None of the procedures listed above in paragraphs 10-15, which appellant contends Millstone had a duty to perform, are part of winterizing or de-winterizing a boat. (Tr. at 67:8-12). Millstone was only asked to winterize and de-winterize the boat. (Tr. at 62:3-12; Tr. at 65:1-14).
- The fuel line on the boat in question is not readily visible and is located below the flooring. It is not visible during winterization or de-winterization. (Tr. at 69:21-70:1).
- During winterizing or dewinterizing, respondent would have no reason to remove the flooring to have access to the fuel tank and lines. (Tr. at 70:21-24).

These facts, if true, establish that Millstone was never asked to and did not do any work on the fuel lines of the boat, thus, had no duty to dismantle the flooring to check them. There is certainly "substantial evidence" to support the trial court's finding that Millstone established a meritorious defense.

Thus, the trial court did not abuse its discretion by finding that a meritorious defense exists, and this Court should deny appellants' Point I on appeal.

II. The trial court did not abuse its discretion by sustaining Millstone's motion to set aside because there was substantial evidence to support the court's finding regarding "good cause" in that Millstone did not recklessly or intentionally impede the judicial process, but gave the suit papers to its insurer for handling before default and the insurer subsequently failed to timely retain defense counsel and answer.

A. The standard of review is abuse of discretion.

Again, the trial court's finding that a "good cause" exists is reviewed under an abuse of discretion standard. *See Fuller*, 68 S.W.3d at 500. The trial court's finding that Millstone "made a sufficient showing of good cause for failure to timely answer the petition resulting in the default judgment" must not be reversed unless it is unsupported by substantial evidence.

B. Millstone has demonstrated "good cause" under Rule 74.05(d).

Rule 74.05(d) provides that "[g]ood cause includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process."

The good cause requirement of Rule 74.05(d) is fulfilled by proving good faith mistakes, including negligence, inadvertence, incompetence, unskillfulness or failure to take precautions. *Billingsley v. Ford Motor co.,* 939 S.W.2d 493, 498 (Mo. App. S.D. 1997). Moreover, where a reasonable doubt exists it should be resolved in favor of good faith. *Myers v. PitneyBowes, Inc.*, 914 S.W.2d 835, 839 (Mo. App. S.D. 1996); *Keltner v. Lawson,* 931 S.W.2d 477, 480 (Mo. App. S.D.

1996)("the amended rule clarifies that good faith mistakes do constitute good cause, and a default judgment can now be vacated *even if movant has negligently failed to file a timely answer.")(italics in original)(internal quotations omitted).*

In *Gibson v. Elly*, 778 S.W.2d 851, 853 at n.1 (Mo. App. W.D. 1989), the court discussed the difference between recklessness, which is needed for lack of good cause, and negligence stating:

> To be reckless, a person must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless conduct and negligent conduct is a difference of degree of risk, but this difference in degree is so marked as to amount substantially to a difference in kind.

778 S.W.2d at 854 *(quotations and brackets omitted)(quoting* Restatement (Second) of Torts (1965)). S*ee also Young v. Safe-Ride Services*, 23 S.W.3d 730 (Mo.App. W.D. 2000)("A prior version of Rule 74.05 was interpreted to mean a defendant who negligently failed to timely file an answer was denied relief; however, the present rule has been broadened and changed").

For the reasons below, the trial court properly concluded that Ms. Blazier made a "good faith effort [ ] to obtain representation," and that while there "may have been negligence on her part, it does not constitute an intentional or reckless attempt to impede the judicial process." (L.F. 290-291).

1. Millstone did not recklessly or intentionally impede the judicial process; rather, the failure to answer was due to errors in handling paper work by insurance agents, satisfying the "good cause" requirement.

Throughout Point II, plaintiffs accuse Millstone's registered agent, Carla Blazier, of "providing false testimony" about whether she did or did not receive service of the petition on May 23, 2000. Plaintiffs say that this is evidence of reckless conduct meant to impede the judicial process, namely that Ms. Blazier intentionally ignored the summons and petition. But the record does not support this accusation. To be clear, while Ms. Blazier testified that she was not personally served, she immediately explained that she was denying service because she simply did not recall the deputy serving the lawsuit papers. (Tr. 123). Plaintiffs contend that the trial court's finding that Ms. Blazier had been personally served proved that Ms. Blazier lied under oath, and is evidence of reckless and intentional conduct. But the fact that Ms. Blazier does not recall being served, and therefore denies that fact, is not the same as saying that she intentionally lied about being served and intentionally ignored her obligation to respond to the lawsuit.

Importantly, as it is permitted to do, the trial court believed that Ms. Blazier just did not recall being served and found that:

> Carla Blazier, one of the principals in Millstone and its registered agent, was served with the lawsuit on May 23, 2000. Mrs. Blazier does not

> remember being served with it. However, once she was contacted by Plaintiffs' attorney and faxed a copy of the amended petition, she sent a copy to her insurance agent. This was the accepted means of notifying the insurance company in the industry and is an indication of a good faith effort on her part to obtain representation. This occurred in August of 2000.

(L.F. 290).

In addition to believing her testimony that she simply did not recall being personally served, the trial court can fairly infer from her reaction to plaintiffs' attorneys' phone call that she was not intentionally ignoring the suit:

> Intent . . . is generally not susceptible of direct evidentiary proof and may be established by circumstantial evidence or inferred from surrounding facts . . . a [party]'s mental state may be determined from evidence of his conduct before the act, the act itself and from the <u>party's subsequent conduct</u>.

State v. White, 847 S.W.2d 929, 933 (Mo.App. E.D. 1993*)(internal citations omitted)(emphasis added.)*

Unfortunately, the suit paperwork was not sent to the proper insurance company for handling before plaintiffs' sought and obtained a default judgment almost 7 months later. Instead, after receiving the papers from Ms. Blazier, the Laurie Insurance Agency faxed the papers to Bohrer, Croxdale & McAdoo, the general agent, on August 23, 2000. (L.F. 51). Bohrer, Croxdale & McAdoo then

sent the papers by fax on to Stuckey and Company, the broker, so that the insurance company providing coverage could be notified for defense of the claim. (L.F. 108; 91 at ¶6). Stuckey then sent the papers to Reliance Insurance Company, which is not Millstone's liability insurer. (Tr. 26; L.F. 116, at ¶5). Millstone is insured by Certain Underwriters at Lloyd's. (L.F. 116). Dennis Stuckey of Stuckey & Company testified that the papers should have been sent to Elliston, L.L.C. who was appointed as the representative for Lloyds. (Tr. 28-29). Reliance did not notify Stuckey of the error until after default judgment was entered.

As the trial court found, "Mrs. Blazier received the notice of the default judgment on June 26, 2001. She faxed a copy of the default judgment to the insurance agent on June 27, 2001 and faxed it again on July 11, 2001." (L.F. 291). This time, the agent and brokers sent the papers to the right place, and Underwriters at Lloyd's finally received notice of the loss and the lawsuit on July 10, 2001, nearly four months after default judgment was entered. (L.F. 116). The trial court further found that Lloyd's "retained counsel on July 16, 2001. The motion to set aside the default judgment was filed on August 1, 2001, well within the one year limitation provided by Rule 74.05(d)." (L.F. 291).

2. Turning over suit papers to an insurance agent is reasonable and the subsequent mishandling by the brokers and agents is "good cause" for setting aside a default judgment.

The case law is replete with examples that the negligent mishandling of paperwork, although not good business practice, is good cause for setting aside a

default judgment. In *Keltner v. Lawson,* 931 S.W.2d 477, 481 (Mo. App. S.D. 1996), good cause was shown where defendant turned over paperwork to its insurer, but because of insurer's personnel problems, no attorney was retained nor pleadings filed. In *Gibson*, supra, good cause was shown where suit paperwork was received while the insurer's claims department staff was at a week-long seminar out of state, temporary employees misplaced the document during that week, and regular employees did not discover the documents until a month later. *Gibson,* 778 S.W.2d at 853. In *Bell v. Bell,* 849 S.W.2d 194, 198 (Mo. App. W.D. 1993), good cause was shown where a party had turned her suit paperwork over to an attorney and took no further action until she heard from him. The *Bell* court further held that it is reasonable to turn suit papers over to an attorney and rely on him or her to deal with them. *Id.*

While there may have been substantial evidence of negligent mishandling of paperwork by insurance agents here, there is nothing to support a finding that Millstone was reckless or intentionally impeded the judicial process. In fact, once the suit was brought to Ms. Blazier's attention by plaintiffs' counsel, she immediately forwarded it to her insurance agent requesting a defense and indemnity, conduct that the trial court here found to be an "accepted means of notifying the insurance company" and a "good faith effort" to obtain representation. (L.F. 290). It was only after this that the paperwork was negligently handled by others, constituting good cause to set aside a judgment under *Bell*, *Gibson* and *Keltner*.

There was substantial evidence before the trial judge upon which she based her finding of good cause. (*See* L.F. at 291).

3. Millstone established "good cause" within the first 30 days and well before default was entered on March 29, 2001.

Plaintiffs argue that Millstone is required to but has not established "good cause" in the first 30 days—the answer period—because Ms. Blazier did not forward the suit papers to the insurer before that time expired, or otherwise respond to the suit. Of course, this is because Ms. Blazier did not recall being personally served with suit papers, and only first became aware of the suit when plaintiffs' attorney contacted her well after the 30-day answer period expired "adamantly" requesting that she send the suit papers on to Millstone's insurer. The trial court believed this testimony. (L.F. 290). Certainly, Ms. Blazier cannot be required to answer within thirty days or send the suit papers to her insurer within that time period if she is not aware that they exist. Millstone presented substantial evidence of good cause in the first 30-days by establishing that Ms. Blazier simply could not recall being served and, therefore, was not aware of the suit.

Plaintiffs' argument rests on the unfair and inaccurate accusation that Ms. Blazier intentionally ignored service, and then lied about her recollection. As noted above, this is not a fair representation of the testimony, and was not the factual finding of the trial court. This factual finding is supported by substantial

evidence (e.g. Ms. Blazier's testimony at L.F. 123) and cannot be disturbed on appeal. *See Fuller*, 68 S.W.3d at 500.

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. Rather, it is clear that in these cases, the defaulting party had actual knowledge of service and consciously ignored it or did not do enough to establish a good cause excuse for failing to answer or otherwise respond before default was entered. *See, e.g., Great Southern Savings & Loan Assoc. v. Wilburn*, 887 S.W.2d 581 (Mo. banc 1994)(defendant aware of the suit and attempted to hire a lawyer before the answer date, but the lawyer could not represent him, and failed to deliver the case file to a second lawyer before default entered); and *Stradford v. Caduillo*, 972 S.W.2d 483, 486 (Mo. App. W.D. 1998)(defendant consciously ignored service of the petition because she was a single parent with little money, did not realize her insurer would handle it, and was concerned about being laid off of her job).

Plaintiffs next argue that conduct occurring after the first 30 days cannot establish good cause. In other words, ignoring the fact that Ms. Blazier did not remember being served and the "good cause" established by that fact, plaintiffs say Millstone had to forward suit papers to its insurer within the first 30 days to establish good cause based on the insurer's mishandling of the paper work. But there is no explicit "30 day rule" in Missouri. Instead, the conduct giving rise to good cause must occur "prior to default," which may not be within the first 30

days. *See Klaus v. Shelby*, 42 S.W. 3d 829, 832 (Mo.App. 2001)(defendant admitted being served, but failed to take "any affirmative action before entry of default judgment" and, thus, it was abuse of discretion to set aside default judgment).

Plaintiffs rely on *Klaus* for the argument that conduct occurring after the first 30 days is irrelevant to establish "good cause." But *Klaus* actually supports Millstone's position, and presents a very different factual scenario than the one here. In that case, unlike here, the defaulting defendant admitted that he was aware of being served, but took no action "prior to the default judgment being entered. . ." *Id*. at 831. In the motion to set aside, which was filed within ten days of the entry of default judgment, defendant's sole reason for establishing good cause was that his attorneys did not receive notice of the suit until seven days after default judgment had been entered. *Id*. He did not offer any reason at all for why he failed to respond to the petition or hire an attorney before default. *Id*. On appeal, defendant argued that the promptness with which his attorneys responded to the default (*i.e*. within 3 days of being hired) was evidence of his good faith. *Id*. at 832. The court rejected this argument finding that while defendant's attorneys may have acted promptly, this did not excuse him from responsibility and the obligation to establish "evidence that Defendant attempted to or did contact an attorney **prior to the entry of default judgment**." *Id*. at 832. The court further held that "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 four months." *Id*. Clearly, *Klaus* is not supportive of a 30 day rule, but rather requires that there be evidence of some affirmative action taken prior to entry of the default judgment, which in *Klaus* was four months after service.

Contrast *Klaus* with this case. First, Ms. Blazier did not remember being served, so there is no basis to assert that she intentionally ignored the suit papers. But as soon as plaintiffs' attorneys called her, albeit after the 30 day answer period, she immediately forwarded the suit papers to her insurance agent for defense and indemnity. This was an appropriate response and a "good faith effort on her part to obtain representation." (L.F. 290). After that, but well before default judgment was entered in March 2001, the insurance agents mishandled the suit papers and sent them to the wrong insurer for handling (Reliance). Certainly, this is evidence that Millstone attempted to or did contact the appropriate handling party prior to entry of default judgment, and sufficiently justifies setting aside the default.

Plaintiffs further assert that their attorneys informed Millstone that it was already "in default,"[6] suggesting that this is somehow the same as "entry of default judgment" in *Klaus* such that any conduct after that time cannot be considered. First, under Rule 74.05(a), default judgment "may" be entered only "upon proof of damages or entitlement to other relief." Plaintiffs did not even file their motion for default judgment with this "proof" until nearly seven months later. While

[6] *See* p. 38 of plaintiffs' brief.

plaintiffs could have moved for an interlocutory default judgment for failure to answer at the time Ms. Blazier was contacted,[7] no default judgment had been entered or requested.

Second, Ms. Blazier testified that she did not recall being told in that conversation that Millstone was in default, but did understand that plaintiffs' attorney wanted her to send it to the insurance company. (L.F. 124-125)("he was very adamant about me getting it to my insurance company."). If nothing else, plaintiffs' attorneys' request that she forward suit papers to her insurer three months after service, and well after the 30 days, is a clear waiver of any right seek default based on prior conduct. That is, if plaintiffs really wanted to obtain default judgment based on the failure to answer up to that point, they would have filed their motion for default without insisting that Ms. Blazier send suit papers on to Millstone's insurer. Plaintiffs should not now be able prevent Millstone from establishing good cause based on negligent conduct of its insurance agents (mishandling the paperwork) after plaintiffs requested that she turn the paperwork over to them. *See Thompson v. Chase Manhattan Mortg. Corp.,* 90 S.W.3d 194 (Mo. App. S.D. 2002)(waiver is the intentional relinquishment of a known right, and conduct must be clear, unequivocal and decisive).

[7] There are two other defendants who are alleged to be jointly and severally liable for the plaintiffs' damages (L.F. 54-64).

CONCLUSION

Appellants' entire argument in Point I is premised on the fact that the motion, the affidavit, and the proposed answer do not state facts that constitute a meritorious defense. However, as demonstrated above, the motion, the affidavit, and the proposed answer do state sufficient facts that constitute a meritorious defense, which is not a "high hurdle." Millstone (1) was not asked to nor did it have a duty or responsibility to recommission the boat or do a general maintenance or safety inspection; and (2) was not asked to and did not work on the fuel system.

In addition, pursuant to its authority under Rule 55.28, the Court heard evidence on the motion that further supported these facts. The testimony of Mr. Doolittle and work orders clearly and specifically demonstrate that Millstone's work and responsibility was limited to de-winterizing, a task that is separate and distinct from recommissioning or performing general maintenance or safety inspections. And, importantly, does not include work on the fuel system, which plaintiffs alleged to be defective. Thus, the limited work done by Millstone could not have caused plaintiffs' damages.

Therefore, the trial court did not abuse its discretion by finding that a meritorious defense exists and Point I should be denied.

There was also substantial evidence regarding the trial court's finding of good cause. Good cause exists because Ms. Blazier did not intentionally or

recklessly disregard service of the petition (she did not recall service) and, after being made aware of it by plaintiffs' attorneys' request that she send it to her insurer, promptly responded in a reasonable fashion by sending it to her insurance agent. The subsequent mishandling of the suit paperwork by Millstone's insurance agents constitutes good cause. Therefore, the trial court did not abuse its discretion, and appellant's Point II should also be denied.

WHEREFORE, respondent Millstone Marina Service, L.L.C. respectfully requests that appellants' appeal be denied, the trial court's Order Granting Motion to Set Aside Default Judgment be affirmed, and the cause be remanded for trial against all remaining parties.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo.R.Civ.P. 84.06(c), counsel for respondent certifies that respondent's brief complies with Mo.R.Civ.P. 55.03 and 84.06(b) and that the brief contains 8,457 words. In addition, counsel for respondents certify that the disk filed containing the brief has been scanned for viruses and is virus free.

_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief was deposited in the United States mail, postage prepaid, on this 2nd day of October, 2003 addressed to:

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