

Class 3 – Introduction to Points Relied On

Assignment

- Read the material below
- If you haven't yet reviewed the material at the [Points Relied On Information link](#) on the Advocates page, review it now.
- Make sure to do the reading – Judge Smith will expect you to be prepared

The significance of "points relied on" may easily be underestimated when they count for a small portion of your overall score in App. Ad. II. In real life, however, the points relied on can make or break your case. The following are excerpts from Missouri cases explaining the shortcomings of points that adversely affected the ultimate decision of the court. As you read the Points, think about how they failed to comply.

***Thummel v. King* 570 S.W.2d 679 (Mo. 1978)**

The court of appeals declined to consider appellant's points relied on Nos. I, II, III and IV for the reason that they "fail to state wherein and why the ruling of the court was erroneous as required by Rule 84.04(d). This fails to preserve any question for review. *Barber v. MFA Milling Co.*, 536 S.W.2d 208 (Mo. App. 1976)." As set forth in appellant's brief, points I-IV were:

I. The Court Erred in Failing to Enforce a Written Contract of Agency and Guaranty for Which Consideration Was Paid to the Agent. [citations omitted]

II. The Court Erred in Failing to Enforce Fiduciary Responsibilities on Defendant Brady Company. [citations omitted]

III. The Court Erred in Failing to Require Defendant to Account as Disbursal Agent. [citations omitted]

IV. The Court Erred in Failing to Enforce Settlement Agreement of September 20, 1973 [citation omitted].

Rule 84.04(d) provides in part: "The points relied on shall state briefly and concisely what actions or rulings of the trial court are sought to be reviewed and wherein and why they are claimed to be erroneous, . . ."

At the outset it is apparent that the foregoing points do not set forth any *action or ruling* of the trial court. One purpose of the requirement that this be done is the pragmatic consideration that nothing is preserved for review if the question was not properly presented to the trial court in the first instance. The bare allegation that the trial court erred in failing to enforce, require, etc., is plainly inadequate because it does not identify any specific ruling complained of and does not even give any indication of any point in the trial of the case where the trial court was called upon to take such affirmative action. At first glance, it would appear that appellant is asserting that the trial court refused to enforce a contract for some reason. However, it seems from the argument portion of the brief concerning point I that such is not appellant's real complaint. Although the actual thrust of the argument is subject to more than one interpretation, it *appears* that appellant is really disputing the trial court's interpretation of the agreement or, more particularly, paragraph 11 of the agreement. We already have ruled that contention adversely to appellant in No. 773678. The ruling of the trial court in this regard was stated as its conclusion of law number I to the effect the Swander was responsible for the payment of all bills. If that was the action of the trial court of which Swander complained, he should have directed his point relied on to that specific ruling.

We turn now to the basis upon which the court of appeals rejected points I-IV-i.e., the failure to specify *wherein* and *why* the (unspecified) ruling of the trial court was erroneous. The dual requirements of Rule 84.04(d) that the point relied on state *wherein* and *why* the action or ruling is claimed to be erroneous are apparently the most common source of error in appellate briefing. Actually, compliance with these requirements is a matter of common sense if counsel bear in mind the informational purpose of the brief. After stating the ruling the trial court actually made, it stands to reason that the point should then specify *why* the ruling was erroneous. This requirement essentially contemplates a statement which ordinarily will closely approximate what appellant believes should have been the trial court's conclusion of law on the point being addressed. After stating why the ruling was erroneous, the court then must be informed *wherein* the testimony or evidence gives rise to the ruling for which appellant contends.

The application of these requirements can be illustrated by again referring to appellant's point I. If we assume that the ruling of which appellant complains is the court's interpretation of the paragraph II, appellant's point I (as supplemented by reference to the argument section of the brief) arguably states the legal reason the action of the trial court was allegedly erroneous (*i.e.*, what appellant contends is the legal effect of paragraph II) but fails to cite any evidence or testimony upon which appellant relies to give rise to the contended legal effect. To assert, in the form required by Rule 84.04, the point that we have assumed (but are by no means certain) appellant was trying to make, it might be stated:

The trial court erred in its interpretation of the contract as stated in conclusion of law No. 1 to the effect that Swander was obligated to pay all amounts of labor and

materials, including amounts paid on forged requests, over and above the amount of the loan *because* paragraph II of the contract constituted a written contract of agency and guaranty, supported by consideration, whereby Brady Co. undertook the responsibility for such payments *in that* it provided that Brady Co. would pay *all* bills for labor and material (not just to the extent of loan proceeds) and would guarantee against all liens on the property.

Point I in appellant's brief is not sufficient to so inform counsel and the court. Points II-IV are similarly deficient.

The foregoing example illustrates the three components of the point relied on mandated by Rule 84.04. The challenged ruling of the trial court is concisely stated, the rule of law (in this case, the contended legal effect of the contract) which it is asserted the court should have applied is set forth and the evidentiary basis upon which it is contended that the asserted rule is applicable is specified.

The requirement that the point relied on clearly state the contention on appeal is not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts. It is rooted in sound policy. Perhaps the most important objective of the requirement relative to the points relied on is the threshold function of giving notice to the party opponent of the precise matters which must be contended with and answered. Absent that, it is difficult, at the very least, for respondent's counsel to properly perform his briefing obligation. This is particularly so in a case such as this where the facts are complex. In addition, such notice is essential to inform the court of the issues presented for resolution. Clear statement of the points relied on facilitates full advocacy and affords the opportunity for clarification by meaningful questions directed to the issues stated in the points relied on. If the appellate court is left to search the argument portion of the brief (or even worse, to search the record on appeal) to determine and clarify the nature of the contentions asserted, much more is at stake than a waste of judicial time (even though in this time of increased litigation and heavy caseloads, that alone is sufficient justification for the rules). The more invidious problem is that the court may interpret the thrust of the contention differently than does the opponent or differently than was intended by the party asserting the contention. If that happens, the appellate process has failed in its primary objective of resolving issues raised and relied on in an appeal.

Failure to properly state the points relied on indicates a lack of understanding of the appellate function and process. Ordinarily, an appellate court sits as a court of review. Its function is not to hear evidence and, based thereon, to make an original determination. Instead, it provides an opportunity to examine asserted error in the trial court which is of such a nature that the complaining party is entitled to a new trial or outright reversal or some modification of the judgment entered. It is not the function of the appellate court to serve as advocate for any party to an appeal. That is the function of the counsel. It would be unfair to the parties if it were otherwise. That is the reason for the sometimes expressed unwillingness of an appellate court to

assume the role of counsel and advocate for a party on appeal. When counsel fail in their duty by filing briefs which are not in conformity with the applicable rules and do not sufficiently advise the court of the contentions asserted and the merit thereof, the court is left with the dilemma of deciding that case (and possibly establishing precedent for future cases) on the basis of inadequate briefing and advocacy or undertaking additional research and briefing to supply the deficiency. Courts should not be asked or expected to assume such a role. In addition to being inherently unfair to the other party to the appeal, it is unfair to parties in other cases awaiting disposition because it takes from them appellate time and resources which should be devoted to expeditions resolution of their appeals.

In light of counsel's failure to comply with Rule 84.04 in these and the remaining points and the long delay in the case, the court refused to hear the appeal. In the next case, the Missouri Supreme Court accepted transfer of the case, apparently because it posed important issues to be resolved. As you can see, those issues got little attention because of non-compliant PROs.

J.A.D. v. F.J.D.
978 S.W.2d 336 (Mo banc 1998)

II.

Appellant's brief fails to meet the requirements of Rule 84.04(d).

* * *

This Court's policy is to decide a case on its merits rather than on technical deficiencies in the brief. Generally, this Court will not exercise discretion to disregard a defective point unless the deficiency impeded disposition on the merits. A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal. If the defective brief fails to meet that standard, the point will be disregarded, reviewed only for plain error, or the appeal dismissed. *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo. banc 1997).

A point relied on must meet three requirements: (1) it must state the trial court's action or ruling about which the appellant complains; (2) it must state why the ruling was erroneous; and (3) it must state what was before the trial court that supports the ruling appellant contends should have been made. *Murphy v. Aetna Cas. & Sur. Co.*, 955 S.W.2d 949 (Mo.App.1997).

III.

Appellant's first point relied on reads:

THE TRIAL COURT ERRED IN AWARDING SOLE CUSTODY OF THE CHILDREN TO FATHER BECAUSE THE CUSTODY DETERMINATION WAS NOT IN THE BEST INTERESTS OF THE CHILDREN AS REQUIRED BY MISSOURI LAW IN THAT THE EVIDENCE CLEARLY SHOWED MOTHER WAS THE BETTER CHOICE AS CUSTODIAN AND MOTHER SHOULD HAVE BEEN GIVEN AT LEAST JOINT CUSTODY RIGHTS.

The point is defective for two reasons. The point fails to state what was before the trial court that supports the ruling appellant contends should have been made. Although it asserts evidence exists, the point fails to identify the evidence. The argument portion relating to this point is of little assistance in focusing the issue. It consists of a review of the non-exclusive statutory factors considered in awarding custody and a review of the evidence in a light favorable to J.A.D., explaining why she is the best choice and should have been given joint custody rights. An objective reading of the point and argument reveal only a broad plea that this Court substitute its custody decision for the decision of the trial court. That, of course, is not this Court's function. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).

A second, and perhaps less obvious, defect is that the point relied on is so nebulous that it is impossible to identify which of several possible claims appellant is attempting to raise. These possible claims include: (1) that no substantial and credible evidence supports some unspecified factual findings of the trial court with respect to its custody decision; (2) that some unspecified evidentiary factor or factors were improperly considered; or (3) that the trial court failed to consider some essential but unspecified evidentiary factor or factors. Inadequate points create a root problem: this Court may interpret a contention differently than does the opponent or differently than was intended by the party asserting the contention. *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. banc 1993) (Benton, J., dissenting).

* * *

IV.

Appellant's second point relied on reads:

THE TRIAL COURT ERRED IN DENYING MOTHER CUSTODIAL RIGHTS, CONDITIONING AND RESTRICTING HER VISITATION, AND MANDATING MOTHER INFORM HER CHILDREN SHE WAS HOMOSEXUAL BECAUSE THE STATE CANNOT DISCRIMINATE AGAINST A PARENT AND VIOLATE A PARENT'S CONSTITUTIONAL RIGHTS ON THE BASIS OF HOMOSEXUALITY IN THAT THE COURT'S DENIAL OF CUSTODY AND ITS RULING WAS [sic] MADE WITHOUT JUSTIFICATION SOLELY ON THE BASIS OF MOTHER'S SEXUAL ORIENTATION.

This point relied on also fails to state what was before the trial court that supports the ruling appellant contends should have been made. It also fails to set out the specific constitutional rights that are alleged to be violated. To properly assert a violation of a constitutional right in a point relied on, an appellant must specifically identify the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself. See *Century 21 v. City of Jennings*, 700 S.W.2d 809 (Mo. banc 1985). Courts should avoid considering constitutional issues unless clearly presented. *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. banc 1993) (Benton, J., dissenting).

* * *

V.

As with the first two points relied on, appellant's third point relied on fails to state what was before the trial court that supports the ruling appellant contends should have been made. The point reads:

THE TRIAL COURT ERRED IN UPHOLDING THE ANTENUPTIAL AGREEMENT AND ENFORCING ALL OF ITS TERMS BECAUSE THE AGREEMENT WAS UNCONSCIONABLE IN ITS APPLICATION IN THAT IT IS AMBIGUOUS, MISLEADING AND VAGUE IN THE WAY IT IS WRITTEN, IS BASED UPON FRAUDULENT AND MISREPRESENTATIVE DISCLOSURES, WAS OBTAINED BY UNDUE INFLUENCE AND WAS SO OPPRESSIVE AND ONE-SIDED IT IS AGAINST PUBLIC POLICY.

This point relied on asserts various legal bases for holding the agreement was invalid, but it fails to assert any evidentiary basis for so holding. As the point relied on preserves nothing for appeal, review is for plain error under Rule 84.13(c).

* * * * *

State v. Jones
786 S.W.2d 926 (Mo. App. W.D. 1990)

The State of Missouri appeals from the trial court's action in sustaining respondent's motion to suppress in cases involving s 195.020, RSMo 1986, misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia. These charges arose out of a search conducted by a conservation agent who was looking for a wild turkey, taken or possessed illegally, that was allegedly in respondent's possession. These cases are consolidated on appeal. Respondent, Gregory Jones, moved to dismiss this appeal as not in compliance with our Rules. This motion was taken with the case. For the reasons cited herein, the motion to dismiss is sustained.

Appellant originally filed two briefs with this court, one for each of the cases heard below. Except for the case numbers, these briefs are word-for-word identical and for the purposes of our review will be considered as one brief. The first thing one notices when looking at appellant's brief is its color. The cover of the brief is bright red, in

violation of Rule 84.06(c)(1), which requires that in the Court of Appeals, briefs on the merits for appellants will be white. Upon opening the brief we read (much to our surprise) that jurisdiction for this appeal "lies in the Missouri Court of Appeals, Eastern District." These preliminary points are de minimis but are mentioned as an indication of the quality of the brief.

Much more serious are the errors and omissions contained in Points Relied On and argument portions of the brief, which are so egregious as to warrant dismissal. The brief filed with this court contains three points, none of which can even aspire to adequacy. As these points are concise, almost to the point of non-existence, we set them out together with argument, in their entirety.

I.

THE TRIAL COURT ERRED IN APPLYING SECTION 252.100 RSMO BECAUSE THE DEFENDANT HAD WAIVED THE PROTECTION OF THAT STATUTE IN THAT THE RESULTS OF THE SEARCH AND THE STATEMENTS OBTAINED FROM HIM WERE OBTAINED BY VOLUNTARY CONSENT.

A search and seizure may be conducted upon the basis of voluntary consent by an individual who has right of control over the place searched or property seized. Neither probable cause nor a warrant are required if there is valid consent. *Schneekloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), on remand 479 F.2d 1047 (9th Cir.1973); *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), rehearing denied 424 U.S. 979, 96 S.Ct. 1488, 47 L.Ed.2d 750 (1976); *State v. McMahan*, 583 S.W.2d 540 (Mo.App.1979). Voluntary admissions by the Defendant after being advised of his Miranda rights are admissible. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1956) [sic], rehearing 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966).

II.

THE TRIAL COURT ERRED IN CONSIDERING THE OBJECTION TO THE SEARCH UNDER SECTION 252.100 RSMO BECAUSE SAID OBJECTION WAS NOT RAISED IN DEFENDANT'S MOTION TO SUPPRESS.

The motion to suppress should include the reasons why a warrantless search is invalid. Section 542.296.5(1) and (5), RSMo.

III.

THE TRIAL COURT ERRED IN CONSIDERING THE OFFER OF PROOF BY DEFENSE COUNSEL BECAUSE THE OFFER OF PROOF BY DEFENSE COUNSEL WAS A MERE STATEMENT AS TO WHAT COUNSEL CLAIMED IN THAT IT DID NOT OFFER SPECIFICS OF FACT.

A mere statement of counsel as to what he intends to prove is not a sufficient offer of proof and said offer should be specific as to the factual allegations made. *Duncan v. Price*, (1981, Mo.App.) 620 S.W.2d 70 and *Hawkins v. Whittenberg*, (1979, Mo.App.) 587 S.W.2d 358.

Rule 84.04 covers the contents of briefs. The rule requires that "[t]he points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous...." Rule 84.04(d). Moreover, "[s]etting out only abstract statements of law without showing how they are related to any action or ruling of the court is not a compliance with this Rule." *Id.* It is also necessary that the argument portion of the brief "substantially follow the order of 'Points Relied On.'" Rule 84.04(e). The Rule also mandates that "[a]ll statements of fact and argument shall have specific page references to the legal file or the transcript." Rule 84.04(h).

The requirements set out in Rule 84.04 are both mandatory and essential for appellate courts to function smoothly and effectively. *Draper v. Aronowitz*, 695 S.W.2d 923, 924 (Mo.App.1985). We do not function as advocates; it is not our job to make appellant's case for him. *See McKee v. Wilmarth*, 771 S.W.2d 955 (Mo.App.1989). "It is not our duty or responsibility to spend judicial time searching through legal files, transcripts or argument portions of briefs in an attempt to interpret the thrust of a party's contentions and correct counsel's deficiencies." *Green v. Lutheran Charities Ass'n*, 746 S.W.2d 154, 156 (Mo.App.1988).

The appellant's briefs before this court in the instant case are inadequate. The points relied on and argument sections set out basic statements of hornbook law. No attempt has been made to relate these arguments to the facts of the case. No reference to the transcript or legal files are given in these sections. No page numbers appear to reference counsel's bold, abstract statements of law to the case. It is as if this brief was written in a vacuum without any thought given to how the principles of law and the facts of the case interact. The Missouri Supreme Court in *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978), points out that compliance with the Rules is a matter of common sense. After stating the ruling of the trial court it should be specified why that ruling was erroneous. "[T]he court then must be informed wherein the testimony or evidence gives rise to the ruling for which appellant contends." *Id.* at 685. This is precisely what counsel has failed to do. Nor has anyone addressed the problem of how it can be believed that a large avian such as a wild turkey can be found in an opaque brown bottle approximately two inches long.

The primary function of an appellate court is one of review. Where appellants do not make clear what is to be reviewed, we are hamstrung. It is improper use of judicial time and resources to sift through a record in order to find clues regarding what is being argued on appeal. Not only is this unfair to the court, it is also unfair to respondent, who must answer the unanswerable. It is unfair to the system, as a case such as this interferes with the orderly administration of justice and case flow.

Appellant failed to comply with the requirements of Rule 84.04. Its non-compliance has left us with nothing to review. This appeal is dismissed.

All concur.

Care must also be taken to insure that Points do not include multiple alleged errors not based on the same issue and facts.

In re Marriage of Cochran
340 S.W.3d 638, 647 (Mo. App. S.D. 2011)

* * *

Wife's Third Point Relied On is Multifarious

In her third and final point, Wife contends:

The trial court erred and abused its discretion: by imputing income to Wife of \$4,673.00, when the evidence at trial showed that she earned \$3,484.00 per month in gross wages; by failing to increase Husband's Social Security Disability income by a percentage to compensate for the fact that those benefits were non-taxable; and by failing to impute additional income to Husband due to the \$465,381.66 financial benefit that the trial court awarded Husband, because the law requires the court to consider all relevant factors, including the financial resources of a party pursuant to Rule 88.01 and § 452.340; and the trial court erred by modifying Husband's child support obligation to a lower amount in the *amended judgment* and ordering Wife to reimburse Husband for back child support that Husband was ordered to pay in the original *judgment*, without Husband filing a post trial motion to request a modification and without a change in obligation.

(Upper- and lower-case substituted for all capitals in original). Wife's point relied on does not comply with the requirements of Rule 84.04 and is therefore dismissed.

Wife's third point relied on contains no less than five separate allegations of trial court error: wrongfully imputing income to Wife; failing to consider the non-taxable nature of Husband's Social Security disability in calculating Husband's income; failing to impute income to Husband; modifying Husband's child support in the amended judgment; and ordering Wife to reimburse Husband for overpayment of back child support. "A statement of a point relied on ... violates Rule 84.04 when it groups together contentions not related to a single issue." *Biever v. Williams*, 755 S.W.2d 291, 293 (Mo.App.1988). As such, it is multifarious.

Moreover, while identifying five different trial court rulings she is challenging, Wife has failed to state the legal reasons for each such claimed erroneous ruling and has failed to explain in a summary fashion, in the context of the case, how those omitted legal reasons support each claimed error as required by Rule 84.04(d). Our supply of those legal reasons or our marshalling of the facts in the case to support those reasons would improperly thrust us into acting as an advocate for Wife, which is something we cannot and will not do. "Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that the appellate court does not become an advocate for the appellant by speculating on facts and on arguments that have not been made." *BBCB, LLC v. City of Independence*, 201 S.W.3d 520, 530 (Mo.App.2006).

"Improper points relied on, including those that are multifarious, preserve nothing for appellate review." *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 477 (Mo.App.2001). Consequently, Wife's third point is dismissed.

* * * * *

Obviously, the Missouri courts take the requirements of Rule 84.04 seriously. This is true whether the point fails to identify the action challenged, specify why that action was erroneous, apply the relevant legal rules to the facts of the case, or cite available authority.¹

While courts rarely dismiss a client's appeal because of an attorney's mistake, more recently they have moved toward a different remedy. In *J.A.D. v. F.J.D.*, the Missouri Supreme Court did not dismiss the appeal. Rather, it engaged in "plain error" review of the issues raised by the offending points. Pursuant to Mo. Sup. Ct. Rule 84.13(c), when an issue is not properly preserved for review, the Court can review for the limited purpose of determining whether

¹ See also *Coleman v. Gilyard*, 969 S.W.2d 271, 273-274 (Mo. App. 1998) (court dismisses appeal for "flagrant violations of Rule 84.04" and refuses plain error review because the "deficiencies in the brief . . . are so flagrant that it is virtually impossible to even determine the precise nature of their claims"); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 646 (Mo. App. 1991) (two points not supported by authority nor an explanation of why authority was unavailable were "drafted with blatant disregard of the requirements of Rule 84.04(d)" and are deemed abandoned); *Green v. Lutheran Charities Ass'n*, 746 S.W.2d 154, 156 (Mo. App. 1988) (court refuses to address five of appellant's points on the ground that they are not properly preserved by the Points presented and states: "It would behoove appellant to familiarize herself with the teachings of *Thummel v. King*"); *Albers v. Hemphill Contracting Co.*, 740 S.W.2d 660, 662 (Mo. App. 1987); *Bell v. Neiman Marcus, Inc.*, 733 S.W.2d 493, 493-494 (Mo. App. 1987); *Rigby Corp. v. Boatmen's Bank & Trust Co.*, 713 S.W.2d 517, 537-538, n. 14 (Mo. App. 1986).

failure to remedy the alleged error will lead to manifest injustice or a miscarriage of justice. This approach was followed in the Southern District in *In re Marriage of Ford*² and *In re Marriage of Wright*.³ Perhaps because the remedy is not as severe, the courts seem freer in their willingness to apply it to Points that are not truly awful.

Note also that violations of other provisions of Rules 81 and 84 can lead to dismissal of the appeal or refusal of the court to address issues presented by the parties. An example is *Kent v. Charlie Chicken II, Inc.*,⁴ where the court dismissed the appeal on the grounds that neither the brief nor the legal file conformed to applicable rules, including use of a font that was smaller than permitted and that caused the brief content to exceed permissible page limits.⁵

The message of these materials should be clear. The best legal thinking and analysis will not serve your client if the appeal is dismissed or review limited for technical non-compliance with the rules. Students should get used to reading and applying the rules with care. This will serve you and your clients well in practice.

² 990 S.W.2d 698, 701-2 (Mo. App. 1999)

³ 990 S.W.2d 703, 708 (Mo. App. 1999).

⁴ 972 S.W.2d 513 (Mo. App. 1998).

⁵ See generally, Appellants Beware: Failure to Follow the Rules May be Fatal to your Appeal, J. Mo. B. (July-Aug. 1998), p. 174.