

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

=====
COMPLETE TITLE OF CASE

JOE AGNELLO and ELIZABETH AGNELLO,

Respondents,

v.

KENT WALKER d/b/a HARDWOOD PRODUCTIONS,

Appellant.

DOCKET NUMBER WD71013

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: March 23, 2010

Appeal from

The Circuit Court of Jackson County, Missouri
The Honorable John M. Torrence, Judge

APPELLATE JUDGES

Division Three: James Edward Welsh, Presiding Judge, Mark D. Pfeiffer and Karen King Mitchell,
Judges

ATTORNEYS

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Kansas City, MO

Attorneys for Respondents,

Tamara Putnam
Kansas City, MO

Attorney for Appellant.

AFFIRMED IN PART; REVERSED IN PART.

Division Three holds:

The trial court did not abuse its discretion in denying Walker's motion to set aside the default judgment because Walker failed to provide a verified motion asserting facts that demonstrated both good cause for his failure to respond and a meritorious defense as required by Rule 74.05(d). The trial court was similarly correct in denying Walker's motion to reconsider and motion for relief under Rule 74.06(b). Though Walker asserted facts detailing good cause in the argument portion of that motion, he again failed to verify the motion through affidavits or testimony. Argument of counsel does not qualify as sworn and competent testimony and does not replace movant's burden of proof requirement to produce competent and sworn testimony or evidence.

The trial court did err, however, in granting the Agnellos relief that they did not properly plead. In a default judgment, a trial court only has authority to grant the relief that was pleaded. The judgment granted actual damages under Counts II and V when the damages were either: not pleaded in the original petition, or, already granted in the first count. Because there was not a valid award of compensatory damages under either of those counts, the trial court's grant of punitive damages under Count II was improper. Furthermore, the award of attorney's fees under Count V was statutorily predicated on the plaintiff prevailing on that particular count. Because the Agnellos did not prevail on that count, the award of attorney's fees was invalid.

We, therefore, affirm the default judgment as to Count I and reverse the default judgment as to Count II and Count V and herewith order that all awards of damages related to Count II and Count V be stricken from the default judgment.

Opinion by: Mark D. Pfeiffer, Judge

March 23, 2010

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