LAW OFFICES

NIEWALD, WALDECK & BROWN

A PROFESSIONAL CORPORATION

51 CORPORATE WOODS
9393 WEST 110TH STREET, SUITE 500
OVERLAND PARK, KANSAS 66210-1402
(913) 223-6840

TWELVE WYANDOTTE PLAZA
120 WEST 12TH STREET, SUITE 1300
KANSAS CITY, MISSOURI 64105-1932

TELEPHONE: (816) 471-7000
FAX: (816) 474-0872

WEBSITE: http://www.nwb.com

November 12, 2003

Writer's Direct # (816) 292-7031
jgibson@nwb.com

Via Federal Express
Ms. Christina Vinson
Deputy Clerk of the Missouri Supreme Court
Post Office Box 150
Jefferson City, Missouri 65102

RE: *Eric Krugh and Joseph Krugh v. Millstone Marina Service, L.L.C.*
Supreme Court No.: SC85392
Our File: 2006-29566

Dear Ms. Vinson:

The Court requested a letter brief discussing whether *Adams v. Borello*, 975 S.W.2d 188 (Mo. App. 1998) is applicable to this case. That case is indeed applicable and controlling as to the issue raised in Point I of this appeal.

Adams supports defendant Millstone Marina's position that a trial court has broad discretion to conduct an evidentiary hearing on a motion to set aside a default judgment under Rule 74.05(d), to consider evidence presented at that hearing to establish a "meritorious defense," and in granting the motion. This discretion is not limited by the same heightened pleading standard that applies on review of a decision denying a motion to set aside and denying the right to a hearing on the motion. In other words, while a trial court is not required to conduct an evidentiary hearing unless the motion meets the facial requirements of Rule 74.05(d) – asserting facts constituting a "meritorious defense"

and "good cause" – it does not abuse its discretion by conducting a hearing where the motion makes only a "perfunctory assertion" of a meritorious defense. *Id.* at 191.

In *Adams,* the trial court granted the motion to set aside based on evidence presented at an evidentiary hearing, and not on facts stated in the motion. *Id.* The motion alleged only a "conclusory allegation" that defendant "has a meritorious defense in every way to the claim of instant plaintiff, not only as to liability but damages as well." *Id.* On appeal, as here, the plaintiff argued that because the motion itself did not state sufficient facts constituting a meritorious defense, the trial court abused its discretion in holding an evidentiary hearing and granting the motion. *Id.* Rejecting the plaintiff's argument, the appellate court endorsed the trial court's broad discretion to proceed with a hearing and set aside the default judgment stating:

> But while a motion's failure to facially meet the requirements for setting aside a judgment means that a trial court is not required to hold an evidentiary hearing, it does not also mean that a trial court necessarily abuses its discretion if it does, in fact, conduct such a hearing. . . .Although the trial court would have been justified in denying [defendant's] motion without an evidentiary hearing, we cannot say it abused its broad discretion by proceeding with the hearing.

Id.

The same is true in this case. Plaintiffs contend that conclusory factual allegations of a meritorious defense in Millstone's motion did not entitle Millstone to an evidentiary

hearing, and any facts and live testimony presented at the evidentiary hearing should thus be ignored. Millstone's motion certainly contains more than the perfunctory allegation that a meritorious defense exists as in *Adams*. Millstone asserts that it had no duty to fix leaks in the fuel system in connection with its work in "winterizing" and "de-winterizing" the boat. *See* Millstone's brief at p. 18. But even if these assertions do not entitle Millstone to a hearing if the trial court had denied one, under *Adams* it is clear that the trial court did not abuse its broad discretion by holding a hearing and basing its ruling on the evidence submitted.[1]

We appreciate the opportunity to brief the *Adams* case, and regret not having included it in our initial briefing.

---

[1] For the first time in their Substitute Reply Brief, plaintiffs contend that the evidence submitted at the hearing supporting a meritorious defense was insufficient. Plaintiffs did not preserve this argument on appeal because their initial brief, and in particular Point I, is limited to challenging the sufficiency of the facts presented in the "motion, affidavit or proposed answer." Nowhere do plaintiffs challenge the hearing evidence as insufficient to establish a "meritorious defense," which of course, is not a "high hurdle." *See Bank of America v. Dooms*, 884 S.W.2d 710 (Mo. App. 1994)(claim of error first asserted in reply brief does not present issue for appellate review).

Very truly yours,

NIEWALD, WALDECK & BROWN

Julie J. Gibson

Julie J. Gibson

c.c. Mr. John Turner
Mr. Christopher Sweeney