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MISSOURI APPELLATE PRACTICE - 2019 UPDATE

I prepared this Missouri appellate practice update as part of a CLE Program sponsored by Solo and Small Firm Committee of the Bar Association of Metropolitan St. Louis. I am presenting my part of the program along with Norah Ryan. This article expands upon an earlier version that I prepared for another CLE program this past summer. Since that time, I've discovered several new cases revealing some important new developments on appellate practice issues. Most notably, the Supreme Court has just clarified the answer to the thorny question for appellate purposes of what is a judgment. The appellate courts also have offered some clarity on when you have to file a post-trial motion to preserve an issue in a bench-tried case under the recent revision to Rule 87.07(b). And I've added a section covering a few wrinkles I've run across in electronic filing for appellate cases.

A. Word of Caution in the *Ivie* Footnote

For those of you who may not be familiar with the decision, the Missouri Supreme Court created a monumental change in framing the issues for appeals of court-tried cases several years ago. See, *Ivie v. Smith*, 439 S.W.3d 189 (Mo. banc 2014). Because of the general standard of review, appellate lawyers customarily would raise a single claim of trial court error on the ground that the challenged ruling was not supported by substantial evidence, was against the weight of the evidence and involved a misapplication of law. In what has become a critical footnote in *Ivie*, the Supreme Court took aim at this combined approach as a violation of Rule 84.04(d). *Ivie,* 439 S.W.3d at 199, n. 11. Judge Zel M. Fischer, writing for the Court, observed in his footnote these were distinct claims. The distinct claims must appear in separate points relied on in the appellant's brief to be preserved for appellate review. *Id.* at 199, n. 11.

Before *Ivie*, the Missouri Supreme Court recognized that a claim on appeal could present a mixed question of fact and law. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012). Yet the Court in *Ivie* criticized an appellant for combining into the same point relied on a substantial-evidence challenge, a misapplication-of-law challenge, and an against-the-weight-of- the-evidence challenge. *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014). How does the appellant's lawyer comply with *Ivie* when the claim on appeal presents a mixed question of fact and law? I view this kind of dilemma as the *Ivie* trap.

My concern is with the gray area when a single claim on appeal presents a mixed question of fact and law. I offer a few illustrative examples from recent cases to demonstrate my concern. The Missouri Supreme Court found a mixed question of fact and law was presented by the determination of whether a particular map complied with the constitutional compactness requirement for congressional districts. *Pearson v. Koster*, 367 S.W.3d 36, 47 (Mo. banc 2012). Later, the Western District found a mixed question of fact and law over whether there was substantial evidence under the law applicable to fixtures or abandonment to support a judgment. *Herron v. Barnard,* 390 S.W.3d 901, 911 (Mo.App. W.D. 2013). The Western District also found a mixed question over whether a firefighter was entitled to official immunity under the facts of the particular case. *Rhea v. Sapp,* 463 S.W.3d 370, 375 (Mo.App. W.D. 2015). The Eastern District found the same kind a mixed question in deciding if there was sufficient evidence to support a finding that a father was unfit as matter of law to serve as a guardian. *In re L.M.*, 488 S.W.3d 210, 217 (Mo.App. E.D. 2016). And the Western District found a mixed question in determining if two lawyers were members of the same firm for the purpose of determining if a fee sharing agreement was enforceable under Rule 4-1.5(e) of the Rules of Professional Conduct. *Brady v. Starke*, 517 S.W.3d 28, 33 (Mo.App. W.D. 2017). Most recently, the Southern District found a mixed question over whether sufficient evidence supported a finding against parties claiming rights to unique property by adverse possession. *Scott v. Hicks*, 567 S.W.3d 266, 269 (Mo.App. S.D. 2019).

From a practical standpoint, what does the *Ivie* rule mean when a proposed point relied on presents this kind of mixed question of fact and law? Traditionally, courts would admonish an appellant to use the argument to explain "how the principles of law and the facts interact." *In re State of Missouri, Dept. of Social Services, Family Support Division v. Shipley*, 517 S.W.3d 37, 39 (Mo.App. W.D.

2017). Yet now under *Ivie*, an appellant who follows this course could be accused of improperly combining legal and factual issues in a single point.

Some appellate panels will give lawyers the latitude to combine legal and factual issues when the panels are satisfied that the point creates a true mixed question of fact and law. But what if a particular panel disagrees with the appellate lawyer's characterization of the issue? Hopefully, the Missouri Supreme Court at some point will reconcile the conflicting approaches in *Pearson* and *Ivie*. Until that happens, however, the appellant's lawyer must navigate the minefield of drafting points and arguments in a way that will not cause his or her appeal to be dismissed.

B. 2017 Change in Missouri Supreme Court Rule 78.07(b)

For a court-tried case, Rule 78.07(b) has long provided that "neither a motion for a new trial nor a motion to amend the judgment is necessary to preserve any matter for appellate review." Under this traditional rule, it was customary for appellants to go straight to the Court of Appeals after the trial court issued its judgment. Rule 78.07(c) created an exception for allegations of error "relating to the form or language of the judgment, including the failure to make statutorily required findings." For those narrow kinds of issues, the rule still requires a motion to amend the judgment.

The old Rule 78.07(b) was not absolute for all purposes. Despite the declaration in the rule that no post-trial motion was necessary, some courts nonetheless held that an appellant still had to make some effort to bring an error to the trial court's attention. See, e.g., *Bank of Am., N.A. v. Duff*, 422 S.W.3d 515, 518 (Mo.App. E.D. 2014); *McMahan v. Missouri Dep't of Soc. Servs., Div. of Child Support Enforcement*, 980 S.W.2d 120, 126 (Mo.App. E.D. 1998). Because of the categorical nature of Rule 78.07(b), these kinds of rulings created an ambiguity over whether the appellant's obligation to bring an error to the attention of the trial court applied if the error first appeared in the judgment itself. Such an obligation would appear to contradict the rule that no post-judgment motion was necessary. A related rule creates an exception on the general need to object to preserve an error "if a party has no opportunity to object to a ruling or order at the time it is made." See, Mo.Sup.Ct.R. 78.09.

The appellate courts addressed these kinds of contradictions by defining the preservation of error rule in disjunctive terms. "An issue that was never presented

to *or decided by the trial court* is not preserved for appellate review." *Credit Invs., Inc. v. Dieter*, 504 S.W.3d 253 (Mo.App. S.D. 2016) (emphasis supplied) (holding due process question in calling case for hearing without proper notice was not preserved for appellate review). "[T]here can be no review of a matter which has not been presented to *or expressly decided* by the trial court." *BMJ Partners v. King's Beauty Distributor Co.*, 508 S.W.3d 175, 179 (Mo.App. E.D. 2016) (emphasis supplied) (holding notice of lease termination issue was neither presented to or expressly decided by the trial court). This dual approach suggested that an appellant did not necessarily have to present a formal objection to preserve an issue if the trial court expressly ruled on that issue.

Effective July 1, 2017, Rule 78.07(b) was amended to state that no post-judgment motion will be required in a court-tried case only if the matter was previously presented to the trial court:

> Except as otherwise provided in Rule 78.07(c), in cases tried without a jury or with an advisory jury, neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review *if the matter was previously presented to the trial court.*

Mo.Sup.Ct. R. 78(b) (effective. July 1, 2017) (emphasis supplied).

This new rule puts the onus on the appellant to file a post-trial motion to preserve the issue if it was not previously presented. This rule change is expected to make the filing of a post-trial motion mandatory in far more court-tried cases. And recent cases suggest that this is likely to be true. See, e.g., *Franklin Farms, LLC v. N. Am. Auction Co.,* 554 S.W.3d 497, 501 (Mo.App. E.D. 2018) (observing that under the amended version of Rule 78.01(b), the matter must previously have been presented to the trial court to be preserved for appellate review); *Butler Cty. Juvenile Office v. T.S.H.*, 566 S.W.3d 629, 632, n. 6 (Mo.App. S.D. 2018) (holding Southern District could not address due process argument not raised at trial); *Fox Creek Constr., Inc. v. Opie's Landscaping, LLC*, 2019 Mo.App. LEXIS 1171*11 , n. 7 (July 30, 2019) (noting that a concurring opinion would have held the question of whether the judgment was supported by substantial evidence was not properly preserved under Rule 78.07(b), but certifying the question for transfer to the Missouri Supreme Court).

It remains to be seen what practical impact the change will have on the

general preservation of error standards. Appellate lawyers must be aware of this important rule change.

C. Recent Cases on Appellate Practice Issues

What is a "Judgment"? The Missouri Supreme Court issued two decisions this year to clarify "persistent confusion surrounding the issues of what a judgment is, what form it takes, and when it is entered." *State ex rel. Henderson v. Asel,* 566 S.W.3d 596, 598 (Mo. banc 2019). The two cases are *Henderson* and *Meadowfresh Solutions United States v. Maple Grove Farms*, 2019 Mo. LEXIS 313 (Mo. banc Aug. 13, 2019). This article explains the holdings in *Henderson* and *Meadowfresh Solutions* and how the Supreme Court resolved what is often a thorny question for appellate purposes: What is a judgment?

The general rule is that a party may only appeal from a judgment denominated as such under Rule 74.01(a). The trial court in *Henderson* sustained a motion to dismiss filed by the defendants in a case for lack of subject matter jurisdiction. *State ex rel. Henderson v. Asel,* 566 S.W.3d 596, 598 (Mo. banc 2019). The lawsuit raised claims over a sales tax election. The trial court declared in its docket entry that the cause was "dismissed in its entirety without prejudice." But the dismissal order was not denominated as a judgment. Henderson petitioned the Western District and the Supreme Court for an extraordinary writ. Both petitions were denied. Henderson nonetheless filed a notice of appeal to the Supreme Court under its exclusive jurisdiction. The Supreme dismissed the appeal for want of an appealable judgment. Henderson then went back to the trial court and asked that the dismissal order be denominated as a judgment. The trial court refused. Henderson then petitioned the Supreme Court for a writ of mandamus seeking the same relief. This time the Supreme Court granted the extraordinary writ. *Id.* at 598.

In issuing the writ, Judge Paul C. Wilson, writing for a unanimous Supreme Court, made clear that the order of dismissal was a judgment. The Court defined a judgment as "a legally enforceable judicial order that fully resolves at least one claim in a lawsuit and establishes all the rights and liabilities of the parties with respect to that claim." *Id.* at 598. Because the dismissal order in *Henderson* was intended to resolve all of Henderson's claims against all the defendants, Judge Wilson ruled that it was a judgment and should have been so denominated. *Id.* at 599. The Court left open the question of whether the trial court intended the

judgment to be "with prejudice" or "without prejudice." And the Court understood that this distinction could still affect whether the judgment was appealable. But the Court ruled that the distinction did not change the trial court's obligation to denominate the dismissal order as a judgment *Id.* at 600.[1]

The Supreme Court again confronted the question of what constitutes a judgment in *Meadowfresh Solutions United States v. Maple Grove Farms*, 2019 Mo. LEXIS 313*1 (Mo. banc Aug. 13, 2019). Relying on the rule that a judgment had to be so denominated, the Southern District dismissed an appeal from an order denying a motion to revoke an interlocutory order appointing a receiver. See, *Meadowfresh Sols. USA, LLC v. Maple Grove Farms, LLC*, 2019 Mo. App. LEXIS 105 (Mo.App. S.D. Feb. 4, 2019). The Southern District reached this conclusion even though the order denying the motion was explicitly appealable under §515.665 RSMo (2016) and §512.020 RSMo (2016). Judge Nancy Steffen Rahmeyer dissented and certified the case for transfer to the Missouri Supreme Court under Rule 83.03.

On transfer, Chief Justice George W. Draper, III, writing again for a unanimous Supreme Court, ruled that the interlocutory order denying the motion to revoke the receivership indeed was appealable. *Meadowfresh Solutions United States v. Maple Grove Farms*, 2019 Mo. LEXIS 313*1 (Mo. banc Aug. 13, 2019). And because the interlocutory order did not resolve at least one claim and establish all the rights and liabilities for such a claim, it was not a "judgment" and did not have to be so denominated. *Id.* *1. So, the Court ruled that the order under review was only interlocutory because it "is not final and decides some point or matter between the commencement and the end of the suit but does not end the entire controversy." *Id.* *5-6. Yet this distinction did not cause the appeal to be dismissed.

In allowing the appeal from the order denying the revocation of the receivership to go forward, the Court relied largely on its precedent in allowing a similar appeal from an order denying arbitration. *Meadowfresh Solutions, supra, **8, citing *Sanford v. CenturyTel of Missouri, LLC*, 490 S.W.3d 717 (Mo. banc

[1] Relying on the Supreme Court's holding in *Henderson*, the Western District just issued a permanent writ of mandamus directing a trial judge to enter a judgment, denominated as such, when granting a motion for summary judgment. *State ex rel. Malin v. Joyce,* 2019 Mo.App. LEXIS 910 *8 (Mo.App. W.D. June 11, 2019)

2016). The Court held in *Sanford* that the interlocutory order denying the arbitration did not become a judgment just because a statute made it subject to an interlocutory appeal. *Id.* at 721. Applying the same reasoning, the Court ruled that "[r]equiring a circuit court to inaccurately label its clearly interlocutory order as a judgment for the sole purpose of allowing Maple Grove to perfect an appeal, which is authorized by two different statutes, defies reason and elevates form over substance." *Meadowfresh Solutions, supra,* * 8. The Court retransferred *Meadowfresh Solutions* to the Southern District to consider the underlying merits of the appeal. *Id* *11. In reaching this decision, the Court cautioned the opinion did not eliminate the normal rules for when an actual "judgment" resolves at least one claim under the "distinct judicial unit" rule and is certified for appeal under Rule 74.01(b). *Id.* *9.

So, in the end, the Supreme Court was consistent in defining a judgment as "a legally enforceable judicial order that fully resolves at least once claim in a lawsuit and established all the rights and liabilities of the parties with respect to that claim." *Henderson, 566* S.W.3d at 598; *Meadowfresh Solutions, supra,* * 1. Yet the Supreme Court reached opposition conclusions in deciding whether the particular orders under review met this definition and how this affected the right of appeal.

Procedural Predicate for Mandamus Appeal: In a high profile appeal, the Missouri Supreme Court opened the door for a gay employee and his friend to claim discrimination under the Missouri Human Rights Act on the theory that the gay employee did not "exhibit the stereotypical attributes of how a male should appear and behave." *Lampley v. Mo. Comm'n on Human Right*s, 570 S.W.3d 16, 25-26 (Mo banc 2019). But if two of the judges would have had their way, the Court never would have reached the question. The Missouri Human Rights Commission terminated its investigation in the matter and refused to issue right-to-sue letters. The Commission did so on the theory that the Act does not protect against discrimination based on sexual orientation. *Id.*at 20. The claimants filed petitions for administrative review, or alternatively, a writ of mandamus to force the Commission to issue right-to-sue letters. *Id.* The trial court granted summary judgment in favor of the Commission. Claimants appealed. *Id*. Writing for the majority, Judge George W. Draper, III, reversed the judgment and directed the trial court to remand with instructions for the Commission to issue the right-to-sue letters. *Id.*at 25-26.

Two of the judges disagreed and would have dismissed the appeal on procedural grounds. Judge Powell contended the only remedy for review of this noncontested case was by writ of mandamus. *Id.* at 47 (Powell, J., dissenting). And Judges Powell and Fischer both pointed out that the appellants proceeded with their administrative review actions by summons and not by a preliminary order in mandamus. *Id.*at 49; see also, Id. at 32 (Fischer, C.J., concurring in part and dissenting in part). Because of this procedural deficiency, Chief Judge Fischer declared: "The failure to follow Rule 94 is where the resolution of this case should begin and end." Id. at 32 (citing Judge Fischer's own concurring opinion in *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 365 (Mo. banc 2013) (Fischer, J. concurring).

In the principal opinion, Judge Draper disagreed with Judge Powell's assertion that mandamus was the only avenue for review of an uncontested administrative case under §536.150 RSMo. (2000). *Id.*at 20-21. And Judge Draper did not consider Judge Fischer's concurring opinion in *Boresi* to be controlling. *Id.*at 21. Nor could the appellants be charged with knowledge of any procedural flaws revealed by more recent decisions issued after their suit was filed. *Id.*at 22.[2] In the end, Judge Draper thought the importance of the sexual stereotyping issue justified an exercise of discretion to consider the case. *Id*. at 21-22. It remains to be seen if appellate courts will be as lenient in allowing future mandamus appeals.

The Timing for the Appeal from a Civil Contempt Judgment: . The general rule is that a civil contempt order is not final and appealable until it is enforced. *Emmons v. Emmons*, 310 S.W.3d 718, 722 (Mo.App. W.D. 2010). When the remedy is imprisonment, the traditional rule is that the contempt order is enforced when there is actual incarceration under an order or warrant of commitment. *In re Marriage of Crowe and Gilmore,* 103 S.W.3d 778, 781 (Mo. banc 2003).

The appellant in a recent appeal from a civil contempt order met this often critical timing requirement for his appeal. Yet his appeal ultimately was unsuccessful. The trial court found him in civil contempt for failing to comply with an injunction calling for the removal of a building, fence and satellite dish. *Cty. of Boone v. Reynolds*, 573 S.W.3d 696, 699 (Mo.App. W.D. 2019). The trial court

[2] See, *State ex rel. Tivol Plaza, Inc. v. Mo. Common on Human Rights*, 527 S.W.3d 837 (Mo. banc 2017) and *Bartlett v. Mo. Dept. of Ins*., 528 S.W.3d 911 (Mo. banc 2017).

rejected the contemnor's representations that he did not have the financial ability to purge himself from the contempt. The court then entered its Contempt Judgment and Order of Commitment. *Id.*at 702**.**

On appeal, the Western District concluded that the trial court's findings about the contemnor's financial ability to purge himself from the contempt were supported by substantial evidence and not against the weight-of-the-evidence. *Id.*at 704. The Western District also rejected the contemnor's attempt to collaterally attack the underlying injunction under Rule 74.06. *Id.* at 705. The court observed that Rule 74.06 is not to be used as an alternative to a timely appeal. *Id.* at 705.

D. Electronic Filing Issues

Before I conclude, I should remind you that your appellate briefs must be filed electronically under Supreme Court rules. The rules for electronic filing have been in place for a number of years now. You should review the local rules in each of the three districts carefully to ensure compliance with the procedures. Hard copies have not been eliminated. Under Eastern District Local Rule 333, for example, you still need to file four hard copies of your brief within five days after electronic filing. This is less than the ten hard copies required under the old rules. And you still need to file one original copy of the Transcript within five days after electronic filing. But the old requirement for filing a hard copy of the Legal File has been eliminated in most cases. You now may file the Legal File electronically by simply checking the documents you will want to include. The certification of your list of documents then will be created for filing electronically. This is a far easier procedure than the old method for requesting the documents from the clerk and then preparing and filing an index and electronic copy of the Legal File.

I have run across a few wrinkles in electronic filing system that may be worth mentioning. First, if you were not the lawyer representing the appellant at trial, you may have difficulty in accessing some of the trial court records for the purpose of compiling the Legal File. This is often a special problem in domestic relations cases where some records are confidential. If this occurs, your entry of appearance in the appeal may not be sufficient to allow you full access to the trial court record. If this happens, you may have to enter your appearance as an attorney of record in the trial court to gain access to the necessary records. You can call the OSCA Help Desk if you need assistance with this process.

Second, you can't always assume that the transcript alone is sufficient to create the full record of the trial. When lawyers play videotaped depositions to a jury, I've learned that a common practice among court reporters is to just say in the transcript that a videotaped deposition was played to the jury without elaborating on the substance of what was actually played. If the deposition testimony becomes an issue for one of your points on appeal, you may have to ask leave to supplement the Legal File with the deposition transcript. Or, if you can obtain the cooperation of opposing counsel, you may be able to supplement the Legal File in this manner by stipulation.

Finally, there is the question of submitting trial exhibits. Under Supreme Court Rule 81.16, if original trial exhibits are necessary to the determination of any point on appeal, the exhibits must be deposited with the appellate court "on or before the day the reply brief is due or when the court so directs, whichever is earlier." Be careful here. The rules on trial exhibits are different in each district. In the Western District, lawyers may file the trial exhibits electronically so long as the lawyer certifies that the exhibits "are in fact the original exhibits submitted to the court or agency from which the appeal is taken." Western District Local Rule 12(d). But unlike the later filing date called for in Supreme Court Rule 81.16, the Western District compels the lawyers to submit their exhibits "no later than the date on which they file their initial briefs in this Court." Western District Local Rule 4. By contrast, the Eastern District continues to allow exhibits to be deposited by the later date when the reply brief is due. But under Eastern District Rule 333(e) and Southern District Rule 4, copies of the exhibits only may be filed electronically "if the opposing party consents." So, as a practical matter, you must secure the written consent of your opposing counsel to avoid the burden of delivering the original exhibits to the Eastern District or the Southern District. Even if you secure that consent, the Eastern District still will not allow electronic filing for "photographs, oversized exhibits, or physical objects." Eastern District Rule 333(e). The Southern District has a similar rule for "original photographs or oversize exhibits." Southern District Rule 18(e). For those kinds of exhibits, you must submit the original exhibits to the Court under Rule 81.16.

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