

## Class 4 – Points Relied On II

### ***Assignment***

1. If you have not already done so, review the PRO Teaching set PowerPoint. Really think about each point before you go on to see the discussion. That will help you in drafting your own Point.

2. After reviewing the PowerPoint, the Points Relied On Template and the BBCB case below, draft a Point Relied On (or multiple points if necessary) related to the sufficiency of the evidence provided compliant with Missouri's rule. You should draft point(s) only for the side that you were assigned for the first competition round, either Appellant or Respondent. You may make up (or assume) facts if necessary to complete this assignment. Submit your draft point(s) in typewritten form (use at least 1¼" margins and a font size of at least 20 point) to me via e-mail no later than **noon Thursday, September 17<sup>th</sup>**.

Note that, despite actual practice, Respondents do prepare Points in this competition.

### **Points Template**

#### **1: *RULING OF THE COURT***

What specific **action** or **ruling** of the court is alleged to be error? What is it that the trial judge did wrong (should have done differently)?

#### **2: *WHY WAS THE RULING WRONG?***

Specifically, **what was wrong** with the ruling of the judge? What is the **legal basis** for concluding that the judge's ruling was erroneous?

#### **3: *WHEREIN WAS THE ERROR MADE?***

What **facts** (testimony/evidence/material in the record) give rise to the conclusion that the court erred? How do these facts, when viewed in context of the legal basis for the party's argument (the why), support the conclusion that the judge erred?

#### **THE SUGGESTED WORDING:**

**The trial court erred in**

**Because**

**In that**

***BBCB, LLC v. The City of Independence***  
**201 S.W.3d 520 (Mo. Ct. App. W.D. 2006)**

Big Bob's County Bunker (BBCB) appeals the circuit court's judgment, pursuant to § 536.150.1, upholding the decision of the Liquor License Officer (LL Officer) of the respondent, City of Independence (City), to revoke BBCB's city liquor license.

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We affirm.

Facts

BBCB owned and operated "The Bunker," a nightclub in Independence, Missouri. BBCB was the holder of a city liquor license issued by the City, which allowed it to sell alcoholic beverages by the drink and packaged liquor at The Bunker.

In 2003, the City's police department received numerous complaints from neighbors concerning excessive noise at The Bunker. In August 2003, due to the number of complaints received, the case was referred to the Community Service Division (CSD) of the City's police department for investigation. The CSD flagged The Bunker as a nuisance and assigned Officer Harold Echols to the case.

Echols proceeded to investigate the alleged noise problems at The Bunker. Echols, having identified the owner of The Bunker as BBCB, sent its representatives, Ollie Gates and David Rauzi, letters of abatement notifying them that The Bunker had been identified as a nuisance and directed it to take the necessary steps to abate the excessive noise. Despite the letters, the police continued to receive complaints from neighbors concerning excessive noise. In fact, Echols went to The Bunker to investigate numerous complaints of excessive noise, including on June 24, 2004, June 25, 2004, and July 10, 2004. On those dates, to determine the noise level at The Bunker, Echols took decibel readings near the property line, which confirmed that the noise levels exceeded 50 decibels, in violation of § 7.10.006. . . .

As a result of the ongoing complaints against The Bunker, the City's LL Officer, Terry Hartwig, was contacted about the case. After investigating, he sent a "show cause" letter to BBCB notifying it that on September 17, 2004, at 10:00 a.m., pursuant to § 2.06.002.A, a hearing would be conducted at City Hall to determine whether BBCB's liquor license should be suspended or revoked. The letter advised BBCB that its liquor license was being considered for suspension or revocation for "violations of the City Code," specifically: (1) "licensee has not at all times maintained an orderly place"; . . . In addition, the letter set forth the underlying bases for the alleged violations:

1. . . .
2. Maintaining a nuisance property on or about August 24, 2004;
3. Maintaining a nuisance property on or about July 10, 2004;
4. Maintaining a nuisance property on or about June 25, 2004;
5. Maintaining a nuisance property on or about June 24, 2004;
6. Maintaining a nuisance property on or about March 6, 2004;
7. Numerous phone calls regarding noise and/or other nuisance at the licensed premises during 2004; . . .

At the revocation hearing before the LL Officer, Echols and two neighbors testified on behalf of the City . . . BBCB was given an opportunity to defend itself. No record of the hearing was made. At the conclusion of the hearing, the LL Officer revoked BBCB's liquor license, based on the alleged Code violations with respect to The Bunker.

Pursuant to § 2.11.001.A of the Code, BBCB appealed the LL Officer's decision to revoke its liquor license to the city council. The appeal was heard on October 4, 2004. At the appeal, Echols testified that there had been numerous noise complaints made against The Bunker by neighbors. He also testified that on June 24, 2004, June 25, 2004, and July 10, 2004, he went to The Bunker and took decibel readings, which indicated noise levels that exceeded 50 decibels in violation of § 7.10.006. . . . He further testified that neighbors of The Bunker had made at least 50 noise complaints to the police. Valerie Logan, one such neighbor, testified that the excessive noise at The Bunker had been an ongoing problem for the neighborhood. Rauzi was present and testified on behalf of The Bunker. At the conclusion of the appeal, the city council affirmed the LL Officer's revocation of BBCB's liquor license.

On October 5, 2004, BBCB appealed the City's revocation of its liquor license to the Circuit Court of Jackson County. . . . BBCB's appeal was heard by the circuit court on October 15, 2004.

\* \* \*

Before the circuit court, the City called the LL Officer who testified that he revoked BBCB's liquor license on the basis, *inter alia*, that The Bunker was not maintained as an orderly place of business because there were numerous complaints from neighbors concerning excessive noise, and it failed to abate the nuisance despite repeated warnings from the City. The Bunker's neighbors, including Logan, Ann LeCluyse, and Julie LeCluyse, testified that they had called the police on numerous occasions to complain about the excessive noise at The Bunker. Officer Echols testified that The Bunker had generated more complaints than any other local business. On December 18, 2004, the trial court affirmed the City's revocation of BBCB's liquor license.

This appeal follows.

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### III.

In Point III, the appellant claims that:

[T]he trial court erred in affirming the city's revocation because the city failed to adduce competent and substantial evidence which supported the revocation and because the revocation was made without law procedures in that the city's evidence was wholly lacking as proof of the essential elements of the case and in that the city made no record of its two revocation hearings so it left nothing to review as to the requirement of lawful procedures.

Before attempting to address the merits of the appellant's claim of error, we must first address the obvious deficiencies of the appellant's Point Relied On (PRO). *See Finnical v. Finnical*, 81 S.W.3d 554, 557-58 (Mo. App. 2002) (stating that an appellate court must first address briefing deficiencies to determine, *sua sponte*, its own jurisdiction). The appellant's PRO in this point fails to comply with Rule 84.04(d), governing proper PROs.

Rule 84.04(d)(1) provides:

- (1) Where the appellate court reviews the decision of a trial court, each point shall:
- (A) identify the trial court ruling or action that the appellant challenges;
  - (B) state concisely the legal reasons for the appellant's claim of reversible error; and
  - (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

Thus, Rule 84.04(d)(1) requires that a proper PRO must: (1) identify the ruling or action of the trial court that is being challenged on appeal; (2) state the legal reason or reasons for the claim of reversible error; and (3) explain in summary fashion why, in the context of the case, the legal reason or reasons support the claim of reversible error. *Johnson v. Mo. Dep't of Health & Senior Servs.*, 174 S.W.3d 568, 587 (Mo. App. 2005). 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. *Id.* at 587. The failure to comply with Rule 84.04(d) warrants dismissal of the appeal. *Id.*

BBCB's PRO in Point III fails to explain in summary fashion why, in the context of this case, the legal reason or reasons alleged support its claim of reversible error. Its PRO is nothing more than an abstract statement of the law, which is unacceptable in satisfying the requirements of Rule 84.04(d). *Id.* at 587-88. In essence, all it claims is that the trial court was wrong. BBCB's failure to comply with Rule 84.04(d) is sufficient reason to dismiss its claim of error in Point III. *Id.* at 588. It is not proper for the appellate court to speculate as to the point being raised by the appellant and the supporting legal justification and circumstances. *Sullivan v. Sullivan*, 159 S.W.3d 529, 537 (Mo. App. 2005). To do so, would cast the court in the role of an advocate for the appellant, which we cannot be. *Id.* Nonetheless, in keeping with our policy that we would prefer to rule on the merits, if possible, rather than dismiss for briefing deficiencies, *id.*, and in an attempt to understand BBCB's claim in this point, we will view it in light of its argument thereon.

After reading BBCB's PRO in this point in conjunction with its argument, we are able to ascertain the appellant's claim. In essence, it is claiming that the trial court erred in affirming the City's revocation of its liquor license because the record is insufficient to support the grounds on which the City revoked BBCB's license. In that regard, it claims that there was insufficient evidence to support a finding, pursuant to § 2.06.001, setting forth the grounds for revoking a liquor license, that The Bunker had not at all times maintained an orderly place of business in violation of the City Code. We disagree.

In reviewing a noncontested case, this court reviews the trial court's judgment, not the agency's decision and, thus, the standard of review is the same as in any other court-tried case. *State v. Mo. State Highway Patrol*, 168 S.W.3d 122, 126 (Mo. App. 2005); *Cade*, 990 S.W.2d at 37. Thus, the scope of our review is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The trial court's judgment will be affirmed, unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares or erroneously applies the law. *Id.* at 32. Hence, we review the trial court's decision, as to whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion, to determine whether it is supported by substantial evidence, is not against the weight of the evidence, or erroneously declares or applies the law. *Mo. State Highway Patrol*, 168 S.W.3d at 126-27; *Cade*, 990 S.W.2d at 37. The evidence and all

reasonable inferences drawn therefrom will be viewed in the light most favorable to the trial court's judgment and all contrary evidence and inferences are disregarded. *Pride v. Lewis*, 179 S.W.3d 375, 378 (Mo. App. 2005). The trial court is the trier of fact and, as such, determines the credibility of witnesses and is free to believe or disbelieve all or part of witness testimony. *Id.*

Section 2.06.001 sets forth the permissible grounds for suspension or revocation of a liquor license. It reads:

The following actions shall be considered as grounds for suspension or revocation of a license:

1. A licensee has not at all times maintained an orderly place; or

\* \* \*

§ 2.06.001. Proof of any one or more of these grounds would be sufficient to revoke a licensee's liquor license.

In his letter of revocation, the LL Officer advised BBCB that its liquor license was being revoked on ground 1 . . . of § 2.06.001. . . .

As to grounds found, he further advised that they were based on his findings that the underlying factual allegations were true:

1. . . .

2. Maintaining a nuisance property on or about August 6, 2004; July 10, 2004; June 25, 2004; and June 24, 2004, by actions including but not limited to, failing to abate all criminal and nuisance activity when given written notice on August 29, 2003, by exceeding the noise level after 10:00 p.m. set forth by City ordinance;

3. . . .

4. Numerous police calls regarding noise and/or other nuisance at the licensed premises during 2004 (approximately 50 calls so far);

\* \* \*

BBCB claims that the record does not support these factual findings of the LL Officer, including those concerning the noise complaints, such that its findings as to the grounds for revocation are not supported by the record. Our review of the record, viewed in a light most favorable to the judgment of the trial court, supports the allegation that there were "[n]umerous police calls regarding noise and/or other nuisance at the licensed premises during 2004," which, in turn, is sufficient to support the first ground found by the LL Officer for revoking BBCB's liquor license, that The Bunker failed to maintain an orderly place of business at all times, in accordance with § 2.06.001.1.

The City contended at trial, *inter alia*, that evidence of numerous complaints from neighbors concerning excessive noise at The Bunker and the failure of BBCB to abate this nuisance, despite numerous letters of abatement from the City, constituted a "[f]ailure to at all times maintain an orderly place," in violation of § 2.06.001.1. In support of its contention, the City called the LL Officer, who testified that he revoked the BBCB's liquor license, *inter alia*, on the basis that the police had received numerous noise complaints regarding The Bunker. The LL Officer testified that, in his opinion, a business is not an orderly place of business if there are numerous complaints from neighbors concerning

excessive noise and the business fails to abate the nuisance despite repeated warnings from the City. To corroborate his testimony, concerning the numerous noise complaints, the City called Logan, a nearby neighbor, who testified that, due to the noise at The Bunker, she had called the police at least fifteen times. Similarly, Ann LeCluyse, another neighbor, testified that she had called the police, at least, thirty times. Her daughter, Julie LeCluyse, also testified that, in the last two years, she had called the police, at least, thirty times. Finally, Officer Echols, testified that The Bunker had generated more phone complaints than any other local business establishment. The trial court was free to believe the testimony of these witnesses. *Pride*, 179 S.W.3d at 378. If believed, this testimony was sufficient to establish that due to the overwhelming number of noise complaints, The Bunker was in violation of § 206.001.1, failure to maintain, at all times, an orderly place of business. As such, the trial court did not err in affirming the City's revocation of BBCB's city liquor license.

Point denied.

### Conclusion

The circuit court's judgment upholding the City's revocation of BBCB's liquor license is affirmed.