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JUDICIAL WORD GAMES AND HYPERTECHNICALITIES

Introduction: The Disturbing Trend under Rule 84.04(d).

This article confronts what I consider to be a disturbing trend in how Missouri appellate courts are applying Supreme Court Rule 84.04(d). I approach any criticism of this entrenched rule with some caution. Still, as a retired lawyer on inactive status, I no longer feel constrained by how my opinion might affect clients with pending appeals.

Missouri appellate lawyers appreciate the importance of Rule 84.04(d) in framing issues for appeal. When working under the Missouri Rules, lawyers must use a full disclosure method of identifying "points relied on."[1] An appellant must state the basis of the claim of trial court error and explain in the body of the point wherein and why the court erred. The point must be presented in substantially the following format: "The trial court erred in *[identify the challenged ruling or action*] because [*state the legal basis 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*]." [2] To my knowledge, Missouri is the only state in the country that has this kind of unique appellate rule.

The seminal case for interpreting Rule 84.04(d) continues to be *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978). The Supreme Court in *Thummel* declared: "The requirement that the point relied on clearly state the contention on appeal is *not simply a judicial word game or a*

[1] Mo. Sup. Ct. R. 84.04(d).
[2] *Id.*

matter of hypertechnicality on the part of the appellate courts." *Id.* at 686. (emphasis supplied) Instead, the Court insisted the rule was "rooted in sound policy." *Id.* at 686. The most important objective was "the threshold function of giving notice to the party opponent of the precise matters which must be contended with and answered." *Id.* at 686. The Court also viewed such notice as "essential to inform the court of the issues presented for resolution." *Id.* at 686.

No matter how justifiable these objectives might be, I worry that the Missouri appellate courts in recent years are turning the application of Rule 84.04(d) into just the kind of "judicial word games" and "hypertechnicalities" rejected by *Thummel*. Historically, the courts most often applied the rule to dismiss appeals or points brought by *pro se* litigants who were unfamiliar with the technical requirements of the rule.[3] But more recently, the appellate courts are now attacking counsel for perceived rule violations. Just within the last year or so, the Missouri Supreme Court and the intermediate appellate courts repeatedly dismissed appeals or individual points relied on because of counsel's noncompliance with the mandatory briefing requirements of Rule 84.04.[4] It seems like barely a week goes by without someone getting hit by a Rule 84.04(d) violation. Even if the court "gratuitously" chooses to take up the matter, the court has sufficiently criticized the lawyer with the rule violation that the decision on the merits typically becomes a foregone conclusion.[5]

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[3] See, *Ireland v. Division of Employment Security*, 390 S.W.3d 895 (Mo.App.W.D. 2013); and *Estate of Kyle v. 21st Mortgage Corporation*, 515 S.W.3d 248 (Mo.App. S.D. 2017).

[4] *Lexow v. Boeing Co.,* 643 S.W.3d 501, 510 (Mo. banc 2022); *O.H.B. v. L.Y.S.*, 685 S.W.3d 329, 331, n. 1 (Mo.App. E.D. 2023); *Wilson v. Schmelzer*, 653 S.W.3d 913, 917 (Mo.App. E.D. 2022); *Gan v.Schrock*, 652 S.W.3d 703, 711 (Mo.App. W.D. 2022); *Young v. Missouri Dep't of Soc. Servs.*, 647 S.W.3d 73, 78 (Mo.App. E.D.2022); *Jefferson v. Missouri Dep't of Soc. Servs.*, 648 S.W.3d 50, 55 (Mo.App. E.D.2022); *Schultz v. Bank of Am. Merrill Lynch Credit Corp.*, 645 S.W.3d 689, 697 (Mo.App. E.D. 2022).

[5] See, for example, *Ivie v. Smith*, 439 S.W.3d 189 (Mo banc 2014); *O'Gorman & Sandroni, P.C. v. Steve Dodson Dibia Clayton Computer*, 478 S.W.3d 539 (Mo.App. E.D. 2015); and *Sellers v. Woodfield Property Owners Ass'n*, 457 S.W.3d 357 (Mo.App. S.D. 2015).

A. The Impact of *Ivie v. Smith.*

In my view, this turn of events began nearly a decade ago with *Ivie v. Smith*, 439 S.W.3d 189 (Mo. banc 2014). In *Ivie*, the Missouri Supreme Court focused on the second element of the point relied on in a court-tried case. That is, the Court focused on the "because" element that requires the appellant to state the legal basis for the claim of trial court error. The Court cautioned there can be only one legal basis for each point relied on.[6] The Court drew this conclusion even though the rule speaks to plural "legal reasons" and not a singular "reason." This ruling departed significantly from what had been accepted appellate practice in court-tried cases.

Under the standard of review in a court-tried case, the appellate court must affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. This is the often-cited standard from *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Because of the general standard of review, lawyers customarily raised a single claim of trial court error by alleging a challenged ruling was not supported by substantial evidence, was against the weight of the evidence or involved a misapplication of law.

The Supreme Court in *Ivie* took aim at this customary approach. The Court observed in a footnote that the appellant's brief combined into the same point relied on a substantial evidence challenge, a misapplication-of-law challenge, and an against-the-weight-of-the-evidence challenge. The Court ruled these were distinct claims. The Court then ruled that the distinct claims must appear in separate points relied on in the appellant's brief to be preserved for appellate review.[7] Although the Court gratuitously addressed the merits of the

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[6] *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014).

[7] *Id.* at 199, n. 11, citing Rule 84.04 and *In re J.A.R.*, 426 S.W.3d 624, 630, n. 10 (Mo. banc 2014) (ruling in a footnote that "not supported by substantial evidence" and "against the weight of the evidence" were distinct legal claims and should have been raised in two separate points relied on).

appellant's claims, the Court declared: "Appellate counsel should take caution to follow Rule 84.04(d)." [8]

B. The Potential *Ivie* Traps.

From a practical standpoint, *Ivie* added a new layer of complexity to Rule 84.04(d). As I see it, the first potential problem faced by an appellant's lawyer is how to comply with *Ivie* when a single claim of error presents a mixed question of fact and law. I view this dilemma as an "*Ivie* trap."

Before *Ivie*, the Missouri Supreme Court recognized in *Pearson v. Ko*ster, 367 S.W.3d 36, 44 (Mo. banc 2012) that a single claim could present a mixed question of law and fact. The reviewing court would segregate the parts of the issue that were dependent upon factual determinations from those dependent on legal determinations.[9] But under *Ivie*, the appellant must draw this distinction and raise separate points – not only for substantial evidence and weight-of-the-evidence claims – but also for any alleged misapplication of law. Does this mean the appellant's lawyer must draft the legal and factual challenges as separate points even on a mixed question of fact and law? Say, for example, the trial court committed an error of law that only reveals itself as reversible error when the ruling was applied to the facts of the case. If the appellate lawyer must create two separate points, I worry the separation dilutes the strength of each argument.

To my knowledge, the Missouri Supreme Court has never reconciled its conflicting approaches in *Pearson* and *Ivie*. Even if the Court allows an appellant to present a mixed question as a single point, would an appellate court necessarily have to accept a lawyer's characterization of the issue as a true mixed question? Or does the appellant's lawyer just have to run that risk? These are more than abstract hypothetical questions. In multiple cases, the courts treated a

[8] *Ivie*, 439 S.W.3d at 199, n. 11.
[9] *Pearson v. Ko*ster, 367 S.W.3d 36, 44 (Mo. banc 2012).

single claim on appeal as a mixed question of fact and law.[10]

A second potential trap under *Ivie* is that the rule may impose limitations on what the appellant may say in a factual challenge to the judgment. The first element of both a substantial evidence challenge and a weight-of-the-evidence challenge is to "identify a challenged factual proposition, the existence of which is necessary to sustain the judgment."[11] Defining what factual proposition must be proved often is a question of law.[12] Surely the *Ivie* rule does not bar the appellant from citing statutes or cases to show that a particular factual proposition is necessary to sustain the judgment. In my view, this approach is perfectly justified. The appellant is supplying the authority necessary to satisfy the first element of the factual challenge. But how far can the appellant go in defining the factual proposition without being accused of combining legal and factual issues? And why should it matter if the point presents a true mixed question of fact and law?

I cannot answer all these troubling questions. The answers must await clarification from the Missouri appellate courts. Without clear guidance, the appellant's lawyer must navigate the minefield of drafting points in a way that will not cause his or her appeal to be dismissed. The courts characterize the briefing requirements in Rule 84.04(d) as

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[10] See, *Pearson v. Koster*, 367 S.W.3d at 347 (finding a mixed question over whether a particular map complied with the constitutional compactness requirement for congressional districts); *Herron v. Barnard,* 390 S.W.3d 901, 911 (Mo.App. W.D. 2013) (finding a mixed question over whether there was substantial evidence under the law applicable to fixtures or abandonment to support a judgment); *Rhea v. Sapp,* 463 S.W.3d 370, 375 (Mo.App. W.D. 2015) (finding a mixed question over whether a firefighter was entitled to official immunity under the facts of the particular case); and *In re L.M.*, 488 S.W.3d 210, 217 (Mo.App. E.D. 2016)(finding a mixed question over whether there was sufficient evidence to support a finding that a father was unfit as matter of law to serve as a guardian).

[11] See, *O.H.B. v. L.Y.S.*, 665 S.W.3d 329, 333 (Mo.App. E.D. 2023).

[12] Take, for example, the holding in *In re L.M.*, 488 S.W.3d 210, 217 (Mo.App. E.D. 2016). The Eastern District in *L.M.* held there was no substantial evidence to support a finding that a father was unfit to be guardian. But before reaching this factual conclusion, the court reviewed the relevant factors for finding a parent unfit. *Id.* at 217. As part of its reasoning, the Eastern District concluded that the reasons given by the trial court for finding the father unfit in that particular case were insufficient as a matter of law. *Id.*

"clear, unequivocal and mandatory."[13] But my questions show this is not always true.

C. Hypothetical Examples of Judicial Word Games and Hypertechnicalities.

Let me offer a couple hypothetical examples of how appellate courts can play "judicial word games" or engage in "hypertechnicalities" under Rule 84.04(d). I offer these hypotheticals to show the kind of minefield the current rule can create. The hypotheticals also show how courts can trigger the explosion of the mines on any lawyer acting in good faith to comply with the rule.

For my first hypothetical, you can assume an appellant is appealing from a modification of child custody. Suppose the appellant's lawyer argues the trial court's finding of a substantial change in circumstances was against the weight of the evidence. But assume the appellate court on its own questions whether "substantial change in circumstances" was the proper legal standard. The court concludes it was. But the court seems to accuse the appellant's lawyer of raising this legal issue and improperly combining legal and factual issues in violation of *Ivie*. For what it's worth, you can assume the appellant's lawyer disagrees. Instead, assume the lawyer simply believes he or she was following the four-pronged analytical framework for a weight-of-the-evidence challenge. Assume for part of this framework, the lawyer cited cases to show the finding of a substantial change in circumstances was a factual finding necessary to sustain the judgment. Fortunately for the lawyer, you can assume the criticism ultimately has no practical effect because the appellate court gratuitously affirms the judgment on the merits.

For my second hypothetical, you can assume an appellate court accuses an appellant's lawyer of a glaring defect under Rule 84.04(d) of improperly setting out the standard of review as the legal basis for a

[13] See, *O.H.B. v. L.Y.S.*, 685 S.W.3d 329, 331, n. 1 (Mo.App. E.D. 2023)

claim of error. Yet suppose the lawyer actually stated the legal basis for the claim of error was that the trial court misapplied the law. And assume the lawyer made reference to the *de novo* standard of review later in the "in that" portion of his or her point. You will find nothing in Rule 84.04(d) to prevent the lawyer from arguing about the *de novo* standard of review in his or her point relied on. Indeed, the appellant must state the standard of review as a compulsory part of any argument. Once again, you can assume no harm is done because the appellate court gratuitously affirms the judgment on the merits.

These two hypotheticals show how the vagaries of Rule 84.04(d) allow appellate courts to second-guess the judgment of lawyers. The court thus may find a rule violation when none actually exists.

D. Another Approach to Framing Issues for Appeal.

I don't expect to get much traction with my opinion about Rule 84.04(d). I worry the rule is a far too entrenched part of Missouri appellate law. But I hope the Missouri Supreme Court someday will reconsider the structure of the rule. The rule compels appellants to say "the trial court erred in doing [x] because [y] in that [z]." By demanding substantial compliance with this format, I believe the Court is forcing lawyers to create long, convoluted, run-on sentences for each point. In my experience, these points often run a page or longer. I heard one experienced appellate lawyer say at a CLE program that nothing in the rule requires the point to be limited to only one sentence. Technically, this statement may be true. But would you really want to risk dismissal of an appeal by deviating from substantial compliance with the format demanded? And the format in the rule is structured as one sentence.

Rule 84.04(d) cautions the point should be concisely stated. Fair enough. Yet if the lawyer omits matters from a point in the interest of being concise, the court could construe the omission as a waiver of parts of the argument. The rule demands the argument generally should follow the substance of the point relied on. The respondent is allowed to make arguments not included in the appellant's points relied on. The

appellant does not have the same luxury.

I reviewed appellate rules from other jurisdictions and found nothing remotely comparable to Missouri's Rule 84.04(d). These other jurisdictions typically apply what is commonly called the "notice" method of presenting issues. The federal appellate rules say only that an appellant's brief must include "a statement of the issues presented for review."[14] Kansas requires only "a brief statement, without elaboration, of the issues to be decided on appeal."[15] Illinois similarly requires only "a statement of the issues presented for review, without detail or citation of authorities."[16] If the Missouri Supreme Court wants to simplify Rule 84.04(d), I suggest consideration of these kinds of notice rules for guidance.

If the Court adopts the notice approach, the Court might want to add some of the slightly more detailed rule language used in other states. To my mind, these kinds of details sufficiently satisfy the *Thummel* objectives of giving notice of the issues to the opposing party and the appellate court. Of course, if the Court replaces the current Rule 84.04(d), the *Thummel* decision no longer would be controlling law. But if the Court continues to be worried about the notice objectives in *Thummel*, the Court could adopt the Indiana requirement that the appellant "shall *concisely and with particularity* describe each issue presented for review."[17] (emphasis supplied) Or the Court could consider the Ohio requirement that the statement of issues must include "references to the assignments of error to which each issue relates."[18] In a similar vein, Kentucky requires the appellant to "set forth succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal." To add more clarity, Kentucky also requires "a listing under each [point] the authorities cited on that point

[14] Fed. R. App. P. 28(a)(5).
[15] Ks. R. App. P. 6.02(a)(3)
[16] Ill. Sup. Ct. R. 341(h)(3).
[17] Ind. R. App. P. 46(A)(4).
[18] Ohio R. App. P. 16(A)(4).

and the respective pages of the brief on which the argument appears."[19]

Beyond these specific rule samples, the Missouri Supreme Court might consider requiring the appellant simply to include enough facts in a point to ensure it is more than just an abstract proposition of law. Under this approach, the lawyer should not have to spell out each detail necessary for the court to rule in the appellant's favor. This method allows the lawyer to be creative in framing the issue in a way that suggests a favorable result. I taught law students to apply this approach to framing issues under the federal appellate rules when I was coaching moot court teams at Saint Louis University Law School.

Regardless of which approach the Court takes, I believe the Court has options for satisfying the *Thummel* notice objectives without continuing to force appellants to comply with the far more onerous burdens of the current rule.

Conclusion

In sum, the Missouri Supreme Court obviously possesses sole authority to continue applying Rule 84.04(d) if it so chooses. Still, I believe there are sound reasons for reconsidering the rule. In my opinion, the Court can do so consistent with the notice objectives spelled out many years ago in the *Thummel* decision. I have shown how the Court can look to the appellate rules of federal courts and other states for guidance.

If the Court wants to keep Rule 84.04(d) in place, I hope the Missouri appellate courts at least might begin taking a more lenient view of the rule in its application. By a more lenient approach, I mean the courts should give the appellant's lawyer the benefit of the doubt on close questions. As the Supreme Court admonished lawyers and the appellate courts in *Thummel*, the application of the rule should not be

[19] Ky. R. App. P. RAP 32(A)(2).

"simply a judicial word game or a matter of hypertechnicality."[20] Appellate lawyers should not be put at risk by what is becoming an increasingly arcane rule.

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[20] *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. 1978).