MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE:

EAGLE STAR GROUP, INC.,

Appellant

v.

DAVID MARCUS, ESQ. AND BERKOWITZ, OLIVER,
WILLIAMS, SHAW & EISENBRANDT, LLP..

Respondents

DOCKET NUMBER WD71622

DATE: December 14, 2010

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Michael W. Manners, Judge

Appellate Judges:

Division Two
Mark D. Pfeiffer, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Attorneys:

David E. Larson, Liberty, MO	Counsel for Appellant
Michael W. Blanton, Leawood, KS	Co-Counsel for Appellant

Attorneys:

Steven H. Schwartz, St. Louis, MO	Counsel for Respondents

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

EAGLE STAR GROUP, INC., Appellant, v.
DAVID MARCUS, ESQ. AND BERKOWITZ, OLIVER, WILLIAMS, SHAW & EISENBRANDT, LLP., Respondents

WD71622 Jackson County

Before Division Two Judges: Mark D. Pfeiffer, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Eagle Star Group, Inc., appeals from a judgment entered upon a jury verdict in favor of David Marcus and Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP, on a claim for legal malpractice. Eagle Star had hired Berkowitz Oliver to set aside a default judgment previously entered against Eagle Star, but Berkowitz Oliver was unsuccessful in getting the default judgment set aside. In its legal malpractice case, Eagle Star claimed that Berkowitz Oliver committed legal malpractice when it failed to raise the issue of a defective return of service in the motion to set aside a default judgment. A jury disagreed and found in favor of Berkowitz Oliver, and the circuit court entered judgment consistent with the jury's verdict. Eagle Star appeals, asserting that the circuit court erred (1) in limiting Eagle Star's ability to present evidence regarding the amendment of the return of service and allowing Berkowitz Oliver to argue that the return would have been amended and (2) in admitting into evidence an agreement made between Eagle Star and the attorney and plaintiff from the default judgment case.

AFFIRMED.

Division Two holds:

(1) Because Pam Jaax was an officer of Eagle Star, the return of service could have been amended in this case to conform to the facts and to reflect proper service upon Eagle Star. The circuit court, therefore, did not err in concluding that not only could the return of service be amended but that the circuit court would have exercised its discretion and granted a motion to amend the return in this case. Moreover, the circuit court did not err in admitting David Marcus's testimony that the return would have been amended and that it would have been pointless to seek to set aside the default judgment on the basis of defective service because such testimony was elicited by Eagle Star's own counsel. Further, it would have invaded the circuit court's province on matters of law for the circuit court to allow Eagle Star to question Marcus on case law which Eagle Star believed would have undercut Marcus's opinion that the return of service could be amended. The circuit court also did not err in refusing to allow testimony from former Judge Robert A. Russell and attorney Steven Effertz that the return of service could not be amended because such was an issue of law for the circuit court to decide. The circuit court also did not err in allowing Berkowitz Oliver to argue during closing arguments that the defective return of service would not have been an effective argument in the Motion to Set Aside the Default Judgment because such argument was a reasonable inference based on the testimony and evidence admitted during trial.

(2) The circuit court did not err in admitting into evidence the original Agreement to Retain Counsel. It was only superseded "to the extent any provision set forth herein is in conflict with any prior provision." The original Agreement to Retain Counsel was logically relevant because the agreement was central to the issue of damages in this malpractice action. It was also legally relevant in that its probative value outweighed any prejudice to Eagle Star. The agreement was probative on the issue of damages and did not confuse the issues or mislead the jury. Nor did the agreement's admission into evidence violate the rule prohibiting the admission of settlement agreements into evidence because a clear and cogent reason existed for admitting the agreement into evidence because it was pertinent to the issue of damages.

Opinion by: James Edward Welsh, Judge Date: December 14, 2010

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